INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

DRAFT BEST PRACTICES OF EFFECTIVE ENFORCEMENT

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PART I. ENFORCEMENT BY WAY OF PUBLIC AUTHORITY

Chapter I. Fundamental principles of enforcement

Introduction

Recommendations for effective enforcement should be informed and guided by fundamental and organisational principles. These principles should not only govern the development of the specific procedural design of enforcement proceedings – they should also determine their implementation through recommendations concerning specific, individual enforcement measures. The recommendations in this Chapter and Chapter II are intended to highlight the key principles that inform the specific Chapters in Part I of these Best Practices.

Chapter I is focused on fundamental principles that generally should inform enforcement by way of public authority. It thus highlights the fundamental right to secure the effective enforcement of substantive rights, which is considered by the highest courts worldwide to be an integral aspect of the right of access to justice, which should be fair and effective. It also makes clear that enforcement proceedings should, consistent with the rule of law, be regulated by law – hence they should be effected through regular proceedings that have a clear legal basis, one that is generally applicable, and publicly known.

This Chapter also introduces the term "enforceable instrument", *e.g.*, a judgment, a notarial deed etc., which refers to the requirements to be met for enforcement to be given effect (see particularly, Chapter III). This Chapter also emphasises the importance of giving effect to other fundamental rights that generally protect the rights and freedoms of citizens from being subject to the disproportionate interference by public authorities, *i.e.*, those of third-party creditors, debtors and other third parties who are or may be affected by the enforcement proceedings. While enforcement has its primary aim of securing a creditor's substantive rights, enforcement proceedings should be designed and implemented to ensure that the debtor's fundamental rights are also protected by, for instance, giving effect to their rights to privacy, family life, data protection, or property. They should also ensure that the enforcement measures do not infringe a debtor's or a third party's rights except and in so far as is necessary to give effect to the enforceable instrument.

Chapter I also emphasises the importance of party disposition over enforcement proceedings, the parties' right to be heard, and the requirement that enforcement proceedings should be managed effectively and proportionately by enforcement organs. A key issue here is the need to implement effective sanctions for non-compliance with obligations that arise in the enforcement proceedings. If, for instance, debtors and third parties fail to or refuse to comply with such obligations, enforcement would become a *de facto* voluntary process, and as such will fail to give effect to the right to effective enforcement and will also fail to secure the creditor's fundamental rights. Equally, non-compliance by creditors or enforcement organs with obligations imposed on them, if not subject to adequate sanction or supervision, may lead to unjustifiable infringements of debtors' and third parties' substantive and fundamental rights. Effective sanctions and supervision and their consistent implementation should operate both as effective deterrent to non-compliance, while also acting as an effective adverse consequence such that future compliance is secured.

Recommendation 1 – Enforcement by way of public authority and the rule of law

(1) The effective enforcement of substantive rights is a fundamental right. Legislators should ensure that this right is implemented effectively.

(2) The right to enforcement includes the State's obligation to provide efficient modes of enforcement that enable all actionable claims to be enforced. Legislators should, in principle, enable

monetary enforcement on all of a debtor's assignable and transferrable assets, irrespective of whether they are tangible, intangible, movable or immovable assets, rights or other kinds of interests.

(3) Enforcement by way of public authority should be regulated by law and should be effected through enforceable instruments.

Comments

1. Effective enforcement is a fundamental right. It is a self-evident consequence of the right of access to justice, and, therefore, forms part of its protective effect. It is the means by which judgments on the substantive merits of disputes or other enforceable instruments, where they are not complied with voluntarily by debtors, are given effect. As a consequence, enforcement proceedings and the enforcement measures to be taken further to them must be practical and effective. They must be timely and economical. And they must be proportionate (see Rec. 5, below). In the design and operation of enforcement organs, authorities (whether public sector or private sector authorities that conduct enforcement by way of public authority), and proceedings, this fundamental right must inform the choices legislators make.

2. The fundamental right to enforcement should enable the enforcement of all claims. Legislators should, therefore, provide a complete system of enforcement that covers all kinds of behaviour that could be the subject of actionable obligations. Where monetary enforcement is concerned, execution measures should be comparable to, and replace, all kinds of transactional measures that could apply were a debtor to enter voluntary liquidation. Consequently, all types of assets held by debtors that are assignable and transferable should be capable of being seized and their value realised, to satisfy the interest of creditors, by enforcement organs. This should not only apply to traditional assets, e.g., immovables, tangible movables or intangible receivables, it should also apply to digital or virtual assets and other intangible movables, data stored in controlled electronic records or clouds as well as to all kinds of rights or other interests.

3. As a means by which judgments or other enforceable instruments are given effect, civil enforcement must be regulated by law. That is a basic requirement of a commitment to the rule of law. Enforcement must, as a consequence, conform with fundamental rights, see Rec. 2. It must also be established in generally applicable laws, which are public, and prospective in effect. Enforcement proceedings and enforcement measures should be carried out by properly established public authorities, although that may be exercised by public organs and authorities or by bodies, organisations or private individuals who are able to conduct enforcement by way of public authority (see Rec. 6). It should also be subject to judicial oversight, to ensure that it is conducted lawfully.

4. The enforcement process should also be effected through the use of enforceable instruments. The development and use of such instruments is a means by which clarity and simplicity in the enforcement process can best be achieved (see further Chapter III).

Recommendation 2 – Enforcement measures and fundamental rights protection

(1) Enforcement measures should be given effect by modes of enforcement established by law.

(2) Enforcement measures should not unduly infringe fundamental rights.

(3) To protect fundamental rights, legislators should make provision for clear, limited exceptions to enforcement. Exemptions should not impair the essence of the fundamental right to effective enforcement.

Comments

1. The fundamental right to effective enforcement is the means to give effect to a creditor's substantive rights (Rec. 1). Enforcement measures that give effect to that right, may, however, interfere with the fundamental rights of debtors and third parties, such as the right to human dignity or to privacy. This Recommendation requires that enforcement measures in giving effect to the creditor's fundamental right should be consistent with and give effect to, *i.e.*, be balanced by, a third party's or a debtor's fundamental rights in so far as doing so does not undermine the effectiveness of the creditor's fundamental right to effective enforcement. Such matters should be reflected in legislation.

2. To ensure that this is the case, enforcement must be underpinned by a court order or an order of another public authority with satisfactory independence and neutrality; that is a *sine qua non* of giving effect to fundamental rights. An enforceable instrument should be considered to be a sufficient basis for enforcement measures and measures to obtain information if, and in so far as, specific legal provisions clearly define the scope and manner of intervention to be taken by enforcement organs that fulfil the requirements of foreseeability, predictability and proportionality. In those cases where an intervention has particularly intrusive effects, a specific court order should be obtained (see, for instance, Rec. 17).

3. The existence of an authorising court order, and hence prior to enforcement taking place, is the means by which the infringement of fundamental rights can best be avoided. Hence before enforcement measures that could amount to a serious infringement of a debtor's rights to privacy, data protection or property takes place (*e.g.*, through search orders that compel a debtor to give access to buildings, apartments, documents, electronic data, as a means to identify and then seize previously unknown assets), a court order should be necessary.

4. Similarly, if execution of enforcement is to take place at times that pose a serious infringement or invasion of a debtor or their dependents' rights (*e.g.*, through it taking place on a public holiday, non-working day, very early in the morning or late at night, or under similar circumstances), a court order should be necessary to ensure that those rights are, in so far as they properly can be, protected.

5. To give effect to a debtor's and any interested third party's fundamental rights, it is also necessary for there to be a prior court order in all situations where enforcement measures affect individuals directly, *e.g.*, where non-compliance with enforcement obligations is to result in the imposition of fines or the imprisonment of the defaulter (see Chapter VIII).

6. Legislators should also ensure that provision is made in their enforcement processes to exempt specific assets from enforcement. Typical examples of this type of exemption, which are intended to protect the fundamental rights of debtors, are limitations imposed on enforcement against domestic property, professional equipment or tools (see, for instance, Rec. 26) or on a debtor's claims against third parties (see, for instance, Rec. 34).

Recommendation 3 – Party disposition

(1) Parties can dispose of their procedural and substantive rights in enforcement proceedings in the same way as they can do so generally. This should be given proper effect in:

(a) the commencement, development, and termination of enforcement proceedings; and

(b) settlement endeavours and settlement.

(2) Party disposition requires enforcement organs to consider creditors' applications concerning the mode of enforcement, sequence of enforcement measures, and how it is to be put into effect. Enforcement organs should not, however, be bound to accede to creditors' applications where they do not promote the efficient, economical or proportionate management of enforcement.

Comments

1. Parties can dispose of their procedural and substantive rights in the framework of enforcement proceedings in the same way as they can do so generally, as a reflection of party autonomy. The clearest manifestation of this right is the right of creditors, debtors and third parties to enforcement proceedings to take the initiative in proceedings. This is generally referred to as the principle of party disposition. At its most basic, it refers to the creditor's right to initiate enforcement proceedings or not to do so following a judgment, or other enforceable instruments, on the substantive merits of their dispute with the putative debtor. Enforcement proceedings are thus an elective process and may not be initiated by courts or enforcement organs (see Rec. 6 on enforcement organs).

2. While creditors have the right of initiative where enforcement proceedings are concerned, party disposition does not also entail that such proceedings depend upon debtor cooperation or debtor initiative. If the ability to initiate enforcement proceedings depended upon debtor consent, the creditor's ability to secure effective enforcement (Rec. 1, above) would be easily capable of frustration by a recalcitrant debtor. If creditors' applications concerning the start of enforcement measures, their sequence and design are not made or lack sufficient details, enforcement organs should take such steps as are necessary to meet the requirement that they further the speedy and efficient management of enforcement proceedings (see Rec. 8 below).

3. Creditors and debtors should have the right to make applications concerning the mode of enforcement, and in respect of specific measures within a specific mode. This right is not, however, an unqualified right. It is subject to scrutiny by enforcement organs. If a creditor's or a debtor's preferred method is one that an enforcement organ concludes is disproportionate, too costly, too time-consuming, or likely to unjustifiably infringe a debtor's fundamental rights, it may reject such proposal and determine that another enforcement method be applied. Para. (2) thus enables enforcement organs to give effect to effective enforcement and the protection of fundamental rights, as required by Recs. 1 and 2, while taking account of party disposition.

4. Party disposition also requires creditors to have a right to determine whether to terminate enforcement or resolve enforcement proceedings by way of settlement in the hands of the creditor.

5. Debtors also have the right to terminate enforcement proceedings, albeit only by way of satisfying the debt due or entering into an agreed settlement with the creditor. Debtors do not have a right to determine the enforcement method chosen; as with commencement of enforcement proceedings that is a unilateral right of the creditor.

Recommendation 4 – Due notice and the right to be heard

(1) Debtors should be given due notice in respect of enforcement.

(2) Debtors should be given the right to be heard, not least in respect of proposals to minimise the cost and invasiveness of enforcement measures, while maintaining their effectiveness.

Comments

1. The requirement for due notice and the right to be heard should apply in enforcement proceedings. This Recommendation emphasises the importance of their specific application to the

enforcement process itself. Due notice refers to compliance by public authorities and parties with the formal requirements to give notice according to national provisions.

2. To ensure that debtors are able to take steps to either comply with the requirements of the enforcement process or to take timely and effective steps to challenge it, they should be given due notice of it. Effective advance notice will thus include such notice of any enforceable instrument and the means by which it is to be executed, *i.e.*, given effect in a very general form. Such notice does not include, however, a requirement to provide debtors with actual advance notice of any specific enforcement measure that is to be taken, *i.e.*, creditors and enforcement organs are not required to inform debtors of the date and time that a specific asset is to be seized or attached or when land is to be subject to execution. It should be up to the enforcement organ to decide whether the provision of such advance notice is beneficial or, at the least, helpful.

3. A necessary corollary of the right to due notice is set out in para. 2: the debtor's right to be heard. It is particularly important that debtors should be heard upon application on measures to minimise the costs, time and invasiveness of enforcement measures. These issues help to secure the debtor's fundamental rights, *i.e.*, to property, by minimising the extent to which enforcement affects their property rights, by minimising the cost of the enforcement measures, and by ensuring that an enforcement measure's intrusion on their substantive rights is kept to a minimum. This requirement is a specific instance of the requirement specified in Rec. 2, above, that fundamental rights are respected by the enforcement process.

Recommendation 5 – Proportionality

(1) Enforcement measures, including measures providing for the disclosure of assets subject to enforcement, should be economical, efficient and proportionate to the amount subject to enforcement, and to the nature, value and complexity of the assets subject to monetary and non-monetary enforcement.

(2) Sanctions for non-compliance with obligations that arise in enforcement proceedings should be proportionate to the nature of the non-compliance.

Comments

1. Enforcement measures must be effective. They must also be economical and efficient, so that they do not cost public authorities, parties to enforcement or third parties affected by more than is proportionate.

2. Proportionality should particularly be relied upon to determine the scope of application of enforcement measures and their execution, not least when those measures apply to individuals personally (act *in personam*). Its application to the design and operation of enforcement measures and their management by enforcement organs should be pervasive, *i.e.*, it should be inherent to all aspects of design and operation of the enforcement system. It should, particularly, guide the design and application of sanctions for non-compliance with obligations that arise in the enforcement proceedings and which are intended to promote its effective management (see Rec. 2, comment para. 4, above, and Chapter VIII, esp. Rec. 65).

3. To ensure that enforcement measures are effective, economical, efficient and proportionate, it is advisable that the approach to their management be flexible, *i.e.*, a rigid, formalistic approach should not be taken. Enforcement organs should be able to adapt and manage the enforcement process so that it is as effective as possible. Flexibility also ought to be applied to the approach taken to the order in which modes of enforcement are to be utilised: a flexible rather than overly formalistic approach, again, promotes effectiveness (see, for instance, Chapter VI, Subsection 1.4, Introduction).

Chapter II. Organisational principles of enforcement

Introduction

This Chapter focuses on organisational principles. It focuses on the approach to the organisation of the design and operation of the enforcement system. It thus considers the general approach that should inform the organisation of specialised execution courts and of enforcement organs and the approach to the use of public forms of organisation as well as private sector forms through which enforcement by way of public authority operates (see, particularly, Chapter XI).

This Chapter also emphasises the importance of the use of information technology, including artificial intelligence, in the design and operation of enforcement. This is both important for the design and operation of enforcement by way of public authority in Part I of these Best Practices, as well as Part III, which focuses on enforcement on digital assets. Finally, this Chapter addresses principles concerning the coordination of enforcement management by enforcement organs and the advancement of proceedings by parties.

Recommendation 6 – Organisation and operation of execution courts and enforcement organs

(1) Legislators should ensure that the overall design and operation of the system of enforcement primarily promotes the economical, efficient and proportionate enforcement of creditors' interests within a reasonable time

(2) Legislators should ensure that judges and magistrates who are competent to deal with enforcement proceedings have sufficient specialist knowledge and experience of enforcement law. To achieve this, specific bodies of judges and magistrates should be established within the court system ("execution courts"). Legislators should consider how best to translate the idea of specialisation into the structure of courts or judicial organisation within their jurisdictions. The term "magistrate" is used here to refer to individuals who exercise judicial authority and form part of the judiciary but are not formally understood to be full-time or permanent members of the judiciary.

(3) Legislators should make provision for enforcement organs. They may public enforcement organs or additionally or in the alternative organs, which are imbued with public authority, in the private sector. They should determine, according to their organisational preferences or traditions, whether enforcement organs should be centralised or decentralised, specialised or of general jurisdiction.

(4) Where private sector organs that can carry out enforcement by way of public authority are established, legislators should ensure they are subject to regulation comparable to that applicable to public enforcement organs.

(5) Legislators should create registers to support enforcement, the operation of which should be coordinated effectively with the execution courts and enforcement organs. Such registers should be fully accessible to execution courts and enforcement organs. They should also be accessible to a limited extent to creditors, debtors, their representatives, third parties and all courts or public authorities upon it being established that they have a legitimate interest in accessing them.

Comments

1. The overall design and operation of execution courts and enforcement organs, and enforcement processes in general, consistent with the fundamental right to effective enforcement, should give effect to enforcement economically, efficiently and proportionately. It should also ensure

that effective enforcement is capable of being secured in a reasonable time, *i.e.*, it should be sufficiently speedy that it secures the creditor's right to effective enforcement while also taking sufficient time to protect the fundamental rights of debtors and third parties, such that the risk of their property being wrongly subjected to interference is minimised.

2. In some countries, specialist bodies of judges or magistrates who deal with enforcement proceedings are described as execution courts. The term execution court is used in this Recommendation solely to convey the importance and convenience of structural specialisation. Whereas enforcement law is not an academic subject in the universities of many countries, other educational traditions put more emphasis on this field of law where numerous other fields of law interfere and knowledge of their combined influence on enforcement law is indispensable. The establishment of special bodies with judges and magistrates is designed to further specialist knowledge and experience in the interest of the quality of enforcement and the interest of public and private parties, including third parties (also see Rec. 77, comment paras. 1 and 2; Rec. 82, comment para. 1).

3. Legislators should make effective provision for there to be enforcement organs. They should do so taking account of their general principles and preferences concerning the means by which public authority is exercised in their legal tradition. They need not, however, be restricted by past choices, particularly where innovation and development may better secure a system of effective enforcement. In considering how to organise their enforcement organs, legislators may opt for public organisation, private sector organisation, or a combination of the two. Their design choice should, however, always take account of the advantages and disadvantages of an organisational model. As private sector enforcement organs exercise public authority in carrying out the enforcement process, they should be subject to effective state regulation (see further Chapter XI).

4. Effective enforcement, particularly when carried out by several enforcement organs within a State or a higher or superior court district, requires effective coordination. This presupposes effective access to information concerning enforceable instruments and information about assets subject to enforcement and enforcement measures that have and are being taken concerning creditors, debtors and, where relevant, other interested parties. This should be facilitated through the establishment of registers where information concerning enforcement proceedings can be recorded, and which can then be accessed by the execution court and enforcement organs, and to a lesser extent by creditors, debtors and third parties, see, for instance, Recs. 19 and 23. This should now be facilitated through the use of technology (see Rec. 7, below, and, for instance, Rec. 15).

Recommendation 7 – Use of appropriate technology, including artificial intelligence

Legislators should make appropriate provision for enforcement authorities to utilise appropriate technology. This includes the appropriate use of artificial intelligence in so far as that is compatible with those fundamental rights and principles specified in Chapter I.

Comments

1. To give effect to this Recommendation legislators should ensure that the design, implementation, operation and improvement of their enforcement processes, and particularly of the internal organisation of their enforcement authorities, utilise technological developments, such as digital technology. This requires detailed consideration of how technology can assist the implementation of enforcement proceedings and enforcement measures, including provisional measures that can assist with potential future enforcement proceedings. Consideration should also be given to how legislators can ensure that the use of technology is underpinned by a commitment to adequate and sustainable funding.

2. Use of technology should also encompass the use of automated systems, including those involving artificial intelligence (AI), where that can assist the enforcement process. Legislators should therefore ensure that legal rules governing enforcement are, where appropriate, adapted to the use of, and promotion of the use of, AI. This may encompass simplification of procedural steps in the enforcement process, adaption of enforcement processes in small or low-value claims so that execution may be effected by automated systems, etc. The use of automated systems must not, however, be such as to infringe or otherwise be inconsistent with the fundamental rights of creditors, debtors and interested non-parties.

3. The appropriate use of technology ought to also apply to the provision of information to creditors, debtors and third parties and to the development of registers that can facilitate the digital registration in enforcement. Such steps, as is the case for the appropriate use of technology generally, will ensure that enforcement is capable of being carried out as efficiently, economically and proportionately as possible. To fully promote these objectives, electronic registers should be fully utilisable by enforcement organs. Creditors, debtors and non-parties also ought to have access to them, but to a more limited extent so as to: first, enable them to access the information, etc., necessary to enable them to engage in the enforcement process and thus protect their rights effectively; and, secondly, ensure that access to such registers is consistent with any applicable rights to privacy and data protection. For questions of accessibility concerning digital registers, Rec. 6(5) applies accordingly.

4. The appropriate use of technology may also include the creation of electronic registers. These should be established to facilitate the creation and use of digitised registration of all enforcement proceeding's data. This should be done to further the efficient organisation of cooperation between execution courts, enforcement organs, and parties or third parties.

Recommendation 8 – Enforcement management by parties and by enforcement organs

(1) Enforcement authorities and parties should share responsibility for the effective and flexible management of enforcement measures, including the use of concurrent measures.

(2) Adequate coordination and common responsibility for enforcement proceedings must be secured when different executive activities are carried out by different enforcement organs. For this purpose, use may be made of information on enforcement measures that have already been registered. Mutual exchange of individual information may also be effected for this purpose.

(2) Enforcement measures, which have already commenced and which are likely to satisfy the debt due to the creditor in full and in a reasonable period of time, should only be complemented by additional enforcement measures where the initial measure fails to achieve its objective or where special circumstances arise that justify additional enforcement measures.

Comments

1. Taking enforcement measures or measures to obtain information that can facilitate enforcement commences with the debtor being given notice of the enforceable instrument's registration (Rec. 20(3)). Enforcement proceedings should be carried out as through a model that is based on shared responsibility between enforcement organs and parties for effective enforcement is preferable to other solutions, such as those that adopt a purist approach that places sole responsibility in the hands of either one or the other. A shared model is both a flexible and pragmatic means to secure effective enforcement.

2. Reference to concurrent measures in para. (1) concerns, for instance, where a creditor is pursuing enforcement against the same debtor in different courts with different territorial or other

jurisdictions, or where a creditor is required to pursue enforcement against the same debtor via multiple modes of enforcement due to the nature of the debtor's assets.

3. If a creditor promptly applies to a competent enforcement organ for an enforcement measure, the enforcement organ should consider whether it is an available measure and, if so, whether it is appropriate. If it concludes that it is, then the enforcement measure should take place following payment of any relevant costs. If a creditor takes no active steps, and the enforcement organ has sufficient resources of its own, then it should consider what measures might be appropriate and give the creditor notice of those possible measures and of the relevant enforcement costs, which should be paid in advance. In this latter circumstance, the creditor should be able to pay the costs without having to make any further proposals of their own, and the enforcement measure as proposed by the enforcement organ may either take effect immediately or following additional information concerning the debtor and the extent to which they have satisfied the debt. Alternatively, the creditor may make a further proposal or modify the enforcement organ's proposal.

4. Rec. 3(2) makes clear that creditors' requests are not binding. If the enforcement organ, upon considering the availability and appropriateness of the proposed enforcement measure, concludes that the request ought not to be granted, it can modify the requested measure. It may also propose an alternative measure or decide otherwise. Pragmatism may lead to a dialogue between the creditor and the enforcement organ that may generally produce a reasonable solution. The model of shared responsibility also produces positive results in those cases where the debtor's protective interests are relevant. If a debtor has a right to claim an exemption, then the enforcement organ should consider those interests independently of a request being made by the debtor, even though an application could have been made prior to the execution of the enforcement measure.

5. Enforcement organs should have a shared responsibility for the proper, *i.e.*, adequate, coordination of their different executive activities (para. (1)). Shared responsibility requires the timely provision of information about extant enforcement measures and their results through the use of the register of enforcement measures (see Recs. 19(1) and 22). It also requires them to be ready to promote the use of steps that properly coordinate activities and to do so in a manner that avoids the need for creditors to initiate avoidable opposition procedures.

6. Effective management may also require enforcement organs to utilise separate enforcement measures concurrently (see para. (3)). It may, for instance, be the case that an initial form of enforcement, which was viewed as providing the optimum means to satisfy the debt due to the creditor, is hampered, becomes subject to unreasonable delay or may not on analysis fully realise the debt. In such circumstances, enforcement organs ought to have flexibility to adapt the enforcement process by utilising complementary enforcement measures, which may then be concluded if the initial measures fail or other specified circumstances arise.

Chapter III. Enforceable instruments

Introduction

Effective regulation requires clear rules regarding enforcement's commencement. Good practice entails that such regulation is based on the existence of an enforceable instrument, *i.e.*, the document that establishes the liability that is to be realised through the enforcement procedure. Legislators should establish which documents are enforceable instruments, and particularly should specify requirements concerning their form, content, and authenticity. The greater effectiveness of enforcement increasingly depends on the degree to which it is digitalised. Good practice therefore supports the development and promotion of enforceable instruments that are digital in form. Such a development will, consequently, support their entry and management via individual registers or systems of registers that facilitate automated processing.

Recommendation 9 – The significance and regulation of enforceable instruments

(1) The enforcement process should only be initiated at the request of a creditor entitled to enforce a registered enforceable instrument.

(2) Admissible enforceable instruments should be specified by law. Sufficient guarantees of their authenticity and reliability should be required.

Comments

1. Para. (1) corresponds with Recs. 3, 13, 19 and 20. It assumes that digital communication between parties and the court will be the norm and paper-based forms of communication the rare exception. Accordingly, all court records will be stored in digital form. This will include court decisions and any additional documents concerning their service on debtors and their enforceability, where such matters are not documented together with the judgment in a single document. Service on the debtor (Rec. 4(1)) and "actual enforceability" are necessary prerequisites for the commencement of enforcement in all developed legal cultures (see below, Rec. 11(2) and comment para. 2). Where paper-based enforceable instruments are used, they should be digitised to facilitate digital registration (see Rec. 12(2), below).

2. Para. (2) addresses the responsibility that lies with the legislator to establish a full and exhaustive list of enforceable instruments. This is a necessary consequence of the application of principles of foreseeability and transparency, which are essential elements of the rule of law. They require legislators to provide a clear legal basis and justification for any encroachment on civil liberties carried out through the enforcement process. Clarity and certainty are also of practical importance. They facilitate the work of enforcement organs by minimising the prospect of unnecessary disputes arising as to the correct legal basis of any future enforcement measures. The provision of sufficient guarantees of authenticity by a legislator is an important criterion in determining the admissibility of enforceable instruments. This is particularly important where enforceable instruments are based on private documents (see comments to Rec. 10(4), below).

Recommendation 10 – Types of enforceable instruments

(1) Enforceable instruments should include the following instruments issued by courts: court judgments; court orders; provisional measures; in-court settlements independently of their form; out-of-court settlements that are affirmed by a court decision; and orders concerning costs, including the costs of enforcement.

(2) Enforceable instruments may also include instruments issued by courts in suitable cases by fair and expedited procedures. Where the procedure involves consumers, it must take account of the need to protect them from inadvertent tacit admissions. Such instruments may not finally determine the merits of the underlying claim but postpone the determination completely or in part. Examples of fair and expedited procedures, the integration of which should be considered by legal systems that do not yet incorporate them, include:

(a) consent decisions of courts that are based on written party agreements ("confession-of-judgment-provisions") entitling creditors to obtain an enforceable instrument without notice to the debtor;

(b) enforceable provisional judgments that are based on documentary evidence only and which postpone evidence-taking by other means to later ancillary proceedings; and

(c) execution notices for monetary enforcement where a debtor did not take steps to challenge enforcement in the light of prior judicial notice warning them of impending enforcement.

(3) Enforceable instruments may also include notarial documents.

(4) Legal cultures that permit enforcement procedures to be commenced upon the production, to a competent court or enforcement organ, of legally determined private documents should limit the number of such documents to those that are sufficiently reliable. Such documents should be capable of registration in the register of enforceable instruments. They should only be capable of registration, however, if the debtor, following the provision to them of a warning notice issued by a court or a competent enforcement organ, either fails to satisfy the creditor's claim or fails to challenge the claim within an adequate, legally determined time limit.

Comments

1. Para. (1) enumerates traditional enforceable instruments, most of which are common to all developed legal cultures. This is true of the large majority of types of court judgments. These include monetary and non-monetary judgments that order debtors to do or refrain from doing something, consent judgments, default judgments, partial judgments, judgments by recognition, and final judgments upon a full hearing of the case or early final judgments in those cases that lack a relevant defence or where the claimant has no case or offers no evidence or no evidence that supports their case having a real prospect of success on its merits ("summary judgments"). They also include court orders that determine cost liability and the reimbursement of such costs.

2. In para. (1), provisional measures may also order the payment, preservation or sequestration of assets. They may require a party to do or refrain from doing something. They may be issued before a lawsuit is filed, during ongoing proceedings and prior to final judgment. They may also be rendered after final judgment and thereafter supplement enforcement proceedings and/or strengthen the efficiency of other enforcement measures. Depending on the nature of the provisional measure they too may be regular enforceable instruments, see for instance provisional attachment. It should be noted, however, that the modes of enforcement where provisional measures are concerned differ in part from the canon of enforcement measures designed to enforce final decisions (see Chapter IX, esp. Rec. 68).

3. Depending on national or local traditions, in-court settlements may result in consent judgments, or they may be authenticated by being recorded in the protocol of court hearings, *i.e.*, the formal minutes of the hearing. Out-of-court settlements become enforceable instruments by affirmative court order or consent judgment or, in countries where notaries are invested with public authority that enables them to issue enforceable instruments, by notarial authentication of the agreement where that is carried out under responsible supervision and advice (see para. (3) along with paragraph 9 of the comments). Cost decisions issued by enforcement organs should also be enforceable instruments. Their enforceability should arise independently of whether the creditor, debtor or any third party owes fees. It should also be independent of whether such decisions are issued at the beginning, at the final stage or in the course of enforcement procedures.

4. Foreign judgments or court decisions and domestic and foreign arbitral awards are regularly not enforceable *per se* (although see the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial 2019). They need a judgment or court order of enforceability that is itself considered an enforceable instrument as provided for by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("1958 New York Convention"). Similarly, the United Nations Convention on International Settlement Agreements Resulting from Mediation ("2019 Singapore Convention on Mediation") provides for executability of settlement agreements that result from mediation that is subject to the Convention. It is only in

special cases that obtaining any form of exequatur is unnecessary, *e.g.*, where individual states of federations or member states of close unions of states like the European Union (EU) treat the judgments or decisions of an EU member state as equal to their own domestic judgments or decisions that such additional requirements are either unnecessary or are replaced by the need to do no more than effect a form of simple registration of the judgment, etc.

5. Para. (2) recommends the introduction of an adequate number of expedited procedures for issuing enforceable instruments in situations where it is highly improbable that a dispute on the merits will arise. This might be the case, for instance, where the substantive law excludes or minimises the likelihood of success of an affirmative defence. This might particularly arise against certificated claims or where a party's willingness to defend a claim may diminish if their defence is evidently weak and the creditor's conduct demonstrates that they have a serious intention to enforce their claim. Different legal cultures have developed a remarkable variety of procedural methods to enable the enforceable instruments to be issued in an expedited manner. These instruments could prove attractive to other legal cultures, not least as a means to integrate such methods into their procedural systems. Para. (2) then sets out a non-exhaustive list of the most common forms of enforceable instruments generated in expedited procedures.

6. The first type of instrument identified is that of a judgment-by-consent (consent judgment). This is well-established in common law jurisdictions, *e.g.*, England and Wales as well as some U.S. states. In the former, parties can agree to judgment being entered in the event of debtor default based on their written agreement. In the latter, parties, for instance, to loan agreements may make provision – through a cognovit clause in the agreement – for a creditor to rely upon a confession-for-judgment clause in the event of debtor default. Such provisions permit judgment to be rendered against the debtor without any further steps being taken. The debtor may apply for a hearing upon relevant facts that happened or became known after the conclusion of the agreement.

7. The second type of instrument identified is that of an enforceable provisional judgment arising from a special procedural track known as "documentary procedures". These are well-established in civilian legal traditions, where creditors can apply for a judgment on the merits of the dispute based on documentary evidence only. This kind of procedure is particularly used by creditors to prevent defendants from attempting to set out an affirmative oral defence to claims that are clearly established in documents, where such a defence is made with the intention of introducing delay into the enforcement process for tactical reasons, *e.g.*, to frustrate the creditor with the aim of leading them to agree a settlement that is advantageous to the defendant. In such documentary procedures, any non-documentary defence is postponed to later ancillary proceedings, which take place after an enforceable provisional judgment has been rendered. In the common law tradition, a similar approach could be said to be taken where summary judgment on the merits is entered. For instance, if a defendant has no real defence to a claim that is based on documentary evidence only. It should be noted, however, that such a judgment would not be viewed as provisional in common law jurisdictions.

8. The final type of instrument is that of execution notice following judicial notice of enforcement of monetary claims. This is well-established in many European countries, as well as the EU. Such instruments are, for instance, used where a creditor files an application for a warning notice to be served on a debtor advising them of their claim. Upon service, debtors typically have two to four weeks to take steps to object to enforcement. Absent objection, an execution notice is issued by the court. Such a notice takes effect as an enforceable instrument. This process is both simple to use and expeditious.

9. The form of instruments identified in para. (3) are notarial documents. These are documents that are provided and signed by a notary. This important form of enforceable instrument is well-established in the European continental tradition and is also commonly found in legal cultures highly influenced by the law of such continental states. Notaries are expected to be neutral and act in a

quasi-judicial manner. They are responsible for drafting, supervising and authenticating enforceable instruments. This form of instrument is not generally established in common law jurisdictions.

10. When registration of enforceable instruments becomes an indispensable precondition of the commencement of enforcement proceedings, private documents should not be considered to be registrable enforceable instruments without any restrictions, which guarantee their reliability (see para. (4)). Nor should they be registered as such without it being reasonably likely that enforcement will actually take place. Without this limitation there is a real risk that very significant numbers of private documents will be registered as enforceable instruments, which will adversely impact the efficient and transparent operation of the enforcement process, particularly any register. Hence there is also a need for protective procedures, as identified in para. (2) subpara. (c), which limits registration to those cases where a debtor does not fulfil voluntarily and does not take steps to challenge enforcement. Whether or not the requirement to provide advance notice (a warning) to debtors forms part of the application process for the registration of enforceable instruments or is a separate from it, is a matter of administrative, organisational design. Such design choices are the responsibility of the applicable regional or local authorities (see generally below Rec. 19(5) with comment para. 10). Most legal cultures that consider qualified private documents a suitable basis for an enforcement application provide for debtors to be given a warning notice. Integrated into those warning notices are the means to facilitate the debtor's right of challenge enforcement. In this way, the process seeks to minimise the number of unnecessary steps towards enforcement that are required. Para. (4) is, therefore, consistent with the strong tendency towards avoiding unreasonably intrusive measures against debtors.

11. There may be several advantages to increasing the use of expedited procedures based on private documents to obtain enforceable instruments. For instance, non-judicial enforcement of security interests, pledges or liens may need to be supplemented by enforcement measures taken by a public authority. This is particularly the case when movable property is transferred by way of security or charged with any kind of security interests, the transferred or charged movable property is not under the creditor's control, and the debtor refuses to transfer control or custody to the creditor. In such cases a creditor may use an enforceable instrument derived from a secured monetary claim as the basis for execution against transferred or charged movable property. This will then provide the creditor with the means to forcibly secure control, while also enabling liquidation to take place consistently with the rules on enforcement applicable to public authorities. If case law does not give a creditor's execution lien the same rank as that afforded a contractual security interest where conflicts arise concerning the lien's priority vis-à-vis other security interests, judicial liens or execution liens, then specific legal provision should protect the creditor's right to priority. Such provisions should do so by providing the execution lien with the same rank as that afforded contractual security interests. In so far as the proposals for the expedited generation of enforceable instruments for monetary enforcement are concerned, the recommendations set out in para. (2), subparas. (a) to (c), and paras. (3) and (4) are also helpful where a debtor fails or refuses to surrender movable property to the secured creditor further to monetary enforcement.

Recommendation 11 – Requirements concerning the content of enforceable instruments and of their actual enforceability

(1) Enforceable instruments should identify the creditor, the debtor and the performance owed by the debtor with sufficient certainty and with all necessary data.

(2) If an enforceable instrument incorporates reference to settled external data concerning future performance owed to a creditor or to any agreement reached by the parties that sets out special requirements concerning when and if it can be enforced (actual enforceability), then the public authority that issues the enforceable instrument should ensure that any such external data and party-agreed special requirements are clearly and sufficiently defined and ascertainable.

(3) Legal rules should provide for enforcement by a creditor's successor or against a debtor's successor.

Comments

1. Para. (1) implements the requirement that the preconditions of civil enforcement by public authorities must be subject to precise legal regulation. This requirement is an essential element of the rule of law (Rec. 1(2) and Rec. 9, comment para. 2). Such preconditions also specify the information that is indispensable if enforcement organs are to manage the execution process effectively. This is particularly the case where the process is carried out via automated processing. The recommendation is particularly aimed at those legislators, courts, lawyers, and notaries that are responsible for drafting, in detail, the text of enforceable instruments. If such information is incomplete, not fully understandable, unclear or imprecise, such that it is not possible to interpret it sensibly, then enforcement organs must reject any application for execution made by a creditor. In such circumstances, the creditor must then apply to the issuing authority for the text to be amended. Alternatively, the enforcement organ must amend the text themselves, with the debtor's consent, so that it contains all necessary information. Where proceedings are automated, and amendment is necessary, the automated system should request that the text be amended promptly and should facilitate amendment through providing informative feedback to the creditor.

2. The are many cases (para. (2)) where an enforceable instrument does not itself contain all such details concerning the nature and performance that are necessary for parties to understand how the enforcement measure should be executed. It may be the case, for instance, that the instrument refers to settled and published data, like a central bank base rate, a cost of living index, Gross National Product, the rate of inflation, a stock index, or foreign currency, and so on. In such cases, the enforcement organ may be responsible for identifying or specifying the exact information given in the document as at the time enforcement is finalised. In some cases, creditors may, however, lack specific knowledge concerning the time at which individual enforcement measures will be effected when they formulate their claims in proceedings that result in enforcement instruments being issued. Automated processing should be able to integrate any usual forms of indexing in its programmes.

3. If an enforceable instrument can only be given effect under special conditions, the enforcement organ should verify whether those conditions are fulfilled. Such conditions may be, for instance, payment before delivery or delivery versus payment, transfer of a fund upon birth of a child or successful completion of a professional education, etc. Automated systems will need to be provided with documented confirmation of performance for effective data processing.

4. Para. (3) addresses those cases where successors of the original parties to litigation, or to any other procedure that results in an enforceable instrument being issued, acquire following a court decision or the issue of another enforceable instrument, an interest in the matter subject to enforcement. Where they do so they should profit from, or be bound by (as applicable), the judgment or enforceable instrument. The core of the enforceable instrument remains unaffected by such changes between the time it is issued and any application for enforcement made by a creditor's successors.

5. Most legal cultures provide simplified procedures governing the extension of an enforceable instrument's effect in many different types of cases where the creditor's interest or the debtor's liability passes by way of succession. Such procedures are generally the responsibility of lower judges, court magistrates, other authorities that can issue enforceable instruments, or enforcement organs. Only where succession is challenged, its validity is doubtful or it arises in complicated circumstances, may a special hearing before a judge take place. While some national laws have a very broad understanding of "succession", which comprises all forms of universal succession by heritage, merger, or forms of administration or trust, with all kinds of succession to individual rights

forming the subject matter of an enforceable instrument, other legal cultures are much more restrictive.

6. Para. (3) indicates that well-considered generosity may be recommendable in the interest of facilitated and expeditious enforcement. Whether rules on succession referred to in this Recommendation are procedural or substantive law differs in individual legal cultures. It is not necessary to discuss their classification here, not least because exact differentiation is not provided for in many such legal cultures, and in many such cases rules of procedural law refer to rules of substantive law.

Recommendation 12 – Digitisation of enforceable instruments and of documentation concerning their actual enforceability

(1) States should generally promote digital communication between courts, parties and third parties in relation to judicial proceedings. They should also promote the storage of court records in digital form. Such measures should extend to enforcement organs and the digitisation and storage of their records. Enforceable instruments should thus also be communicated and stored in digital form.

(2) In so far as the actual enforceability of enforceable instruments depends on additional requirements, those requirements should either be integrated within the registered version of the enforceable instrument or recorded in interlinked digital documents.

Comments

1. Electronic communication between parties and courts and among parties is increasingly the norm. Paper-based documents are becoming the exception. Court records and documents should be in digital form. This will include documents that embody enforceable instruments. According to para. (1), legislatures should support this development. They should adapt legal organisational rules to the necessities of digitisation. Creditors and debtors who are legally represented should receive all documents concerning enforcement proceedings through their lawyers. The documents should be in digital form and capable of being printed on paper. Where a creditor or debtor is not legally represented, they may receive such documents directly from the court. Parties may be afforded the right to receive paper copies of documents if they are natural persons and not acting in the course of business or in another professional capacity.

2. The core features of an enforceable instrument are set out in Rec. 11(1) above. Para. (2) makes provision for further requirements concerning the documentation of enforceable instruments. Such additional requirements should be regulated by law. They include the exact type of enforceability (*e.g.*, whether it is provisional or final); whether security from either the creditor or debtor is or is not required; the allocation and reimbursement of costs; whether it is necessary for there to be formal confirmation of enforceability or similar by, for instance, a court, judge or magistrate (*e.g.*, provision of a formal certificate of enforceability on a special copy of the enforceable instrument); and whether it is necessary for a creditor to apply to the court for a special order for enforcement (*e.g.*, for a writ of execution). All these additional requirements may be recorded together with the core instrument in a single document. They may also be recorded in different documents depending on national regulation or local judicial practice. This paragraph also makes it clear that such additional requirements form part of the enforceable instrument and should be registered together with the core of the instrument. The same applies to certification of service of the enforceable instrument and of the notice of its registration on a debtor (see Rec. 4, and for decisions concerning the extension of enforceability to a creditor's or debtor's successors, see Rec. 11(3) with comments).

3. Registration within a single register or an interconnecting system of registers (register system) may contribute to the law's simplification. At the present time, certification of enforceability, writs of execution and judicial enforcement orders are, at least partially, designed to avoid there being a lack of mutually accessible information across various enforcement organs and the development of parallel enforcement activity, which can lead to unnecessary confusion, complexity, cost and delay. Where there is a single register or register system accessible to all enforcement organs, the risk of unnecessary parallel enforcement activity may be obviated, as such a system will document all enforcement instruments and measures initiated or taken to execute enforcement. Accessible registration through such an approach may also, consequently, render redundant the need for some currently existing forms of certification.

Recommendation 13 – Registration procedure for enforceable instruments where enforcement is to be effected

Registration of enforceable instruments should be a mandatory precondition for commencing enforcement procedures. An application for registration should be submitted to the register in digital form by a court or any other competent public authority such as notaries or enforcement organs. Registration, however, should not be done by the court or competent public authority on its own initiative (*ex officio*) but only upon the creditor's request.

Comments

1. This Recommendation emphasises that registration should be a mandatory precondition for the commencement of enforcement proceedings (see Rec. 9). The introduction of registration may be implemented in stages over time. Registration ensures that all enforcement organs may communicate effectively with each other. Such communication is, for instance, necessary where a debtor has assets in different judicial jurisdictions and, consequently, enforcement measures need to be coordinated by relevant enforcement authorities across those jurisdictions. It is also necessary where enforcement is complex, *e.g.*, where it is by different modes of execution or it is to be effected by different enforcement organs in systems where there is a decentralisation of responsibility for enforcement (see Chapter II, Rec. 6(3)).

2. A creditor may choose whether and when to commence enforcement. This is an aspect of party autonomy or party disposition (Rec. 3). A court or other comparable body, however, cannot apply to register an enforceable instrument on its own initiative. Therefore, enforcement procedures cannot commence without registration upon the creditor's request for registration of the actually enforceable instrument to an authority competent to submit all necessary data to the register. If a creditor applies to the court or an enforcement organ for commencement of enforcement procedures, this application may also include, besides the request for completion of all necessary preconditions, the obligatory registration according to the circumstances of the case. Notice must be given to the debtor according to Recs. 4(1) and 20(3).

3. Where paper-based enforceable instruments remain in use, they should be digitised before being submitted for registration. Digitisation must utilise the same metadata as used by electronic documents to enable them to be registered on the same basis.

Recommendation 14 – Challenges to the registration and commencement of enforcement proceedings

Where a debtor challenges the validity of a decision on the merits of the underlying dispute between the creditor or debtor, or disputes the merits for the first time in circumstances where a registered enforceable instrument was issued without prior court proceedings on the merits of the underlying dispute, any enforcement proceedings may be stayed, varied or dismissed by either a

court seized of the underlying dispute or a judge competent for enforcement proceedings (execution court) according to Recs. 76 and 79.

Comments

1. It is a principle of all developed legal traditions that judgments that are *res judicata* do not create preclusive effects in so far as new facts have arisen subsequent to the earlier proceedings, particularly the final hearing in such proceedings where parties could have presented new facts. In such cases, parties may apply for a new hearing in the light of the new facts that have occurred. Alternatively, they may file an appeal from the final judgment if they are within any applicable appellate time limit. A court dealing with such a matter, either at first instance or on appeal, should generally be competent to overrule or modify the enforceability of the original court decision.

2. If the enforceable instrument is not based on a court decision where the parties have been afforded a full right to be heard by a judge, *res judicata* does not prevent the court from hearing the full case and rendering a judgment against the creditor that challenges the effect of the enforceable instrument either fully or in part. Rules of substantive law determine the extent to which facts may be relevant to the underlying proceedings that existed at the time where any agreement underpinning the enforceable instrument was concluded.

3. The execution court may, in all the circumstances specified in para. 1, stay, modify or dismiss execution. Upon a final decision being given by a competent court, the execution court may then set aside any stay or variation or measures to execute an enforceable instrument that had already been taken either partially or in full. In such circumstances, where execution had already been completed, the creditor will be required to compensate the debtor for any damages and losses caused by such execution.

4. Where such challenges are based on deficits in the substantive law or deficits of the proceedings that generated the enforceable instrument, they should not be conflated with challenges to the registration of enforceable instruments or refusals to register such instruments that are based on formal defects in the instrument itself (Rec. 19, comment para. 2).

Chapter IV. Information regarding the debtor's assets

Introduction

The effective regulation of enforcement proceedings requires rules that minimise the existence of obstacles which would hinder enforcement organs and creditors from obtaining information regarding those of the debtor's assets that are necessary to promote effective enforcement. Such rules should be consistent with the fundamental principle of proportionality. Fundamental to the effective operation of these rules are both the duty of cooperation, which is emphasised in Rec. 15, and the general duty of disclosure, which particularly underpins the operation of Recs. 16 and 21.

Recommendation 15 – The duty of cooperation and the importance of effective means to obtain information

(1) Proportionate and effective means to obtain information concerning a debtor's assets, including those under the control of a third party that could be subject to enforcement, should be established.

(2) Debtors should be subject to a duty to cooperate with competent enforcement organs.

(3) All natural persons, legal persons and public authorities, including social security administrations, national revenue services, and bank and insurance supervisory authorities, which may have knowledge of or control over relevant information should have a duty to cooperate with competent enforcement organs.

(4) The duty to cooperate extends to providing enforcement organs with written and oral statements and to the production of documents and data.

(5) Competent enforcement organs should search for relevant information in all freely accessible public registers. Where registers with restricted access exist, competent enforcement organs should be entitled to request and obtain access to search them, where that is justified, to support an efficient enforcement process.

(6) The duty to cooperate should be subject to all recognised legal privileges, including those of civil procedural law. Debtors should have the right to refuse to provide information and assert the privilege against self-incrimination except where an immunity against the use of the information in criminal proceedings has been granted by the competent authorities.

(7) If a debtor has provided a written disclosure statement, no further statement should be requested by an enforcement organ until a reasonable period of time has passed, except where there is clear indication of a change of circumstances relating to the debtor's assets. Enforcement organs should be authorised to use information contained in a debtor's extant disclosure statements in enforcement procedures commenced against that debtor by other creditors.

(8) Any information about a debtor's assets obtained by a creditor during the enforcement process should be used or stored only for enforcement purposes. Any information stored should be required to be destroyed upon satisfaction of the debt underlying the enforceable instrument. Enforcement organs should inform creditors of this obligation.

Comments

1. Para. (1) expresses the key point that enforcement cannot proceed without information about a debtor's assets. Direct compulsory measures that lead to the disclosure (or discovery) of assets that are subject to execution are an essential element of effective execution, subject always to the fundamental principle of proportionality.

2. The subsequent paragraphs of the Recommendation address the duty to cooperate imposed on debtors and third parties (paras. (2) and (3)), the forms of disclosure (para. (4)) and the search obligation imposed on enforcement organs (para. (5)). Additional recommendations to promote proportionality in relation to specific issues are outlined in paras. (6), (7) and (8). All disclosure provisions must be considered together to avoid any misinterpretation regarding the means by which information is to be gathered. This is an essential requirement to ensure proportionality.

3. Paras. (2) and (3) provide for the duty to cooperate with a competent enforcement organ. This duty is owed by debtors and by third parties that may know of or have control over relevant information relating to a debtor's assets. Third parties include private parties; individual or legal persons; and public authorities, such as social security administrations, national revenue services, and bank and insurance supervisory authorities. While the extent to which public authorities are authorised to disclose financial information to enforcement organs may depend on any applicable privacy or data protection regulations, a duty to cooperate remains a valuable principle. The Recommendation does not propose that third parties be involved only after a debtor has failed to cooperate. Moreover, the principle of proportionality should determine how the enforcement organ proceeds to obtain necessary and appropriate information on a debtor's assets. For example, where there are good reasons to believe that a debtor is able to satisfy the debt with suitable assets under

their control or custody but nevertheless refuses to cooperate, it would not be disproportionate to compel the debtor to provide full disclosure by way of a formal statement. Where relatively small claims are to be enforced, a debtor should not be entitled to resist disclosure requests where they could otherwise do so by making a voluntary payment. The balancing approach required by proportionality may be different if third parties are asked for information in cases that are of minor importance or where a debtor repeatedly refuses to satisfy the debt. There may be merit to the argument that private third parties should only be subject to disclosure duties in significant cases where action against a debtor has been unsuccessful. Where public authorities are concerned, the strength of such an argument may depend on the weight of conflicting public or private interests, as well as the application of any relevant data protection requirements. No hard and fast rule can be imposed. Any decision on how to proceed will depend on the circumstances. The necessary balancing act should, however, take account of the creditor's fundamental right to enforcement. It should not create an obstacle to the enforcement process at the early information-gathering stage. Such obstacles would negate a creditor's rights and also damage the public interest in enforcement as an element of the rule of law.

4. Para. (4) provides details about the duty to cooperate. Debtors and third parties should be placed under an obligation to contribute to the information provided to enforcement organs. This obligation should apply to all the usual means of disclosure available to and determined by enforcement organs. It should thus encompass formal written or oral statements as well as the production of documents and electronically stored data. Rec. 18 provides for the application of sanctions for non-compliance with this obligation.

5. Para. (5) specifies that enforcement organs should search for a debtor's assets in all relevant public registers. They should also search in any relevant restricted-access register and should do so to the extent that any applicable access requirements are met. Further to the obligation to cooperate provided for in para. (3), states should provide competent enforcement organs with access to restricted-access registers. Such access should be permitted upon the enforcement organ demonstrating that access is justified in the interest of effective and efficient enforcement. This Recommendation refers, among other things, to land registers, all types of commercial registers, motor vehicle or shipping registers, as well as registers of security interests that may provide information on assets available for charging orders or seizure.

6. Para. (6) relates to evidentiary privileges. The Recommendation recognises that most, if not all, legal systems provide, to varying degrees, for third parties to be exempt from obligations to disclose information in civil proceedings on the basis of, for example, family relationships, trade secrets, significant prejudice, professional duties of confidentiality, etc. Where these privileges apply in civil proceedings, they should also apply to the enforcement process. Where banks are concerned, they may rely upon specific confidentiality privileges that exempt them from disclosure and which are afforded to them in many jurisdictions. However, bank authorities, upon application, should determine whether disclosure of information from existing accounts should be provided (see para. (3)). Moreover, following an account's seizure, the relevant bank will be obliged to give detailed third-party information. A party's duty to cooperate within litigation is less commonly restricted by such evidentiary privileges, but if a privilege is available and is invoked in litigation, a negative inference can typically be drawn. Such an inference, however, is of no useful effect in enforcement proceedings. In principle, therefore, the most significant privilege applicable to a debtor in the enforcement context is the privilege against self-incrimination. This privilege, which is a constitutional right in all states governed by the rule of law, should remain available to debtors, unless they are already protected by an immunity regarding the use of such information that has been granted by a relevant prosecuting authority.

7. Paras. (7) and (8) address two specific aspects of proportionality. Para. (7) sets limits on requests for additional written statements about a debtor's assets. Many enforcement systems set time periods of between one to three years before a second request can be made if there is no

reasonable indication that the debtor's financial position has improved. Para. (7) also addresses the problem of dual use of debtor statements in the interest of a debtor's other creditors. It provides for their ability to use statements given in pending enforcement procedures brought by other, specified creditors. With a view to data protection rules, some states adopt a very restrictive approach to dual use, requiring either the debtor's consent to dual use or authorisation for such use by court order. This procedural complication does not seem to be justified; permitting dual use corresponds with the rule against repeating demands for statements, which are designed to protect the debtor from harassment and to promote proportionality. Para. (8), for its part, deals with information obtained by creditors in the course of their enforcement process. Proportionality requires that the information only be used and retained by the creditor for the purpose of that process and that stored information must be destroyed once it has been completed. Requiring enforcement organs to inform creditors of these obligations reinforces their importance.

Recommendation 16 – Commencement of disclosure

(1) The means for obtaining information set out in this Chapter should only be available after an enforceable instrument has been registered in accordance with Recs. 11 to 13 and notice has been given to the debtor according to Recs. 4(1) and 20(3).

(2) Recourse to coercive means to obtain information should not be permitted where:

(a) current information about the debtor's known assets is available and there is good reason to believe that those assets may suffice to permit full execution of the enforceable instrument (including the costs of execution), or

(b) the debtor proposes the seizure or attachment of suitable assets.

Comments

1. Para. (1) clarifies the earliest time at which the disclosure stage of enforcement proceedings can commence. Disclosure should only be initiated where an enforceable instrument, which fulfils all the preconditions required for executability (Rec. 11(2) with comment para. 2), has been registered and the creditor demonstrates a serious intention to apply for enforcement measures. Disclosure proceedings entail encroachments on civil liberties, which can only be justified where execution measures are genuinely pending and the debtor has been given effective notice.

2. Para. (2) sets out in detail how proportionality should be implemented at the beginning of the disclosure stage. It is particularly intended to realise the benefits that stem from the avoidance of unnecessary disclosure. To do so, both creditors and enforcement organs should initially consider the extent to which a debtor's known assets may provide a sufficient basis to fully satisfy the debt due to the creditor. Creditors are, for instance, often familiar with the facilities and annual accounts of their business partners and debtors and should use their knowledge to save costs and time. Subsequently, creditors or enforcement organs may be able to motivate a debtor to facilitate execution through suggesting how the debtor may satisfy the debt by reference to specific assets owned by the debtor. If such steps fail, an order to submit a formal document, set out in a standard form, will regularly meet the requirements of proportionality. This does not, however, mean that in special circumstances an order to submit a standard form at the very beginning of enforcement procedures is to be considered disproportionate, *e.g.*, if there is a well-reasoned suspicion that the debtor is already hiding and transferring assets and applications for arrest or freezing orders are already pending (see also Rec. 15, comment para. 3).

3. Where standard forms are used, they should require all the debtor's assets relevant to the enforcement process to be listed. They should also require debtors to provide details of all asset transactions they had effected which were of a substantial value and which were made at a time that

raises a reasonable suspicion that the transaction was fraudulent or otherwise intended to avoid enforcement. Any further steps taken by an enforcement organ thereafter depend on the nature of the information set out in the document submitted by the debtor and the overall circumstances of the case (see above, Rec. 15, comment paras. 2 and 4). The beginning of the disclosure stage provides a good opportunity for settlement endeavours to take place. This is particularly the case where enforcement organs are able to provide mediation between creditors and debtors effectively, not least where, through such a process, they can promote an atmosphere of cooperation and mutual trust (see Rec. 8 with comments and Rec. 15 (2) – (4)).

Recommendation 17 – Civil search orders to discover assets

(1) Enforcement organs should be able to obtain authorisation from a court or relevant authority to search for unknown assets or those that are not reasonably [identifiable/identified] or information about such assets in buildings, apartments, offices, facilities, or other locations when a debtor or third party, without justification, refuses to consent to such a search.

(2) Enforcement organs should be able to obtain authorisation from a court or relevant authority to search for unknown assets or those assets that are not reasonably [identifiable/identified] or information about such assets, stored in digital form. This authorisation should include an order that

(a) the debtor provide the information necessary to grant access to the digital storage, or

(b) an expert be appointed to access the digital storage and to disclose any relevant information to the enforcement organ.

(3) Authorisation to search should only be granted upon it being demonstrated that the proposed search measure is proportionate and appropriate.

Comments

1. This Recommendation concerns measures that facilitate information gathering. Its focus is on measures that enable information about assets to be found through searching buildings, apartments or offices, including searching equipment contained in such premises. It is *not concerned with the search for assets that take place further to regular execution measures* where an enforcement organ enters into a debtor's or third party's premises with the intention of seizing or taking control or custody of specific assets. This is especially the case if the existence and identity of such assets is already known or highly probable given the creditor's own knowledge or the results of any applicable disclosure procedure. This latter type of search is generally permissible without specific court order in many legal cultures as forced entry into a debtor's premises is permitted as a necessary consequence of an enforcement court's order effecting execution, *e.g.*, it is authorised through the grant of a warrant of execution or, according to these Recommendations, similarly by the registration of an actually enforceable instrument. This Recommendation and the type of search measures for which it makes provision form a separate preliminary to execution measures and hence any search that may take place as part of such measures.

2. The type of search effected under this Recommendation is intended to secure information, whether contained in written or digital documents or data. Such information could provide evidence as to the existence of, for instance, accounts, receivables, tokens, shares, funds, contractual claims or options, intellectual property rights, etc. In practice, enforcement organs, with the debtor's consent, are likely to combine execution measures against individual assets with the means to carry out additional searches for further assets. This is particularly likely to be the case where attachable assets in a building do not suffice to satisfy the debt and there are good reasons to assume the debtor has not been fully candid in the disclosure. Where debtor consent is not given, it will be

necessary for a court order to specify the terms of any search, not least to ensure that the scope for fishing expeditions for information is limited and, particularly, does not improperly impinge upon a debtor's private sphere or any legally protected and confidential business matters. Where it becomes apparent that a search may, unexpectedly, be necessary, an enforcement organ should obtain a court order authorising it to cover the possibility that the debtor may refuse to consent to the search. Such a step should, however, be exceptional. Prior to taking it, an enforcement organ should try to obtain information using less intrusive information-gathering mechanisms. Only where they have been exhausted or have no realistic prospect of succeeding should a court order be obtained.

3. In many jurisdictions, enforcement organs are either not permitted to or do not in fact search for information. This Recommendation thus would mark a significant extension of the enforcement organs' competence in those jurisdictions. Such an extension, as it requires either debtor consent or a court order authorising the search, is intended to ensure that it remains consistent with constitutional and legal protection applicable to debtors, *e.g.*, concerning their property rights, privacy rights, right to liberty and due process. Such protections are typically carried into effect in those jurisdictions where civil search orders can be granted by courts as a means to facilitate information gathering by parties during civil proceedings or as an aid to post-judgment disclosure during enforcement proceedings. Such measures are, consistently with proportionality (Rec. 5), always a remedy of last resort. Depending on the organisational structure of the enforcement system (see Recs. 6 and 8, Rec. 7 comment 4 and, generally, Rec. 83 the creditor or the competent enforcement organ could be responsible for applying to the court for a search order. Other systems may require an application to be made by mutual consent only.

4. The court should ensure that a search order is both proportionate and appropriate (para. (3)). To do this it should consider, for instance, the time at which a search is likely to take place, *i.e.*, whether it is appropriate to conduct a search in the evening or at night, on a non-working day or legal holiday. It should also consider whether, and if so to what extent necessary, force might be required to gain access, *e.g.*, to buildings, locked rooms or furniture, or safes. Particular consideration ought to be given to the nature of any order where a search is to be conducted in the offices of lawyers, auditing firms, tax advisers, medical practitioners and hospitals, journalists, media publishers, digital platforms or other communication providers, banks and other financial institutions, or in the offices of other professionals that typically store information and data protected by professional privileges.

5. Para. (2) highlights the fact that information about assets suitable for enforcement is increasingly stored in server systems that are only accessible by computer (cloud servers, distributed ledger technologies such as blockchain, etc.). It is anticipated that such forms of storage will replace the use of paper-based records held in buildings, safes or strong rooms as the primary means through which information is kept. In most legal systems, enforcement organs are not permitted to conduct searches for information about assets by entering buildings, opening safes, or accessing computers under the debtor's control without authorisation through a court order. Para. (2) emphasises the necessity of this requirement while also providing guidance on what such orders should specify. Debtor compliance with such orders, not least where the provision of access codes to digital systems is concerned, will necessarily be a function of the efficacy of the sanction regime for non-compliance (see Rec. 18, below).

6. Where a debtor persists in non-compliance with such an order or is unable to comply with it, for instance where a third party's consent is required to grant access and that third party is outside the jurisdiction and fails to cooperate, the court may instruct an expert to secure access and thereafter conduct a search. The court may also take possession of a computer to enable such access to be secured. If a debtor refuses to cooperate because of fear that access may amount to a fishing expedition that would improperly infringe privacy or expose professional secrets, involving an expert may be beneficial. Through engaging an expert who is only permitted to inform the relevant enforcement organ of information obtained from a search and otherwise must keep that information

secret, the debtor may become more willing to cooperate. Engaging an expert may also help ensure that the search order is both proportionate and appropriate.

Recommendation 18 – Sanctions for non-cooperation

If a debtor (including a legal person's representative) or a third party without a legitimate reason or reasons refuses to cooperate, they should be subject to adequate and proportionate adverse consequences.

Comments

For comments, see Recs. 64 and 65.

Chapter V. Digital registration

Introduction

This Chapter makes provision for the digitisation of registers or systems of registers, which should be administered by courts or public authorities that are responsible for the supervision of enforcement measures. It gives specific effect to the fundamental principle of effective enforcement as well as that of proportionality. It also gives effect to the fundamental organisational principle concerning the use of information technology.

Recommendation 19 – Digital registers or registration systems

(1) Digital registers or registration systems should be established. They should contain records of all enforceable instruments against all debtors of commenced enforcement procedures within the territorial range of the register and the results of disclosure. They should also contain records of all enforcement measures and their outcome.

(2) Registers should be administered by courts or other public authorities responsible for supervising enforcement measures that operate consistently with the rule of law, independence, integrity and fairness. Administration should include ascertaining the formal accuracy of applications, the organisation and supervision of the design and structure of the register's contents, and decisions to erase data held on the register (deregistration). If a register's technical administration is outsourced to other public administrative bodies or private enterprises, effective data protection measures should be put in place. Additionally, there should be close and reliable coordination between the court or public authority responsible for the register and the body to which its administration has been outsourced.

(3) Registers should be designed to store all relevant data concerning enforcement proceedings. They should also facilitate, for all competent enforcement organs, a complete and detailed overview of the course of proceedings. This should be done to secure efficient and effective coordination of all enforcement activities.

(4) Creditors, debtors and their legal representatives should have access to data relating to their enforcement proceedings. Where such data arise from competing or conflicting proceedings, such access should only be allowed upon application to the court or other competent authority that is responsible for the data, *i.e.*, for the register in which it is held. Specially-adapted data protection rules should regulate access to such data. Such rules should, amongst other things, require the date at which such information is accessed and the reason why access was granted to be recorded.

(5) Registers and their administration should be reasonably centralised. Centralisation should be consistent with the territorial organisation of individual states, federations, provinces or similar entities, or by reference to districts of higher courts. Where regional, local, etc. registers are established, effective mechanisms should also be established to integrate the information held on all such registers and to permit access to the integrated information. Integrated accessibility should also be secured where a legal system establishes separate registers for different types of data (enforceable instruments, enforcement measures, disclosure).

(6) Registers should allow for automated processing of information in compliance with data protection rules.

(7) Registration of enforcement proceeding data should be erased or otherwise deleted once the claim or claims specified in the enforceable instruments have been satisfied or after an adequate and legally determined period of time.

Comments

1. The communication and storage of documents in civil proceedings, including execution proceedings, will no longer be paper-based in the future. They will be digitised (see Rec. 9, comment para. 1). Notwithstanding this shift, it will remain necessary for there to be effective coordination where enforcement measures are carried out by different enforcement organs with differing competences. The nature of such coordination will inevitably depend on the nature and kind of execution measures taken or on the place where the debtor's assets are located. Where enforcement proceedings are not directed by a single central authority and a creditor has taken enforcement measures through different individual enforcement organs which have differing substantive and territorial competences (see Rec. 6(3) and Rec. 7 comment para. 4; in detail Rec. 83), coordination between them is necessary for execution to be efficient and economical. The use of reliable digital registers is a means to organise such coordination (see para. (3)). Para. (1) thus makes provision for digital registers to be established.

2. Digital registers, once established, should contain and make available all information relevant to enforcement proceedings. This does not require each register to contain all relevant information. Where several registers are established (*i.e.*, a registration system), *e.g.*, on local or regional bases, different ones may hold different information. Where this occurs, access to the combined information of all the registers should be reasonably easy to obtain (para. (5)). At the present time, access to all the information held may be easier to provide through a single central or unified register which contains local or regional sub-divisions. However, it may be feasible, either now or in the future, to establish decentralised registration systems, where they are connected through, for instance, distributed ledger technology.

3. Para. (2) requires the administration and supervision of registers to be regulated. Regulation should take regional or local practice and tradition into account. Administrative decisions that directly affect enforcement proceedings should be in the hands of courts or other suitable public authorities that are responsible for supervising the legal accuracy of enforcement measures (see para. (2)). Such decisions include control of the formal accuracy of applications; the structure and design of a register's content; decisions concerning access by creditors, debtors, third parties, or their representatives, to registers; and decisions concerning the erasure or deletion (deregistration) of data. Court magistrates should be responsible for administering registers of enforceable instruments that contain data drawn from court records. Clerks or other public authorities that are responsible for supervising enforcement officers or agents should be responsible for administering registers where data is provided by enforcement organs.

4. The use of digital registers may make it easier to ascertain if applications for access are formally or substantively defective. It may also lead to defective information being held on the

register as a result of cyber attacks or other data security breaches. It is to be anticipated that in the future such matters will be capable of being identified, and the veracity of applications to the register and of information held on the register will be checked through the use of artificial intelligence (AI). Where AI is responsible for checking the veracity of applications, court magistrates or clerks may not be permitted to change the preconditions of registration. There may, however, be cases where the application of AI indicates doubts concerning, for instance, the identity of the public notary or enforcement organ making an application or its contents, or doubts concerning the authenticity of documents delivered to the register. Human control over any such automated decisions concerning applications for registration remains indispensable. It should primarily be the responsibility of specialised, independent court magistrates or specialised clerks of other suitable public authorities to carry out such control. Judicial control, *i.e.*, by members of the judiciary, over decisions not made by court magistrates should only be carried out where such decisions are challenged.

5. Providing courts and public bodies with exclusive competence to administer registers does not mean that other public bodies or private firms could not perform technical and supervisory services. Such matters could be outsourced by the court or public body. However, complete outsourcing of the administration of registers, or of essential parts of registers, to private firms in the absence of close supervision by the relevant authority or without close supervision by that public authority is not recommendable. This is the case because complete outsourcing may result in relevant courts and enforcement organs that are responsible for the register losing complete control of their data (see para. (2), sentence 3).

6. Para. (3) makes it clear that the main purpose of registration is to facilitate cooperation between enforcement organs. It does not, however, recommend special rules for such cooperation in case of conflicts. On the approach to conflicts, see Rec. 8(2), which seeks to avoid parallel execution measures taking place (see also Rec. 5 on the proportionality of execution measures, and Chapter VII, Section 1 on combining modes of enforcement).

7. In some legal cultures, enforcement management is strictly centralised. It may, for instance, be the responsibility of a single court magistrate or enforcement organ to take control of the full course of enforcement proceedings, *e.g.*, the timing of the process, any disclosure measures, settlement measures and modes of enforcement (see, for this choice, Recs. 7 and 8). Even in such systems, registration as provided for in this Recommendation is important. Cooperation between a central enforcement manager and individual enforcement organs is a means to promote standardisation of information across all available registers. Where separate court districts establish their own central enforcement managers, conflicts may arise through parallel enforcement proceedings taking place in each district. To minimise such potential conflicts, information registered in each district should be made accessible to enforcement organs from other districts. A similar approach can be taken where central enforcement managers are established in states within a federation or across member states of close unions of states (see also comment para. 10, below).

8. Rec. 3 (2) guarantees party disposition concerning the right of creditors to make a responsible choice concerning the mode of enforcement applicable to their case (see also Recs. 7 comment 4 and Rec. 8). They also seek to promote the resort to settlement procedures by parties to enforcement proceedings (Rec. 3 (1)(a)), not least by helping them to apply for mediation, which could be carried out by a competent enforcement organ (for details, Rec. 85). Promoting such matters is an important function of registers. Hence they should be easily accessible to creditors, debtors and their legal representatives (see para. 4 with comment 9), not least as a means to ensure enforcement procedures are transparent. Transparent procedures enable parties to take well-informed decisions (see Rec. 7 comment 4).

9. Para. (4) promotes the right to privacy of those individuals whose details are registered. It does so by restricting access by creditors and debtors, including their representatives, to only such

information as pertains to their own specific enforcement proceedings. Access to third-party information by a creditor or debtor should, however, be permitted where, and only to the extent that, enforcement proceedings being carried out by those third parties directly affect execution measures taken or to be taken by a creditor. Access should only be granted by the court or public authority that administers the particular register. It should also be subject to any applicable data protection rules. However, the application of such rules should not be construed so as to prevent enforcement organs and third parties from obtaining information about data collected in civil enforcement procedures and thereby interfering with the effective carrying out of such procedures (for "dual use", see Rec. 15 comment para. 7; for private law enforcement see, *e.g.*, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data).

10. Para. (5) recommends that registers should be subject to a reasonable degree of centralisation. This should accord with the general structure of the court system, of administrative institutions, and any territorial division of a state or a federation or union of states. Centralisation should not be understood as a technical term that recommends the creation of a single, compendious, register within any given State. Individual regional or local circumstances should determine whether a system of separate, interconnected registers or a single, compendious register with or without separate divisions is considered to be preferable. A clear recommendation is, however, given for access to be provided to all information that is registered and for such access to be available in such a manner as to promote the speedy and efficient execution of enforceable instruments (see also Rec. 22(3) with comment 5 *et seq*.) regarding access to registers of contractual liens and special kinds of judicial liens or legal privileges).

11. Para. (6) specifies that registered data should be suitable for automated information processing. This will facilitate the flexible use of electronic documents in, for instance, the commencement of enforcement proceedings (see Rec. 9(1)), the automation of enforcement measures (see, *e.g.*, Rec. 24(3)(c) and Rec. 35; for the parallel case of automated contracts in non-judicial enforcement, Rec. 119), or the automated provision of information concerning the content of registers to enforcement organs, creditors, debtors, or their legal representatives (see para. (4) with comment 9). In so far as necessary and appropriate, centralised web-based platforms should be established, which would enable applicants to obtain guidance quickly and easily. Such platforms could also secure safe and controlled (authorised) access to data, as well as communication with enforcement organs for creditors, debtors or their legal representatives.

12. Para. (7) recommends that registered data should be erased or deleted from the in part publicly accessible record according to globally acceptable data protection rules, *i.e.*, where the purpose for which it was registered no longer pertains or any applicable archiving purpose no longer pertains ("purpose principle"). Different periods for which registered data should be retained before it is erased or deleted may be applied to different types of data registered; see, for instance, Rec. 23. It makes clear, however, that all those parties who are entitled to obtain information from registers should have a fair opportunity to access information that is pertinent to their enforcement proceedings before it is erased (see para. (4) with comment para. 5).

Recommendation 20 – Registration of enforceable instruments

(1) Records of all enforceable instruments issued against a debtor should be recorded in digital registers upon the creditor's application.

(2) Registers should record the fact that all the preconditions of the enforceable instrument's enforceability have been satisfied.

(3) The debtor should be given notice of registration. This notice should inform the debtor that future individual enforcement measures do not require specific information to be given to them prior to such measures being taken. An enforcement organ should decide, according to the circumstances of the case, whether or not prior notice of upcoming individual enforcement measures should be given to the debtor, and it should do so by reference to the interest in promoting efficiency in enforcement procedures.

(4) Registers should record procedural matters that indicate an enforceable instrument is or will be *res judicata* or may be challenged or varied pending enforcement proceedings.

Comments

1. Para. (1) summarises the most important preconditions for registration: that creditors must apply for registration, further to the principle of party disposition (see Recs. 3, 9 and 13); the need for certainty concerning the identity of the creditor and the debtor (see Rec. Rec. 11(1)) and the performance due to the creditor (*id.*); legislative recognition of the enforceable instrument (Rec. 1(2); Rec. 9(2)); and that the enforceable instrument must be a digital document (Recs. 9 and 12).

2. Para. (2) requires further information to be recorded when an enforceable instrument is registered. It specifies that all those preconditions of an enforceable instrument's enforceability, which are not recorded further to para. (1) are recorded in the register. Thus it requires, for instance, registration of: references to settled and published data; any specific conditions concerning executability to which the parties have agreed; or executability in cases of succession (see especially Rec. 11(2) and (3) comment paras. 1–5).

3. Para. (3) specifies the requirement that debtors be given notice of registration, *i.e.*, it should be served. This is an important consequence of the right to be heard (see Rec. 4(2)). It should be noted that the notice of registration is required independently of any prior service of a court decision on the parties to litigation necessary in the interest of parties to finalise the legal dispute by a court decision which is *res judicata*. This paragraph also makes it clear that prior notice of individual upcoming enforcement measures is not obligatory and that the enforcement organ that executes the enforcement measure may decide whether prior notice is recommendable in the interest of good cooperation between the enforcement organ and the debtor or should be omitted to avoid any kind of obstruction.

4. Para. (4) concerns the registration of information concerning procedural matters relevant to whether the enforceable instrument is or will be *res judicata* according to national law or may still be challenged or varied. It thus concerns, for instance, registration of information concerning: service of judgments on a party to litigation that result in the time period for filing appeals commencing; the filing of appeals or other challenges concerning the enforceable instrument; any applications to vary or otherwise modify the enforceability of an enforceable instrument, and the results of such applications (see Recs. 14, 76 and 78, 79 and 80, 81). Such information enables creditors and debtors to calculate the risks and possible costs of ongoing enforcement proceedings. Information is especially important for competing creditors and enforcement organs that are not really familiar with local circumstances and activities.

5. It should generally be a matter for interested parties whether or not to apply for such registration referred to in para. (4). National law may determine whether courts that render decisions on enforceability should apply for such registration on their own initiative (ex officio) and whether, and if so to what extent and in what circumstances, enforcement organs should apply for registration. These comments should not be confused with the registration of challenges to individual enforcement measures according to Recs. 22(1) and 19(1) and (3).

Recommendation 21 – Registration of sanctions for non-compliance with asset disclosure obligations

The results of debtor asset disclosure and information concerning any sanctions for non-compliance with disclosure obligations should be recorded promptly in a register.

Comments

1. The debtor asset disclosure process is generally the responsibility of the enforcement organ that is authorised (competent) to carry out all those execution processes that necessarily entail direct contact with debtors or their representatives at their habitual place of residence or, where the debtor is a legal person, at the place of their central administration or seat. That such enforcement organs register such disclosure information promptly is an important part of effective enforcement. It is particularly important as it may be of utility to other enforcement organs, *i.e.*, those not involved in the asset disclosure process itself (for third parties, see Recs. 19(4) and 23).

2. Enforcement organs that are responsible for registration will differ, depending on the manner in which a country organises its judicial and legal professions. They may, for instance, be bailiffs, marshals, or other kinds of court officers or enforcement agents who are invested with public authority (see Rec. 82). The enforcement organ competent to effect execution of admissible disclosure measures should be responsible for securing the prompt registration of information further to this Recommendation.

Recommendation 22 – Registration of enforcement measures and the results of such measures

(1) Records of all enforcement measures and their results should be registered in digital registers promptly and in a summary form.

(2) Where the seizure or provisional attachment of assets is concerned, registration should include the exact date and time that determine priority between competing forms of attachment or execution liens resulting from different provisional or enforcement measures against those assets.

(3) In so far as liens that result from enforcement measures are concerned, registers should facilitate a comprehensive review of all existing contractual, legal or judicial liens, attachment or execution liens that are held on other extant registers. This should be done, as far as possible, through the speedy and effective integration of communication methods between all such registers.

Comments

1. Para. (1) recommends that all execution and attachment liens should be registered. Different common law cultures use differing terminology for liens resulting from execution measures by execution organs and liens resulting from provisional measures.

2. An execution lien is, following the approach taken in the United States of America, to be understood as a lien that results from execution measures. This type of lien includes all kinds of seizure measures that are intended to secure a pledged item. While it is generally doubtful, given common law and some continental European traditions, whether liens that result from third-party debt orders ("garnishee orders") are to be considered execution liens, for the purpose of these Recommendations, liens derived from third-party debt orders are deemed to be execution liens. This is done in the interest of terminological simplification, taking account of comparable approaches to the seizure of tangibles and receivables or intangibles and the fact that in a remarkable number of countries third-party debt orders fall within the competence of bailiffs or enforcement agents.

3. An attachment lien is one that is derived from provisional measures ("provisional or preliminary attachments") which do not provide for the realisation of a pledged item without there being a judgment on the merits of the underlying legal dispute. It nevertheless makes sense to register this kind of lien along with execution liens within registers of enforcement measures. This is because seizure further to an attachment lien, aimed at securing a pledged item, is only of limited utility where the item is subject to an execution lien that takes priority.

4. Para. (2) requires information concerning the priority ranking of liens to be registered by competent enforcement organs. This is a significant responsibility, notwithstanding the fact that the enforcement organs are only responsible for recording such information. They are not responsible for finally determining priority by way of such registration.

5. Para. (3) addresses a complicated but nevertheless important problem concerning efficient registration. Enforcement organs should be aware of any contractual, legal and judgment liens that compete with attachment or execution liens. This is necessary for effective determination of which form of attachment or lien has priority.

6. Contractual liens (mortgages or security interests) and land charges (real property) are recorded in land registers, as is the case in many continental-oriented legal systems for legal mortgages or, increasingly, privileges. The exact effect of registration in land registers differs among the various legal cultures. For creditors and enforcement organs, however, the protection of priority is the most important effect of registration in land registers and should be calculated before taking steps towards enforcement in land.

7. Registers of security interests on movables or receivables are, generally, only designed to protect priority. They do not tend to provide any reliable information concerning the extant or no longer extant security interests. Generally, such information is only found in specialised registers, *e.g.*, in registers of shipping, planes or industrial equipment in some legal cultures.

8. Judgment liens concerning land form a special case. Some common law systems make provision for charges to be granted over land by way of a judicial lien that grants priority upon rendition of a judgment or upon its docketing without the need for a lien to be registered in the land register. By way of contrast, in continental Europe or legal cultures influenced by it, judicial mortgages or the seizure of land are generally recorded in land registers, which as a minimum protect priority upon registration.

9. Judicial liens on personal property can be found in a remarkable number of common law jurisdictions. Numerous attempts to create harmonising model laws for contractual liens or security interests at a national or international level have had some success in this field (see, for instance, the 2016 UNCITRAL Model Law on Secured Transactions). Such model laws have, by way of contrast, had little success in respect of mortgages or securities on land. Judicial liens have, however, not formed an essential part of such projects. Where effective enforcement that is carried out by public authorities is concerned, they need to ensure that they carry out effective research into the question whether there are any potential or extant competing contractual liens or security interests (see Rec. 15(5)).

10. Access to public registers or other registers that make provision for various forms of limited access by enforcement organs responsible for asset disclosure, should be facilitated through the development and use of interconnected digital registers and registration systems. Whether access to registers should be granted to the holders of contractual liens or security interests is another question. Additionally, access in such circumstances to data documenting the existence of judicial liens should only arise, consistently with established data protection rules, upon application to a competent court or public authority (see Rec. 19(4)).

Recommendation 23 – Access to registered disclosure statements of debtors

Third parties should be able to access registered data concerning a debtor's participation in disclosure proceedings and the imposition of any sanctions for non-compliance with obligations arising in such proceedings. Access should only be granted upon application and upon the third party demonstrating that they have a specific legitimate interest in the information. Registered data should only be held, and be accessible, for a legally determined and adequate period of time.

Comments

1. There is a long historical tradition within the law of execution of the establishment of debtor blacklists, *i.e.*, lists of debtors who fail to satisfy creditors in enforcement proceedings. The original purpose of such lists was to act as a warning for individuals or businesses against doing business with potentially unreliable partners. This aim is to be balanced now against more modern views that place weight on the ability of individuals and businesses to make a fresh start, as well as greater weight given to the right to privacy and contemporary rules of data protection. These recent trends have, in many legal cultures, led to abandoning or at least significantly restricting the use of such blacklists. It has, moreover, become commonplace in some countries for an inability to satisfy creditors to now be regarded as a minor or trivial matter, particularly where business start-ups or similar enterprises that rely upon risk capital are concerned. The same view has also developed where the requirement to make a declaration concerning debtor's assets is concerned.

2. While it can be said that financial failure may be understood to be an important and beneficial experience for entrepreneurs and businesses, a debtor's financial stability and reliability is generally a matter of concern for potential creditors. Consequently, sources of reliable financial information remain important, such as that concerning a debtor's participation in disclosure proceedings, any non-compliance, or sanctions for contempt imposed. Public authorities which hold such information should not therefore withhold it from businesses, etc., that have a well-justified reason for and interest in obtaining it. While this Recommendation does not propose the reintroduction of traditional public blacklists, it does make provision for limited access to such information as they would have contained concerning the credit worthiness and financial history of debtors to third parties, on application, and where such access is justified.

3. This Recommendation not only protects a debtor's privacy and data protection rights by limiting access to registered data, it also protects the debtor by requiring such information to be held for no longer than an adequate period of time, *e.g.*, between three and five years. It thus incorporates a right of erasure or deletion.

4. Financial information about business partners is likely to not only be available from public registers, but also via private credit agencies or information bureaux that collect information from official gazettes, public registers, broadcast media, newspapers, internet providers, and social media of all kinds. Information held by public authorities is likely to be more accurate than that held by private bodies as the data they hold will, generally, be derived from regulated administrative activities. The same is the case for information held by enforcement organs. Where privacy and data protection are concerned, while private bodies will also be required to erase information held further to those rights in the same way that public authorities must do so, the application of those rights may be modified where private bodies are concerned. Private bodies may, for instance, be able to hold information for longer periods prior to erasure, albeit for EU Member States this does not seem to be possible in the light of decisions of the EU Court of Justice.

Chapter VI. General modes of enforcement

Section 1. Monetary enforcement

Subsection 1.1. Enforcement on tangible movables

Introduction

Monetary enforcement presupposes the use of the debtor's assets to satisfy the creditor's interest in some way. The nature of the debtor's assets determines and modifies the methods of monetary enforcement. The debtor's movable assets, *i.e.*, tangible personal property, are a relevant category for this purpose. In all legal cultures, enforcement of title for payment on tangible movable assets is, in principle, done by seizure. In many legal cultures, this traditionally created a form of execution lien. Such a lien empowers the public sale of the asset that is subject to it. This is, generally, carried out after the asset has been appraised so as to safeguard against any sale realising an inadequate price. Sale proceeds, after the deduction of any fees, costs and payments to priority creditors, are paid to the creditor whose interest the enforcement process is aimed at satisfying. Any excess goes to the debtor.

Within this general framework, some variations may be necessary to ensure that enforcement is fair, convenient and efficient. Thus, in some circumstances, the private sale and direct transfer of property to the creditor ought to be permissible. Some legal systems acknowledge a debtor's right to regain ownership of property following its seizure and subsequent sale to a non-party as a result of an enforcement process (a right of redemption) as a safeguard against sales at excessively low prices. It is reasonable to set limits to such rights. It is also important to ensure that purchasers are also protected. The absence of such protection would act as a deterrent to potential purchasers, reducing the prospect that they would take part in public auctions. Legislators should also be aware of the potential coexistence of creditors interested in seizing and thus securing the proceeds of sale of the same asset. The following recommendations are intended to strike an appropriate balance between fairness and efficiency.

Recommendation 24 – Seizure by taking control of movable assets

(1) The enforcement organ should take appropriate measures for the control of movable assets (movable assets). Such measures may be taken in combination.

(2) Measures taken should have a reasonably proportionate relationship between the value of the seized assets and the amount of the claim subject to enforcement, including interests and costs.

(3) Measures for taking control of movable assets include:

(a) the sealing of individual goods or storage rooms;

(b) gaining physical control of goods by moving them to facilities that are under the enforcement organ's control;

(c) installing or enabling preinstalled electronic restraints or monitoring;

(d) facilitating registration in registers generally designed to register interests in movables;

(e) receivership by the enforcement organ or by a receiver to be appointed – this should be applied, particularly, where it is necessary to secure the storage of multiple movables in

a warehouse, to secure plant and materials, or to secure collections of valuables, or funds provided for in certificates or securities in paper form; and

(f) agreements that permit the debtor to retain use of the movables pending discharge of the debt. In suitable cases, with the creditor's consent, this may be combined with an instalment agreement (for mediatory activities of enforcement organs, see Rec. 85).

Comments

1. The category of movable property is so broad that it is not reasonable to establish a single method for the seizure of, or for securing, seized property. It is therefore advisable to provide enforcement authorities with the power to determine, depending on the circumstances of the individual case, the best approach to take. Flexibility in this regard is intended to promote rationality and efficiency.

2. Taking possession of seized assets or movables has historically been used to ensure that they can be sold and then delivered to a purchaser. In many cases, however, taking possession is not possible or economically reasonable. Therefore, several alternative methods for securing control over seized assets, each of which is just as effective as taking possession, are listed in this Recommendation, such as sealing individual items or storage rooms. The list is not exhaustive. Particular note should be taken of the fact that the development of the Internet of Things may also end up playing an important role for enforcement purposes. It may, for instance, facilitate the use of electronic measures to prevent the use of certain assets, such as cars, once they have been seized or made subject to an attachment. It may also facilitate monitoring debtors' use of assets where they are subject to asset restraining orders or are, for instance, subject to control by telemetric tracking [see, for example, the remedies provided in the Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets].

3. In addition, it may sometimes be appropriate to combine several mechanisms for taking control. This could be necessary to reinforce the efficacy of the enforcement process. For instance, if certified securities in paper form are subject to execution, taking control of those paper documents could be combined with a third-party debt order with notice to the issuer of the certificate or its custodian. Combining modes of enforcement is addressed at Rec. 61 and comments.

4. Seizure should be proportionate to the amount of the monetary claim to be enforced. Proportionality should be assessed by reference to the expected cost of enforcement, relevant interests, and the value of the assets seized (see Rec. 5; also see Rec. 98 for the comparable approach in Part II). More generous standards should apply in cases where there is an urgent need for the movables to be sold within a short timescale. This may be the case, for instance, where the movables are perishable. Proportionality should not, however, be an argument to prevent enforcement organs from seizing valuable assets for the enforcement of small claims if lower value assets are unavailable and the debtor has failed to take steps to organise such financial liquidity as to enable the creditor to be satisfied in good time.

5. Agreements with debtors to retain and use goods that are otherwise subject to measures that transfer control and custody to the enforcement organ may also be entered into on the basis that the debtor will discharge the debt due to the creditor. Such agreements are usually made on the basis that the debtor will repay the debt according to an agreed payment schedule, which is set out in the agreement. The agreement should contain full details concerning the goods subject to it. Failure to abide by the terms of the payment schedule enables the creditor to continue with the process by which control or custody of the goods is in the hands of the competent enforcement organ.

Recommendation 25 – Legal consequences of seizure

(1) Taking of control of movable assets should create binding effects against debtors and third parties. Those effects are without prejudice to any interests in the movable assets that arose before seizure.

(2) The debtor should not be permitted to remove, transfer or encumber the movable without the competent enforcement organ's authorisation. Third parties should not be able to acquire rights on or any interests in movables that are under the control of an enforcement organ, where such interests would impair the creditor's right to enforcement and its priority in respect of any later-acquired interests in movables.

(3) Ranking among interests of all kinds in movables, which came into existence with binding effects on debtors or third parties, should be determined according to Recs. 53 and 54. This applies independently of how the interest arose.

Comments

1. The effects vis-à-vis debtors and third parties that flow from taking control occur at the time when seizure of the goods becomes effective. The effects arise independently of the exact legal form of seizure as it is characterised in national law. Those effects do not have an impact on any interest in the movable assets that arose before the seizure took place, *i.e.*, seizure does not affect any priority of extant interests in the movable seized.

2. In some legal systems, seizure generates an attachment of a public nature, which determines the power of the State to use the seized property, without the debtor's consent, in the interest of the creditor. In other systems, any such consequences occur at the level of private law, which parallel the consequences where assets are pawned privately. In any case, the important thing is to ensure that seizure is fully effective, *i.e.*, that the seized property does not lose its value and can be used to satisfy the creditor's interest.

3. The main legal consequence of seizure is that it gives the creditor the right to satisfy their claim with the proceeds of the seized property. To secure this right, para. (2) describes the prohibitions imposed on debtors and third parties. It is up to each national legislator, in accordance with its legal tradition, to determine the specific mechanisms to ensure the effectiveness of any such prohibitions and to proceed with any authorisations for which provision is, exceptionally, made.

4. In the case of competing rights over seized assets, the rules on priority set out in Recs. 53 and 54 apply.

Recommendation 26 – Exempt movable assets

Where the debtor is an individual, movable assets should be exempt from enforcement if and in so far as they are necessary

(a) for satisfying the debtor and their family's basic domestic needs consistently with appropriate, modest standards of human dignity and their right to privacy;

(b) items of equipment or tools of the trade to be used by the debtor in the course of their employment, profession, or business.

Comments

1. In all legal systems, certain assets are exempt from execution, *i.e.*, they cannot be seized. What these are varies from country to country and is directly related to its culture and, above all, its socio-economic structure. The term "family" should cover all members of the debtor's family that have a legal or contractual right to support from the debtor and, in so far as appropriate and depending on regional customs and traditions, to persons living with the family for a longer time and being dependent on the debtor's support.

2. This Recommendation recognises the two broad bases on which movable assets can be exempt from seizure. First, assets that are necessary to enable a debtor and their family to have a dignified lifestyle, including those consistent with their right to family life, are excluded from seizure. Some systems may refer to households or dependents rather than family. This can include clothing, bedding, furniture, household or medical equipment, cell/mobile phones, or vehicles. It can also include property with sentimental value, *e.g.*, family photographs, military awards, medals or honours and other similar items. It should also include medical and other assistive technology. Seizure of pets should also be excluded. Assets that have a religious significance can also be included here, as a guarantee of religious freedom enshrined in most constitutions. Diaries, day books and similar collections of information should be exempt from seizure, at least in so far as they concern the inner private sphere of the debtor or their family members, which is protected by the right to privacy. Secondly, assets that a debtor needs to carry out their professional or business activity are also generally excluded from seizure. This can include tools, books, vehicles, computers or machinery. In these cases, efficiency justifies the exemption from attachment. It is reasonable to grant a certain margin of flexibility to the enforcement authority here so that this rule can be applied proportionately. It would not, for instance, make sense, *e.g.*, for a valuable asset which in abstract terms is productive but which the debtor has not used for a long time, to be excluded from seizure. The level of the exemption will depend on the culture and socio-economic conditions of each country. Also see Rec. 34, below.

3. Where provision or use of a specific type of moveable is necessary, it may be replaced with a more modest or less expensive substitute by the enforcement organ. It may do so to ensure that this Recommendation is applied flexibly and proportionately. The debtor should be provided with what is necessary and no more than that.

Recommendation 27 – Seizure of movable assets in the control of third parties

(1) Where a third party has control, including custody, of a debtor's movable asset, the enforcement organ should inform them that they are under a duty to cooperate with it and provide it with accurate information concerning the asset.

(2) If the third party

(a) does not claim a right to control or possession that is based on credible facts or documents concerning the debtor's asset, then the enforcement organ should take control of it;

(b) does not surrender the asset to be seized voluntarily and the enforcement organ concludes that the third party has a valid right to possession or control of the asset and the debtor has a right to the delivery of possession or control or to the transfer of ownership of the asset to be seized that becomes mature only upon the fulfilment of special requirements, then it should inform the creditor that enforcement should be effected by third-party debt order, which seizes the debtor's claim for the asset's surrender or transfer (see Rec. 30(2)).

Comments

1. Movable assets to be seized may be in the possession or under the control, in various ways, of a third party. If they are not entitled to retain control of it, it must be placed at the enforcement organ's disposal. Where necessary, force may be used to achieve this if the third party does not surrender it voluntarily. The third party may challenge the enforcement organ's erroneous exercise of force by opposition (see Rec. 76).

2. If the third party is entitled to retain possession or control, it will normally be because the debtor receives something in return from the third party, *e.g.*, rent or a monthly fee, and return of possession or control is only due upon the proper termination of the contract. Where this is the case, the third party's right may be an obstacle to seizing the asset. In such cases, the enforcement organ should identify the need to alter the modes of enforcement. The enforcement organ should inform the creditor and debtor accordingly. If the proper termination of a contract or other legal relationship is necessary to justify the third party's possession or control, the appointment of an agent or receiver acting as the debtor's representative in the interest of due enforcement may be beneficial (see, also, Rec. 30(2) and Rec. 61 comment para. 3(3) and Recs. 62 and 63). Rec. 27(2) should also apply if the debtor owns a right to transfer of any kind of property by the third-party debtor. An example of an enforceable right of transfer of an asset in Rec. 27(2) is an enforceable promise to sell or a sale agreement the aim of which is to transfer a title in land or any property of assets or to deliver possession or transfer control, depending on the applicable substantive law (for this, again, see, Rec. 30(2) and Rec. 61 comment para. 3(4) as well as Recs. 61 or 62).

Recommendation 28 – Realisation of the value of seized movable assets by enforcement organs

(1) Enforcement organs should use their best efforts to identify and use the most effective means to maximise the value of seized movable assets through sale or disposition. They may use public or private sale methods. Public sale includes sale on a regulated or recognised market.

(2) Public means should be the usual method to realise value. This may include sale, lease, and other means of disposition capable of realising value. Sale should be the presumptive method to realise value.

(3) Seized assets should be valued according to their market value. If necessary, an expert should determine the market value. Where a private method is to be used, the enforcement organ should ensure that the market value is assessed by an expert prior to the sale and the asset's value can thus be realised properly.

(4) Public sales should be properly pre-announced. Whenever possible they should be conducted consistently with the recommendations for online auctions (see Rec. 52).

(5) The debtor and the creditor should be permitted to make their own offers as part of the bidding process in any public sale.

(6) The highest bid in any sale process should only be accepted if it meets a pre-determined minimum and an effective mechanism to secure payment is in place.

(7) With the creditor's consent, enforcement organs should be empowered to transfer goods to the creditor at the market price as determined by a competent expert.

(8) Where appropriate, the execution organ may appoint a receiver or agent to realise the seized movable's value. It should set the conditions governing such realisation, including any necessary authorisation to rent or lease the movable (see Recs. 62-63).

Comments

1. Public sale, generally through an auction organised and conducted by the enforcement organ, should be the usual method for realising the value of seized movable assets. It should be used by default, *i.e.*, when the use of a different method is not more appropriate or convenient. Where public sales are conducted via online auctions, the recommendations concerning such auctions apply (see Rec. 52). Sale may be effected via a regulated market, such as a stock market. It may also be effected through the use of a recognised market. The term "recognised market" has a wide scope and includes any well-recognised trading venue, exchange or platform suitable for negotiation, transfer, and the realisation of one or several subclasses of assets.

2. Before proceeding with a public sale, it is necessary to determine the market value of the assets to be sold. The appraisal of the value of the goods seized should be made and recorded as well as registered promptly after seizure by the enforcement organ. This is the only way to determine whether or not the assets are sufficient, *a priori*, to satisfy the creditor and whether or not any bids offered are reasonable. If the value of the assets is not established officially, it is necessary to have them appraised by an expert. The expert's remuneration should be regarded as part of the costs of enforcement, although it may be up to the creditor or the enforcement authority to advance the amount (see Rec. 90 on the allocation of costs). The procedure for the valuation should be efficient and speedy. If they consider the appraised value of the asset to be too low, either the creditor or debtor may challenge the value in court by opposition (see Rec.76). They may do so as an inappropriate value may have a negative impact on enforcement. Any appeal from such a challenge should be resolved as a matter of urgency.

3. A public sale can only be successful if potential bidders are informed that it is taking place. To that end, the time and place (physical or electronic site) of the sale should be announced in official journals and in freely accessible regional digital information platforms, particularly those made available by courts. Announcements should contain a description of the movable assets to be sold and an assessment of their value. Where assets are of a high value, detailed information should be given for each of them. More summary information may be given for lower-value assets. In so far as reasonable in the interest of the efficient realisation of the value of the assets to be sold, enforcement organs should make use of audio and video communication. They should do so to facilitate the participation of interested bidders, and they should use computerised techniques to identify them. Serious infringements of obligations concerning public information should be considered to be a reason to challenge by way of opposition, and within a reasonable period of time, the sale procedure (see Recs. 76 and 78).

4. To avoid distress sales and abuse by professional buyers, a minimum value (a reserve price) should normally be set for the highest bid to be accepted. As a rule, a sale below half the value of the assets should not be accepted, unless the circumstances of the case make this advisable. Such circumstances may, for instance, include taking account of the difference between the value and what is offered or the extent to which the debtor has cooperated with the sale process. Where there are multiple creditors with priority rights, Rec. 48 (6)(d), (e) and (i) should apply; also see Rec. 53(10) with comment 7.

5. Creditors and debtors cannot be prohibited from taking part in an auction. Creditors may have an interest in participating in an auction in order to subsequently transfer the asset to a third party. In such cases it is reasonable, to reinforce the efficiency of the enforcement system, that the second transfer is not penalised by tax law, as the creditor in such a situation is in reality securing an asset that they already have a claim or security over due to the nature of the enforcement process. Enabling debtors to participate is a means by which they can be compensated for extinguishing any rights they have over the asset (*e.g.*, kinds of rights of redemption, etc.). Denial of such rights should make participation in public sales more attractive for interested bidders, who would often be deterred

by the expectation of later loss of their award if, for instance, the debtor were able to exercise any right over the asset at a later time (see the introduction to Subsection 1.1).

6. Where creditors can bid in the auction, they may use the level of debt due to them as a credit for payment where they bid successfully in the auction, *i.e.*, they may set-off the amount of debt due to them (see Recs. 100, 103 (3)(b) and comments to Section 1 comment 14 on credit bidding).

7. Where specific official markets exist for certain assets, they should also be used by enforcement organs in so far as appropriate. Accordingly, the enforcement organ should have the competence to sell securities at the official stock exchange price or goods at the official exchange commodity price. The creditor should have a right to acquire assets at official exchange prices.

8. As an alternative to an auction, it is possible that a creditor may acquire ownership of the seized assets and that, as a result, the claim is fully or partially extinguished. To avoid unjust enrichment, it should be considered essential that the value or price of such assets should have been estimated by an expert appraiser and that the enforcement organ should have established the exact amount in respect of which the acquisition is to take place. The creditor's consent is essential since this is a form of monetary enforcement in which they are not receiving money but goods that may not have been purchased by buyers at a public auction. Creditors may consent to a method of realisation after it becomes apparent that nobody has taken part in an auction or that no appropriate bids have been made at an auction.

9. Where the sale of an asset is not easily achievable, a reasonable alternative to sale is to place the assets into receivership. In that way, an economic return on the asset can be achieved. This is particularly appropriate, and proportionate, where the seized asset is very valuable and the amount to be obtained in enforcement is not very high. The receiver should be permitted to rent seized assets in suitable cases, *e.g.*, where this approach is more efficient and effective than a sale. Rec. 24(3)(f) should apply accordingly. Receivership should be subject to authorisation by the enforcement court, which should also set general limits on the receiver's actions, including remuneration.

Recommendation 29 – Party realisation of the value of seized movable assets

(1) Creditors and debtors may agree to dispose of seized assets themselves by a method capable of maximising their value. Such agreements may include an agreement to rescind the seizure. Any such disposition while not carried out by the enforcement organ should be carried out under its supervision.

(2) Creditors and debtors must inform the enforcement organ of any agreement to realise the asset’s value. Such agreements are only binding with the enforcement organ’s consent. Consent is not, however, needed where the assets are of minor value.

(3) Where legislation does not prescribe what is minor value, its determination is a matter for the enforcement organ.

(4) In considering whether to grant its consent, an enforcement organ should take account of, amongst other things, the proposed sale method and whether it is likely to maximise the asset’s value, the nature of the asset, and the interests of any third-party creditors engaged in the enforcement process against the debtor.

(5) The enforcement organ should record the fact that it has been informed of a creditor-debtor agreement to dispose of seized assets. The record should be set out in the register.

Comments

1. This Recommendation should be understood against the general background that enforcement proceedings are governed by the principle of party disposition (see Rec. 3(1)). That implies the right to terminate enforcement proceedings. If creditors withdraw their application to commence enforcement proceedings (see Recs. 9, 13, and 20(1)), they will be terminated and enforcement measures must be rescinded by the enforcement organ on its own motion. If the withdrawing creditor is the only one who applied for enforcement, the proceedings end upon their withdrawal, and the creditor and debtor are free to agree on the realisation of the value of the debtor's assets within the limits of provisions against fraudulent conveyance that provide recovery in favour of other creditors. If other creditors have already joined the proceedings or have already been informed about ongoing proceedings by the competent enforcement organ, enforcement proceedings may go on, and the debtor's assets will be subject to enforcement measures in the interest of the other remaining creditors. Only if all creditors withdraw and abstain from further initiatives could a free agreement between all creditors and the debtor be feasible and realised. In practice such an eventuality is not very likely and would be complicated.

2. Given that general background, this Recommendation specifically provides another kind of exercise of party disposition within the framework of ongoing enforcement proceedings. This is more limited and could be exercised only with the consent of the responsible enforcement organs and under their supervision. It is also subject to control by the courts upon applications for review (see Chapter X). This Recommendation thus only deals with this kind of limited party disposition as generally addressed in Rec. 3(1) and (2). It specifically provides an alternative means through which the value of seized assets may be realised within the framework of ongoing enforcement proceedings. It enables creditors and debtors to effect the disposition of assets by agreement. In doing so they are, in effect, the enforcement organ's agents. If the parties wish to dispose of the assets without being the enforcement organ's agents, they ought to act outside ongoing enforcement proceedings and must first terminate them, as described in comment para. 1.

3. Party agreements to realise the value of assets may only be entered into by the creditors and debtors with the enforcement organ's consent. Where, however, the asset is of a minor value, requiring consent would be disproportionate and is thus not necessary.

4. Party agreements to realise value enable the disposition of certain types of goods for which there are niche markets or in which certain persons or entities are well-established as private auctioneers. The most obvious examples are works of art, ancient books, scores of prominent composers or antiques, but there are many more. Securing their sale via such mechanisms may maximise the sale price and therefore optimise enforcement. Such party agreements may also enable parties to agree to use public or private internet-based platforms to realise the value of assets. This may be of particular utility where the asset is of minor value.

5. Enforcement organ consent to such agreements is necessary to protect the interests of other creditors who are participating in the enforcement process and the public interest more generally. Requiring consent enables the enforcement organ to ensure that any necessary limits or controls over the disposition process are put in place, *e.g.*, the imposition of a minimum sale reserve price, maximum limits on the remuneration to be paid to the vendor, time limits within which any sale should be completed. Requiring consent also enables enforcement organs to minimise the prospect of fraud or other forms of abuse, as it enables them to be kept informed of such agreements and any transactions made under them. Prior to giving its consent where a private sale method is to be used, an enforcement organ should inform the creditor and debtor of the risks that may arise from the proposed sale method. Consent should not be given if a private sale platform permits a purchaser to rescind their purchase within a specified period of time, *e.g.*, 30 days. This is intended to maintain the integrity of the enforcement process.

Subsection 1.2. Third-party debt orders

Introduction

Third-party debt orders or garnishment, *i.e.*, the seizure of earnings and bank accounts, is the preferred form of monetary enforcement where a debtor is in regular receipt of earnings or has monetary savings. The basic structure of such proceedings is broadly comparable across the world. It requires a creditor to apply for a third-party debt order (garnishment). The third-party debtor (garnishee), who is the execution debtor's debtor, must then be informed of the seizure by the order being served on them formally. Following service, the third-party debtor is no longer permitted to satisfy the execution debtor. Nor is the execution debtor permitted to take any steps to satisfy the debt due to them. The seizure provides the creditor with a right to demand fulfilment of the third party's obligation towards the execution debtor. Differences in approach do exist across national systems. These include the degree of specification of the claims seized; access to information regarding the existence of claims that may be seized, *e.g.*, bank accounts, expected tax refunds; the extent of seizure, especially where earnings or bank accounts are to be seized, *e.g.*, future claims, future account balances, etc.; a third-party declaration's function, *e.g.*, whether it is an acknowledgement of the debt or has evidentiary significance, whether it is an actionable obligation or not; the admissibility of alternative methods of service on the third-party debtor; and how the claim seized by the creditor is collected or enforced.

Effective regulation of the enforcement of monetary claims on receivables requires rules that ensure the reduction of obstacles to access to information. It also requires third-party debt orders to be issued and served with the utmost speed. Both are required to enable the creditor to promptly recover what is due. Intervention by the third party is essential for this form of enforcement. It is necessary both in recognising the existence of the claim and in enforcing it in the creditor's favour.

The provision of rules concerning third-party debt orders is one where digitisation of procedure is both feasible and desirable.

Recommendation 30 – Application for a third-party debt order

(1) A creditor may apply for a third-party debt order, which if granted should be served formally on the execution debtor and the third party against whom it is granted. The order should prohibit the execution debtor from making any future transactions in respect of the debt seized, including the acceptance of any kind of fulfilment of the debt seized by the third-party debtor and any kind of satisfaction of the execution debtor by the third-party debtor.

(2) Following service, the creditor may seize such of the third party's assets that are subject to the order in fulfilment of the third party's obligation to the execution debtor. The extent of seizure provided for in the order should be determined by: the identity of the third-party debtor; the nature of the claim to be seized; the ground of the claim and its contents; the amount to be paid denominated in the enforceable instrument or the content of any other obligation to surrender or transfer assignable assets that have an economic value and which are owed to the execution debtor; and interest and the cost of execution.

(3) The seizure of reasonably specified future claims and future bank account balances should be permitted.

Comments

1. The starting point for this mode of enforcement, which as a best practice differs from the approach taken in some jurisdictions, is the creditor's application for a third-party debt order and its service on both the debtor and the third party against whom it is granted. The order must specify

what is to be subject to seizure. This requires two things. First, the claim to be seized must be specified. It should be identified through its basic elements, *e.g.*, by identifying the third-party debtor, the ground of the claim and its contents. Secondly, it should specify the amount that the creditor is entitled to obtain in the enforcement by virtue of their enforceable instrument or the assignable asset owed and which is to be surrendered or transferred to the execution debtor. A creditor does not therefore need to obtain an enforceable instrument against the third party as a basis or prerequisite for the grant of a third-party debt order because the third-party debt order as such should be considered to be an enforceable instrument with respect to the debtor's claim against the third-party debtor. The proceeds of the claim seized should be considered to be charged by the seizure that had already been perfected on the claim.

2. The creditor is entitled to interest and the costs of enforcement. At the initial stage of the enforcement process, that amount will not yet have been determined. It is therefore reasonable to estimate the amount. The estimate will depend on the country and the circumstances, *e.g.*, interest and enforcement costs may be considered to be 20, 25 or 30 per cent more than the value of the amount recognised in the enforceable instrument, depending on these factors.

3. If the amount to which the creditor is entitled is higher than the amount of the seized claim, the creditor must pursue the recovery of the difference by seizing other assets. If the value of the seized claim is, however, higher than the amount that the creditor can collect in enforcement, the enforcement authority should determine the maximum amount to be delivered to the creditor.

4. It should also be possible to seize future assets if they are likely to have an economic value. This includes future receivables and future account balance. The creditor has to assume in such cases that satisfying their claim will not be immediate and will have to wait until the seized claim has matured and can be validly claimed from the third-party debtor. For the attachment to be effective, the future claims must be sufficiently identified so that the third-party debtor can respond to the enforcement process and take appropriate measures to ensure the creditor receives payment at the time of maturity.

5. A future claim may include a certain degree of conditionality as to whether the claim will actually mature or as to its amount. These are not particularly desirable scenarios for creditors. In some circumstances, they can, however, represent the only option available to the creditor as a means to secure payment. An effective system of enforcement should thus make possible the availability of such an option.

6. If the claim seized concerns a third-party debtor's obligation to surrender an asset of economic value to the execution debtor, the third-party debt order should be considered an enforceable instrument for the transfer of possession (see Recs. 32(1), 55, 56 and Rec. 61 comment para. 3(3)), and the competent enforcement organ should liquidate it (see Rec. 29). If the claim concerns an obligation to transfer property in any asset of economic value, the competent enforcement organ should act as the execution debtor's agent. Depending on the value and nature of the asset owed (see Recs. 62,63 and 61 comment 3(4)), it should either effect the acquisition of the asset or appoint an agent or receiver. The liquidation procedure should be performed according to the general rules applicable to differing kinds of assets.

Recommendation 31 – Third-party declaration

(1) Third-party debtors should be required to give a declaration concerning the validity of the claim subject to seizure, the extent to which it has been fulfilled, and any other circumstances that are relevant to the future satisfaction of the debt due to the creditor.

(2) If the third-party debtor breaches their duty of cooperation by failing or refusing to provide a declaration or by giving a false declaration, they should be liable to pay the creditor damages.

Comments

1. Enforcement requires the effective cooperation of third parties. Knowledge of the existence of the claim often derives from the debtor or from information obtained in other ways either by the creditor or by the enforcement authority. The first thing that a third party should do is to confirm, if necessary, the existence of the seized claim, so that the subsequent enforcement process can be carried out on a proper basis. In particular, the third party must confirm that the claim exists and its current amount (for which it is necessary to determine its level of performance). The third party must also provide information of any other circumstances that may have an influence on the creditor's satisfaction, *e.g.*, if the claim is pledged, has been previously attached or has become disputed. This information should be provided by a declaration given by the third party in response to a request by the enforcement authority. This is the first step of the enforcement procedure in relation to this type of asset.

2. To ensure that third parties cooperate effectively in respect of the declaration, provision should be made for the third party to be liable for any damage caused to the creditor by their failure or refusal to provide a declaration or by their providing a false declaration. This liability will need to be implemented within the framework of a different procedure. It may include full payment of what is due, *e.g.*, if the third-party debtor's conduct resulted in the creditor not being paid, although he would have been paid if the third-party debtor had been diligent, then the third-party debtor should be liable for the whole of the unpaid debt.

3. In the event of opposition by the third party, Recommendation 33 applies.

Recommendation 32 – Enhanced effectiveness of third-party debt orders generally and in commercial cases

(1) A third-party debt order should permit direct enforcement against a third-party debtor. If the claim seized is not a monetary claim, the order should be deemed to be an enforceable instrument against the third-party debtor.

(2) Legal provisions should permit the sale of the debtor's claim against the third-party debtor if the creditor so requests; general rules on the sale of receivables should apply. Any additional costs arising from the sale, including deductions, should generally be borne by the creditor.

(3) In commercial cases, when a third-party declaration does not challenge the third-party debtor's obligation, it should be deemed to be an acknowledgement of the claim seized.

(4) In commercial cases, when a third-party debtor does not provide a declaration, the creditor may apply for sanctions (see Recs. 18, 64 and 65).

Comments

1. Paras. (1) and (2) make provision for enhancing the effectiveness of third-party debt orders generally.

2. Para. (1) specifies that third-party debt orders may enable enforcement to be carried out directly against the third-party debtor, *i.e.*, against them personally. Para. (2) clarifies that one specific way in which the effectiveness of third-party debt orders may be enhanced is through facilitating the sale of a debtor's claim against a third-party debtor. Where this is the case, the general provisions on receivables apply.

3. Paras. (3) and (4) make special provision for commercial cases. The efficacy of third-party debt orders should be enhanced in commercial matters. This should be achieved through emphasising

the weight to be given to the third-party debtor's declaration. First, any failure by a third-party debtor to challenge their obligation should be treated as having the same value as if they expressly acknowledged the claim that is seized, *i.e.*, the debt that is subject to the third-party debt order. Secondly, on this basis, direct action can be taken against the third-party debtor's assets, *i.e.*, it operates as if the creditor has an enforceable title against the third-party debtor. One consequence of this is that if the claim is a non-pecuniary one, the creditor can then use the enforcement method appropriate to the nature of the asset. The party subject to enforcement in such a situation is the third-party debtor rather than the original debtor (see Rec. 30, comment para. 6).

4. The basis for this approach where commercial matters are concerned is to be found in the third party's express or tacit acknowledgement of the claim. To reinforce the third-party debtor's duty to cooperate, any failure to respond to the enforcement authority's declaration request should be punishable by sanctions (see Recs. 18, 64 and 65). This should be additional to the liability provided for in Rec. 31(2), above.

5. To further strengthen the creditor's position in commercial cases, they should also be able to sell their claim to another party. This should be done according to the general rules applicable to the transfer of claims. Any costs arising from the sale should normally be borne by the creditor. In some cases, however, liability for such costs may be attributed to the original debtor or to the third party itself, if they are in any way responsible for the need to sell the claim in order to satisfy the creditor.

Recommendation 33 – Third-party debtor opposition to the seizure of a claim and its enforcement

(1) Upon the third-party debtor's opposition to the asserted claim seized, the execution court may stay the enforcement proceedings against the third party. Where a stay is imposed, the court should set a deadline by which the creditor should file a claim against the third-party debtor with the competent court.

(2) The execution court should set aside the third-party debt order when either the deadline for filing a claim has expired and the creditor has failed to file a claim or, following the filing of a claim, a final judgment has been given against the creditor.

Comments

1. Regulation of the enforcement of claims must provide for the possibility that the third-party debtor denies the existence of the debt. Opposition to the asserted claim in para. (1) is accordingly intended to refer to this situation, *i.e.*, where a third-party considers they should not pay. If the third party argues that the claim is not yet due, they should also be able to assert this. In such a case, the creditor and enforcing authority may, if necessary, have recourse to other mechanisms, including the sale of the future claim, under the terms set out in previous recommendations.

2. Each jurisdiction should decide how to proceed in the event of opposition from a third party (for opposition, see generally Chapter X, Section 1). However, provision should be made to ensure that such processes cannot be abused, not least to unnecessarily delay the enforcement process. To avoid this possibility, third parties should only be given a short time limit to oppose the claim's validity. They should be informed of the time limit when they are informed of the seizure or attachment of the claim and are requested to make a declaration further to Rec. 31, above. Third-party opposition should generally result in a stay of enforcement of the claim and the imposition of a deadline for a creditor to apply to a competent court to commence regular proceedings against the third party (see also Recs. 14, 75 (1)(a), 79(1)(b) and 80(2)).

3. If the creditor goes to court and obtains a favourable judgment, any stay of enforcement will cease, and the third-party debtor will have to comply with the third-party debt order under the terms

resulting from the court decision. The cost of those proceedings and of the third-party debt order should be paid by the third party.

4. The creditor who is taking enforcement steps is not a creditor of the third-party debtor: it is the enforcement debtor, whose cooperation cannot be relied upon to pursue applications to the courts for decisions on the claim (on cooperation, see Rec. 15). The creditor should therefore be given standing to seek a court decision as to the existence and validity of the claim which is to be fulfilled. Assuming such a creditor will not always have sufficient information and evidence to justify the grant of a favourable decision, legislators should consider introducing rules that can facilitate proof of relevant facts. If the third-party debtor fails to convince the court that they have properly carried out their pre-action duty of clarification (see Rec. 31) and failed to promptly provide the court with information that it required, the court should be able to freely evaluate the third-party debtor's conduct together with any evidence provided by the creditor. Recs. 31(2) and 32(1) and (2) should remain unaffected.

5. If the creditor does not apply to the court within the reasonable period of time set by the enforcement court, they should be deemed to have waived their claim by way of third-party debt order. In such situations, the court should set aside the third-party debt order. It should also set it aside where an unfavourable final judgment is made against the creditor.

Recommendation 34 – Exemptions from seizure

(1) Exemptions from seizure of claims should apply to protect individual debtors if and in so far as necessary for satisfying the debtor's and their family's basic domestic needs consistently with appropriate, modest standards of human dignity.

(2) Special protection accounts should be established where some of the debtor's funds remain exempt from seizure. Such accounts should be established for the use of the debtor by the third party on their own initiative. A debtor should not be required to request their establishment.

(3) Exemptions should be restricted in so far as appropriate in respect of the enforcement of other claims. Priority should be given to the debtor's interest in satisfying their and their family's basic domestic needs as provided for in para. (1).

Comments

1. In all modern legal systems, debtors are assured of a minimum level of dignified subsistence. This is reflected in exemption from seizure where monetary enforcement is concerned under Rec. 26(a). The same approach is adopted here and for the same reasons. Third-party debt orders ought therefore to ensure that they make provision for debtors and their families to be capable of meeting their basic domestic needs, see Rec. 26, above. The level of the exemption will depend on the culture and socio-economic conditions of each country. On the meaning of "family", see Rec. 26.

2. Sums of money ordinarily protected from enforcement, such as a non-attachable part of salary, are usually paid into bank accounts, which are subject to third-party debt orders. To ensure that problems do not arise, particularly for banks against which a third-party debt may be made, legislative provision should be made to ensure that the minimum level required by para. (1) cannot be subject to seizure. It may be advisable where banking capacity is sufficient for provision to be made for special bank accounts to be opened, into which the amount that is not subject to seizure can be transferred, thus clarifying which parts of any salary or other payments received in a bank account are subject to seizure. Such measures ought to operate *ex officio*, not least because most debtors and their families who benefit from this approach are likely to be vulnerable individuals who cannot be expected to take active steps to defend their legal position in the context of enforcement.

3. Legislators should set limits to exemptions from seizure, which protect other valid interests. The clearest example of such an interest that equally deserves protection is when enforcement has been initiated in order to secure the discharge of a debtor's obligation to pay maintenance to a relative. In such circumstances, protection of their rights would also be endangered by non-payment by the debtor.

4. The approach under this Recommendation, which is designed for application to natural persons, can also be applied to legal persons in appropriate cases. This is particularly the case where small or medium-sized companies are concerned. Seizure of their regular income may jeopardise their operations and the minimum living standard of their owners that are natural persons. Consideration could therefore be given to extending this Recommendation so that it applied to such companies, *mutatis mutandis*.

Recommendation 35 – Automation of the third-party debt order procedure

(1) States should promote the automation of third-party debt order procedures, which resume or conclude such procedures according to the court decisions.

(2) An automated third-party debt order procedure should be established. It should enable the verification of enforceable instruments that have been served on a debtor (see Recs. 4 (1), 20(3)). The automated procedure should also be able to deal with other enforcement measures that have already commenced, and which preclude unnecessary third-party debt orders being issued (see Recs. 8(2) and (3), 19(3) and (6)).

(3) In those cases where the enforceable instrument has not been served on the debtor, the automated procedure should, where possible, perform electronic service on the debtor. The procedure should be such as to reasonably guarantee notice (see, *e.g.*, the ELI-UNIDROIT Model European of Civil Procedure Rule 74 (1)(b) and (c)).

(4) The automated procedure should generate a third-party debt order, serve the order electronically on the third-party debtor and the debtor, and communicate it to the electronic register of enforcement measures (see Rec. 22).

(5) In the absence of any opposition or challenge to a third-party debt order being made within a reasonable time limit or an application of the creditor, the automated procedure should, in so far as possible, permit automated enforcement through the transfer of money seized by the creditor.

(6) The automated procedure should permit electronic opposition, withdrawals and amendments. In the event of an opposition or an application of the creditor, it should stay the automated enforcement process until a decision is issued by the execution court or the court competent to determine the dispute on the claim seized.

(7) In appropriate cases, the use of automated proceedings should be facilitated by replacing the right to oppose and to stop automated decision making, by claims for damages where small claims enforcement is being carried out or upon security being given by the debtor.

Comments

1. Automation may facilitate the attachment of monetary claims against third parties. It should be achieved via a digital or equivalent platform, which will provide effective data security and traceability. The exact nature and structure of such platforms will inevitably differ in different jurisdictions. Full automation may well not be achieved in the short term; however, incremental steps towards full automation should be taken in so far as possible.

2. The following matters, amongst others, should be considered in the design of any digital platform: how the platform can verify the creditor and their representative's identity; how to deal with priority or equality of non-privileged creditors that apply for attachment; whether the platform can deal with registered judicial or contractual liens or rights to priority; how the platform can deal with determining temporal priority; how the digital or equivalent platform deals with questions of the scope of creditors' disposition of different kinds of execution measures; how the platform makes provision for the centralised or deregulated competences of execution organs; and whether and how the platform could integrate means to search for otherwise unknown accounts held by the third-party debtor (see Rec. 17).

3. To facilitate the third-party debt order process, a platform should make provision for creditors to provide details of the nature of any third-party debt and of the identity of alleged third-party debtors. Such details should enable the third-party debtor to be served via the automated process, where possible. It should also make provision for effective service on third-party debtors.

4. Automation of the third-party debt order procedure should specifically be able to verify if an enforceable instrument has been served on the debtor. It should also facilitate provision of accurate information about the existence and exact nature of any technology-based enforcement judgment or enforceable instrument and its service on the debtor. For the system to be effective, a digital or equivalent register of enforceable instruments should be able to supply proof of service (see Recs. 9 (1), 19 (3), 20 (3)). Digital service and the ability to challenge it should be effected consistently with the general approach taken in these Best Practices (see Recs. 4, 9 (1), 14, 76 *et seq*., 79 *et seq*.).. The automated procedure should ensure that it makes provision for service that is reasonably guaranteed to provide notice (see para. (3)). This is particularly important where a registered enforceable instrument has not previously been served on a debtor.

5. The platform should be able to automatically generate an attachment order, *i.e.*, it should be able to produce the decision to charge an individual third-party debt with seizure (enforcement lien) that covers the amount of the creditor's claim, which is owed by the debtor, and any costs of execution (an attachment order). As with digitisation generally, this automated system should comply with any national legislation on automated decision-making.

6. A seizure order should contain, amongst other things, the order to the third-party debtor to make payment to the creditor of the amount specified in the third-party debt order and to ensure that payment of such an amount is not made to the debtor. It should also specify that the debtor is not to dispose of the claim against the third-party debtor and is not to accept any payments from the third-party debtor that are within the scope of the seizure or attachment order.

7. The platform should also be able to deal with exemptions to third-party debt orders, as provided for in Rec. 34, above. It should also be designed so as to facilitate coordination with prior seizures and preferential rights. Where other registers contain details of such matters, the platform should automatically send requests for information to them concerning whether the claim seized is already attached, subject to preferential rights and if so the ranking of the seizure amongst them. It should be able to act according to the information provided.

8. The platform should make provision for challenges or opposition to a third-party debt order by the third-party debtor or the debtor further to Rec. 33, above. It should also facilitate the use of special bank accounts further to Rec. 34, above.

9. Where information about an application to challenge enforcement via a judicial process is provided to the platform, the process should automatically stay any relevant third-party debt order procedure. The stay should remain in place until the conclusion of the judicial process. If that process is dismissed, the procedure should resume. To facilitate coordination, the platform should be able to

communicate digitally, to any available digital court process, *i.e.*, the platform and court processes should be interoperable.

10. Where para. (7) is concerned, it ought to be modified to ensure that the rights of vulnerable parties are protected. Similar provision should be made to ensure that where there is a significant structural imbalance between the parties, such as might exist between a consumer and a business, that it is modified. Modification should ensure that the rights of the parties are protected and balanced effectively.

Recommendation 36 – Asset restraining orders

In so far as appropriate and according to the circumstances, the seizure of receivables and especially accounts should be combined with or replaced by asset restraining orders upon the creditor's application (see Rec. 67).

Comments

1. The enforcement of claims, even where the process is digitised, may take considerable time. This is particularly the case in the event of opposition by the debtor or the third-party debtor.

2. To avoid the enforcement process being frustrated by improper behaviour by either the debtor or the third-party debtor, a creditor should be able to apply for protective measures, such as freezing a bank account or restraining the debtor or a third party from disposing of specific assets. Where the enforcement of claims is concerned, the most appropriate such measure is an asset restraining order.

Subsection 1.3. Enforcement on special types of intangibles or on rights or legal positions

Introduction

Enforcement measures should generally be those that secure the most efficient means by which an economic return from the seized asset can be realised. There are cases where such regular modes of enforcement are either partially or wholly inadequate. This is generally because of the specific nature of seized assets. Their nature entails the application of special legal regimes because the generally applicable modes of enforcement need to be modified or combined because on their own they are not adequate. They may not be adequate because of the substantive legal regime governing those assets, and particularly because of the nature of the rules governing their transfer, where such rules must be taken account of when enforcement measures are applied. It may, for instance, be necessary to overcome the absence of consent to transfer the seized asset to enable enforcement to take place effectively.

Where the general approach to enforcement cannot be applied due to the specific nature of the assets to be seized, special enforcement rules need to be developed. These are often complex, not least as they may need to combine the use of different enforcement methods (see Rec. 61). For example, where securities in a paper format or contained in a tangible token are in the possession of third parties, such as trustees or intermediaries, special rules may need to combine rules that generally apply to enforcement on goods as well as the rules concerning third-party debts (see Subsection 1.2 and Section 2 of Chapter VI). Special rules may also apply, for instance, where enforcement concerns company shares, copyright, intellectual and industrial property rights, technological or commercial business secrets, software, domains on the internet, or other intangible movables like data stored in a record or cloud.

Steps can be taken to simplify enforcement in such special cases through, for instance, combining enforcement measures on the basis of the "mirror principle" (see Rec. 61). In some cases, however, due to the complexity of combining enforcement measures, such approaches are not able to fully protect the creditor's interests.

Most countries, therefore, practice post-judgment receivership of immovables (see Rec. 50). Some legal systems, however, particularly common law systems and, to a limited degree, some civil law systems, have developed kinds of post-judgment receivership of assets subject to enforcement on a wider scale (see Rec. 63). In particular, receivership is practised in enforcement is on: income derived from a trust fund; the future proceeds from a sale of land; a debtor's usufruct; a debtor's claim for the transfer of land; and receivership for collection of assets located or arising in foreign countries. Where receivership is being considered, it should be borne in mind that it is more the exception than the rule and a matter of last resort in most jurisdictions.

This Subsection provides recommendations concerning some of the most frequently utilised special cases.

Recommendation 37 – Enforcement on intangible movables

(1) All types of assets, rights or similar legal interests can be subject to seizure if and in so far as they are assignable or transferable (see Rec. 1 (2)).

(2) Generally, parties may not exclude a right or legal interest from seizure by agreeing that it is not assignable or transferable. They may, however, do so in limited circumstances where that is justified by a prevailing interest.

(3) Recs. 24 – 29 and 30 – 36 should apply to enforcement on intangibles. Where effective enforcement cannot be realised through the use of one mode of enforcement, combined modes of enforcement provided for under Recs. 61 – 63 may also be utilised.

(4) The competence of execution courts regarding enforcement on intangibles and their ability to give guidance to other enforcement organs should be determined by national law. This may include making provision for execution courts to intervene on their own initiative or only upon the application of a party.

Comments

1. Generally, all the debtor's assets, including intangible property, rights or similar legal interests should be subject to seizure, as a basis for their subsequent disposition, if and in so far as they are assignable or transferable. Enforcement only makes sense when assets can be assigned or transferred, as that is the only way to obtain an economic return where monetary enforcement is concerned (see Rec. 1, comment para. 2).

2. In the absence of any specific overriding interests, the parties' agreement to exclude the assignability or transferability of an asset should not prevent enforcement. This is the case even though the parties' intention may make enforcement more complicated. If the asset is by its very nature seizable, it must be capable of being seized and used to satisfy the creditor's interest. In some cases, excluding assignability or transferability is justified by reference to a prevailing interest. Where this is the case, assets should not be seizable and therefore direct enforcement against them should not be possible. In other cases, however, the origin of the exclusion is contractual, and it is counter-intuitive to assume that the mere will of individuals should be an insurmountable obstacle to enforcement. Among the prevailing interests that may justify giving effect to a party agreed exclusion of assignability or transferability, may be the rights or legitimate expectations of third parties, which the legal system considers valuable and whose protection may be necessary for the proper

functioning of legal transactions, e.g., the need to protect vulnerable individuals. Making the basis of this form of protection for third parties compatible with the right of creditors is the objective to be achieved by resorting, where necessary, to complex enforcement measures.

3. The appropriate application of Recs. 24 – 29 or 30 – 36 depends on the circumstances of individual cases, including the specific nature of the intangible movable that is to be seized. It is not, therefore, advisable to provide generally applicable rules. The examples in the following paragraphs illustrate how these recommendations may be applied to intangibles.

4. When an intangible asset is under the debtor's full control, Recs. 24-29, with necessary adaptations, should apply to the disposition of the intangible movable, e.g.,

(1) where enforcement concerns confidential technical know-how or trade secret that is not protected by any kind of patent and which is stored on a shared computer folder that is under the debtor's control, the creditor may apply to the enforcement organ for seizure of movables. If the enforcement organ (court officer, agent) could gain entry to the computer with the debtor's assistance, they could remove the folder from the computer and store it elsewhere. If it is then stored on, for instance, a memory stick, that and the data could be the subject of a public sale (Rec. 24) or could be transferred to the creditor at its market price (Rec. 28). In either case, the content of the folder could then be transferred to the third-party acquirer upon sale or to the creditor. Care should be taken, however, to ensure that the confidential information or trade secret is not devalued by providing access to it to potential purchasers or the creditor prior to any sale or appropriate transfer to them. From a pragmatic point of view, the use of Rec. 28 (7) or (8) may be the only feasible approach to take. Their use, however, requires a competent expert to be appointed. Such an expert should be required to do no more than provide a general description of the information and its value: they should be required to keep the exact nature of the information secret. The parties may also come to a suitable arrangement, with suitable safeguards concerning the information (Rec. 28). Nevertheless, in high value cases, a court officer or enforcement agent may not be able to take full responsibility for the expert. As a consequence they would potentially be liable for any expert misconduct in the absence of an order issued by a judge of the execution court. Such a judge should therefore be available to affirm the enforcement organ's decision or to provide the creditor with appropriate guidance.

(2) If the debtor refuses to co-operate with the creditor, it may be necessary for the creditor to obtain a civil search order (Rec. 17). Access to a computer could be feasible with the help of an expert or, in cases where access is controlled by biometric recognition, an unknown password or code, enforcement measures that apply to the debtor personally may be necessary (Rec. 65). Enforcement may then take place according to Rec. 28(7).

(3) It may be necessary to combine modes of enforcement to secure enforcement on a debtor's copyright (Rec. 61, comment 3(6)). This might be the case, for instance, where it is necessary to seize copyright and an original manuscript (Recs. 24 and 41), the sale or licensing of transferable copyright with its owner's consent, in cases of licensing delivery of possession of the manuscript (Recs. 28 with comments and 55). In such circumstances it may also be advantageous to obtain a civil search order (Rec. 17).

5. Recs. 30 – 36, with necessary adaptations, should apply where a debtor does not fully control an intangible movable, a third party exercises any kind of control over it, and the enforcement organ fails to reach voluntarily transfer or full control because the third party claims a right to control based on credible facts or documents (Recs. 27, 30), e.g.,

(1) where the debtor has a digital entitlement to securities against a third-party debtor. This may particularly arise if securities are under the control of a debtor's custodian or intermediary (for differing examples, see Rec. 61 comment 3 (5a – c));

(2) where a debtor has valuable cryptocurrency, a creditor who has a claim for payment in a national currency could apply for a third-party debt order against the holder of an external or internal cryptocurrency platform, which permits the seizure of the debtor's right to participate in the exchange of their cryptocurrency assets into a national currency that could then be transferred to the creditor (Rec. 38). In such situations it may also be necessary to use combined enforcement measures (Rec. 61). It may, for instance, be necessary to obtain an order for information about how to access the cryptocurrency system (Rec. 15 (1) and (2)), a search order, an order for the appointment of an expert (Rec. 17), an order prohibiting the debtor and the cryptocurrency system holder from frustrating access to it (Rec. 65), or an order against the debtor personally requiring them to initiate the payment process under threat of a fine or imprisonment (Rec. 64). See Part III for recommendations concerning enforcement on digital assets (Recs. 132 *et seq*.). For further specific relevant examples see, Part III, Recs. 131 *et seq*. with Appendix and comments.

(3) Other examples are beneficial interests in a debtor's assets, such as usufructs, beneficial interests in trust estates, partnerships or participation in limited liability partnerships or corporations (Recs. 38 – 42). In these situations, the legal position to be seized underlies special obligations towards former partners or co-owners. Fairness requires particular attention to be given to the interests of, for instance, the opposing party or former parties in these cases. Information of seizure by third party debt order should be provided to such parties because of the impact it may have on them. Generally, the effects of seizure are somewhat unclear in national law. This is particularly the case where the effect of seizure on all future claims arising from the relationship between the parties is concerned. Often it is not clear if seizure concludes all future claims or whether it remains necessary for specific third-party debt orders to be obtained concerning each individual claim. Where higher economic values are concerned, the long-term consequences of seizure and potential for further legal disputes suggest that an order for receivership is preferrable (Rec. 63).

6. Seizure orders issued under Rec. 30 and following do not fall within the competence of execution courts in all states. However, in an increasing number of states this is the responsibility of other enforcement organs, such as court officers or enforcement agents. Independently of this distribution of competence, the enforcement organ or the parties should have a right to apply for guidance from the execution court (see Rec. 37(3)).

Recommendation 38 – Usufruct and similar beneficial interests

Where substantive law prohibits the transfer of usufruct or other beneficial interests but permits them to be subject to different kinds of agreed use within the limit of the beneficial interest, such as rental, then the usufruct or other beneficial interest should be subject to seizure. Such seizure should only be permitted within the limit of the beneficial interest.

Comments

1. Usufruct can be granted on a wide variety of assets and has an obvious economic value. Substantive law often ensures that it is non-transferable. That does not, however, preclude enforcement on income derived from usufructuary property, which can be seized. Enforcement on such income can be carried out, where appropriate, by third-party debt order, *e.g.*, where the debtor is the beneficial owner of property that they have leased to a third party. Enforcement may also, if

more appropriate, be carried out through a receivership scheme, *e.g.*, where the debtor is the beneficial owner of a group of properties that require professional management.

2. The same approach should apply to legal arrangements that are equivalent to usufruct, *i.e.*, to situations where a debtor holds a legal position in respect of an asset that is not transferable, but which may be subject to various types of agreed use. In such cases, enforcement will also obtain the proceeds derived from such use, *e.g.*, rental income, by a third party. Again, third-party debt orders or receivership may be utilised to effect enforcement.

Recommendation 39 – Partners' interest in partnership

(1) A partner's participation in a partnership should not, in itself, be subject to seizure.

(2) A partner's economic interest in a partnership, such as their interest in a distribution of profits or their interest in the dissolution or winding-up of the partnership, should be subject to seizure. This includes being subject to third-party debt orders issued in respect of the partnership and their partners.

(3) Upon seizure, the creditor should have a right to dissociation, at least in so far as the partner had this right at the time of entry of the charging order, thereby realising the amount distributable upon dissociation.

(4) Seizure should not entitle a creditor to participate in the management or conduct of the partnership's business. It should also not enable them to secure access to partnership information.

Comments

1. A partner's membership in a partnership should not be seizable. This is because the basis of trust and confidence between partners cannot be secured in the context of execution, *e.g.*, were a creditor to replace a debtor as a partner in a partnership. Partners cannot, moreover, be forced to take on as a partner someone with whom they have not agreed to enter into partnership. For that reason, para. (1) makes clear that a partner's participation in a partnership, including their ability to manage the partnership, cannot be subject to seizure.

2. It is, however, possible to seize a partner's economic interest in a partnership. As such, the benefits that partnership status provides to the partner, such as profits or sums due on dissolution or winding-up of the partnership, may be seized.

3. The enforcement organ should be able to apply to the enforcement court for appropriate measures if it becomes apparent that the partnership, with or without the debtor's direct intervention, is taking decisions aimed at frustrating enforcement. Such measures include exercising the right of dissociation. A creditor should be entitled to activate that right as a last resort. From it, the creditor should derive a right of access to money and assets to which the debtor was entitled after the dissociation took effect.

4. The power of dissociation should be available to creditors, even if there is no risk or indication of fraud, if the debtor had it, in accordance with the terms of the partnership, at the time of the attachment. It is clear that dissociation can seriously alter how a partnership functions. It thus affects the rights of third parties. It should thus only be triggered, in the absence of fraud or indications of fraud, where the partners themselves had foreseen it being used.

5. This Recommendation deals with enforcement. Legislators should take care to ensure that where this Recommendation is implemented it is consistent with any relevant law concerning partnerships.

Recommendation 40 – Interests in a limited liability partnership, limited liability corporations and their functional equivalent

(1) Participation in a limited liability partnership, limited liability corporation, and their functional equivalent, should be subject to seizure.

(2) A creditor should, at a minimum, have the right to receive any distribution to which the partner or equivalent would otherwise have been entitled.

(3) A creditor should have the right to apply for sale of the interest seized if the company agreement provides for the transferability of membership. It should only do so if transfer can be affected in the absence of opposition of the other partners and if there is good reason for the transfer membership to the proposed transferee given the nature of the purpose of the limited liability company.

(4) Rec. 39 paras. (3) and (4) apply, with necessary adaptations.

Comments

1. The approach to enforcement for partners in limited liability partnerships (LLPs), limited liability corporations, and entities that are functionally equivalent to LLPs and LLCs (*e.g.*, co-operatives), can differ from that taken for partnerships in general. Due to the specific corporate structure of LLPs, an interest in the LLP or participation in an LLC may be subject to attachment. This is because their status is associated with ownership of shares or their equivalent in the LLP, including their right to participate in the management of the LLP or LLC. A creditor may, therefore, receive the economic benefit of LLP or LLC through attachment of such shares, etc.

2. An LLP's or LLC's rules concerning the transfer of shares and the debtor's right to participate must be respected, provided that it does not represent an unjustifiable obstacle to the creditor's satisfaction. Therefore, if the LLP's or LLC's rules that regulate its management provide for membership to be transferred, a creditor can also request it as part of an enforcement process to secure the speedy recovery of what is owed to them. The same applies to the right of separation. The same measures concerning dissociation as those set out in paras. (3) and (4) should apply to LLPs or LLCs as they do to partnerships.

3. This recommendation deals with enforcement. Legislators should take care to ensure that where this recommendation is implemented it is consistent with any relevant law concerning LLPs and LLCs.

Recommendation 41 – Intellectual property rights

(1) In principle, intellectual property rights, including patents, utility and design patents, should be subject to seizure in so far as they are assignable.

(2) Generally, assignment and seizure should be permissible upon the registration of an intellectual property right. However, assignment and seizure should be permitted upon an application for registration being made. It may also be permitted where an intellectual property right, given its state of development, is capable of being registered.

(3) Exclusive licences that prevent the holder of an intellectual property right or third parties from competing with the exclusive licensee should be assignable and subject to seizure if the license agreement does not exclude or restrict the possibility of assignment. Recommendation 37(2) should apply accordingly.

(4) Licence agreements that provide that an intellectual property right holder cannot sue the licensee for any infringement of the right as long as the licensee only carries out permitted use of the subject matter protected by the right, should either not be subject to seizure or should only be subject to seizure with the right holder's consent.

(5) Trademarks should be subject to seizure only where their future use is in accordance with applicable rules on fair competition and consumer protection. This does not apply where their use does not accord with the business activities of the future holder or licensee of the trademark.

(6) Copyright should be subject to seizure in so far as it is transferable according to the applicable substantive law. If the transfer or licensing requires the copyright holder's consent, it should be given before seizure.

(7) [If, according to the applicable substantive law of copyright, the owner's consent is temporarily restricted or has been validly revoked, execution measures should no longer be admissible except in cases where seizure has been completed.]

Comments

1. The substantive regulation of intellectual and industrial property rights is sophisticated and, in many cases, serves the purpose of adequate market and consumer protection. It is therefore advisable that enforcement measures adopting such rights be compatible with their substantive regulation. This Recommendation, therefore, focuses on the seizure of economic returns that are derived from these rights. Furthermore, under no circumstances may any right the transfer of which is prohibited by substantive regulation be transferred by enforcement. The legitimate expectations of those who have agreed exclusive licences with debtors must be respected.

2. Where copyright is concerned, only those rights that are generally transferable may be subject to compulsory transfer. Where transfer is concerned, the legitimate expectations of third parties must also be protected.

3. Depending on substantive national law, either patent or copyright rules will apply to computer software.

Recommendation 42 – Contractual common law trusts and similarly structured civil law trusts

(1) A creditor should not be permitted to attach or seize a trust asset that is held by a debtor as trustee of a contractual trust. The trustee and the trust's beneficiaries should be able to resist, through a third-party claim, any enforcement measures taken by a creditor (Rec. 81).

(2) In so far as a debtor could realise their beneficial interest in trust assets, a creditor should be allowed to attach or seize it independently of its exact nature under the applicable national law.

(3) Where the same person is the settlor, trustee or beneficiary of a trust, legislators should determine whether and how far these Recommendations could apply according to applicable substantive law.

Comments

1. This Recommendation concerns enforcement where assets are held in trust. Contractual common law trusts spread worldwide over the course of the last century. This development was particularly contributed to by the Hague Conference on Private International Law (HCCH)'s 1985 Convention on the Law Applicable to Trusts and on their Recognition, as well as the influence of U.S.

law on hybrid legal cultures. An increasing number of civil law countries developed trusts through the evolution of their own legal instruments. That evolution arose through imitation of the design of common law constructive trusts and the protective consequences they had where enforcement and insolvency or reorganisation and restructuring proceedings were concerned. These protective consequences are common to all kinds of trusts and apply even if the trustee's obligations are rather limited in extent, as they are in terms of what are known as bare trusts in common law countries. This Recommendation provides that, in principle, the terms of contractual trusts must be respected, and therefore assets subject to such trusts cannot be attached or seized by the personal creditors of the trustee or creditors of the settlor or beneficiaries. Third-party claims may be pursued by trustees or the beneficiaries of trusts to resist enforcement measures.

2. If, however, a debtor can realise any beneficial interest that they have in trust estates and their assets, a creditor may be permitted to attach or seize that interest. Whether and the extent to which they may be able to do so will, however, be a matter of assignability and chargeability as determined by any applicable contractual terms and the substantive law, which may differ across jurisdictions. More generally, given the different approaches national law takes to trusts and trust assets, legislators should consider how this Recommendation should apply to them. This is particularly recommendable in cases where identity between beneficiary and trustee or settlor, beneficiary and trustee is admissible.

Recommendation 43 – Seized claims secured by collateral or guarantee

If a debtor's seized monetary claims are secured against a third party, whether by collateral, including security interest, or other types of guarantee, the seizing creditor should be able to extend the effects of the third-party debt order to the collateral or to that which constitutes the guarantee.

Comments

1. The Recommendation articulates the requirement that the seizure of monetary claims, which are secured by collateral or other types of guarantee, should include seizure of the collateral or guarantee. An example of such a situation is where judgment is entered against a debtor, which entitles the creditor to seize the debtor's assets. In such a situation one or more of the debtor's assets may be a receivable owed to the debtor by a third party. Where the third party's obligation to the debtor is secured by a security interest, the creditor's seizure of the secured claim should extend the seizure to the third party's assets charged. The type of situation, as described by Rec. 43 should not be confused with cases where the creditor enforces a secured monetary claim underlying an enforceable instrument against the debtor. If the enforceable instrument permits only the monetary claim the recommendations for enforcement of monetary claims apply (Recs. 24 – 54); creditors, however, could also enforce the monetary claim by seizure of the charged assets enabling them to liquidate the charged assets and to realise the value of the security interest (see Rec. 10 comment para. 11). If the creditor holds an enforceable instrument that gives an entitlement to the forced delivery of possession or control for sale of the assets charged (Recs. 55 – 60), they could liquidate the charged assets privately within the framework of the security agreement. An alternative is to force the debtor to grant the creditor access to take possession and control for sale and to forbid any obstruction of that process by way of a court order under the threat of punishment (see Part II, Rec. 120).

2. The value of a secured claim is to a significant extent determined by the value of any collateral that guarantees it. Such collateral provides a much better prospect of the creditor's claim being satisfied in full than would be the case where its satisfaction depended on the debtor's solvency. This is particularly the case where the debtor's solvency is questionable, *i.e.*, there is a real risk of insolvency, or valuation of their assets is complex. The law governing security interests or guarantees

is technically complex. Providing a comprehensive overview is outside the scope of this Recommendation.

3. Collateral could be a pledge or lien construed as an annex to the claim, which according to mandatory law necessarily remains attached to the claim where it is transferred or subject to a charge (*i.e.*, to an accessory security interest). Such collateral is extinguished with the claim. Where accessory security interests are concerned, the seizure of a claim should comprise the collateral and grant the creditor those rights that arise from the seizure in respect of the claim and the security interest. Thus, seizure should authorise a creditor to satisfy their claim by realizing the collateral's value or, in the alternative, by taking all the other measures provided for in the execution of monetary claims. Accessory collateral are mainly traditional continental mortgages on land and traditional pledges or liens charging movables or intangibles. Mortgages on land need to be registered in land registers, be it generally mandatory or for the creation of third-party opposition only. It seems to be advisable that the seizure of a claim to which the mortgage is fixed should also be registered in the land register as already provided for in several legal systems. Upon a claim being seized, a creditor should be placed in the same position as the debtor was in prior to the seizure where the sale of charged land is concerned. In many countries, the public sale of such land by an enforcement organ has traditionally been obligatory. An increasing number of countries do, however, permit public sales that are held via a private mechanism (see Rec. 48 on public sales). Generally, mortgagors hold a notarial enforceable instrument that is transferrable together with the claim and mortgage, which should also enable a seizing creditor to enforce by way of public authority. Where mortgage notes are concerned, seizure of a claim should permit the forced delivery of their possession, or where virtual notes are concerned, their mandatory delivery through enabling the use of methods that secure access to them.

4. [Where accessory pledges or liens on movables or intangibles are concerned, the seizure of a debtor's claim against a third party by third-party debt order should enable the collateral's value to be realised by the sale of any securing charged movables or, depending on the circumstances, of the collateral. If collateral are third party's claims against another obligor, the seizing creditor should be permitted to apply for enforcement against this obligor based on the third-party debt order extending to an extant enforceable instrument that the third party has against the obligor, or upon application for an enforceable instrument against the obligor by the creditor who has standing to sue the obligor by the third-party debt order. Where registers for movables or intangibles exist, it is advisable that the seizure of a debtor's claim and its extension to collateral should be registered to secure priority over subsequent contractual security interests, seizure or privileges.]

5. Security interests, provided on the basis of a security agreement combined with a security assignment or transfer of title, or a non-accessory lien or retention of title, could also be collateral. Such security interests entitle the creditor to sell the collateral to satisfy their claim upon the debtor's default in cases concerning movables or land after possession of it has been taken. It is recommended that to seize the claim and at the same time, although separately, also seize the debtor's right to sell and transfer the collateral. They should also be enabled to take possession of it, too, if necessary. Depending on the nature of the debtor's right that is subject to seizure, differing modes of seizure or modes of enforcement may apply, *e.g.*, if the right is a contractual one that would enable the debtor to take possession of a movable or of land for sale, or is one that would enable them to order the sale of an immovable that is held by a trustee either directly or by means of a non-accessory lien, or is one that enables them to require sale of securities that are held by an intermediary as a third-party debtor, etc. The debtor's right that is subject to seizure should also enable the creditor to apply for court orders that force a third-party debtor to act in accordance with obligations arising from the security agreement (enforcement of the security agreement between debtor and third-party debtor, see Recs. 55 *et seq*. (enforcement by way of public authority) or Rec. 120 (non-judicial enforcement)); for a detailed presentation of examples of these kinds of combined enforcement measures, see Rec. 61, comment para. 3(7).

6. Over the course of recent decades, the development of substantive law concerning security interests has, on a comparative level, increasingly resulted in the creation of hybrid security interests. In some circumstances they are considered accessory and in others non-accessory. There are, for instance, accessory security interests that could be held by trustees or by the owner if a claim to be secured does not exist or ceased to exist with further use of the security interest reserved by the owner of the property to be charged. Notwithstanding this development towards hybrid security interests, the differentiation according to the described categories, however, remains helpful in determining the correct mode of enforcement on secured claims.

7. Personal guaranties of debts could either be accessory or non-accessory to the claim secured depending on national substantive law. According to the rules that apply to the seizure of claims secured by security interests on tangibles or intangibles, where there are accessory guaranties, the seizure of a claim should include the seizure of the guaranty. In cases of non-accessory guaranties, two separate seizures would be needed or, at the least, should be considered to be recommendable, in order to extend the effects of seizure to the personal guaranties.

Subsection 1.4. Monetary enforcement on immovables

Introduction

Creditors should be entitled to secure monetary enforcement by seizure and subsequent sale of immovable property. Given that immovables, while being a valuable asset are, in many cases, also a debtor's home – and hence of importance to private and family life – many legal cultures provide specific limitations on enforcement here, such as those that require it to be a remedy of last resort only available where other enforcement methods have failed or would be of limited value (a strict ranking approach). Such an approach can be understood as an early instance of the fundamental principle of proportionality, which is or should be now well-established as an element of the rule of law.

The modern approach to enforcement on immovables has moved away from strict regulation. A more flexible approach is now taken and is adopted here. This approach more effectively balances the conflict between the creditor's right to effective enforcement with the debtor's right not to be subject to disproportionate enforcement measures (Recs. 1, 2 and 5). The historic strict ranking approach is not only rejected as a general principle, but that rejection in favour of a more flexible approach is given concrete effect in this Subsection. This flexible approach is also one that gives greater weight than strict ranking to both party disposition and the need to ensure that enforcement is matched effectively to the circumstances of each case (Rec. 2(1) and (3)).

As a general rule, where debtors have multiple assets that could satisfy a debt, they ought to choose the one that best suits them. Where they refuse to do so, and enforcement measures are taken, enforcement on immovables ought not to be considered disproportionate in all circumstances. It may, however, be viewed as disproportionate where a debtor is unable, for instance, due to emotional distress, to make a rational choice for the enforcement organ to balance the creditor's and debtor's rights and interests before determining whether enforcement on immovables is appropriate.

Different jurisdictions and legal traditions have taken different approaches to enforcement on immovables. Some have historically required a court or other public authority or a notary to issue an enforceable instrument before such enforcement can take place; others have either not required such a step or have, over time, abandoned the requirement. These Best Practices adopt a hybrid approach. In Part I, it maintains a consistent approach with that generally taken to enforcement by way of public authority, *i.e.*, that it is based on the issue of an enforceable instrument, while promoting proportionality by simplifying the enforcement process. In Part II, recommendations on non-judicial enforcement of security interests on a contractual basis are developed.

Recommendations for enforcement in this Section apply to immovables as provided by substantive law. According to applicable national substantive law, this may generally include, for instance, land, building on lands, condominiums, rights over or interests in land such as long-term transferrable leaseholds or similar rights.

According to the principle that monetary enforcement by way of public authority replaces debtor conduct that is necessary to convert their assets into money to be paid to creditors (see Rec. 1 (2) with comment 2), the rules on enforcement on immovables parallel rules applicable to transactions that effect all forms of transfer as provided by substantive law. Consequently, recommendations for enforcement in this section apply to land with buildings, fixtures and appurtenances if in case of transactions so provided by substantive law. In cases where substantive law permits, in special circumstances, the transfer or charge of buildings separately from land or rights or interests in land, recommendations for the enforcement on movables may apply or recommendations for the enforcement on land or on rights or interests in land, according to national substantive law. As a result, this Chapter's recommendations are only designed to be guidelines for enforcement against immovables that are organised under substantive law as it applies to land as such.

Recommendation 44 – Types of enforcement on immovables

Legislators should, at least, provide the following three different types of monetary enforcement on immovables:

(a) enforcement by seizure and sale;

(b) enforcement by receivership; and

(c) means to secure enforcement by judicial mortgage or liens.

Comments

1. Rec. 44 enumerates the modes of enforcement on immovables, which are common to nearly all well-developed legal systems. The list in this rule is not therefore intended to be exhaustive. Legislator refers to any authority empowered to adopt binding rules.

2. Seizure and public sale is the most commonly utilised form of enforcement on immovables by way of public authority. This is because it is the most effective means by which a creditor can maximise realisation of its value.

3. Receivership is most appropriate where satisfaction of the debt due to the creditor can be achieved through renting or leasing the immovable or through any other means to secure income from it. It is a particularly beneficial approach in such circumstances as it both enables the debt to be satisfied while leaving the immovable in the hands of the debtor. It can thus, in appropriate circumstances, be a proportionate approach to enforcement (also see Recs. 50(1), comment 1 and 63(1), comment 1).

4. Judicial mortgages or judgment liens are designed to secure priority for the creditor's claim over claims, privileges or securities that arise after they have been issued. Approaches to these enforcement methods differ across the world, however their purpose is consistent: to secure priority for the creditor's claim.

Recommendation 45 – Seizure by order of an execution court or enforcement organ

(1) A creditor should have the right to apply to an execution court or another enforcement organ for an order of seizure for sale of the debtor's immovable.

(2) The seizure order should contain

(a) the enforceable instrument;

(b) the claim underlying the enforceable instrument;

(c) information necessary to enable the immovable subject to seizure to be identified properly;

(d) an explanation of the legal consequences of seizure; and

(e) information explaining the debtor's right to apply for review of the order.

(3) The seizure order should be registered with the land register upon the application of either the execution court or enforcement organ that issued it or upon the creditor's application.

(4) The seizure order should also be registered in the register of enforcement measures by the execution court or enforcement organ that issued it (see Rec. 22(3)).

Comments

1. This Recommendation emphasises that it is generally a matter for the creditor to determine which enforcement method to rely upon, while also making provision for enforcement organs to determine which should be utilised where the creditor does not do so or where there are good reasons to prefer one method over another (Rec. 8). They also do not specify any particular sequence by reference to which enforcement methods should be used. They do not, for instance, provide that enforcement on immovables should be a method of last resort. Application of the general principle of proportionality, specified in Rec. 5, does, however, require that the cost and degree to which any specific enforcement measure may intrude upon the debtor's fundamental rights be taken into account in any consideration of resort to enforcement on immovables. Against the background of this general framework, para. (1) emphasises the creditor's right to apply to an execution court or enforcement organ for an order authorising the seizure and sale of a debtor's immovable. See Rec. 82 and 83 for provision on where responsibility for the sale of immovables, further to such an order, lies.

2. Para. (2) specifies the necessary minimum content of a seizure order. It is intended to ensure that all parties to the order, relevant enforcement organs, etc. have all sufficient information necessary to secure the seizure and promote the sale of the immovable subject to it.

3. Land registers, which identify the ownership of immovables and details of persons who have interests in an immovable, are commonplace in many jurisdictions. To a significant extent, these registers are designed to determine priority between competing interests (in a broad sense) in immovables. To a more limited extent, some jurisdictions' land registers provide a guarantee concerning the accuracy of the data they hold. Irrespective of these national differences, registration of seizure orders under para. (3) is beneficial and should thus be adopted, as it is a means to protect the creditor's interest in the immovable's priority over rights, interests or privileges that are subsequent to it. Not all legal systems have a publicly accessible register for immovables or all immovables registered where such registers exist. The creation of such is, however, recommended

as a means to ensure transparency of rights on land, including agricultural land, in several international instruments, including those adopted by UNIDROIT.

4. It is necessary to register a seizure order within the register of enforcement measures. This is to ensure that information concerning the enforcement process be available to all enforcement organs and other creditors in so far as appropriate. The availability of such information can enable them to join the sales procedure or to consider whether to take, and if so to take, any other suitable, proportionate enforcement measure or measures (see Recs. 8 and 22(3)).

Recommendation 46 – The legal effects of seizure

(1) A seizure order should prohibit the debtor from taking any steps with the property that is subject to the seizure order that could impair the rights of the creditor in whose favour the order was made.

(2) Any transactions the debtor enters into concerning the immovable seized after the order is issued and registered should be ineffective in so far as that is necessary to secure the creditor's enforcement rights.

(3) A seizure order should give the creditor a right to satisfy their enforcement rights from the proceeds of the realisation of the public sale of the property.

(4) A seizure order should guarantee priority for the creditor in whose favour the seizure order is made. Priority should be secured over the claims of all other creditors, where their claims, security interests or privileges arose after registration of the seizure order (see Recs. 53 and 54).

(5) Where judgments create general liens over immovables (judgment liens), such liens may determine questions of priority as between a seizure order and other claims, privileges or security interests. Alternatively, priority of seizure may be determined where judgment liens are concerned according to the time at which they were registered within a land register (see Recs. 53 and 54).

Comments

1. Seizure orders are the basis on which immovables can be sold publicly. They prevent debtors from taking any steps or entering into any transactions that could impede the creditor's attempt to satisfy the debt due to them by way of sale (para. (1)). The prohibition on debtor action here complements the provision in para. (2), which renders ineffective any such steps taken by a debtor. Ineffective transactions can, by their very nature, cause complexity, delay and increased cost. In such cases, the prohibition contained in para. (1) can form the basis for the imposition of sanctions upon the debtor, *e.g.*, a requirement to reimburse the creditor any costs caused by their void action or damages (see also Recs. 15(2) and 18).

2. Para. (2) only provides that debtor transactions are ineffective in so far as necessary to protect the creditor's enforcement rights. As such they are only rendered ineffective in so far as they harm the creditor's ability to take steps to satisfy the debt due to them through the sale of the immovable (para. (3)).

3. Para. (3) makes it explicit that effective seizure should establish a creditor's right to satisfy their claim from the proceeds of realisation of the sale. Where there are multiple creditors, satisfaction from the proceedings of sale should be distributed according to priority ranking: see para. (4) and Recs. 53 and 54.

4. To provide clarity and certainty, para. (4) specifies that the seizure order should have priority over other claims, security interests or privileges that arise after it was granted as from the time it

was registered. This avoids questions arising as to the effect of *bona fide* transactions concerning the immovable that occur after the seizure order is issued and prior to it being registered. Where a transaction takes place concerning the immovable after issue and before registration, questions may still arise concerning whether it is a *bona fide* transaction. Such questions should be considered by reference to substantive law concerning fraudulent or otherwise void or voidable transactions.

5. Para. (4) addresses the consequences of ranking according to priority for privileged or secured creditors, whose claims, security interests or privileges arose after the first creditor's order of seizure was registered. It also makes provision for the ranking of unsecured creditors, those without claims or privileges concerning the immovable. Questions of ranking may be particularly acute where an immovable was acquired by the debtor through financing provided by different banks, financial institutions or through different types of loans or forms of financing. Such situations may complicate enforcement due to the fact that they will raise complex questions of ranking and of the proper distribution of the proceeds of sale (see Recs. 53 and 54).

6. Para. (5) makes provision for judgment liens, which are well-established in many common law jurisdictions. Generally, they grant priority over unprivileged, unsecured claims and any later arising privileges, security interests or judgment liens without the need to register a seizure order. Variations to this approach are seen. In some jurisdictions, they take effect when the judgment is issued or when it is filed in the judicial district where enforcement ought to take place. In other jurisdictions, their scope differs. Some apply to all forms of real property. Others only apply to immovables in the district where the judgment is filed and is to be enforced. In some, they all apply to all property, whereas in other jurisdictions they only apply to immovables in existence at the time the judgment is given. In others still, it applies to such immovables and after-acquired immovables. Other distinctions are also evident. Given this divergent approach, this paragraph recommends reform to simplify their application. It thus recommends that they take effect on registration in the land register (see Recs. 19(1) and 22(3) and comment para. 3; Rec. 54 and comment para. 4).

Recommendation 47 – The scope of seizure

(1) Seizure of an immovable should generally comprise land, buildings on the land and such other rights, accessories and benefits provided for in substantive law.

(2) Insurance claims concerning damage to immovables should come within the scope of seizure.

(3) Substantive law may provide exceptions to the general rule, which provide for assets, rights and interests to be treated independently of rights or interests in the land itself.

Comments

1. In principle, monetary enforcement must mirror the steps that a debtor would take if they were to liquidate their assets voluntarily (see Recs. 1(2) with comment para. 2, 61(1)). The same approach applies to enforcement on immovables. Where the latter is concerned, different jurisdictions take significantly different approaches to the law governing immovables.

2. National substantive variations to the scope of seizure of immovables include, for instance, the manner in which different persons can hold land and any property on it and the basis on which they hold it arises (by legislation, by written agreement etc.), the manner in which persons hold immovables, *i.e.*, whether under freehold, leasehold (short- or long-term), rental contract, usufruct, emphyteusis, etc., and whether and to what extent appurtenances to land, such as legal rights (*e.g.*, rights of access over neighbouring land), technical equipment in industrial facilities, on farm land, or in shops or restaurants, or on property built on land are dealt with as immovables or as movable property (*e.g.*, fixtures, which can be viewed as movables that are in some way attached to the immovable).

3. The approach taken in this Recommendation is intended to encompass all possible national substantive law variations. Para. (1) thus makes provision for all aspects of immovables as provided for in national substantive law to come within the scope of seizure. It is thus intended to promote the adoption of an approach that understands the scope of seizure to be broad. Para. (3) does, however, make provision for substantive law to create exceptions to the general rule and thus specify matters that fall outside the scope of seizure where immovable property is concerned.

4. Where appurtenances are concerned, see also Rec. 48(6)(k), which provides that where it is unclear under the applicable substantive law whether something is an appurtenance, the conditions of any public sale should make it clear what is to be treated as such for its purposes. In circumstances where the enforcement organ's approach to defining what is an appurtenance in the conditions of sale is not accepted by a creditor, debtor or bidders, they should exercise their right to opposition prior to the sale proceeding.

5. Further national substantive law differences arise where claims arising from land or building insurance are concerned. Some jurisdictions extend the scope of seizure to such claims, including insurance claims arising from damage to immovables caused by nature as well as claims concerning unpaid rent or damage caused by wrongdoers. Other jurisdictions take more restrictive approaches, leaving it to the parties to determine the application of such matters to immovables.

6. Para. (2) includes claims against insurers if the insurance acts as a form of surrogate for the substance of the immovable where it has been damaged. This approach is preferable to third-party debt orders to be rendered on the creditor's special motion, which are unable to provide effective protection from prior seizure by other competing creditors.

Recommendation 48 – Realisation of the value of seized immovables

(1) Enforcement organs should be primarily responsible for realising the value of immovable assets through sale. They should use their best efforts to identify and use the most effective means to maximise the value of seized immovable assets. They may use public or private sale methods, including online auctions under Rec. 52.

(2) Creditors and debtors may agree to dispose of the immovable seized themselves, in which case Rec. 29 should apply with necessary adaptations.

(3) Public sale should be the usual method to realise a seized immovable's value. Rec. 28(2) should apply with necessary adaptations to the sale of immovables.

(4) In determining the market value for sale of the immovable, publicly accessible, reliable data concerning comparable sales may be used. Where such data is unavailable, an expert may be appointed to determine the market value. Once the market value is obtained, it should be registered promptly in the register of enforcement measures (see Rec. 22(3)).

(5) The enforcement organ should ensure that it obtains, in so far as possible, all relevant information concerning the immovable prior to any sale process commencing (see, for instance, Recs. 15, 19, 22 and 23). It should particularly take steps to obtain information about the existence of any rights or interests opposed to the property's public sale and of any rights, interests or privileges that have priority over the creditor's right to seek satisfaction by public sale. It should also try to obtain any extant, up-to-date, expert reports about property's quality and value.

(6) The announcement of a public sale of immovable property (see Rec. 28(4)) should, amongst other things:

(a) identify and fully describe the immovable subject to sale. The description should highlight any specific issues that are relevant to its valuation;

(b) identify the creditor and the amount of their claim;

(c) specify the assessed market value of the immovable and the reserve sale price – where expert reports have been obtained to value the immovable, details of those reports and their valuations should be provided;

(d) specify the reserve price, if any;

(e) specify the nature of any known rights, privileges or security interests concerning the property and their priority, including those of the creditor;

(f) provide reasonable notice to owners of rights, privileges or security interests concerning the property who are unknown so that they may take steps to join the enforcement procedure should they so wish;

(g) specify the time limit within which owners of rights, privileges or security interests should commence a third-party claim where they are opposed to the public sale (see Recs. 79 and 80);

(h) set out information about existing options to acquire the immovable;

(i) specify whether bids calculated on the basis that pre-existing rights, privileges or security interests concerning the property will persist post-acquisition are permitted (see Rec. 53(10));

(j) provide an adequate description of any flaws, defects or other matters affecting the quality or value of the property (see para. (5));

(k) describe fixtures or appurtenances of significant value, if any, that are to be sold together with land and buildings;

(l) specify whether the sale is to take place via an online auction and, if so, its details;

(m) where necessary, refer to other documents (or to where such documents may be obtained) which contain information relevant to the proposed sale.

(7) Acquisition of the immovable by the highest bidder should be recorded in a formal decision issued by the enforcement organ or by an execution court. The decision should specify a reasonable time limit for opposition to the acquisition to be made. It should also provide any necessary permission required by substantive law to effect the acquisition. Where the decision becomes final, and is thus *res judicata*, the property transfer should be registered in the land register.

(8) Where sale to the highest bidder is not concluded due to the sale being opposed successfully or any necessary permission not being granted, the enforcement organ should cancel the sale process and make provision for a new sale process to commence. The cost of the failed process should be borne by the highest bidder in that process, except where the process's failure resulted from a procedural irregularity on the part of the enforcement organ, in which case it should bear the costs.

(9) Acquisition of property by final court order upon public sale should only be void or voidable through civil proceedings where it resulted from fraud or other criminal activity.

(10) See Subsection 1.6 on the participation of multiple creditors in enforcement and public sales procedure and the distribution of proceeds to creditors.

Comments

1. Enforcement organs should be primarily responsible for realising the value of immovable assets. Public means should generally be the means by which immovables are liquidated, as is the case for enforcement against movable assets (see Rec. 28). See Rec. 50 for realisation of value by receivership. Para. (2) makes provision for parties to dispose of immovables by a method agreed between themselves. This gives effect to the principle of party disposition. It does so by reference to the same approach to party agreement to dispose of tangible movables: see Rec. 29.

2. Para. (3) thus provides for immovables to be liquidated through the use of a public method of sale. Again, as with enforcement against movables or intangible assets, enforcement organs are under a duty to take sufficient steps to minimise the risk of obstacles arising to the detriment of effective enforcement: paras. (4) and (5). Where immovables are concerned, this primarily requires steps to be taken to identify both the existence of rights or interests that are opposed to the sale and rights, interests or privileges that have priority over the creditor's right to satisfy the debt due to them.

3. Valuation of immovables, under para. (4), should generally be carried out by reference to reliable publicly available comparable sales data, if possible. Where such data does not exist or is otherwise unavailable, enforcement organs ought to obtain a valuation from an expert. In determining the value of an immovable, any information that could impair or reduce its market value should be taken into account. The valuation should be registered in the enforcement register (Rec. 22). This enables effective coordination between enforcement organs and any enforcement measures they may be involved in concerning the immovable and which are being pursued by the creditor who is seeking its sale or that are being pursued by other, competing creditors (see Rec. 8 (2) and (3)).

4. Paras. (5) and (6) specify all the steps that need to be taken to promote the effective public sale of immovables. They enable sufficient information about the property that is for sale to be considered and assessed by potential purchasers, thus promoting the prospect that the sale will fully realise its value. To facilitate this, relevant information, both positive and negative, about the immovable should be provided. If no more than partial information were provided, public trust in the sale process generally would be impaired, which in turn would undermine the prospect that any specific sale would fully realise the property's value. Partial information would also undermine public confidence in the enforcement organ and its impartiality.

5. Para. (6) enumerates the most important information that should be set out in any announcement of sale. The criteria specified are non-exhaustive. Depending on the circumstances, additional information may be necessary, or the specific information outlined in para. (6) may be unnecessary. Any such announcement should be calculated to bring the proposed sale to the attention of the widest range of possible bidders, to other creditors of the debtor and any other interested parties. It should at the least be made in an official journal. It should also, wherever possible, be made via modern communication technology, online platforms, etc. The announcement should be made so as to give other creditors and third parties sufficient time to take steps to protect any rights, interests or securities they have in respect of the immovable. If the sale is to take place by online auction, see Rec. 52.

6. Para. (6)(d) specifies that the announcement should specify a reserve price. This should reflect the minimum reasonable price that can be accepted to effect the immovable's sale. This requirement, and the setting of a reserve price by the enforcement agency, which should be done by reference to its value, is a means to protect the creditor, the debtor and other potential creditors.

It ensures that the immovable cannot be sold at an undervalue. It thus helps maximise the prospects that the sale realises the immovable's value.

7. Para. (7) requires the enforcement organ or an execution court to issue a formal decision recording the fact that a sale has taken place, and which provides permission to transfer the immovable if necessary. Such decisions should be sent in digitised form. This requirement is intended to facilitate the completion of any formalities applicable to the transfer and registration in any public land registers of an immovable upon sale. It is also a means by which public authorities may, where necessary, be notified of the transfer and through which the tax authorities may be informed of the sale. Such a decision should be *res judicata* following the expiry of a reasonable time limit during which the sale can be challenged.

8. The approach taken to sale in this Recommendation, as it is effected by public authorities, is intended to ensure that participants in the sale process can be confident that acquisition of property further to it will be carried out in good faith and will be without legal defects that may give rise to further disputes. Paras. (8) and (9) provide for two specific situations where the sale process may be terminated or set aside. The former provides for sale to the highest bidder to be halted where sale is successfully opposed. In such a circumstance, the enforcement organ should take steps to start a new sale process. Where the opposition's success was a result of conduct or otherwise by the highest bidder, they should be responsible for the costs of the failed sale process. Where, however, the opposition succeeded because of something the enforcement organ did or failed to do, it should bear the costs. Para. (9) provides for a public sale to be set aside only in civil proceedings where it was tainted by fraud or criminality. It does not therefore make provision for criminal proceedings to act as a means to impede enforcement.

9. Para. (10) makes specific provision for multiple creditor situations and the distribution of sale proceeds between them. As such it applies the approach taken in Subsection 1.6.

Recommendation 49 – Debtor eviction and protective measures – the position of debtors, debtors' families and third parties

(1) An entitlement to acquire immovables sold via an enforcement process should permit the forced eviction from it. Eviction should provide a short period of time for the property to be vacated by the debtor or the family.

(2) Legislators should make provision for debtors and debtor's families to be able to apply to the execution court to seek a stay of eviction for a short period of time if the debtor and their family are particularly vulnerable and are habitually resident in the property subject to seizure.

(3) Paras. (1) and (2) should apply, with necessary amendments, to those persons who acquire real property in the course of the enforcement process.

(4) If a third party rented or leased an immovable that is subject to sale, the rental or lease agreement should continue with the new owner, subject to substantive law that makes alternative provision. The new landlord or lessor should have a right to terminate the agreement on reasonable notice. Legislators should make provision for what is reasonable notice to be determined by reference to the nature of the tenant or lessee. Different provision should therefore be made for natural persons, professional tenants or lessees or merchants. Where the agreement made provision for the right to eviction on sale, no such notice need be given. For natural persons and their families, para. (2) should apply.

(5) Rec. 57(1) and (3) should apply, with necessary amendments, where movables are not removed from an immovable where there is a forced eviction.

Comments

1. Historically, an enforcement organ's formal decision to access the highest bid for an immovable could, in many jurisdictions, be used as an enforceable instrument that could effect the eviction of the debtor or their family from the property subject to it. On the scope of "family", see Rec. 26.

2. The general trend is for courts to permit debtors and their families a short period of time to vacate the property, or to enable them to remain in the property on the basis that they pay a fair rent, as part of the eviction process. This Recommendation gives effect to this development: see para. (1). This requires the debtor or their family to be informed of the disposition of the property and that they should quit the property within a short, specified, time period. If that time period has expired and the debtor or their family remain in the property, the execution court should, as part of the eviction process, issue an enforceable instrument for their forcible eviction. Following the expiry of the time period inherent in para. (1), any further period of time depends up the consent of the property's new owner or upon the grant of a stay of eviction for the reasons given in para. (2).

3. This Recommendation does not adopt or endorse specific provisions protecting debtors that are common to jurisdictions such as the United States of America, *e.g.*, homestead exemptions. Nor does it provide specific protections such as those that arise in some jurisdictions that provide protection for debtors such as through the full discharge of any remaining liability they may have upon the return of possession or the provision of a right to reclaim the property after it has been sold where they are able to repay the debt owed. Adopting such approaches would introduce too great a degree of complexity into the approach taken here. Moreover, the approach taken here, which takes account of the rights of creditors and those of the debtor and their families to remain in the property for a short period of time, *i.e.*, their right to human dignity and family life, strikes a fair and proportionate balance between the two sets of rights. Para. (2) articulates the essential criteria that should be taken account of when a debtor or their family seeks an additional period to remain in the property pending execution and eviction (also see Rec. 57 and comment para. 3).

4. The provisions contained in paras. (1) and (2) apply both to creditors and to any new owner of an immovable subject to sale: see para. (3). This is to secure the application of these provisions in circumstances where the creditor takes no steps to evict the debtor or their family from the property and hence the new owner must take that step. To ensure judicial continuity, this Recommendation enables the execution court to continue to manage the enforcement process after sale by the new owner. This will minimise the cost and time of further enforcement steps, as the execution court's experience in dealing with such matters generally, and the immediate case specifically, can be brought to bear.

5. In most jurisdictions, where an immovable is sold, any rental or lease agreements concerning it continue with the new owner stepping into the shoes of the previous owner. In other jurisdictions, however, such agreements either terminate or are subject to specific short notice periods that terminate the agreement that arise upon the sale taking place. To promote the utility of the public sale of an immovable as part of the enforcement process, para. (4) adopts the latter approach, subject to substantive law: it enables a new owner to terminate such agreements on reasonable notice; what is reasonable may differ depending on whether the tenant is a private individual, professional, or a business.

6. Where, however, a rental or lease agreement made specific provision for termination of the agreement, and hence eviction, upon sale, no such protection need be given. In such cases, the parties to the agreement will have had advance notice of the possibility of early termination and eviction in the event of sale, including sale as part of an enforcement process. Similar protection for debtors and their families, as provided by para. (2), also applies, however, to rental and lease agreements.

7. While this Recommendation does not consider whether the execution court should be competent to determine legal disputes arising in respect of rental or lease agreements, given the broad approach taken to its competence in these Best Practices generally and in the interests of efficient enforcement, it ought to do so.

8. Where a debtor or their family are evicted, their possessions, *i.e.*, those that do not form part of the immovable, must also be removed from the land or any building: see para. (5). Where this is not done voluntarily, proportionate force should be taken to remove them. The same approach should be taken here as in respect of the forcible removal of tangible movables: see Rec. 57(1) and (3).

Recommendation 50 – Receivership of immovables

(1) A debtor's immovables may be placed in receivership, upon the application of a creditor, where that reasonably enables the monetary claim that underpins the creditor's enforceable instrument to be satisfied by the realisation of the fruits/proceeds of an immovable.

(2) Recommendations 45 and 46 should apply to any order of seizure, which should be deemed to be an enforceable instrument for the purposes of receivership under this Recommendation. Additionally, such an order should:

(a) identify the receiver and the nature and scope of their authority as such; and

(b) direct the debtor and owner of the real property to cooperate with the receiver and take no steps to hinder or impede the execution of their duties and specify sanctions for non-compliance.

(3) Once appointed, a receiver may exercise all rights and perform all duties necessary to administer the immovable seized. They may conclude contracts to lease, rent or otherwise utilise the immovable to maximise income from it while maintaining it in good condition. They should also prepare proper accounts at reasonable fixed intervals concerning income received as a consequence of their receivership.

(4) The costs of the receivership should be deducted from the fruits/proceeds of an immovable prior to the remainder being transferred to the creditor by the receiver.

(5) Where the fruits/proceeds of an immovable are exploited by a business owned by the debtor, a company in which they hold shares, or any other firm, the receiver may continue or conclude contracts with that business or company or also cancel such contracts, whichever decision is best calculated to maximise the return payable to reduce the debt underlying the enforceable instrument.

(6) Where an immovable that is subject to receivership is to be sold, the receiver may sell it through a private sale process if that is consented to by both the enforcement organ that is responsible for supervising the receivership and all participants in the sale process.

Comments

1. In some legal systems especially of the common law, receivership is considered a mode of enforcement on all types of assets that could be applied especially in cases where it turns out that one single regular mode of enforcement does not suffice and combining multiple modes of enforcement is too complicated and does not work efficiently (see Chapter VII). These Recommendations propose a broader use of receivership in legal systems where this kind of enforcement has been not used or has been used rarely. It does so to promote efficient, speedy and economical enforcement (see Rec. 63). Receivership in the sense of forced or judicial administration

of immovable property, which is dealt with in this Recommendation, is a common traditional mode of monetary enforcement on immovable property in all developed legal systems. A variety of special practices of enforcement regarding the requirements and detailed content of an order for receivership and its execution have developed in different legal systems, and, therefore, this recommendation tries to take account of the most important features of various kinds of judicial practice that have turned out to be efficient or promising and innovative.

2. Receivership of the fruits of an immovable should always be permitted to be ordered where such an order is reasonably able to satisfy the creditor's monetary claim against the debtor. In many cases, it may only be justifiable economically to grant such an order where seizure and sale will not maximise the return to the creditor due to the state of the market in immovables. This may well be the case where debtors own no other assets of value and the debt owed to the creditor is significantly lower than the value of the immovable. In such situations, balancing the creditors and the debtor's rights and a commitment to proportionality would point towards this type of order being made.

3. In some circumstances, it may also be advisable to first appoint a receiver to maximise value from income derived from an immovable and then, when the relevant market reaches a specific level such that sale of an immovable will ensure that the debt due to the creditor is fully satisfied, that it is replaced by an order for seizure and sale. In such circumstances, it would be beneficial for applications to be made for seizure and sale orders to also make provision for receivership pending seizure and sale. In this way the creditor will be able to secure priority for their rights over those that arise at a later date.

4. A receivership order should contain the same level of information as that required for an order for seizure and sale (para. (2)). This is necessary to protect the priority of the creditor's right to receivership and exploitation of an immovable's fruits over rights, interests or privileges that arise at a later point in time and which could impair the receiver's ability to maximise value from the immovable. As a consequence, Recs. 45 and 46 should apply accordingly.

5. Subpara. (2)(a) further provides for the receiver's authority to be specified in the receivership order. From a practical perspective this is important, as it is the means by which the receiver can take steps to secure access to the immovable, possession or control over it, and any information relating to it where a debtor fails to act according to their duty to cooperate with the receiver. The duty to cooperate is specifically provided for by subpara. (2)(b).

6. Receivers may take any steps necessary to manage property subject to the receivership order, and taking such steps encompasses all rights and duties necessary to administer an immovable properly. Delivery of accounts at regular intervals is a necessary means to provide oversight and control of the receiver's management.

7. Costs of management and administration may be deducted from the realisation of any of the fruits of an immovable prior to the remainder being transferred to the creditor (para. (4)).

8. Specific issues arise where provision is already in place for exploitation of the fruits of immovables. This may occur, for instance, where a farm is managed and operated by the debtor themselves, where an estate is rented or leased to a hotel operator, or a quarry is exploited by the holder of a usufruct (a right to exploit) that is based on a rental agreement. It may also arise where the fruits of immovables are subject to agreements to exploit them by a firm owned by the debtor or by a firm that is owned by investors who are outside the jurisdiction. Para. (5) makes provision for a receiver to take such steps as are necessary to administer immovables and obtain the benefits of their fruits in such circumstances. Absent such provision, the receivership order's aims would be frustrated.

9. Receivers may typically take the following such steps under para. (5).

(i) They could conclude a contract with the debtor that permits them to operate the immovable, *e.g.*, a farm. The contract could provide that rent usually paid to the debtor would be paid to the receiver. The receiver would then transfer the proceeds to the creditor.

(ii) Where the immovable is a hotel, the receiver could calculate whether rent paid to the hotel operator is a genuine rental payment, *i.e.*, an adequate sum given the nature of the immovable. If it is not, the receiver could cancel the rental agreement between the debtor and the hotel operator and conclude a more profitable one, *i.e.*, one that more adequately reflects the actual market value, either with the existing operator or a new one.

(iii) Where a quarry or other land is exploited on the basis of a usufruct which was registered in the land register before the receivership order was made, the receiver may seek to adapt the agreement giving rise to the right to exploit the land with the consent of the tenant and the holder of the usufruct because the priority of the usufruct over the seizure for receivership does not permit income derived from the usufruct to be seized: see Rec. 38.

(iv) Where the debtor who owns the immovable also owns a firm that exploits its fruits, and the firm indicates that it may not be in a position to pay sums to the receiver, the receiver may need to take insolvency and related proceedings against the firm, so as to maximise the prospect of recovering value from the fruits of the estate for the creditor.

(v) Where a firm that is exploiting the fruits of an immovable becomes insolvent, it will be necessary for the receiver to take such steps as are necessary to maximise recovery for the creditor.

10. Para. (6) makes specific provision for a receiver to sell immovables subject to the receivership (see comment para. 3, above). See further Rec. 48(2) and Rec. 29, above.

Recommendation 51 – Securing enforcement by judicial mortgages, judgment liens or provisional attachment

(1) Legislators may make provision for one or more of the following, or their functional equivalent, to secure enforcement on immovables: judicial mortgages, judgment liens or provisional attachment.

(2) To secure the priority of a monetary claim that is the basis of a registered enforceable instrument, creditors should have the right to apply for a court order that charges the debtor's immovables with a judicial mortgage. Where a judicial mortgage charges a debtor's immovables, a creditor should have the right to apply at any time for enforcement, which is capable of satisfying the debt secured in full.

(3) To give full effect to judgment liens, judgments should be recorded in the dockets of the court that issued the judgment and the court in whose jurisdiction enforcement on land is to take place. This should be done though the judgment lien is a legal consequence of the judgment.

(4) Judicial mortgages and judgment liens should be registered promptly within the land register and the register of enforcement measures (Rec. 22(3)). They should expire after a reasonable period of time. Creditors should not make use of registration in land registers if liens are clearly not necessary to ensure enforcement due to the value of the debt and of the immovable.

(5) A judicial mortgage's and judgment lien's priority ranking should be determined by reference to the time at which it was registered in the land register. Creditors may levy enforcement against the debtor upon registration in the register for enforceable instruments at a time of their choice following notice of the registered enforceable instrument having been given to the debtor.

(6) If the enforceable instrument orders the provisional attachment of immovables prior or during commencement of civil proceedings (Rec. 70) to secure a creditor's right of enforcement's priority over any seizure, charges, privileges or other kinds of transaction that could impair the creditor's right that arise subsequently, only the following should be permitted:

(a) the immovable's seizure;

(b) the imposition of a mortgage or lien over the immovable.

Such provisional attachment should not permit the immovable's value to be realised. Nor should a judicial lien permit the realisation of the fruits of immovables by receivership.

(7) The creditor should have the right to apply to realise the value of an immovable subject to a judicial mortgage or lien once a registered final enforceable instrument has been issued. Realisation should take effect according to the mortgage or lien's priority. Applications should be made within a reasonable period of time.

Comments

1. This Recommendation makes provision for judicial mortgages, judgment liens and provisional attachment, or their functional equivalent, as means to secure enforcement. The three measures are functionally equivalent in terms of their principal effect, which is to secure priority.

2. Judicial mortgages are well-established in many European or European-influenced jurisdictions. They secure priority for enforcement measures taken by the holder of the judicial mortgage over rights, securities or privileges concerning the land subject to it that arise after the mortgage is ordered to be registered in the land register.

3. Para. (2) provides a creditor with discretion to determine when to take enforcement steps following the grant of a judicial mortgage. This is consistent with the principle of party disposition. It also reflects the fact that delay in full enforcement may be necessary to maximise realisation of value from the immovable subject to the mortgage. Delay may, for instance, provide the debtor with sufficient time to satisfy the debt voluntarily. It may also enable the creditor, and hence also the debtor, to gain the benefit of an increase in property values, or for beneficial steps to be taken by the debtor or third parties.

4. Para. (3) makes provision for judgment liens, which are frequent in common law jurisdictions. They are a regular legal consequence of final judgments. Generally they do not require any application to be made by a creditor to secure priority, though judgments should be recorded in both the dockets of the court that determined the matter as well as the dockets of courts in jurisdictions where enforcement is supposed to take place. To secure their equivalence to judicial mortgages, para. (5) deviates from the general approach and specifies that their priority should be secured when they are registered within the land register.

5. Consistently with the approach taken by a majority of jurisdictions, para. (5) does not require the creditor to satisfy any additional requirements, such as obtaining a specific and additional enforceable instrument, which authorise them to take steps to levy enforcement where a judicial mortgage has been obtained. All that is required is effective notice of the registered enforceable instrument to be given to the debtor.

6. Judicial mortgages or judgment liens should not be permitted to restrict the ability of third parties to take enforcement measures for an unreasonable period of time. Therefore they should expire after a reasonable period of time (para. (4)). Unreasonable and disproportionate use should also be avoided.

7. Registration, as provided for in paras. (4) and (5), is consistent with the general approach in these Best Practices. It also ought to promote the increasing use of digital registers as these will increase transparency and speedy and efficient communication and the transfer of information amongst all participants in the enforcement process.

8. The provisional attachment of immovables, as provided for under para. [7] and Rec. 70, is functionally equivalent to judicial mortgages and judgment liens. They too provide for priority of enforcement measures to be taken in the future prior to the commencement of proceedings that may result in the grant of a final enforceable instrument. The intention underpinning para. (7) does not require applications for provisional attachment to be limited to situations where proceedings on the substantive merits are pending or are to be commenced.

Subsection 1.5. Online auctions

Introduction

This section promotes the increased use of online auctions, which could be automated and could either be public or private sale methods (see Rec. 48).

Recommendation 52 – Online auctions

(1) Legislators should make provision for online auctions for the disposition of assets. Such auctions should be authorised in relation to all types of assets, including immovables.

(2) Online auctions should be designed and operated to secure the implementation of all legal requirements necessary to enable the effective and lawful transfer of assets and the protection of all parties.

(3) Online auctions should generally be designed and operated consistently with the following principles:

(a) Transparency of information on the auction throughout its process and of the rules for its use;

(b) Impartiality and open competition between all users;

(c) Adequate and proportionate measures to ensure the supervision by the competent authorities, particularly for the procedures that are conducted in an automated manner;

(d) Security of the auction process, including in particular data security and protection of personal data;

(e) Consideration of the general principles applicable to auctions generally set out in Rec. 48.

(4) To ensure the effective functioning of online auctions their design should generally include the ability to, at least, determine the sale price, conclude the final transaction, and provide payment facilities. They should also be designed to provide for the possibility to allow the transfer of rights over the asset. Additionally, beneficial features that may be included are those that enable data collection for publicity and personalised notifications of upcoming auctions.

(5) The function, design and operation of online auctions should also incorporate the following elements:

(a) A sufficient description of the asset;

(b) The adoption of commercially reasonable steps in the auction process appropriate to the type and class of asset to be sold, including the provision of appropriate notice periods, as well as methods of pre-sale inspection (where necessary) and proper evaluation of the asset;

(c) Appropriate methods to authenticate and verify users' identities;

(d) Facilitation of simple, prompt, and secure payment by digital payment;

(e) Automation of the process to transfer data or modify public registers where that is required by law upon the completion of sale.

(6) Where the participation of bidders from other jurisdictions is permitted, consideration should be given to ensuring the interoperability of online auction platforms.

Comments

1. Para. (1) takes into account that there are varying degrees of openness in legal systems regarding the recognition of the validity and effectiveness of online auctions in enforcement. In a limited number of jurisdictions there is still a restrictive approach to such procedures, which are either not allowed or limited to certain types of assets. Other legal systems allow hybrid physical/digital auctions while in several other jurisdictions online auctions are recognised and widely used in the disposition of assets during enforcement proceedings. (See further *Guide on judicial e-auctions* adopted by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, paras. 101, 107.) Additionally, there are differences regarding the overall organisation of online auctions, with some legislators opting to recognise only one platform per State, with others permitting competition among multiple officially recognised platforms. Technologically, online auctions may be designed as centralised platforms or based on decentralised models, such as those based on distributed ledger technology (DLT). (See further CEPEJ, *judicial e-auctions*, paras. 37-38.)

2. Para. (1) underscores that legal frameworks should ensure online auctions, consistently with the general approach in Rec. 28 realising the value of assets, can be utilised effectively in enforcement proceedings. In some jurisdictions, existing legislation may permit online auctions, in which case no additional legislation would be necessary. However, where legal obstacles prevent or restrict their use, legislative adjustments may be required to remove such barriers. Additionally, while many rules applicable to traditional auctions may extend to online auctions, the latter may necessitate specific provisions addressing aspects unique to the digital environment—such as security measures, authentication of participants, and procedural transparency.

3. The advantages of conducting online auctions in enforcement proceedings include price maximisation, increased transparency, mitigation of arbitrary risks and conflicts of interest, and improved efficiency in general, including cost reduction, rapidity, and automation potential. Taking such advantages into account, there appear to be no insurmountable legal obstacles to accepting and promoting online auctions as a best practice. Given the acceptance by, for instance, CEPEJ of online auctions, the extension of such auctions to all types of assets, including immovables, consistently with the principles specified in paras. (3) to (5), is recommended. However, recognising the diverse legal landscapes and the unique challenges of online environments, effective utilisation of these advantages requires a nuanced approach to regulation. (See further CEPEJ, *judicial e-auctions*, paras. 1-8, 19, 28, 42-45, 49, 53, 56-63, 65, 69-70, 72-74, 92, 100-103.)

4. Varying legal frameworks across countries make a universal definition of online auctions impractical. Instead, a functional description in para. (2) provides necessary flexibility in the rapidly

evolving digital landscape, avoiding the risk of outdated or restrictive definitions. Para. (2) flags various functions that legislators should or may consider including in the design of online auctions to enhance both the efficiency and the user-friendliness of online auction systems. It is recommended that the online auction be designed to conduct the bidding process including, at least, the determination of the price, the conclusion of the final transaction, and payment facilities. It is also recommended that the procedure facilitate the effective, lawful transfer of rights on the asset deriving from the conclusion of the final transaction, with due consideration of the legal requirements of the applicable law (including anti-money laundering provisions) (see further para. (4)(e) and related comment below). Finally, existing practices of online auctions demonstrate that online auctions can offer additional services, such as providing catalogues of unsold products for subsequent searches and attempts to auction. Platforms may keep track of users' interests in specific asset classes and provide personalised notifications of upcoming auctions, which ought to improve transparency, efficiency, and user satisfaction in the online auction process.

5. In this respect, this Recommendation generally encourages the use of automation throughout the procedure, to enhance its cost- and time-effectiveness, subject to the need to allow for adequate and proportionate supervision by the competent authorities (which is specifically addressed in para. (3)(c) and related comment). In relation to bidding systems, for example, online auctions will become more convenient and competitive if, in the event of the inability of the winning bidder to close the deal, the auction can automatically fall back upon the "second highest bidder" option to ensure continuity and reliability in the process. Other examples of automation are considered in the Recommendation, including payment facilities (para. (5)(d)) and automation of the process of transfer of data and/or modifications in public registries which may be necessary according to the applicable law upon completion of the auction (para. (5)(e)). The extension of online auctions to more complex situations, however, such as the sale of productive units or going concerns, may imply the need to conduct a more complex due diligence, which suggests that platforms be designed for different types of online auctions, including those which do not enable a wholly automated conclusion of the sale process. The limitations in achieving full automation in the enforcement on immovables due to public law requirements and other legal requirements should also be considered.

6. Human supervision should be proportionate and adequate, taking into account the types of tasks to be automated and the potential impact on parties' rights and on the auction's integrity. Automation of certain tasks or procedures in online auctions may not require such human oversight to the extent that they are purely procedural, or do not entail any discretion (*i.e.*, automated generation of notices, publication of information, or analogous tasks).

7. Rather than prescribing an optimal model of governance for the online auction, this Recommendation provides a list of minimum prerequisites. These requirements should ensure that the process is non-discriminatory and competitive and that abuses are effectively avoided. The emphasis on transparency of the information with respect to the auction and the rules of its use is key to trust and confidence among participants (para. (3)(a)). Clear-cut and easily available information about the rules and procedures of the auction and about the assets to be auctioned will help avoid misunderstandings and disputes, thereby facilitating a smoother auction process. Adequate and proportional measures for supervision by competent authorities are essential to maintain the integrity of the auction process. The Recommendation provides for minimal requirements without imposing a specific ownership or management model. It is further recognised that adequate supervision is particularly needed in respect to automated systems. Supervision includes both human oversight of automated systems (as indicated above) as well as proper monitoring by competent authorities, which could be participation of authorised professionals acting as public officers. Moreover, platforms should not only take appropriate steps to address disruptions caused by technical glitches, through specific and robust systems that should be in place prior to the beginning of the auction process, but they should generally guarantee the security of the auction process, including in particular data security and protection of personal data. (See further CEPEJ, *judicial e-auctions*, paras. 95-97.)

8. While para. (3) introduces overarching general principles for the design and operation of online auctions, para. (5) relates to the essential operational elements of online auctions, ensuring that they are effectively and securely conducted. An accurate description of the assets (para. (5)(a)) is important to provide information upon which bidders can make properly informed decisions. Online auction platforms are expected to provide full details and accurate descriptions of the assets, to enhance transparency and enable informed participation. This may include the provision of maps indicating the location of any immovables, as well as access to virtual reality tours, which should be designed to ensure accuracy and ease of access (See, further CEPEJ, *judicial e-auctions*, paras. 101(6), 109(9)). The use of automated systems for verification purposes is also considered, for instance, through connecting with land registries to verify immovable details and employing geolocation tools and images (See, further CEPEJ, *judicial e-auctions*, paras. 52-54). The adoption of models for the inclusion of minimum standards regarding the release of information, with potential sanctions for violations, is further recommended. This is connected to the requirement in para. (5)(b) that commercially reasonable measures be taken at all stages of the auction process, to ensure that the auctions are conducted in a manner that is fair and appropriate with regard to the specific types of assets being disposed of. (See further CEPEJ, *judicial e-auctions*, para. 102.)

9. Additionally (para. (5)(c)) verifying and authenticating bidders' identities before the start of the auction is essential to maintain the integrity of the process and avoid conflict-of-interest situations or ensure implementation of domestic law requirements (for example, in jurisdictions which have requirements regarding the residency or nationality of bidders). (See further CEPEJ, *judicial e-auctions*, para. 101(22).) This practice should hold fraudulent practices at bay and guarantee a free and competitive auction. In this respect, it is possible to use processes such as two-factor authentication, requiring users to validate their identity through an extra verification step, such as a code sent to their mobile device. This extra level of security would help prevent unauthorised access and fraudulent activities. Other more sophisticated mechanisms, such as qualified electronic signature, can also be implemented, provided that they do not impose undue limitations for participation of bidders, for instance foreign bidders.

10. Facilitating secure and prompt payment through digital solutions (para. (5)(d)) ensures that transactions are carried out effectively. Furthermore, the automatisation of data transfer and changes in public registries (para. (5)(e)) leads to an enhanced post-auction process with fewer chances of mistakes and delay. Para. (5)(e) directly references public registers– mainly relating to immovables – and the word "data" here means any kind of data used in the online auction. The underlying concept is that data flow automation should be maximised.

11. Finally, the Recommendation envisages the setting up of interoperable auction platforms (even including interoperability or mutual recognition of identification methods, and interoperability of registers, where necessary) which would allow for greater transparency and wider publicity and participation of bidders from other jurisdictions. This interoperability is already in place at the European level and may be considered by legislators at least at the regional level elsewhere. (See further CEPEJ, *judicial e-auctions*, paras. 98-99.)

Subsection 1.6. Priority or equality governing the satisfaction of multiple secured or unsecured creditors of monetary claims

Introduction

It is not unusual for there to be multiple creditors pursuing monetary claims against a single debtor. This situation may, in some cases, lead to insolvency proceedings being commenced. Where that is not the case, rules are needed to define the relationship between the creditor who first initiated enforcement proceedings (the first creditor) and other creditors (third-party creditors).

Some third-party creditors may hold an enforceable instrument. They may be holders of a security interest or of a general or special legal privilege. They may also be unsecured and non-privileged creditors. Where public authorities, such as tax or social security authorities, are concerned, it is generally the case that as third-party creditors they will benefit from general or special privileges.

Where a third-party creditor has a general legal privilege, they may activate it when they become aware of the fact that the first creditor has initiated enforcement procedures. They may then try to either join those enforcement procedures or stay them. They may do so to prevent or minimise any reduction of the debtor's assets. This may only be done to the extent that any such reduction would otherwise prejudice the third-party creditor's expectation of future satisfaction. Where a special privilege exists, it will be triggered when the first creditor seeks to enforce against a specific asset, whether that asset is a movable or immovable, or whether they are intangible rights and claims.

This Subsection makes provision for the third-party creditor interests to be taken into account where first creditors initiate enforcement procedures.

Recommendation 53 – Privileged and secured third-party creditors

(1) Public and private creditors should have no more legal privileges than are necessary to give effect to public policy goals or other overriding objectives.

(2) Legal privileges and security interests should be capable of registration in registers relevant to the nature of the asset.

(3) Enforcement organs should inform any third-party creditor when they register, in the register of enforcement measures, of a private legal privilege or security interest and of any ongoing enforcement proceedings (see Rec. 22(2) and (3). The enforcement organ should set a reasonable time limit for all privileged or secured third-party creditors to join those proceedings and inform them of it through the public pre-announcement of the sale (see Recs. 28(4) and 48(6)(e)-(g)). No payment, including payment through the posting of security, should be made to the first creditor until that time limit has elapsed.

(4) A privileged or secured third-party creditor should join ongoing enforcement proceedings within any time limit specified under para. (3) of which they have been informed where

(a) they are privileged third-party creditors or they hold a security interest; and

(b) they have an enforceable instrument concerning the secured claim and the privilege or security; or

(c) they have privileged claims or claims secured by security interests and the claims, privileges or security interests are uncontested.

(5) After the time limit specified in para. (3) has expired and privileged or secured third-party creditors have joined the enforcement proceedings, enforcement organs should proceed on the basis of the first creditor's application until distribution of the sale's proceeds. Upon joinder, third parties, in the interest of efficiency, should have a right to apply to modify the proceedings. Before any payment is made to a third-party creditor who has joined ongoing enforcement proceedings, the enforcement organ should ensure that the first creditor receives fair compensation for any costs they have incurred.

(6) If a third-party creditor does not hold an enforceable instrument in respect of their claim, privilege or security interest, or the claim and the corresponding privilege or security interest is contested, they should be required to institute proceedings to obtain one within the time limit

specified by the enforcement organ or the execution court. The first creditor and other lower-ranking creditors should be informed of those proceedings and should be permitted to intervene in them.

(7) Once proceedings have been instituted under para. (6), third-party creditors may apply to the execution court for an order that no further payments be made to the first creditor or other lower-ranking creditors until their case has been finally decided. The execution court, upon consultation with the court seized, may grant such an order except where the first creditor or other lower-ranking creditors post sufficient security. In exercising its discretion whether to grant such an order, the execution court should consider all the circumstances, including the strength of the third-party creditor's case, how probable it is that the proceeds of sale of the asset seized will satisfy their claim, the likelihood that their claim will be satisfied from another of the debtor's seized assets or another of the debtor's security interests concerning the same or parallel claims, and any sums to be distributed to higher ranking creditors.

(8) Where a privilege or security interest is not capable of registration, or an attempt to register it failed through no fault of the third-party creditor, that creditor should join ongoing enforcement proceedings. Joinder should take place before any proceeds of the enforcement proceedings have been transferred to the first creditor or lower-ranking creditors. Where payments had been made to the first creditor or lower-ranking creditors, they should not be reversed. Paras. (5) and (6) should apply accordingly.

(9) Upon joinder, a third-party creditor who holds an uncontested security or an enforceable instrument should be able to apply to realise their security interest consistently with any applicable legal provisions or the terms of the security agreement. Enforcement proceedings should thereafter be stayed by the execution court if the manner in which such a realisation takes place is inconsistent with the rules applicable to the enforcement proceedings. It should permit, however, the due realisation of the value consistent with the third-party creditor's interest. If the third-party creditor's secured claim or security interest becomes subject to a pending proceeding, paras. (6) and (7) should apply accordingly.

(10) Where multiple privileges or security interests charge the asset that is subject to sale, and the nature or value of the asset could attract the attention of bidders who are interested in acquiring that asset, the conditions of the public sale should permit bids calculated on the basis that those privileges or security interests will persist post-acquisition. The enforcement organ should calculate the lowest necessary bid on the basis of the market value minus the value of the privileged or secured claims (see Rec. 48 (6)(d) and (e)). In appropriate cases, double bidding on the basis of extinguished or persisting privileges or security interests should be permitted by the enforcement organ on its own initiative or on the bidder's application (see Rec. 48(6)(i)).

(11) Depending on the number of creditors entitled to satisfaction from the proceeds of the sale, the execution court should establish a final list specifying how the proceeds are to be distributed. The list should be served on the creditors.

(12) All creditors and the debtor should have a right to review all measures taken by the execution court (see Chapter X).

Comments

1. Different legal traditions have developed different approaches to legal privileges, such as those referred to in para. (1), where enforcement is concerned. The best practice approach adopted here recommends that the number and use of legal privileges in enforcement should be reduced, with preference given to the use of contractual security interests created on the initiative of private parties via registration. While this is, strictly, speaking, a substantive law recommendation, it is one that has a major impact on the effectiveness of enforcement proceedings, as lack of certainty over

the enforcement process that can arise due to the existence of legal privileges may deter recourse to enforcement as well as delay and increase the cost of enforcement proceedings. Adopting an approach that places greater weight on contractual regulation combined with a system of registration, by way of contrast, creates a framework of greater legal predictability and facilitates the more efficient distribution of risk amongst contracting parties than is available via a system based on the existence of legal privileges. This is particularly the case where registration as a means to effect priority, implemented via digital registers, does not impose too high a burden on parties to the enforcement process.

2. The use of public or publicly accessible registers should be encouraged. They are a means by which enforcement organs can become aware of the existence of private legal privileges or contractual security interests. Where such registers do not exist, the beneficiary of any privilege or security interest should be required to plead and prove its existence to any relevant enforcement organ.

3. Privilege holders can only claim the benefit of the privilege if it can be activated prior to the conclusion of enforcement proceedings. To incentivise registration of such privileges, enforcement organs should inform third-party creditors of the existence of enforcement proceedings. Privileges should only ever be activated by a third-party creditor joining the enforcement proceedings within a time limit set by law or by the court. Such creditors may only obtain protection during this period by seeking a stay of any payment to the first creditor and other lower-ranking privileged or secured creditors or by seeking payment to be made only if security concerning it is given. Time limits should not be so long as to adversely affect the first creditor, who has taken steps to collect debts due to them via enforcement proceedings, any more than necessary. To further protect the first creditor, they should have the right to recover all or at least part of any costs that they incur in pursuing enforcement proceedings that may ultimately only benefit a privileged third-party creditor.

4. When the third-party creditor's claims, privileges or securities or both are not supported by an enforceable instrument, their entry into the enforcement proceedings will give them direct access to the proceeds, if the privilege or security interest is indeed recognised. Where this is not the case, the third-party creditor will have to take the appropriate steps to obtain an enforceable instrument. In the meantime, compulsory enforcement should not lead to irrevocable financial results, and the court should, therefore, render a regulatory provisional measure taking account of the parties' risks resulting from ongoing or delayed compulsory enforcement.

5. Where a legal privilege or security interest is not registered, the privileged third-party creditor will not, generally, be informed of the existence of any enforcement proceedings by an enforcement organ. Where, however, an enforcement organ is aware of the existence of a relevant privilege or security interest, *e.g.*, because it was informed of it by the first creditor, it should take steps to inform the privileged or secured third party of enforcement proceedings. However they become aware of the existence of proceedings, it is for the third-party creditor to take steps to join the enforcement proceedings in the manner set out here.

6. Para. (8) makes clear that a secured third-party creditor who holds a security interest with priority over the first creditor's or other lower-ranking creditors' right and joins enforcement proceedings, has a right to realise the value of the charged movable. They may only do so according to legal rules governing the security interest affected or according to any relevant security agreement. Such legal rules should, ordinarily, be flexible enough to enable the value of any seized goods to be realised by way of sale on private platforms, via specialised auctions or purchase by the secured creditor, *i.e.*, the rules ought not to insist on public sale by an enforcement organ. Such means of value realisation may well be the same as those provided for by security agreements. Value realisation via an entirely privately organised method should only be permitted where there is good reason to justify such an approach. It is for a secured creditor to demonstrate the existence of such a reason or reasons. Where such an approach is permitted, the court may stay the enforcement

proceedings. In case of an entirely private method, the secured creditor should be placed under an obligation to pay any surplus to the enforcement organ. That surplus should be applied to satisfy the claims of all lower-ranking creditors joined to the first creditor's enforcement proceedings according to the priority rules among these creditors. Only the remaining amount should be used for the first creditor's satisfaction. The costs of the enforcement proceedings should always have priority over all the other claims (see Rec. 90).

7. In most legal cultures, creditors' privileged or secured claims rank before the first creditor's claim. They are satisfied from the sale's proceeds. As a general rule, those privileges and security interests cease and are extinguished in registers upon the acquirer's application or on the enforcement organ's motion. In some other legal systems, depending on the nature of the assets, prior ranking privileges or security interests persist, and, consequently, bids in public sales are expected to be accordingly lower, thereby increasing the attractiveness of public sale for interested investors. These recommendations (see para. (10) and Rec. 28(6) with comment para. 4)) combine the advantages of both approaches, leaving it to the first creditor or enforcement organ to determine how the public sale should be organised. This includes deciding whether or not to permit parallel, competing bids.

8. Where multiple creditors are involved in enforcement proceedings, a final mandatory distribution bill should be provided (para. (11)). Such a list may create preclusive effects if an application to review is not submitted within a prescribed time limit, which should be set either by legislation or by the execution court.

Recommendation 54 – Non-privileged and unsecured third-party creditors

(1) Where the order of registration is determined according to the sequence of registration requests, creditors who applied to register a seizure or attachment before others did so, should have priority where

(a) registration is carried out by a public or otherwise reasonably accessible register of special kinds of assets;

(b) such registration is a pre-condition for the seizure or attachment to have effects on third parties; or

(c) registration is optional in such registers.

(2) Priority over the proceeds of an asset should be accorded to the creditor who applied for the seizure or attachment of a particular asset first. The proceeds should be applied to satisfy that creditor's claim.

(3) Where it is not possible to register a seizure or attachment in a special asset register, priority should be accorded to the creditor who first completes all the requirements for the enforcement measure they are pursuing to be effective against third parties.

(4) An enforcement authority may exceptionally direct the *pro rata* distribution of the proceeds of one or more assets. They may do so where several creditors have applied for or obtained the seizure or attachment of assets and

(a) it is not possible to determine who first applied for a seizure or whose enforcement measure fulfilled all the requirements necessary for it to have an effect on third parties first;

(b) several creditors have applied for registration or for measures referred to in the preceding paragraphs within a short period of time and it can reasonably be assumed that, in doing so, they were not acting in concert to the detriment of third parties.

Comments

1. Most states distribute the proceeds of enforcement measures among competing unsecured creditors according to the priority principle ("first come, first served" or "first in time, first in right"). The manner in which such priority is determined may, however, differ. It may be the time at which the seizure ("execution lien") has been perfected by a competent execution organ. It may also be the time when an application for enforcement is made. Alternatively, again, it may be the time of rendition or registration of judgments or court orders that are to be enforced ("judgment liens"). Different approaches may also be taken depending on the nature of the assets subject to enforcement, *i.e.*, whether they are immovable or movable assets (land or personal property).

2. This Recommendation adopts the priority principle as a general criterion. It does so for several reasons. It promotes party activity and gives practical effect to the first creditor's position. It ensures that neither the creditor nor the executive organ is required to take account of any action carried out by later, competing creditors concerning the same asset. As such it means that steps do not need to be taken to attach additional assets to offset any decrease in asset value where the first creditor is concerned due to proceeds being distributed equally amongst all the competing creditors. Additionally, the priority principle applies the same order among consensual security interests as determined by rules of substantive law, although it should be noted that most legal systems make provision for priority of rights in their private or public substantive law and such matters should be taken into account.

3. In so far as determining the time relevant for priority, para. (1) focuses on the time of registration of seizure or attachment in special asset registers, *e.g.*, land registers or registers for planes, ships, aircraft, technical equipment, etc. The first creditor to apply to a properly functioning register should prevail. Where registration is not possible, the creditor who fulfils all the requirements necessary for seizure or attachment to be effective against third parties should be afforded priority. This latter issue is usually linked to security measures such as control, custody, possession or the provision of information to third-party debtors by enforcement organs (para. (3)). Para. (2) provides an exception to the general rule. It gives priority to creditors who apply for the seizure or attachment of a specific asset first. This is justified by the principle of party disposition as it contributes to the efficient and speedy carrying out of enforcement procedures. It does so as it prompts enforcement organs to carry out the enforcement process.

4. To promote effective, speedy enforcement proceedings, States should ideally establish digital special asset registers that allow the registration of all legal privileges, security interests or charges, including contractual ones, and seizure (execution liens). Limited issue registers such as those provided for in the 2016 UNCITRAL Model Law on Secured Transactions or Article 9 of the U.S. Uniform Commercial Code are for that reason not recommended. The creation of fully comprehensive registers may initially, however, be too significant a change for many States. These recommendations therefore adopt an incremental approach: see Rec. 19 and Rec. 22(3) with comment para. 3, which provides for the registration of all enforcement measures taken to be registered, including the time and date that determine priority between competing seizures (execution liens). This register should also provide information about the registration of competing contractual security interests or legal privileges that generate priority. It should do so according to the time of registration in the special asset registers. Such information should be documented for each case to avoid misunderstandings concerning priority. This conception of coordinating the operation of differing priority rules, combined with an adequate registration and information system, should enable different States to adapt, by stages, their priority rules to the present Recommendation in so far as feasible and independently of the progress reached, the recommended rules on registration could apply.

5. In many countries, there has been a preference toward the principle of equal distribution among all seizing creditors where priority rights provided by the substantive law do not apply. Equal distribution is, for instance, a general principle of insolvency law. More recently, however, due to reforms in insolvency law, an increasing number of States (particularly those with a Latin or hybrid legal culture) have either modified or abandoned an approach to enforcement based on equal satisfaction of unsecured creditors. They have done so by moving towards the use of either a partial or complete application of the priority principle. While the priority principle is to be preferred, para. (4) makes provision for recourse to equal treatment when priority cannot be determined and the various competing creditors have been equally diligent in their pursuit of enforcement.

Section 2. Non-monetary enforcement

Subsection 2.1. Delivery of possession and eviction

Introduction

In certain cases, enforcement must lead to the delivery of possession of tangible assets, which can be both movable and immovable.

In some cases, delivery is owed by the debtor and, depending on the substantive legal system, it may be necessary for transfer of ownership to take place or, at least, for possession to be transferred to the new owner. In some legal systems, it is necessary for a sale agreement or similar transaction to be completed for execution to be fully effected. Such agreements or transactions will generally require a conveyance to transfer ownership and delivery of possession of the property. In other legal systems, transfer of ownership occurs with the conclusion of the agreement with no need for any kind of separate conveyance. In others, ownership is not transferred until the completion of an additional act, such as registration of the transfer of title.

In other cases, the debtor's obligation to deliver is a manifestation of the creditor's right to recover possession of the asset. Therefore, it is also a part of the law of enforcement that is closely linked to the substantive law, especially in the field of rights against the property itself (rights *in rem*). In this area, important national differences exist, and these need to be taken into account to implement an effective enforcement system. Consequently, different kinds of enforcement measures are necessary to take account of the requirements of national substantive law.

Recommendation 55 – Delivery of the possession of movable assets

(1) Enforcement organs should initially seek to secure the voluntary delivery of assets from the debtor or an individual who can properly effect delivery on the debtor’s behalf to the creditor.

(2) Where delivery is not effected voluntarily, an enforcement organ should take possession of the asset. They should do so notwithstanding the absence of consent from the debtor or any third party that may give valid consent. Force may be used to secure possession of the asset. Such force should be no more than adequate and proportionate to effect possession. Where necessary the enforcement organ may secure the assistance of a relevant public authority to enable them to effect possession.

(3) If the enforcement organ does not know the asset’s location, it should seek information from the debtor or any relevant third party. Where the debtor or third party fails to cooperate with the enforcement organ, the creditor may seek an order for information from the court that the debtor or third party provide written or oral depositions concerning the asset’s location.

(4) In the event that an order for information does not provide sufficient detail concerning the asset's location, the creditor may apply for a search order according to Rec. 17.

Comments

1. Enforcement organs should take the necessary steps required to place assets in the creditor's possession. As a starting point, they should try to ensure that the debtor complies voluntarily with the transfer of the asset to the creditor. Thus the enforcement organ should, initially, ask the debtor to deliver the asset to the creditor. This may be effected by asking the debtor to deliver the asset to the enforcement organ, which will then deliver it to the creditor, or by asking the debtor to deliver it directly to the creditor. Where a third party, such as a family member or employee, or where the debtor is a legal person, an individual authorised to act on its behalf, can validly transfer the asset, they too may be asked to comply with the obligation to transfer the asset on the debtor's behalf. Debtors should bear the cost of delivery.

2. Where the time of delivery is prescribed in a judgment or in the enforceable instrument, the enforcement organ should abide by it. Where no time limit is set or if it has already passed, then the enforcement organ should ensure that the debtor transfers possession within a reasonable period of time.

3. Should voluntary delivery of the asset not take place, the enforcement organ will need to use force to compel its surrender. Enforcement organs may take any of the following steps: they may seek the assistance of other public authorities to effect delivery; they may enter domestic or business premises; and in so far as necessary in special cases according to applicable state law, they may seek judicial authorisation to enter premises. Where judicial authorisation is sought, it ought to be granted without delay.

4. In certain circumstances, the asset's location may not be known. Where that is the case, the enforcement organ should take steps to ascertain its location. It may do so itself or with the court's assistance (see Rec. 17, comment paras. 1-3). Individuals who can provide information concerning its location are under a duty to cooperate with the enforcement process and are thus subject to the general rules concerning asset discovery (see Rec. 15(2)-(4)).

Recommendation 56 – Third party in possession of movable assets

(1) Where a third party is in possession of a movable that is subject to execution, the general rule concerning delivery of possession applies.

(2) Where the third party refuses to surrender the movable to the creditor, they should give a formal statement (a declaration) concerning their right to retain possession.

(3) If the third party fails to provide a declaration or provides a false declaration, Recs. 15(4) and 17(1) apply.

(4) If the third party acknowledges the debtor's right to surrender the movable to the creditor or does not provide any plausible reason to contest it, the enforcement organ should take possession of the movable according to Rec. 55(2)-(4) and surrender it to the creditor notwithstanding the third party's right to oppose its surrender.

(5) If the third party in possession of the movable asserts a well-reasoned basis to contest the debtor's right to surrender, the enforcement organ should apply to the execution court to determine the issue.

Comments

1. The general rules concerning delivery apply where movables are in the possession of a third party. Their application is, however, subject to the third party not having a right to possession of the property that can justifiably be asserted against the creditor. To give effect to such rights, third parties should be given an opportunity to assert them.

2. Enforcement organs should, however, have the power to disregard third-party claims where they do not have a sound, well-reasoned basis. They should, for instance, be able to disregard such claims where they are clearly obstructive, without foundation, or fraudulent. Where they are well-founded, they ought to be subject to a judicial determination. To facilitate this, the enforcement organ should apply to the enforcement court for determination of the issue.

3. Enforcement proceedings should not be unduly delayed where the resolution of a third party's claim requires a judicial decision. Such decisions, as they are made in the context of enforcement, should be based on a form of procedure that does not produce a final determination of the issue, *i.e.*, one that is *res judicata* concerning the third party's rights against the creditor. Where necessary, such rights may be subject to determination in regular civil proceedings.

Recommendation 57 – Delivery of possession of immovables and eviction

(1) Debtors should deliver the possession of an immovable to a creditor voluntarily. Where they fail to do so, proportionate force should be used to remove the debtor and all their possessions from the land or building. Such force should also be used, where necessary, to remove any other people and their possessions from the land or property.

(2) A third party may claim a right, independent of the debtor's, to remain in the property. Where they do so, they should not be subject to eviction. The enforcement organ, creditor or third party may apply to the execution court for it to resolve any dispute over the third party's right to remain or the time period in respect of which the third party is entitled to remain.

(3) Any movables not removed from the property following eviction should be stored for a specified period by the enforcement organ. Storage should be at the creditor's expense. Any movables not removed from storage within the specified period should be disposed of by the enforcement organ to cover the costs of enforcement. Any surplus should be transferred to the debtor or third party or should otherwise be disposed of by the enforcement organ.

Comments

1. All other things being equal, the rule on enforcement of the delivery of movable property should apply to the delivery of immovable property. Where necessary, proportionate physical force may be used to remove a debtor and third parties (relatives, friends, employees, etc.) from immovable property (buildings and land) that is subject to enforcement. To effect possession may, in some cases, simply require action such as changing locks on doors. In other cases, it may require registration in a land registry depending on the nature of the right to possession claimed. It should be noted that where possession is concerned regarding immovable property, it entails, at the least, the creditor being able to occupy the property.

2. Third parties may claim an independent right to remain in the property subject to enforcement. Where that is the case, the enforcement organ should determine if they have such a right to remain. In some cases, this may require resort to a form of court procedure that does not produce a final determination of the issue (see Rec. 56, comment para. 3).

3. Where a debtor or one or more of their family members is vulnerable, due to health or similar reasons, and they are habitually resident in the immovable property that is subject to possession, they may apply to the court for a stay of execution. A stay may be granted where there is a credible prospect that alternative provision will be obtained. The stay should remain in place for a reasonable period of time. This may require them to obtain assistance from a relevant health authority or social service. This approach gives effect to the general principle that enforcement should not be disproportionate.

4. Debtors or third parties may not remove all their possessions from a building or land when possession is effected. In such cases, the debtors' or third parties' possessions should be stored for a specified period by the enforcement organ. The cost of storage should be defrayed by the creditor. Any possessions not claimed at the end of the specified period should be disposed of by the enforcement organ. Any value realised by their sale should be used to reduce the cost of enforcement. Any surplus should revert to the debtor or third party, as relevant, or otherwise disposed of by the enforcement organ.

Recommendation 58 – Formal record of the condition of movable assets and immovables

(1) The creditor may ask the execution court to make a formal record of the condition of movables and immovables at the time when possession takes place.

(2) The record may be relied on in any proceedings before a competent court for loss or damage.

Comments

1. A creditor may, depending on the substantive law, be able to seek compensation for loss or damage to movables or immovables delivered into their possession by a debtor. To promote the efficient conduct of any such proceedings, this Recommendation enables a creditor to obtain from the execution court a formal record of the condition of such property when delivery of possession takes place. Such a record can be accompanied by photographs or video recordings. It may also, at the creditor's expense, require an expert to appraise the property, with the appraisal forming part of the record.

2. While the formal record is intended to promote the efficient prosecution of proceedings for damages, that a creditor may ask the court to make such a record serves a further purpose. That a creditor may obtain such a record ought to minimise the prospect that a debtor will deliver movables or immovables in a damaged condition.

Subsection 2.2. Enforcement of obligations to do or to refrain from doing something

Introduction

The enforcement of obligations to do or to refrain from doing something has become an increasingly frequent reality, especially in the fields of intellectual and industrial property rights and competition law. In these and other areas of law, the remedy for the infringement of a substantive right or a legitimate interest consists of a court order requiring or prohibiting one or more parties from carrying out certain conduct. In some cases, that conduct is easy to identify. In others it may be more complex and may require steps to be taken by several parties or through the cooperation of third parties. It may also require the passage of a prolonged period of time before it can be completed. Where a debtor does not comply voluntarily with an enforceable instrument, compliance may be enforced through this type of order. Such orders must be a proportionate means to secure enforcement. It must, however, always be borne in mind that these types of orders may not, ultimately, secure effective enforcement and that, consequently, a monetary form of enforcement will be needed.

Recommendation 59 – Orders requiring a party to do something or to refrain from doing something

(1) Creditors should be able to obtain an order mandating compliance with obligations contained in enforceable instruments which are imposed on debtors. These orders may enjoin debtors to do something or to refrain from doing something. Such relief may be granted either where a debtor's non-compliance with an obligation has taken place or is imminent.

(2) Where such an order is granted, the court should clearly specify what the debtor is required to do or to refrain from doing to give effect to the obligation contained in the enforceable instrument. It should set out the time limit for compliance.

(3) In determining the order's content, the court should take into account the creditor's needs, the content of the obligation owed, and all the circumstances.

(4) Non-compliance with the order mandating compliance may result in the imposition of sanctions on the non-compliant debtor. Possible sanctions for non-compliance, which may include the imposition of fines to be paid to the State or to the creditor or imprisonment for the failure to give effect to the proper administration of justice, should be specified in the order.

(5) In the event of non-compliance, in determining an appropriate sanction, the court may take into account the economic value of the obligation to be performed, the nature and extent of the debtor's non-compliance with that obligation, and their financial capacity. Sanctions should be proportionate to the aim of promoting compliance.

(6) To promote voluntary compliance with obligations that arise under enforceable instruments, debtors should be informed of the possibility that orders enforcing their conduct may be granted. This should be effected through providing a warning in the enforceable instrument to that effect. The warning should also specify the range of possible sanctions for orders mandating compliance.

Comments

1. Enforceable instruments may require personal performance of obligations by a debtor. Debtors are expected to comply with such obligations voluntarily. Where they fail to do so, or where it is apparent that their non-compliance is imminent, an enforcement organ ought to have effective and proportionate measures at its disposal to secure compliance. Consistently with the dispositive principle, such measures should be available where the creditor applies for them.

2. This Recommendation makes provision for a creditor to apply for an order that mandates debtor compliance with obligations imposed on them by an enforceable instrument. The order may require the debtor to perform a specified act. It may also, where relevant, prohibit them from carrying out a specified act. It may, for instance, enjoin a debtor to inform the creditor about an asset's location where knowledge of its location is necessary to secure compliance with an obligation contained in an enforceable instrument to transfer the asset to the creditor. It may, equally, prohibit them from dealing with an asset in a manner contrary to the obligations imposed on them by an enforceable instrument. By way of example, where a debtor is under an obligation contained in an enforceable instrument to transfer possession of immovable property to a creditor and has demonstrated an intention to transfer it to a third party, an order under para. (1) may be granted enjoining them from transferring it to that third party and mandating compliance with the obligation to transfer it to the creditor.

3. While this form of order is intended to secure compliance with the obligations imposed in the enforceable instrument, a debtor may fail to comply with it as provided for by the enforceable instrument. In such cases, sanctions may be imposed on the debtor for breach of the order. Those

sanctions should be clearly specified in the order. They too should be proportionate. A range of possible sanctions should be available. Those should include the imposition of fines on the debtor. Such fines may be payable to the State or to the creditor. Where the latter is the case, the fine is not to be understood as damages for non-compliance. In those systems where imprisonment for non-compliance with court orders for contempt of court is available, such a measure should also be available as a sanction for non-compliance. The aim of the existence and imposition of sanctions is to promote compliance and, conversely, deter non-compliance.

4. Where a debtor has, in breach of a mandatory order, failed to refrain from doing something, the court should also consider whether to order, where possible, the debtor to undo at their own expense what they have wrongfully done. Any additional damage caused to the creditor by the debtor's non-compliance may also give rise to an order requiring the debtor to compensate the creditor.

4. Information concerning the possibility of sanctions for non-compliance should be provided in the enforceable instrument itself. The rationale for this is to promote early voluntary compliance and reduce the need for creditors to seek mandatory orders.

5. Where a debtor consistently fails to comply with a mandatory order and the imposition of sanctions fails to promote due compliance, the court should consider whether, in the circumstances, it is no longer reasonable to take further steps to secure performance. Where the court considers that further such steps are unlikely to achieve that end, performance may be converted into monetary performance.

Recommendation 60 – Enforcement where the debtor fails to make a formal statement necessary to give effect to an obligation

(1) Where a debtor is required to make a formal statement to effectuate an obligation and fails to do so, any one of the following three steps may be taken:

(a) the enforceable instrument should have the same effect as a statement made by the debtor; this should be the case where all essential elements to be covered by the declaration are set out in the enforceable instrument; or

(b) the court may empower the enforcement organ or a third person appointed by the court to act as the debtor's agent; once appointed, the agent may make the required statement; or

(c) the court may enjoin the debtor via a mandatory order to make the statement further to the provisions contained in Rec. 59.

(2) The court should determine the most appropriate step to take.

Comments

1. In certain situations, the enforcement of final judgments, *i.e.*, ones that are *res judicata*, requires a debtor to make a formal statement that has legal consequences specified in legislation. For example, in some jurisdictions a formal statement known as a statutory declaration must be given as part of the process for the conveyance of land.

2. Where a debtor fails to provide such a formal statement voluntarily, provision should be made for alternative means to effect performance. This Recommendation provides three alternative performance measures. The court should determine the most appropriate measure to apply.

3. Where it is not possible to either secure the debtor's performance or to apply one of the three alternatives contained in this Recommendation, a creditor may need to take steps to obtain compensation for non-performance via Rec. 59-. Rec. 65 (4) should apply accordingly. Additionally, if performance is not carried out in a timely manner, so that the creditor can benefit from it fully, they may need to take steps to obtain compensation.

Chapter VII. Special modes of enforcement

Introduction

This Section makes provision for three specialised enforcement modes, the aim of which is to promote cost-effective and efficient enforcement. They do so in different situations. The first form, which is detailed in Section 1, makes provision for situations where to fully realise the creditor's interest it is necessary to combine multiple, different modes of enforcement. The second form, which is dealt with in Section 2, deals with those situations where it is necessary for a third party to be appointed to fully realise the creditor's interest. In doing so it deals with the appointment of agents and receivers. These kinds of enforcement deprive the creditor of their ability to dispose of their assets themselves because only third parties are authori**s**ed to dispose of the assets under receivership in the interest of the creditors. These kinds of execution are a significant intrusion into the debtor's private sphere that is justified in special circumstances only. Enforcement against the debtor in person, which is addressed in Chapter VIII, should be a matter of last resort.

Section 1. Combining modes of enforcement

Introduction

To facilitate cost-effective and efficient enforcement, States should ensure that they provide a sufficient range of enforcement measures that can take the place of any of the steps that a debtor could undertake voluntarily to satisfy the requirements of a judgment or enforceable instrument. In this way, legislators and courts are able to provide for effective enforcement. Provision should also be made for courts, enforcement organs and creditors to combine different enforcement measures, as necessary and proportionate, to best effect enforcement. Combining measures is particularly important where complex transactions are concerned, as the use of different measures may be the only means by which a creditor's interest could be realised fully.

Recommendation 61 – Complex transactions and combining modes of enforcement

(1) Legislators and courts should provide a sufficient variety of different enforcement measures, which can replace any steps a debtor could and should voluntarily undertake consistently with substantive law to satisfy a creditor's interest in enforcement.

(2) Courts and enforcement organs should be aware of the necessity and utility of combining different enforcement measures. The combination of such measures should particularly be considered where complex transactions are concerned.

Comments

1. Effective enforcement requires the replacement of all steps that a debtor could undertake voluntarily to comply with the substantive law concerning executive measures. Para. (1) expects legislators to provide an exhaustive range of enforcement modes to that effect ("mirror principle").

2. Para. (2) further provides that courts and enforcement organs should have the power to adopt those measures that appear the most suitable and proportionate to secure the creditor's interest. This includes combining several enforcement measures. All reasonable steps should be taken to satisfy the creditor's interest consistently with the terms of the enforceable instrument before the creditor is advised that they should transform the enforcement process into seeking damages.

3. The following outlines non-exhaustive, illustrative examples of enforcement measures that may be combined.

(1) Sale and transfer of immovable property: in cases of pre-contractual enforcement of declarations owed by the parties (Rec. 60); registration in a land register, to secure or protect priority, which may be done either with or without the debtor's consent, as applicable (Rec. 60); a formal declaration to convey property via a deed and, if necessary, to secure the surrender the title deed (Recs. 60 and 55); delivery of possession independently of the acquisition of property (Rec. 57).

(2) Sale and transfer of tangible movables or receivables: delivery of possession of the movable (Recs. 55 and 56); if necessary, a declaration of the transfer of property or of ownership (Rec. 60); if necessary, consent to registration (Rec. 60).

(3) Enforcement of monetary claims concerning tangible movables that are in the hands of a third party having an actual right to possession: third-party debt order (Rec. 27 (2)(b) with comment 2, Rec. 32(1)); if necessary termination of a contract or other legal relationship from which the right to possession arises (Rec. 62 or 63); delivery of possession to the enforcement organ (Recs. 55 and 56); sale of the property seized (Rec. 28).

(4) Enforcement of monetary claims on immovable or movable property that is in a third party's possession where the third party is obliged to transfer the property to the debtor: third-party debt order (Rec. 27(2), 32(1), enforcement of the transfer of property (in case of necessary formal statements by third-party debtor, Rec. 60, and the debtor's representative, Recs. 62 or 63), delivery of possession of the asset or a deed Recs. 55 or 57); sale of property seized by an enforcement organ (Rec. 28 or 48) and distribution of the proceeds (Recs. 53, 54, if applicable).

(5)(a) Monetary enforcement on certificated securities or entitlements to securities (for instance, stocks, bonds, notes, debentures, warrants): seizure of any certificate that is in the debtor or a third party's possession (Recs. 24, 27); a third-party debt order with notice to a certificate's issuer or its custodian (Recs. 30-32); the sale of the certificate (Rec. 28) or collection of the certificate's underlying debt (Recs. 30 *et seq*.);

(5)(b) in those situations where there is an entitlement to securities: a third-party debt order in respect of the debtor's entitlement to certificated securities (Rec. 30 et seq.); enforcement of the claim seized according to (4), above; sale of any certificate seized or collection of any underlying debt that is due (see above (5(b))), or;

(5)(c) in other situations: in addition to the approaches outlined in (5)(a) and (b), the enforcement organ may execute an indorsement (Recs. 60 (19(b), 62) or provide the issuer with notice upon sale (above comment para (4)).

(6) Monetary enforcement on intellectual property rights, e.g., copyright: seizure of the transferable right to exploit the right, including of any performance or film (Rec. 41) and of a copy of a manuscript in the debtor's possession or digital custody (Rec. 24(1) with comment 2) by the enforcement organ; sale of the transferable right to exploit the copyright (Rec. 28

accordingly) and delivery of possession of the manuscript's copy to the acquirer of the copyright for use until expiry of the right to exploitation of the copyright.

(7) Monetary enforcement on claims secured by collateral, e.g., a claim secured by accessory pledges on the movables of a third-party debtor or security interests on such movables based on security agreements: the seizure of the assets that form a debtor's claim against the third-party debtor (Rec. 30) comprising the accessory pledge (Rec. 43, with comment 3); seizure of the pledge creates an enforceable right for sale and delivery of possession in case of non-possessory registered pledges using the third-party effect of the seized pledge and applying Rec. 32(1) accordingly; the forced delivery of possession to the creditor (Rec. 55); public sale by the creditor (optional use of enforcement organs in some States); or concerning *contractual security interests on a third-party debtor's movables:* seizure of the debtor's claim against the third-party debtor (Rec. 30); the additional seizure of the debtor's rights arising from the security agreement, *e.g.*, rights to tolerate access to movables subject to security transfer and to take possession of them and sell them, enabling the creditor to apply for injunctions like asset restraining orders (see Rec. 59 and Part II, Rec. 120); or the creditor may seize the debtor's claim for delivery of possession (Rec. 32(1)) and enforce this claim according to Rec. 55 facilitating the performance of sale and realisation of value (also see Rec. 43 with comment paras. 4 and 5).

Section 2. Agency and receivership

Introduction

There are likely to be situations where a debtor will either fail to take steps in the enforcement process or will be unable to do so. In those circumstances, it is advisable for enforcement organs or third parties to be able to step into the debtor's shoes and take the steps that the debtor could and should have taken. Provision ought therefore to be made for a court to direct either an enforcement organ or a third party to act as the debtor's agent. Once such an order is made, the agent will be able to take any and all steps that the debtor could have taken in the enforcement process. To further facilitate effective enforcement, States should also provide the means to appoint a third party as a receiver. This should only, however, be provided as a last resort where other means to secure its achievement are insufficient. The receiver will, as a consequence of their appointment by a competent court, be able to secure any payments due to the debtor, manage the debtor's assets or dispose of them in order to satisfy the creditor's interest.

Recommendation 62 – Agency

(1) Enforcement organs or third parties should have the power to act as a debtor's agent when that is necessary to promote the speedy conduct of enforcement. The power should only be exercisable in so far as it is appropriate further to a court order. Exceptionally in urgent cases, the power may be exercised at an enforcement organ's discretion. This power should be regulated by specific legal provisions.

(2) With respect to the principle of territoriality governing enforcement by public authorities, the debtor's obligation to cooperate should include their consent to a third party in a foreign country representing them to facilitate the execution of all transactions to satisfy the creditor's interest in enforcement according to the applicable private law if

(a) there are no applicable bilateral or international conventions on cross-border execution measures, and

(b) the process to obtain execution of an enforceable instrument by foreign authorities is likely to be lengthy and legally or factually uncertain.

(3) The debtor's consent under para. (2) should be enforced by the court according to Recs. 64 and 65.

Comments

1. Enforcement organs or third parties, when authorised by a court, may act as a debtor's agent. An order to that effect should only be made where it is necessary to facilitate the speedy satisfaction of the creditor's interest. Such an order may be necessary, for instance, where a debtor's assets are perishable and the debtor is not taking or is unable to take steps to realise the asset's value. Agency is thus a protective and facilitative step that can be taken by a court to promote effective enforcement. In cases of pressing urgency, an enforcement organ may act as a debtor's agent without recourse to a court for an order authorising such a step. Given that the power places significant authority in the hands of the enforcement organ or third party, it should be regulated by specific legal provisions. Those provisions should, amongst other things, set out the agent's duty to the debtor as principal.

2. Where a debtor's assets are outside the jurisdiction, it may be beneficial and in some cases necessary for the enforcement organ or third party that has been appointed as an agent, to take enforcement action in that jurisdiction. To respect the other jurisdiction's sovereignty and territorial integrity, it is necessary to ensure that an agent is only able to do so consistently with para. (2). Debtors should, further to their duty to cooperate, give their consent to an agent outside the jurisdiction facilitating execution where the conditions in para 2(a) and (b) are satisfied. If they fail to or refuse to do so, their consent can be enforced further to Recs. 64 and 65 (also see Recs. 15 and 18). [Enforcement organs should also take notice of international practice between the States affected.]

Recommendation 63 – Receivership

(1) Where appropriate, and especially if other modes of enforcement are unavailable or inadequate, the enforcement court may appoint a receiver, who is deemed to be the agent of the creditor.

(2) A receiver is an individual who on appointment has the power to receive any sums due to a debtor from tangible or intangible property. To secure the payment of such sums, including periodical payments due to the debtor, which are to be applied by the receiver to reduce the debt underlying the enforceable instrument, the receiver may take such steps as necessary to manage the debtor's property. Management includes leasing, renting, or securing the disposition of the debtor's assets.

(3) Receivership also applies to assets outside the jurisdiction where the provisions of para. (2) are satisfied.

Comments

1. This Recommendation contains the general approach to receivership as an instrument of enforcement. On appointment a receiver is deemed to be an agent of the creditor: on Agency generally, see Rec. 62. For the specific application of receivership to immovables, see Rec. 50.

2. Para. (1) provides for the appointment of a receiver by a competent enforcement court. Such an appointment is intended to facilitate the satisfaction of a creditor's interest by ensuring that debts due to the debtor, payments arising from rental property or land leasing, and so on are secured and paid to the creditor. Such an appointment is not, however, simply aimed at managing the receipt of

funds that would otherwise go to the debtor. A receiver should also have sufficient power to manage a debtor's property. For instance, they should be able to rent or lease property, put up property for hire, etc. Such steps should only be taken, however, to facilitate periodical payments to be received, which can then be applied by the receiver to satisfy the creditor's interest. Use of this mechanism can avoid the time and expense of selling a debtor's assets. It is also beneficial where an asset, such as property, is generating rental income that can straightforwardly be paid to the creditor, or where an asset has a greater value as a means to generate periodical payments than might be realised through sale. In circumstances where the value of an asset rises during receivership, which would justify its sale, the receiver may be appointed as an expert concerning valuation of the asset so as to facilitate its sale (see Recs. 28 (3), 48 (4), 50 (6)).

3. Para. (3) confirms that receivers may also exercise their powers over debtor's assets that are outside the jurisdiction. This may be particularly important where a debtor has the majority of their assets outside the jurisdiction and enforcement may otherwise be time-consuming and expensive. To respect national sovereignty, this power may only be used where the provisions contained in Rec. 63(2) are satisfied. Also see Rec. 63(3) with comment 2.

Chapter VIII. The Admissibility and scope of enforcement measures that apply to debtors personally

Introduction

Enforcement by way of public authority normally has a substitutive character: the State seeks a way to carry out and complete the enforcement process without relying upon the debtor to do so and by taking those actions that a diligent debtor ought to take to satisfy his creditor's claim. This is most apparent in cases of monetary enforcement when the State ensures that a debtor's assets are converted, in one way or another, into money that is then transferred to the creditor in satisfaction of the debt due. In some circumstances, however, such State action is not sufficient to substitute for action that ought properly to be taken by a debtor. In some cases, it may, for instance, be necessary for the debtor to take specific action for effective enforcement to take place. In such cases, State action, even by way of legal fiction, cannot provide an effective substitute.

In those cases where State action cannot amount to an effective substitute for action that ought to be taken by a debtor, it is necessary for there to be effective measures to promote debtors' compliance with their obligations. Such measures – sanctions for non-compliance – should either operate on the debtor's assets directly, or they should have an effect upon the debtor. The availability of such measures also ought to act as a deterrent to debtors' non-compliance. Such sanctions should generally consist of financial penalties and the threat that they may be imposed for non-compliance. They may also consist of more coercive measures that operate personally on the debtor, *e.g.*, those that provide for restrictions on personal freedoms through the use of direct force, including deprivation of liberty (imprisonment). In such cases, the basis of such a sanction is not the debt underlying the enforceable instrument itself, but the debtor's failure to comply with obligations imposed on them to secure the proper administration of justice via the enforcement process. The use of any form of sanction should always, however, be subject to two fundamental principles that ensure their exceptionality: subsidiarity to those kinds of enforcement that replace activity that a debtor is required to carry out, and the proportionality of sanctions that apply to individuals personally (*in personam*).

This Chapter is intended to provide a general framework for the various measures that apply to debtors personally (*in personam*) and which are necessary to provide effective enforcement. In specific circumstances, such measures may also apply to non-parties.

Recommendation 64 – The availability of enforcement measures that apply to debtors personally

(1) Legislators should provide measures that apply to debtors personally where the enforcement process can only be effected successfully by action being taken by the debtors themselves (see, *e.g.*, Recs. 59 and 60).

(2) These measures should comprise civil penalties and, where appropriate, imprisonment.

(3) These measures should be applied as a last resort. They should only be used in a proportionate manner.

Comments

1. Effective enforcement requires the provision of measures that operate to deter non-compliance with them, *i.e.*, to promote compliance with obligations that a debtor may not otherwise wish to comply with voluntarily. Such measures – sanctions for non-compliance – should generally be available against debtors personally. They may also need to operate against assets in cases where civil penalties are enforced by seizure of a debtor's assets. Sanctions may include civil penalties (fines, astreintes, either or both of which may be imposed on a fixed or periodical basis) or, where appropriate, imprisonment. Where civil penalties are concerned, legislators should opt for the approach that is most appropriate given that it is generally taken in their jurisdiction. Sanction use should generally apply where the debtor's conduct in enforcement proceedings cannot be effected in other ways, *i.e.*, by a legal fiction, action by an enforcement organ, or an award of compensation or damages. If, for instance, enforcement of a monetary claim underlying an enforceable instrument by seizure were available, this mode of enforcement could neither be replaced by the threat of sanctions working personally (*in personam*) to effect the debtor's payment nor could the efficiency of seizure be enhanced by parallel measures that apply to the debtor personally – and this independently of the nature of the claim that is to be enforced.

2. The imposition of sanctions should, generally, be an action of last resort. They should also be proportionate to the nature and consequences of the non-compliance. As they generally apply against debtors personally, if other modes of enforcement are available, such as seizure of land, tangibles or receivables, which do not require the debtor to carry out an act, they should be relied upon. Equally, where enforcement can be effected through the appointment of an agent or receiver, such steps should be taken in preference to the imposition of sanctions. Generally, the least intrusive action should be taken to give effect to enforcement (see, *e.g.,* Recs. 59 and 60). In so far as civil penalties are, however, necessary in the interest of efficient enforcement, States should provide an adequate fee framework, which is sufficient to promote compliance with their obligations by well-financed debtors for whom monetary sanctions may not be effective.

3. Imprisonment is the most intrusive measure that can be applied against a debtor personally. It should made available and only be ordered in extreme situations, where doing so is consistent with a country's constitutional system. As an enforcement measure, it must be distinguished from the mere threat of criminal prosecution. In some circumstances, a debtor's conduct within the enforcement process may render them liable to criminal punishment (*e.g.*, by concealing assets from a competent authority to avoid enforcement, or by disobeying a direct order of the court). Where such criminal proceedings are time consuming and their pursuit by prosecution organs cannot be relied upon, enforcement organs should not be obliged to stay enforcement proceedings pending criminal prosecution.

4. In contrast, imprisonment as a sanction for non-compliance refers to the power of the court responsible for enforcement to order the immediate imprisonment of a debtor. The purpose of such an order is not to punish the debtor. It is to compel them to do something they do not want to do or

to stop them from doing something they were doing in order to secure effective enforcement. It is therefore a power that is exercisable where a debtor is taking steps to frustrate the proper administration of justice in the form of effective enforcement. Where imprisonment is imposed as a sanction, it too must be proportionate in terms of its duration.

Recommendation 65 – Sanctions for non-compliance with obligations arising in the enforcement process

(1) Legislators should make provision for courts to impose appropriate and proportionate sanctions on debtors, and where necessary non-parties, who refuse or otherwise fail to comply with obligations, including obligations to provide information or to cooperate, imposed on them in enforcement proceedings.

(2) Enforcement organs should be required to specify those duties imposed on debtors or non-parties. They should do so as is necessitated by the specific situation that arises in the enforcement process, and they should apply to an execution court for an order in cases where there is manifest or reasonably foreseeable non-compliance. Creditors may also apply for such orders and may particularly do so where the relevant enforcement organ does not do so. Such orders should specify the conduct owed by the debtor or non-party. They should also specify the sanctions that are applicable in response to non-compliance. Where a debtor or non-party is intentionally non-compliant, it should not be necessary to obtain such an order prior to the imposition of sanctions.

(3) Sanctions should only be imposed on the creditor's application.

(4) In determining whether to impose a sanction, and if so which sanction, the execution court should take account of all the circumstances, including:

(a) any reasons for the non-compliance;

(b) the value of the claim to be enforced;

(c) the nature and duration of the non-compliance;

(d) the delay, if any, caused to the conclusion of the enforcement process;

(e) any financial or other damage caused to the creditor;

(f) the debtor or non-party's income and financial situation.

(5) Appropriate and proportionate sanctions should include civil penalties and in serious cases imprisonment for failing to comply with obligations the aim of which is to secure the proper administration of justice.

(6) Where a legal person is non-compliant, sanctions should be imposed on the natural person or persons responsible for the legal person's non-compliance.

(7) The person affected by a sanction should have the means to seek relief from the sanction.

(8) Debtors or non-parties should additionally be liable for damages caused by their misconduct.

Comments

1. This section concerns the application of sanctions for non-compliance with obligations that arise in enforcement proceedings. Such sanctions should be specified by court order. These measures

are intended to reinforce the debtor's duty to voluntarily cooperate with obligations arising in the enforcement process and requests made by enforcement organs. They should encourage compliance with obligations imposed on them through the threat of sanctions that operate on their assets, *e.g.*, through the imposition of fines or astreintes, or, ultimately, on them personally.

2. Sanctions may also be imposed in respect of obligations to provide information necessary for enforcement to proceed effectively (see Recs. 15-17). This includes information about the assets on which monetary enforcement can be executed. It also includes information about the location of assets that are to be delivered to the creditor (see Rec. 55(3)-(4)). Where digital assets are concerned, this includes information concerning passwords and other codes or the use of digital wallets, as well as access to them (see Part III, Recs. 132 *et seq*.). Enforcement organs should particularise the nature and scope of information duties. They should seek a court order where there is non-compliance with those duties, and should do so irrespective of the creditor's right to apply for such an order (see paras. (1) and (2), above).

3. Sanctions may also be imposed for non-compliance more generally, *i.e.*, in respect of debtors' conduct that obstructs or frustrates the effective and timely completion of enforcement proceedings. Debtors may, for instance, take steps to prevent access to property, refuse to allow an expert to appraise assets prior to sale by public auction, dispose of assets, hide them or remove them or themselves from the jurisdiction. They may also take steps to deliberately hinder the progress of enforcement by failing to comply with procedural time limits to complete necessary steps in the proceedings. In such or similar cases, the execution court should, on application by a creditor or an enforcement organ, issue a restraining order that prohibits the debtor from engaging in any activity that obstructs enforcement, such as disposing of or otherwise dealing with their assets. Such restraining orders should also be available against non-parties to prohibit them from participating in the debtor's activities or otherwise dealing with the debtor's assets following notice of the restraining order (see paras. (1) and (2), above). Alternatively, custodial orders should be available to prevent the removal of movables or intangibles from the jurisdiction (see Rec. 72). Attempts by debtors to move to other jurisdictions with the intention of preventing the enforcement of their compliance with their duties to cooperate and provide information should, at the least, be subject to civil penalties. In the most serious cases, such behaviour should be sanctioned by imprisonment (see comment para. 4, below). A prior court order should not be an obligatory requirement for the imposition of sanctions where the debtor intentionally engages in behaviour to obstruct completion of the enforcement process.

4. Sanctions must only be imposed where necessary to promote effective enforcement. When imposed, they must be proportionate. Para. (4) specifies several criteria that should be considered in determining whether and what sanctions are proportionate. The criteria are non-exhaustive; para. (4) makes clear that courts are to consider all the circumstances where considering such questions. In exceptional cases where a debtor is taking steps to prevent or significantly impede effective enforcement, imprisonment may be an appropriate and proportionate sanction for non-compliance. If, for instance, debtors try to move to other jurisdictions to impede the provision of information about their assets, including of their location and value, and do so with the intention of rendering it impossible to complete the enforcement process, this should be considered to be a clear case justifying their imprisonment pending completion of their cooperation and information duties or, at the least, pending the debtor demonstrating a genuine intention to do so.

5. The application of proportionality does not mean, however, that non-compliance with less significant obligations of a lower value is, in practice, unenforceable, *i.e.*, no more than a bare promise (*ius nudum*). A clear and hard line describing the limits of execution against a person (*in personam* execution) cannot be drawn, although most legal systems set definite limits concerning imprisonment given the dubious history of imprisonment for debt and debtors' prisons. The imposition of increasingly heavy fines for non-compliance and default may sometimes be a more efficient means to deter non-compliance and promote compliance than imprisonment. Where fines

are imposed, they should not be set at too low an amount, as is the case in many countries. They should particularly take account of the debtor's income. Where imprisonment is concerned, it should be reasonably limited in duration consistently with proportionality, as is the case in many jurisdictions.

6. Sanctions should only be imposed on the application of a creditor. As they are the main party adversely affected by a debtor's non-compliance, it is a matter for them whether and how to pursue sanctions, the aim of which is to promote the effective administration of justice for the creditor's benefit via effective enforcement.

7. Para. (6) makes clear the manner in which sanctions should take effect when imposed on non-compliant legal persons. As they act through natural persons, sanctions should be imposed on the natural person responsible for giving effect to the legal person's non-compliance, *e.g.*, a responsible senior manager, executive or director.

8. Sanctions, once imposed, should be subject to review. Legislators should determine the manner in which such review may take place consistently with the general approach taken to challenging judicial decisions.

9. Debtors or non-parties should be liable for damages caused by non-compliance with their obligations to cooperate or to give correct information (para. (8); for the special case of third-party debt orders, see Rec. 31(2)). If a debtor or a non-party knows or should have known that information they have provided was false or incomplete, the creditor should be entitled to compensatory damages. This kind of sanction is necessary to protect creditors, who are not permitted to apply for the debtor or non-party to be subject to punishment via fines, astreinte or imprisonment in such cases or in cases where the debtor or non-party persistently refuses to cooperate with the enforcement process. It is necessary as a means to enable the creditor to secure full and effective cooperation with the process (see Recs. 18, 64, 65 with comments). Such an approach enables creditors to hold debtors or non-parties properly liable upon wrongdoing, where that is established by evidence obtained from alternative sources. Cost sanctions are not generally effective because debtors are already liable for all the necessary costs that arise from the enforcement process (see Rec. 90(1)). To the contrary, if costs are discounted where debtors are fully compliant with the enforcement process, that may promote compliance. Cost sanctions against non-parties could, however, act as an effective sanction for non-compliance.

Recommendation 66 – The use of direct force against debtors or non-parties

(1) Enforcement organs should have the right to use direct force against the debtor and non-parties to secure effective enforcement. They may only do so consistently with the law governing the use of force. They may also only do so where the debtor or non-party is seeking to frustrate the enforcement process.

(2) The use of direct force should be exceptional. It should only be used where strictly necessary and proportionate.

(3) In so far as necessary, enforcement organs should seek police aid, or that of comparable and adequate public authorities, where direct force is to be used (see Rec. 17, comment 1 and Rec. 57).

Comments

1. This Recommendation is a clear reminder that enforcement may involve the use of physical force against persons. Such force may be applied against debtors or, in certain circumstances, non-parties. It may, for instance, be applied against a debtor to physically restrain them from interfering with or seeking to physically prevent the enforcement process taking place. It may be used against

non-parties, such as a group of demonstrators who try to prevent a debtor or their family from being evicted from land or property.

2. The use of direct force must be carried out consistently with the rule of law and the general law on the use of force in each country. Its use must be exceptional and must be subject to the strictest application of necessity and proportionality.

3. To ensure that the use of force is consistent with the rule of law and the general law on the use of force, enforcement organs should seek the assistance of the police or an equivalent public authority.

Recommendation 67 – Asset restraining orders in the enforcement process

(1) If an order for seizure is unavailable or would not provide sufficient protection for the creditor's right to pursue effective enforcement proceedings, the creditor should have a right to apply for an asset restraining order.

(2) Asset restraining orders may prohibit debtors from disposing of assets or removing them from the jurisdiction. They may also prohibit non-parties from dealing with the debtor's assets following service upon them of the order or their otherwise obtaining knowledge of it. Such orders should specify sanctions for non-compliance with its terms.

(3) Asset restraining orders may be applied for on a without-notice basis to promote their efficacy.

Comments

1. Asset restraining orders, as a form of provisional measure available to protect future enforcement proceedings, are dealt with in Rec. 71. This Recommendation makes specific provision for their application to situations where seizure orders would either not protect or not adequately protect a creditor's right to effective enforcement.

2. Asset restraining orders should be proportionate. They should also not prevent debtors from entering into *bona fide* transactions with third parties. Nor should they complicate the completion of enforcement measures taken by other creditors. Such orders should therefore contain reasonable limitations on their scope and application as determined by the execution court.

3. Non-parties should be given notice of such orders through formal service. Notice may also be effected by otherwise bringing the order to their attention. This latter method could, for instance, be achieved by a creditor in reliance on their knowledge of the debtor's business relationships or those they reasonably believe the debtor to have. The execution court's power to issue such orders against non-parties is a consequence of the debtor's duty of cooperation upon commencement of enforcement proceedings.

4. In cases of monetary enforcement, the seizure of assets should normally be sufficient to guarantee the sufficient realisation of a seized asset's value (Recs. 24, 25, 30, 45, 46, etc.). Asset restraining orders may be effective as a means to prevent or stop debtors from engaging in behaviour intended to frustrate effective enforcement, however, in those cases where: the individual identification of specific assets capable of seizure is not immediately feasible at an early stage of the enforcement proceedings, and there is a real danger that the debtor may seek to remove their assets from the jurisdiction or take other action to frustrate seizure. This may particularly apply where assets are not individuated or are, for instance, held in bank accounts, stocks, securities or shares held in large funds or through intermediaries.

5. In specific situations, asset restraining orders could be used to enhance the effect of seizure orders that have already been made. This may particularly be the case where it becomes apparent that the debtor is unwilling to comply with a requirement prohibiting them from disposing of assets subject to the seizure, as specified within the seizure order. That the restraining order applies to non-parties, and hence will prohibit them from dealing with the debtor's assets, will further help prevent the debtor from disposing of their assets in breach of the terms of the seizure order.

6. Asset restraining orders may also be made in respect of immovables. This use ought to be particularly beneficial in countries that do not yet have detailed land registers or cadastres, which identify land and its ownership. In such situations, seizure of land may be time-consuming, and hence may otherwise provide a debtor with time to take steps to frustrate seizure. An asset restraining order that prohibits dealing with land, etc. by a debtor or non-parties may thus protect the enforcement process pending the conclusion of the seizure process.

7. In international cases, asset restraining orders could be a beneficial means to overcome territorial limitations that apply to enforcement measures. Where treaties or conventions for the recognition and execution of enforceable instruments do not exist or lead to lengthy procedures, such orders could be particularly beneficial if a debtor's habitual residence, seat or branch is in the execution court's jurisdiction or if debtors or their representatives regularly visit the country in which that court is based. In such circumstances, effective service or notice of an asset restraining order could be effected. If a non-party is similarly connected to the court's jurisdiction, such measures could also be applied effectively to them, thus further enhancing its utility. Measures that apply against individuals personally (*in personam*) are also considered to be admissible according to prevailing international practice.

8. It should, however, be noted that asset restraining orders do not provide priority over contractual securities, privileges or claims that arise after the order is granted. Nor do they permit the realisation of the value of assets. It is, therefore, necessary to seize the assets as early as possible through combining a seizure order with an asset restraining order.

Chapter IX. Provisional measures in support of future enforcement

Introduction

In many circumstances, steps may need to be taken to protect a creditor's right to secure effective enforcement. In appropriate cases, such protective measures should be available during the pre-action phase of dispute resolution before civil proceedings commence and during ordinary civil proceedings that concern the determination of parties' substantive rights. They should also ordinarily be available following the determination of their rights and prior to the commencement of ordinary enforcement proceedings. The importance of the availability of such measures, independently of the procedural stage of doing justice, should not be underestimated. They play as important a role in promoting the effective administration of justice, through protecting the integrity of any future enforcement process and securing the right to effective enforcement, as they do through enabling civil courts to secure the effective administration of justice through protecting the fundamental purpose of first instance and appellate proceedings. This Chapter identifies the leading forms of such measures, which an effective system of enforcement should make available to the parties to proceedings in the circumstances noted above.

Such measures should only be provisional. They should be capable of being varied by the court that issues them or varied or replaced by enforcement measures during enforcement proceedings. They are not intended to finally determine the future enforcement process, nor should they be used as such in practice. Such provisional measures are generally intended to, first, secure a debtor's assets from dissipation. This can be achieved through orders to preserve assets, such as orders to

provisionally attach assets; orders the aim of which is to restrain a debtor or third parties from disposing of assets or moving them outside the jurisdiction where enforcement proceedings will take place; and orders that place a debtor's assets in the custody of a third party. It can also be achieved by the issue of regulatory provisional measures. These are orders that regulate the relationship between creditors, debtors and, where necessary, third parties until the final resolution of a dispute, be it by dismissal of a claim, withdrawal, settlement, voluntary satisfaction of the creditor's claim, or resolution via the issue of an enforceable instrument, or satisfaction through enforcement proceedings. Typical forms of such regulatory provisional measures are orders that restrain a party from acting or those that require a party to carry out an act. The final form of provisional measure is an interim payment order, *i.e.*, an order that requires payment of a sum of money in advance of the conclusion of proceedings concerning the determination of parties' substantive rights and before commencement of enforcement proceedings.

After the commencement of enforcement proceedings, the need for provisional measures protecting the integrity of the enforcement process will clearly decrease because enforcement proceedings have their own tools to prevent debtors or third parties from obstructing its completion, not least through enforcing their cooperation. Provisional attachment, for instance, is generally unnecessary during enforcement proceedings, as creditors can apply to an enforcement organ for a seizure order. It would then be a matter for the debtor or a third party to oppose that order if that was justified because, for instance, the value of the asset seized is greater than then debt subject to enforcement. Similarly, interim payment orders generate an enforceable instrument that is no longer necessary after enforcement proceedings have commenced, as from that point a creditor can apply to an enforcement organ for the seizure of assets.

In other circumstances, provisional measures may be available both before and during enforcement proceedings. Asset restraining orders would, for instance, generally be unnecessary once enforcement proceedings have commenced as a seizure order will include a prohibition on further use or transactional activities, and that will be supported by the possible imposition of sanctions for non-compliance. Such orders may, however, be used during enforcement proceedings where there is a specific need to impose more general restrictions on a debtor's activities. In such cases, asset restraining orders can properly be construed as a necessary complement to enforcement measures utilisable by execution courts. Similarly, an enforcement court could issue a civil search order, just as such an order could be issued prior to the commencement of enforcement proceedings. Such an order issued during enforcement proceedings could, for instance, support enforcement where a debtor has taken steps post-judgment, just as they could pre-judgment, to hide assets.

There are also measures that can be applied during enforcement proceedings that are comparable to provisional measures that are available during ordinary civil proceedings. The most important type of such order is that of a stay of enforcement proceedings. These can be granted by the ordinary courts, *i.e.*, those that determine the substantive merits of the dispute between the creditor and debtor. Such orders maintain the validity of enforcement proceedings pending determination of any challenges to either the judgment that underpins an enforceable instrument or to the instrument itself.

Decisions balancing the risks of continuing or staying an enforcement process should be understood to be a form of regulatory provisional measure, as it protects the parties' position and the enforcement process's integrity pending the outcome of any challenge. The importance of this type of measure and its regulatory function is particularly evident where multiple parties have conflicting interests (see Rec. 53(6) and (7)).

Recommendation 68 – Provisional measures and comparable court orders that support future enforcement

(1) To protect a creditor's right to obtain effective enforcement, a court should be empowered to grant a provisional measure or comparable order to support enforcement and to do so

(a) at any time prior to or during civil proceedings to determine the substantive merits of a dispute, or

(b) at any time between the issue of a judgment on the substantive merits and the commencement of enforcement proceedings.

(2) A provisional measure in support of future enforcement should not finally determine enforcement proceedings. It should be issued to preserve the integrity of such proceedings.

(3) Provisional measures in support of future enforcement should only be issued on the application of a creditor where the application satisfies criteria specified in Recommendation 69.

(4) The following provisional measures or comparable orders should be available in support of future enforcement:

(a) orders that authorise the provisional attachment of a debtor's assets (provisional attachment orders);

(b) orders that prevent a debtor from disposing of or otherwise dealing with their assets (a provisional asset restraining order);

(c) orders that place a debtor's assets in the custody of a neutral third party (a provisional custodial order);

(d) an order that regulates the relationship between a creditor and a debtor on a provisional basis (a regulatory provisional measure);

(e) an order that requires a debtor to make an interim payment to the creditor (an interim payment order); and

(f) an order provisionally staying enforcement proceedings while a challenge to an enforceable instrument is pending (a provisional stay pending challenge).

(5) Except as provided for in this Chapter, the grant of an order in support of future enforcement should be made consistently with the general approach taken to the issue of provisional measures during civil proceedings.

Comments

1. This Recommendation sets out the basic requirement that a range of provisional measures should be made available, the aim of which is to facilitate and secure effective future enforcement. The nature of the various forms of such measures are set out in para. (4) and they are further elaborated in the specific recommendations in this Chapter (also see Rec. 10 (1) with comment para. 2). Reference may be made to the ELI-UNIDROIT Model European Rules of Civil Procedure, Part X, which sets out general model provisions on provisional and protective measures. The current recommendation adapts those general provisions in so far as they can specifically be applied to support future enforcement.

2. The aim underpinning these measures is to protect the integrity of the enforcement process by, for instance, attaching a debtor's assets on a temporary basis or otherwise preventing the debtor from dealing with their assets pending the commencement of enforcement proceedings. In both cases, the ultimate aim of the measures is to ensure that a debtor is unable to take steps to frustrate future effective enforcement. In appropriate cases, courts should also be empowered to promote effective enforcement by requiring a debtor to take positive steps to further promote effective future enforcement, *e.g.*, in patent cases or cases of intellectual property right infringements by requiring the provision of information concerning assets and data, requiring steps to be taken to provide access to assets or data, etc. In such cases, the dual use of information should be permitted, *i.e.*, it should be capable of being used both to assist the determination of the substantive merits of the dispute and to secure assets or data for later enforcement proceedings.

3. Para. (5) clarifies that the general approach to the award of provisional measures in civil proceedings should also apply to the grant of orders in support of enforcement, albeit this is subject to any specific qualifications set out in this Chapter.

4. After the commencement of enforcement proceedings, there is, in principle, no need for provisional measures, as enforcement organs have all the necessary means to support the enforcement process once it has commenced, see Introduction, above. Examples of such means of support include: Recs. 15 (information and cooperation), 17 (civil search orders), 18 (sanctions for non-cooperation), 24 (seizure of movables by taking control), 25 (legal consequences of seizure, etc.), 30 (seizure of claims against third parties, etc.), 37 *et seq*. (extension of the consequences of seizure, etc.), 46 (invalidity of transactions concerning immovables as a consequence of seizure), and 55-57, 64, 66-67 (enforcement measures working against an individual personally). The requirements of and preconditions for the use of these measures are simpler, as they do not need to be subject to enforcement, whereas provisional measures must, themselves, be enforced.

5. There is, however, one situation during enforcement proceedings where an order may be granted that is functionally equivalent to a provisional measure: a stay of proceedings. Stays may, for instance, be granted where the judgment underlying an enforceable instrument is subject to appeal or other challenge. They may also be granted where an enforceable instrument is itself challenged or where debtors or third parties oppose enforcement measures (see, for instance, Recs. 14, 68, 75, 78(3), 80). In such cases, the court dealing with the challenge is generally responsible for determining whether to grant a stay taking into account all the circumstances while also balancing the interests of the various parties. Ultimately, this type of measure, as it is functionally equivalent to a provisional measure, is set out here.

6. The grant of provisional measures should take account of and give effect to the general principles of effective enforcement, the protection of fundamental rights, and proportionality (Recs. 1, 2, and 5). The protection of fundamental rights may be particularly pertinent where enforcement proceedings are subject to challenge because the underlying dispute that is the basis of them is subject to challenge on its merits.

Recommendation 69 – Criteria for awarding provisional measures and comparable orders that support future enforcement

(1) An order in support of future enforcement should be granted only by a court upon the application of a creditor. It should be granted where the applicant satisfies the court that the order is necessary to secure the effective execution of an enforceable instrument because without such an order

(a) the debtor is taking or is likely to take steps to frustrate its execution; and

(b) those steps would render it impossible or, at the least, extremely difficult to execute.

(2) Where the enforceable instrument to which the provisional measure in support of future enforcement relates,

(a) is a court judgment that is subject to challenge, or

(b) is not a court judgment but it is subject to challenge concerning the substantive merits of the underlying dispute,

then the creditor should have to demonstrate that there is a high probability that the judgment or other enforceable instrument will be affirmed.

(3) In appropriate cases, an order in support of future enforcement should be granted prior to the grant of an enforceable instrument where the creditor can demonstrate that they have a good prospect of obtaining an order for the relief in respect of which the order is intended to protect.

(4) Where an order in support of future enforcement is granted prior to the grant of an enforceable instrument, the court should order the creditor, in whose favour the order is made, to initiate enforcement proceedings by a specified date. The order should lapse if proceedings are not initiated by that date, unless the court orders otherwise.

Comments

1. Orders in support of future enforcement may only be granted by a court upon the application of a creditor, who must satisfy the court that without such an order effective enforcement will be frustrated. This requirement is intended to ensure that such orders may only be granted when necessary. It thus limits the court's discretion and does so as a creditor must demonstrate that without the grant of such an order the debtor is either taking steps or is likely to take steps that would make it either significantly difficult to effect enforcement or impossible to do so. It should be noted that a provisional stay (see Rec. 75, below) could be issued upon either party's or a third party's motion.

2. Para. (2) clarifies that orders in support of future enforcement may be granted and hence may continue in force where a court judgment or other enforceable instrument is subject to challenge. This is intended to maintain the efficacy of future enforcement proceedings that remain live, even if stayed or varied, pending the fact and outcome of such a challenge. Such an approach helps promote proportionality and economy in enforcement, as well as its efficacy. It does so because it ensures that creditors need not apply for further orders to support enforcement proceedings after any such challenge is dismissed. It equally ensures that a debtor who the court concludes is likely to take steps to frustrate effective enforcement, by granting order in the first instance, is not able to sidestep the protective effect of the order through challenging the underlying judgment. To balance the creditor's and debtor's rights, however, the creditor must demonstrate in such a situation that there is a high probability that the judgment will be affirmed on appeal. This is required because the grant of an order in support of enforcement is a significant intrusion on a debtor's substantive rights, which the court ought not to interfere with lightly (see Rec. 75, below).

3. Paras. (3) and (4) clarify that orders in support of future enforcement may be granted prior to an enforceable instrument being issued, and may even be issued prior to the commencement of proceedings the aim of which is that such an instrument be issued. Where this occurs, the creditor should be required to commence such proceedings by a specified date. That date should be within a short time after the grant of the order. This is intended to minimise the duration of time that such an order is in place, and to ensure that a creditor acts consistently with their obligations to conduct the enforcement process in an efficient and proportionate manner. To balance the creditor's and debtor's rights, such orders should only be granted where a creditor can establish that they have a good, that

is to say a realistic, prospect that they will obtain in such proceedings the relief that the order to support enforcement is intended to protect.

Recommendation 70 – Provisional attachment orders

(1) A court should be empowered to grant a provisional attachment order in so far as necessary and appropriate in support of future enforcement. Such an order should have the same effect as an order for the seizure of any asset during enforcement proceedings in monetary claims. It should not however, not permit the realisation of an asset's value.

(2) A provisional attachment order should grant the creditor security over the assets subject to it. That security should have priority over subsequent seizures, contractual changes and all other kinds of transactions. If the debtor subsequently becomes insolvent, other creditors should be protected if and in so far as their interest prevails over the provisional attachment according to national insolvency law.

(3) Where a judgment or enforceable instrument which forms the basis of commenced enforcement proceedings, permits full execution on a debtor's assets, a provisional attachment order may be transformed into a seizure order that permits full value of those assets to be realised.

Comments

1. Attachment of assets may be necessary prior to and during proceedings that determine the substantive merits of the dispute between the parties as well as prior to enforcement proceedings being commenced. This may be the case to secure the asset that is to be subject to attachment as there is, for instance, a risk that it will be dissipated, disposed of or otherwise put outside the scope of a future enforcement process. Equally, such a step may be necessary to preserve a creditor's security and priority over the asset, which might otherwise be adversely affected by steps taken by other creditors or third parties whilst the proceeding on the merits is still pending or enforcement proceedings have not commenced.

2. Where provisional attachment is ordered, it should have the same protective effect (including in terms of security) as seizure in the course of enforcement proceedings (see, for instance, Recs. 22 and 25).

3. To promote proportionality and obviate the need for separate steps to be taken to effect a provisional attachment, it should be capable of automatically being transformed into a form of regular seizure, which will permit the seized asset's value to be realised. This should only occur if the judgment or other enforceable instrument to be executed permits the creditor to be fully satisfied in an enforcement procedure that commenced after the order is made.

Recommendation 71 – Provisional asset restraining orders

(1) A court may grant a provisional asset restraining order. It may do so to protect the future enforcement of:

(a) all types of claims whether for monetary relief or otherwise, including monetary claims seeking the seizure and realisation of the value of assets seized;

(b) claims for specific performance arising from obligations to dispose of all kinds of property whether by way of transfer, charging, the grant of a licence or otherwise.

(2) A provisional asset restraining order should not be granted unless there is a real risk that the debtor is likely to take steps to deal with the assets in ways that will frustrate effective enforcement.

(3) Provisional asset restraining orders may be applied for without notice to the debtor and any relevant third party where:

(a) the application needs to be made urgently; or

(b) notice would frustrate the purpose of the order sought.

(4) Debtors and third parties who are subject to a provisional asset restraining order should be given formal notice of it once it has been granted and should have an opportunity to challenge the order.

(5) A third party may be given formal notice of a provisional asset restraining order where that is necessary to secure its effective enforcement.

(6) Non-compliance with the terms of a provisional asset restraining order, whether by a debtor or third party who has notice of the order, should be subject to sanctions.

(7) A provisional asset restraining order should not be granted where a preliminary attachment order can properly be granted (see Rec. 70) and suffices to protect the creditor's interest in full satisfaction of the claim underlying the enforceable instrument.

Comments

1. Provisional asset restraining orders are a form of interim or provisional injunctive relief, which in some jurisdictions are known as "freezing injunctions" or "stop orders". They prohibit a debtor from disposing of their assets or otherwise dealing with them, *i.e.*, moving them outside the jurisdiction, transferring them to a third party, concealing them or otherwise making them difficult to trace, so as to frustrate completion of a future enforcement process. They should therefore only be granted where it is necessary to protect assets subject to future enforcement, *i.e.*, where there is a real risk that the debtor is likely to deal with those assets in a way calculated to frustrate a later enforcement process.

2. As a debtor's assets may be held by a third party on their behalf, *e.g.*, money may be held in a bank account, formal notice that such an order has been made may need to be given to that third party. Notice to a third party is intended to ensure that they are subject to the order, so that they may not properly deal with the asset in ways contrary to the order.

3. To ensure that an order can take effect, it may be necessary for a creditor to obtain one on a without-notice basis. Where, for instance, an order is needed urgently because it is known that the debtor is attempting to move assets out of the jurisdiction or is to do so imminently, notice of the application for an order may mean that, if granted, it is granted too late to have an effect (see Rec. 4(2)). A without-notice application would thus facilitate effective future enforcement through ensuring that justice is not delayed. It may also be necessary to apply for such an order without notice where notice would enable the debtor to frustrate the order's purpose, *i.e.*, notice of the application would enable a debtor to move assets that would otherwise be subject to the order, if granted, out of the jurisdiction. The grant of such orders without notice does not offend against the fundamental right of debtors to receive due notice. It does not as once granted the debtor, the order may be revisited on the debtor's application on a with-notice basis.

4. To promote compliance with provisional asset restraining orders, non-compliance by a debtor or third party may result in the imposition of sanctions. Such sanctions should be those generally

available in a jurisdiction for non-compliance with court orders, *e.g.*, fines, astreintes, adverse cost awards and, where available, imprisonment for disobedience of court orders or for frustrating the proper administration of justice.

5. Provisional asset restraining orders ought only to be granted where preliminary attachment is not available or is an inadequate means to protect effective enforcement (see Rec. 70).

6. It should be noted that provisional asset restraining orders neither secure priority to contractual securities, privileges or claims arising after the provisional measure has been issued, nor do they empower the realisation of the value of the asset that is protected from dissipation or removal from a jurisdiction or undue transactions by measures that apply to debtors or third parties personally (*in personam*). It is therefore generally necessary and recommendable to combine restraining orders with preliminary attachment or, when enforcement proceedings are commenced, with seizure that secures priority and enables asset value to be realised.

Recommendation 72 – Provisional custodial orders

(1) A court may, on the application of a creditor, grant a provisional custodial order.

(2) A provisional custodial order should authorise and instruct a third party (the custodian) to take control of and keep secure assets specified in the order.

(3) The custodian may take control of the specified assets either in the place where they are at the time the order was granted or may do so by removing them to a place of their choice.

(4) A provisional custodial order may be made in respect of physical assets. It may also be made in respect of digital assets or electronic data.

Comments

1. A provisional custodial order places a debtor's assets in the control of a neutral third party pending the conclusion of enforcement proceedings. Custody may, for instance, be utilised to prevent a debtor disposing of assets or using the assets such that their value decreases significantly. It may also be used as a means to prompt a debtor to satisfy the debt due, see comment para. 2.

2. Control over the assets may require the custodian to remove them from the debtor's possession into their own. Control may, however, amount to legal custody rather than physical custody, *i.e.*, a custodian could take custody of a debtor's movable assets by identifying them and informing the debtor that they had taken custody of them while leaving them in the debtor's physical possession. In such circumstances, the debtor may continue to use the assets, while being unable to dispose of them. This particular form of custodial order may be particularly appropriate where the assets in question are those which a debtor and their family may use for personal purposes, *i.e.*, televisions, electronic devices, etc. This latter form of custodial order may be particularly beneficial in the promotion of settlement of enforcement proceedings, as it may prompt a debtor who had previously not constructively engaged with the creditor to propose means by which they could satisfy the debt. Once the debt is then satisfied, this form of custodial order could be set aside.

3. A court may appoint any responsible third party as a custodian. It should, however, be sure that the custodian understands their responsibility to keep the assets subject to their custody secure. Typically, enforcement agents should be appointed as custodians.

4. Provisional custodial orders may be made against physical assets. They may also be made against electronic data (passwords, metadata), which may otherwise be altered or concealed, or against digital assets, such as cryptocurrency, non-fungible tokens, etc.

Recommendation 73 – Regulatory provisional measures

(1) A court may grant a provisional measure to regulate the relationship between a creditor, a debtor or a third party until such time as a legal dispute is finally resolved by judgment or settled. Regulatory provisional measures should not apply in cases of monetary claims but only in disputes about claims to do or not to do something where the conduct in question or behaviour of persons is in dispute.

(2) A regulatory provisional measure may be granted where it is just and reasonable to do so. These requirements are particularly important in complex cases that do not permit of a speedy determination, *i.e.*, judgment, and enforcement in ordinary civil proceedings, where significant damage is threatened if the rights and obligations of parties or third parties are not determined in due time.

(3) In determining if it is just and reasonable to issue a regulatory provisional measure, a court should assess and balance:

(a) the legal and factual strength of each party's case – in approaching this, the court should consider the quality of the parties' cases on uncontested facts, on facts that can easily be established by readily available evidence, or on facts that are not seriously contested;

(b) the risk of harm to the parties if the measure is granted and if it is not granted;

(c) whether, and if so to what extent, any security given by a party may offset any damage caused to the other party if a measure is either granted or not granted.

(4) In granting a regulatory provisional measure, a court should grant an order on an interim basis that

(a) in so far as possible, anticipates what is most likely to be the final judgment on the substantive dispute; while

(b) minimising any disadvantage to the parties arising from the state of the court's knowledge of parties' respective cases on the merits of the dispute at the time the order is sought.

Comments

1. Regulatory provisional measures encompass a wide range of orders that are generally known as interim or provisional injunctive relief or protective measures. They may be granted to regulate the relationship between creditor and debtor, with the aim of securing effective early enforcement. The grant of such an order may only be made when it is just and reasonable to do so (para. (2)). In determining that question, a court should consider all the circumstances, and particularly those factors identified in paras. (3) and (4).

2. This form of order includes injunctions, *i.e.*, orders that mandate or prohibit debtor conduct. They also include orders that preserve and protect assets, especially in cases where contractual obligations for their delivery are in dispute and potential adverse transactions are threatened by debtors.

3. This form of order also includes those that promote access to information, whether that is through securing the means by which a creditor can search for information that is on a debtor's premises, or by securing their access to information held electronically.

4. Regulatory provisional measures between creditors, debtors or third parties include, among other things: orders limiting production or trade based on unfair competition; the full or partial prohibition of intellectual property right infringements upon the giving of security by the applicant for the order; orders not to repeat reports in the mass media pending judicial determination of their veracity or that their publication was justifiable; the modification of the distribution of managerial responsibility and the ability to represent a partnership pending the outcome of partnership disputes; orders regulating the possession or custody of tangibles or intangibles; and orders regarding disputed contractual obligations for the urgent delivery of goods necessary for ongoing production.

5. In some cases, carefully drafted regulatory provisional measures may contribute to an agreed final settlement of a dispute. In other cases, it may be necessary to combine a final court judgment with a claim for damages to compensate losses caused by a regulatory provisional measure that, in the final analysis, ought not to have been granted.

Recommendation 74 – Interim payment orders in support of enforcement

(1) Pending proceedings for monetary claims, creditors should be able to apply for an interim payment order in support of enforcement.

(2) An interim payment order may require a debtor to pay the creditor, pending final determination of proceedings, a sum that satisfies their monetary claim either wholly or in part.

(3) In considering whether to grant an interim payment order, the court should take account of all the circumstances of the case and particularly:

(a) the likelihood that the creditor will secure a final judgment in their favour;

(b) any hardship to the creditor or debtor that may result from granting or refusing the order;

(c) whether the creditor is in urgent need of payment;

(d) the extent to which the debtor is responsible for any delay that has caused or contributed to the debtor's need to receive a payment urgently.

(4) Interim payment orders should generally only be granted on a with-notice basis.

Comments

1. Provision to enable claimants to obtain from a defendant to legal proceedings a payment in advance of a final judgment is available in some jurisdictions (an interim payment). Typically, it is only available where a defendant has admitted liability or there is a high probability that the claimant will succeed on the substantive merits of the dispute. In such cases, claimants can obtain a proportion of the amount they are likely to secure as monetary damages, subject to a duty to repay any over-payment that is made to them through the interim payment. Such payments are particularly concerned with ensuring that a claimant who is likely to succeed is able to secure a proportion of their likely damages in a timely and efficient way, not least in circumstances where delay in awaiting final judgment would prejudice them. Concerns are, however, raised about the propriety of such an interim payment on account of judgment.

2. The provision of this power is particularly beneficial where a creditor seeks enforcement of a monetary sum, which has been awarded in respect of a claim for personal injury and there is a need for early payment to enable them to, for instance, pay for adaptations to their residence necessitated by the injury.

Recommendation 75 – A provisional stay pending challenge to an enforceable instrument

(1) A court may, on its own initiative or on the application of a creditor or debtor, grant an order for a provisional stay of enforcement pending the conclusion of a challenge to an enforceable instrument. This discretion may be exercised upon consideration of the strengths of the parties' cases while any of the following are pending:

(a) a challenge to the enforceable instrument;

(b) an application for a first or new hearing concerning the underlying merits of the dispute that gave rise to the enforceable instrument; or

(c) an application for an extraordinary review or appeal from the judgment to be enforced by the enforceable instrument.

(2) A provisional stay pending challenge may stay or otherwise vary the enforceability of an enforceable instrument. A stay may be granted on the condition that the party seeking it gives security.

(3) A stay or variation of an enforceable instrument's enforceability may also be granted by an execution court under Rec. 14 in appropriate cases. Where an execution court is taking or is likely to take such a step, prior communication with the court seized of the challenge should be made so as to avoid duplication of proceedings or inconsistent results in multiple proceedings.

Comments

1. Enforcement proceedings may be subject to challenge in several ways. The validity of the enforceable instrument may be challenged. Equally, the final judgment that underpins the enforceable instrument may be subject to challenge either because the debtor seeks to challenge it by way of appeal or through seeking to contest the underlying merits of the substantive dispute for the first time. It may also come under challenge by way of an extraordinary form of review of a final judgment or final appeal. This latter possibility may occur, for instance, where it is alleged by a debtor that a final appeal process was corrupted through bias on the part of the court.

2. In such circumstances, there may be a need to pause (stay), vary or set aside the enforcement process. This Recommendation provides the basis to do so, where there is a need to do so, *i.e.*, where the court determines that the enforcement process cannot properly continue while the challenge is taking place. It should be exercised in the interests of both creditor and debtor, particularly to give effect to the former's right to effective enforcement and the latter's right not to be subject to enforcement where the substantive merits of the underlying debt have not been determined finally. It thus provides a basis to balance the rights of creditor and debtor. As a general rule where the court determines that enforcement cannot continue while a challenge is taking place, the imposition of a stay on enforcement may be preferable to setting aside the enforcement process for a court to take where any of the three forms of challenge specified in para. (1) arises. A stay is likely to be the most proportionate approach, as it maintains the enforcement proceedings, which may then be resumed if the challenge fails. Were enforcement proceedings generally to be set aside where the underlying judgment, etc. is challenged, and the challenge fails, requiring a creditor to commence fresh proceedings may result in them incurring additional unnecessary expense to themselves, debtors and any relevant third party, as well as delay in concluding the enforcement process.

3. Para. (3) makes clear that this power is a discretionary one, which may be exercised by a court. It is a parallel power to that provided to execution courts under Rec. 14 in appropriate cases. Effective coordination between the two types of courts (however a jurisdiction organises its court

structure) is thus necessary to ensure the two do not duplicate their activity and either both issue stays or, contrary to the effective administration of justice, issue competing and inconsistent decisions on whether to stay, vary or set aside enforcement proceedings. The existence of this parallel power thus also strongly suggests that there should be a system of effective coordination between the different courts (see Rec. 82).

Chapter X. Challenges to enforcement

Introduction

The proper regulation of enforcement by way of public authority must include mechanisms that protect the rights of parties and third parties adequately in those circumstances where they may otherwise be improperly interfered with. For regulatory purposes, it is important to distinguish three broad types of situations.

First, during enforcement proceedings, any party (creditor, debtor) or third party may consider that they have suffered harm as a consequence of a procedural infringement. In such a case, there is no suggestion that the enforcement itself is unlawful, but simply that the manner in which it is being carried out needs to be modified on the application of the aggrieved party, to render it consistent with the rules of enforcement procedure.

Secondly, a debtor may consider that the enforcement process was unlawful, either in whole or in part, due to something that has arisen after the debtor's liability has been extinguished following the creation of the enforceable instrument. Where this is the case, then enforcement should be terminated if the debtor's liability has been fully extinguished. Where the liability has only been partially extinguished, then the scope of any further enforcement ought to be restricted. In both situations, this is the case because the originally enforceable instrument ought to no longer be treated as being enforceable.

Finally, and on a partially different level, it is also possible that the development of the enforcement process may prejudice the rights or legitimate interests of third parties. They may, for instance, be adversely affected by enforcement action that ought not properly be applied against them, *e.g.*, their property may be wrongly seized on the basis of a mistaken belief that it is the debtor's property. In such cases, the third party should be able to take action quickly so as to prevent any steps being taken that are contrary to their interests, *e.g.*, they should be able to take steps quickly to prevent their property from being transferred to a purchaser via a public sale process as part of the enforcement proceedings.

Comparatively, there is a significant diversity in approach across jurisdictions to these issues. Generally, however, notwithstanding the exact nature of the process adopted, that process tends to be unnecessarily complicated. This is due to there being a plethora of different remedies and processes that are applicable to them. There is an absence of trans-substantive process. On the contrary, there tend to be a range of overlapping, co-existent, different procedures and measures, which may also variously be available in different courts within a jurisdiction. Best practice, particularly the need to secure effective, economical and proportionate enforcement, strongly favours the replacement of complexity in this area with regulation that is simple, uniform and compendious. The recommendations in this Chapter are designed to achieve this. They do so by distinguishing between the three broad types of situations described above.

Section 1. Opposition to procedural infringements

Recommendation 76 – Opposition as the general method to challenge procedural infringement

(1) Legislators should provide the means by which infringements of the rules governing enforcement procedure may be subject to challenge by way of opposition.

(2) Any party or third party may challenge the infringement of such rules by way of opposition.

(3) Court magistrates or judges should be responsible for resolving challenges by way of opposition.

Comments

1. Enforcement must be carried out in accordance with the procedural rules that govern it. Infringements of those rules may be detrimental to any of the parties to enforcement proceedings. It may also be detrimental to third parties. They may, for instance, lead to the seizure of assets owned by debtors or third parties that ought not lawfully be subject to seizure within enforcement proceedings. They may also result in harm to multiple parties, *e.g.*, where an asset that has been lawfully seized is incorrectly valued prior to its auction within the enforcement process, it may result in a sale at an undervalue. Such an eventuality may harm the creditor, debtor and, if there are any, any third-party creditors.

2. To promote procedural simplicity and proportionality, best practice strongly favours the introduction of a single means by which non-compliance with or infringements of enforcement procedure, whether that procedure is being carried out by court magistrates, judges or other enforcement organs, should be to challenge or review.

3. The term "opposition" is used generically here to refer to the different ways in which challenges to infringements could be implemented. The exact choice, whether appeal, review, or otherwise, should be adapted to a jurisdiction's legal tradition. A single choice should, however, be made, and the means of opposition should not, therefore, depend on the nature and type of infringement. Legislators should, furthermore, not establish special means of review that differ depending on the stage enforcement proceedings have reached, nor should they do so depending on the enforcement organ responsible for the proceedings. Best practice thus supports the creation of a single, generally applicable, means of challenge. Such an approach not only reduces the financial burden on parties, it also promotes procedural efficiency and economy and can minimise the risk that courts will be burdened by a high number of appeals arising from procedural disputes.

4. Generally applicable rules of civil procedure may, in some jurisdictions, enable the court that determined the substantive dispute between the parties to take decisions that may potentially affect ongoing enforcement proceedings. This possibility may particularly arise in respect of enforcement proceedings concerning non-monetary claims when such a court issues an order to enforce its decision, *e.g.*, by issuing an order that sets a deadline to comply with the judgment or order it gave that concluded the substantive dispute. Such orders should only be subject to challenge according to the generally applicable procedural rules, *e.g.*, the ordinary routes of appeal or recourse should apply. Opposition proceedings should not, therefore, be available. Where a challenge to such an order is wrongly pursued by way of opposition, Rec. 77(3) should apply accordingly.

Recommendation 77 – Competence to deal with opposition proceedings

(1) The execution court's magistrates should be competent to determine opposition proceedings, where the alleged infringement is not attributable to them. In complex cases, competence should be transferred, on either the initiative of a magistrate or application by the party pursuing the opposition, to a judge of the execution court. Competence should otherwise lie with judges of the execution court.

(2) Where measures taken by a magistrate during enforcement proceedings are challenged by opposition, the challenge should be determined by a judge of the execution court.

(3) Where a party fails to commence their opposition with the competent organ, it should be transferred by that organ to the organ that is competent to deal with it. Transfer may be effected either on the party's application or by the organ in which the opposition was commenced.

Comments

1. Legislators should ensure that those judges and magistrates who are competent to deal with enforcement proceedings have sufficient specialist knowledge and experience of enforcement law. To achieve this, legislators should establish "execution courts" (see Rec. 6, and see Rec. 82(1) with comment 1).

2. In jurisdictions where the magistrates and judges have different roles in enforcement proceedings, comparable differentiation ought to be applied to opposition proceedings. As such, the first level of challenge should be dealt with by a magistrate, with the second level of challenge being dealt with by a judge; see Rec. 78, below. Where the opposition proceedings concern an infringement that is alleged to have been committed or caused by a magistrate, then the first level of challenge should be directed to a judge.

3. Where opposition proceedings concern complex matters, then it may be advisable for a judge to deal with them. To facilitate this, the proceedings should be capable of being transferred from a magistrate to a judge. Transfer should be possible either on application of a party or on the magistrate's own initiative.

4. Any division of responsibility for opposition proceedings should not prejudice the parties to such proceedings. As a consequence, where those proceedings are commenced in the wrong court or before the wrong judge in error, that should not prejudice the parties, and the proceedings should be transferred to a competent magistrate or judge.

Recommendation 78 – The development of opposition proceedings

(1) Opposition proceedings should be commenced within a reasonable period of time after the party or third party bringing such proceedings first became aware or should have become aware of the alleged non-compliance or procedural infringement.

(2) Opposition proceedings should be dealt with through a simple procedure. They should be determined by the competent court after it has heard from the parties and having considered any evidence that they have adduced before it.

(3) In so far as appropriate, enforcement proceedings should be stayed, either fully or in part, or varied pending the outcome of opposition proceedings by the court responsible for the opposition proceedings. It may also impose a requirement that the enforcement proceedings may only continue while the opposition proceedings are pending on condition that the creditor provides security. It may

only take such steps if it considers that they are necessary to prevent harm that is either irreparable or would be particularly difficult to repair.

(4) Opposition proceedings should be subject to appeal. A first appeal should only be made with the permission of a higher court. Where a second appeal is available, it too should only be made with the permission of the higher court. Permission to pursue a second appeal should only be granted where there is a significant divergence between decisions that have been taken by the lower courts or such an appeal would further the law's development.

(5) A court hearing either a first or a second appeal from a decision in opposition proceedings should be able to grant a stay of enforcement proceedings pending the outcome of the appeal. It may also make continued enforcement conditional on the provision of security by a creditor pending the outcome of the appeal.

(6) Where an appeal decision overturns that of a lower court, the appeal court may restrict any compensation by way of damages that result from ongoing enforcement to any benefit that the creditor has received.

Comments

1. Legislators should determine the essential features of the procedure governing opposition proceedings. They should do so consistently with the approach taken by their civil procedural system. In determining questions of procedural design, preference should, however, be given to approaches that promote efficient, economical and proportionate processes. They should guarantee a well-managed and fair process that respects the parties' right to be heard and which can be completed in a reasonable time so that neither legal certainty nor effective enforcement is jeopardised.

2. One particularly important issue to consider is whether commencing opposition proceedings should operate to stay, *i.e.*, suspend, enforcement. A stay or suspension should only be granted upon a party's application, including following a court suggesting to the party that they may wish to consider seeking such an order. The optimum approach is to provide a wide, discretionary power to the court that is seized of the opposition proceedings to determine whether a stay should be promoted and imposed or not. The discretion should be exercised in the light of all the circumstances, including, for instance, the stage which the enforcement proceedings have reached, the nature of the infringement that is subject to the opposition proceedings or its impact on the enforcement process.

3. The grant of a stay should, in any event, be exceptional. They should only be understood to be appropriate where, if not granted, there is an actual risk that if enforcement proceedings are able to continue pending the outcome of the opposition proceedings, irreparable harm will be done. To protect against the risk of harm where enforcement proceedings continue while opposition proceedings are pending, the court seized of the latter proceedings should be able to order that the future progress of enforcement be conditional upon the creditor providing security.

4. Where opposition proceedings succeed, the court responsible for them should order whichever measure is appropriate. This may, depending on the circumstances, lead to the enforcement proceedings being dismissed or individual enforcement measures being challenged in whole or in part.

5. Opposition proceedings cannot be assimilated with ordinary proceedings that determine disputes on their substantive merits. As such, not all decisions made in opposition proceedings should be capable of challenge by way of appeal. Appeals from decisions in opposition proceedings should therefore only be possible where permission to bring them is granted by an appeal court. Different tests should apply to first and second appeals; the latter particularly should only be allowed in limited

circumstances where the appeal raises issues that go beyond the interests of the immediate parties. Where second appeals are pursued, the need to ensure that a stay of enforcement proceedings should only be granted exceptionally is all the more acute. This particular limitation is intended to ensure that second appeals and stays are not used abusively or for dilatory purpose by debtors.

Section 2. Challenging claims and enforceable instruments

Recommendation 79 – Challenging claims and enforceable instruments

(1) A debtor may challenge the validity of an enforceable instrument and apply for a hearing on the merits

(a) if the enforceable instrument is a judgment or other decision of a court that is not subject to appeal or extraordinary review and the challenge is based on facts that occurred after the last hearing where the debtor could present new facts, or

(b) the registered enforceable instrument has been issued without there being a prior court proceeding on the merits of the dispute.

(2) The competence of the court where the challenge is to be filed and the availability of any means of recourse against the decision to be rendered should be determined by generally applicable rules.

(3) Infringements of the rules governing the registration and issue of the registered enforceable instrument should only be subject to challenge by way of opposition according to Recs. 76-78.

Comments

1. This rule makes provision for challenges to enforceable instruments in two different ways. Para. (1) makes provision for challenges that concern the validity of enforceable instruments on the substantive merits. Such challenges are governed by generally applicable rules of civil procedure.

2 Para. (3) makes provision for challenges, via opposition proceedings, based on alleged procedural infringements. Opposition proceedings cannot, however, be used where, for instance, a debtor wishes to challenge the substantive decision that underpins the enforceable instrument or considers that an enforceable instrument is no longer enforceable because, for instance, the debt due by the debtor has been satisfied subsequent to the enforceable instrument being issued, opposition proceedings are not the appropriate means of challenge.

Recommendation 80 – Provisional measures issued by courts and by execution courts

(1) A court hearing a challenge made under Rec. 79 may grant a provisional measure, including a provisional stay, under Rec. 76. It may also order that enforcement should be conditional on the giving of security by the creditor.

(2) An execution court may grant a provisional measure under Rec. 68 where there is an urgent need to do so. The grant of such a measure should be subject to ratification by the court that is hearing a challenge under Rec. 79.

Comments

1. To promote debtor protection effectively, the court responsible for the proceedings referred to in the preceding recommendation (Rec. 79) should be able to take steps to ensure that ongoing

enforcement does not result in irreversible harm to debtors. It should therefore have the power to grant provisional measures as provided for in Rec. 75.

2. Execution courts may also grant provisional measures under Rec. 68 where the court responsible for the proceedings referred to in the preceding recommendation is unable to do so in good time. Hence the execution court may exercise this power where there is an urgent need for it to do so.

3. Under both paras. (1) and (2), it is likely that a provisional stay is granted. Under para. (1), the court may also require the creditor to give security in order for enforcement to continue. Such a step is intended to ensure that any harm that a debtor may otherwise suffer if enforcement continues and in the event their challenge to the underlying dispute succeeds, they are not placed in a position where they suffer irreparable harm through the enforcement process having been permitted to continue whilst their challenge was pending.

Section 3. Third-party claims

Recommendation 81 – Third-party claims

(1) Third parties should be able to bring claims against enforcement measures that adversely affect their property.

(2) Third-party claims may not be brought if the subject matter of the claim can be pursued by way of opposition proceedings under Rec. 76(1).

(3) Third-party claims should be commenced in the execution court, if enforcement proceedings are ongoing. Where enforcement proceedings have concluded, such claims should be commenced in the execution court that dealt or would have dealt with those proceedings.

(4) Third-party claims should be dealt with efficiently, economically and proportionally. They should be determined by the competent court after it has heard from the parties and having considered any evidence that they have adduced before it.

(5) Enforcement proceedings, including the execution of any enforcement measure that affects the third party's property, may be stayed pending the outcome of the third-party claim. The court seized of the third-party claim may also impose any appropriate provisional measure.

Comments

1. Enforcement may adversely affect third-party property. This is particularly the case where property is to be subject to seizure, attachment, the taking of possession, custody or control of assets that belong to the third party and that are not bound, either by law or contract, to satisfy the claim being enforced. To protect their property rights, etc., third parties should have the right to bring proceedings challenging such intrusive enforcement measures.

2. The notion of property, for the purposes of third-party claims, includes all legal titles in land, movables and receivables or other intangibles. It also includes all common law equitable titles and their equivalent in other legal systems.

3. Third-party claims should afford the same degree of procedural protection of their rights as would ordinarily be applicable in civil proceedings. Such claims should thus be pursued through efficient, economical and proportionate proceedings. Such proceedings should not, therefore, be simplified to such an extent that effective rights protection is undermined. Where the issue raised by

the third party concerns a procedural infringement, that should, however, be challenged in opposition proceedings: see Rec. 76(1), above.

4. To avoid irreparable harm, the court hearing the third-party claim may stay enforcement proceedings either in whole or in part. It may also grant an appropriate provisional measure, and where necessary require the giving of security.

5. In some situations, a third party may pursue both a third-party claim and opposition proceedings in parallel. Both means of challenge should be within the execution court's competence. First appeals, however, should be within the competence of appeal courts. Second appeals should fall under the competence of courts of last instance. In both cases, general rules of competence and admissibility should apply to third-party claims, whereas where opposition is concerned, Rec. 78(4) should apply. Parallel appeal procedures should be avoided by the grant of stays.

Chapter XI. Enforcement organs

Introduction

This Chapter concerns the organisation and structure of all enforcement organs including the organisation of enforcement agents. Its basic premise is that all enforcement organs including agents form part of the administration of justice. Both are imbued with public authority, including where enforcement agents are permitted to carry out their activities as part of private sector organs that are able to carry out enforcement by way of public authority.

Underpinning each of the recommendations in this section is the idea that legislators should ensure that enforcement organs and agents are structured and operate so as to best promote effective, efficient and economical enforcement. There is no one set way in which this might be achieved. Hence this section makes provision for different alternative approaches to be adopted, as long as they are implemented consistently with the principles articulated in the specific recommendations, *e.g.*, that enforcement organs are impartial and independent of the parties; that enforcement agents are properly trained, appointed, employed, regulated, etc.

Recommendation 82 – Options for enforcement system design

(1) Execution courts should form a discrete part of the overall court structure. They may form separate courts or specialist parts of a general court structure. Where they are a separate court, there should be effective coordination between them and other courts. Within the court structure, those judges or court magistrates that have the competence to prepare, direct or execute enforcement measures should be the discrete part of the general court structure that is the execution court. That the execution court should be a discrete part of the general court structure should be independent of whether enforcement judges or magistrates are allocated to the court rendering the decision to be executed or to another court that has either a general competence for execution or for specific kinds of execution measures within a district determined by law.

(2) Execution court judges or magistrates should have specific knowledge of and expertise in enforcement matters (see Rec. 6(2) and para. (1) above). Preparatory decisions on enforcement measures and such measures taken by such judges or magistrates, like measures taken by all other enforcement organs, should only be capable of being challenged by opposition. Such challenges should be determined by the execution court.

(3) All enforcement organs should be invested with public authority. They should all be endowed with the same rights and duties in so far as necessary to facilitate effective, efficient and economical enforcement.

(4) All enforcement organs should be considered to be part of the administration of justice. They should therefore all be impartial and independent from the parties to enforcement measures. They should treat all such parties, including third parties, equally and fairly.

(5) Enforcement judges or magistrates and agents who have notice of any good reason that calls into question their impartiality or independence concerning the carrying out of any specific enforcement measure, should recuse themselves. Parties and third parties should have the right to seek their recusal on the grounds of bias, whether actual or apparent.

(6) Enforcement agents that are civil or public servants and who are employed by the execution court should only execute enforcement measures consistently with instructions given by execution court officers. Their conduct should be challengeable either by complaint to the execution court's officers or by opposition to the execution court.

(7) Enforcement agents who are civil or public servants employed by a public body or authority outside the court structure should be sufficiently independent to determine, within the ambit of the law, how to implement execution measures requested by creditors. Any supervision of such enforcement agents by the public authority that is responsible for the enforcement system's organisation should be limited to where there are clear infringements of the law, including the recording, registration or execution of enforcement measures, the veracity of fees charged, and professional ethics. Creditors, debtors and third parties should have a right of recourse, by opposition, to the supervising authority in respect of enforcement agent's conduct.

(8) Enforcement agents in the private sector who are able to exercise enforcement by way of public authority should be subject to comparable regulation as that applied to civil or public sector enforcement agents under this Recommendation, and particularly paras. (3) and (4). Such regulation should particularly prevent the development of free market abuses. It should do so in the interests of the proper administration of justice and enforcement.

(9) Regulation of enforcement agents should deal with

(a) appropriate rules concerning the education and vocational and continuing professional training and regulation (including ethical and disciplinary rules) of enforcement agents;

(b) the establishment of professional bodies to supervise the regulation of enforcement agents;

(c) the regulation of enforcement costs so as to avoid unfair competition and corrupt cost bargaining;

(d) the development of rules governing the carrying out of enforcement measures by enforcement agents in partnership, or in other forms of cooperative relationship, with law firms;

(e) the imposition of limits on the number of enforcement agents or of their territorial competences where they are necessary to competition that could adversely affect the proper administration of justice in enforcement procedures; and

(f) where necessary the imposition of limits on the number of enforcement agents who may be employed within single private sector enforcement structures to avoid the formation of oligopolies or monopolies.

(10) Where other legal professionals (lawyers, notaries or land registrars) are involved in enforcement procedures, their professional regulations should apply in addition to those that apply to the enforcement measures to be executed.

Comments

1. Execution courts should form part of the overall civil justice system. They may form a discrete part of the overarching court structure, *i.e.*, as a separate self-contained court or as a specialist court within a general civil court. Judges or magistrates who are appointed to execution courts should be appointed on merit, *i.e.*, they should be experienced in enforcement procedure and matters. In a significant number of States, the efficient management of enforcement measures requires the State to organise its judiciary and magistracy so that judges and magistrates may also deal with enforcement measures either on a general basis, *e.g.*, regarding the choice and sequence of the measures to be taken, the transcription of enforceable instruments in succession cases, the imposition of sanctions, etc., or only in specific fields of enforcement, *e.g.*, the public sale of real property, the seizure of claims or rights, when needed for reasons of effective administration. To facilitate this, execution court judges and magistrates ought to also be experienced in enforcement measures. Forms of recourse from their decisions in enforcement matters should, however, also be dealt with by the execution court and its judges or magistrates to ensure that their specific expertise can be brought to bear in reviewing such decisions, subject to ensuring that no conflicts of interest arise from the two roles, *i.e.*, from acting as a court of enforcement and from determining opposition. Whether courts rendering enforceable decisions should have their own execution section or execution courts should have centralised competences for a district determined by law is a matter for national legislators according to the overall administrative structure of the justice system as a whole. Also see Recs. 6 and 77.

2. Para. (3) specifies the general rule that enforcement organs, as part of the court structure, form part of the judicial branch of government. They must therefore be provided by way of public authority. They will therefore also necessarily have to be invested with such authority, rights and duties as are necessary to enable them to effect enforcement properly. Consistently with the general approach to court management, they should also have sufficient authority to enable them to deal with enforcement measures in as effective, efficient and economical a way as possible. As part of the judicial branch of government, execution courts and enforcement judges or magistrates will necessarily also have to be institutionally independent of the other branches of government, and individual enforcement judges or magistrates will have to act independently and impartially in the carrying out their responsibilities and duties. A necessary corollary of this is that the general approach applicable to judges requiring them to recuse themselves where there is a well-founded basis of actual or apparent bias should be applied to enforcement judges. The same should also apply to enforcement agents, as they ought to be required to carry out their duties, while they act under public authority, to the same standard as enforcement judges. In both cases, the application of rules against bias and partiality should be applied to secure the integrity of the enforcement process.

3. Paras. (6), (7) and (8) make provision for three alternative approaches to the organisation of employment agents. Whichever approach is adopted, they make clear that enforcement agents exercise public authority. It thus makes no difference whether the enforcement agent is employed by the execution court, whether they are civil or public servants employed by a public body or authority outside the court system, or whether they are employed on the basis of private sector legal and organisational forms. Irrespective of which structure is adopted, it is essential that enforcement agents are subject to effective regulation.

4. Paras. (8) and 9(b) make provision for regulation and the matters that regulation should cover. Regulation and supervision of enforcement agents may be carried out by a representative body, which has the authority to make regulations, or a regulatory body that does not have representative functions. To ensure that other professionals, such as lawyers or notaries, are required

to carry out enforcement procedures and measures to the same standard as that required of enforcement agents, they too should be subject to the same professional regulations, professional standards, and supervision as applicable to enforcement agents.

5. Para. 9(d) refers to the development of rules governing the carrying out of enforcement. Such rules should secure the independence and impartiality of enforcement agents working in such a manner, *e.g.*, there should be rules concerning the exercise of influence or control over the enforcement process that is being conducted by specific agents or specific limbs of a partnership of or cooperative venture by agents or partners in their other limbs of the partnership or venture; requirements to have specified officers within such entities who are under a statutory obligation to secure independence and impartiality, etc. Such measures should particularly protect against any undue (improper) influence, whether actual or potential, that may arise through their working relationships.

Recommendation 83 – Organisation of the system of enforcement organs

(1) Legislators may structure enforcement organs in different ways. They may

(a) establish a single, omnicompetent, enforcement organ; or

(b) several enforcement organs, each of which is responsible for a different mode or different modes of enforcement; or

(c) several enforcement organs which have overlapping responsibilities for the same modes of enforcement.

(2) In determining how to structure enforcement organs, legislators should consider

(a) that enforcement organs with overlapping responsibilities may stimulate competition, thus improving the provision and reducing the cost of enforcement, and may enable creditors to make an informed choice about which organ they wish to use to secure enforcement;

(b) enforcement organs with overlapping responsibilities, particularly where some use private sector organisational forms, may promote entrepreneurial behaviour and innovation and hence may improve the provision of enforcement.

(3) In determining how to structure the system of enforcement organs, legislators should consider the following

(a) national, regional and professional traditions concerning the structural design of administrative bodies;

(b) the relative merits of uniform, simple structural design and those of flexible design;

(c) the advantages of entrepreneurial, competitive structures, particularly those that incorporate a profit-motive, in promoting efficient, cost-effective and customer-focused enforcement services;

(d) the need to integrate enforcement organs within the administration of justice so as to promote the rule of law as well as the interests of creditors, debtors, affected third parties and society as a whole;

(e) the need to ensure that enforcement organs, whether in the public or private sectors, have sufficient funding to enable them to operate effectively;

(f) the need to protect the independence and neutrality of enforcement organs, while also ensuring that they are subject to effective scrutiny and supervision by appropriate public authorities or professional organisations that have been invested with public authority to carry out such scrutiny and supervision;

(g) the need to promote and maintain the professional standards and ethics of enforcement agents; and

(h) the extent to which the development of the structure is best achieved through incremental reforms that best facilitate the effective transition to any new structure.

Comments

1. There is no one best approach to the organisation of enforcement organs. Para. (1) therefore makes provision for three different options capable of adoption. The key aim in determining which to adopt should be to ensure that the choice made is best suited to facilitate effective, efficient and economical enforcement. In some jurisdictions, due to their history or geography, that might be best achieved through the creation of a single, omnicompetent enforcement organ. In others, it might justify the creation of several enforcement organs, each of which is specialised in certain enforcement measures or each of which, while omnicompetent, operates within a specific geographical region.

2. Legislators may also consider the extent to which the establishment of enforcement organs with overlapping jurisdiction and competences may be beneficial. In such circumstances, competition between the enforcement organs could be an engine for the development of innovation and better practices. It could also foster price competition and the provision of different levels and standards of service, which could increase choice for creditors and enable them to determine which enforcement organ to use.

3. Legislators should also consider whether hybrid forms of enforcement organs could be introduced. Hybrid models, which enable public sector enforcement agents in part to work like enforcement organs using private sector organisational forms, may enable them to be remunerated at a higher level than those employed solely on the basis of the legal design of the public sector. Their basic salary would be paid by the State and supplemented by additional income drawn from fees owed by debtors to the State. Such civil servants, like enforcement agents employed on the basis of purely private sector legal design, would be required to finance, organise and manage their own offices, facilities and staff.

4. Specific factors that ought to be considered in determining the optimal means to organise the structure of enforcement organs are elaborated in para. (3).

Recommendation 84 – Legal education, vocational and professional training

(1) Enforcement agents should only be accredited if they have a standard of legal education and vocational training commensurate with their responsibilities.

(2) Enforcement agents should be appointed through open and transparent public appointment processes. They should be appointed solely on merit.

(3) Enforcement agents should be subject to mandatory continuing professional education.

Comments

1. Enforcement agents, whether employed on the basis of public or private sector legal design, should be required to undergo appropriate legal education and vocational training. This is necessary

to ensure that comparable and high standards are maintained across all forms of enforcement agents. It is also required to ensure that they are familiar with the requirements, legal and otherwise, applicable to all the different forms of enforcement measures, as well as how to conduct settlement processes (see Rec. 85). It is also necessary to ensure that they are familiar with, and thus able to act in accordance with, obligations and duties imposed on them. Implementing these requirements will help minimise the risk that enforcement agents will conduct enforcement measures in an unethical, improper or unlawful manner. On the contrary, effective and proper education and training ought to promote good behaviour and effective enforcement.

2. Due to the fact that enforcement agents, irrespective of their being employed in the public or private sector, exercise public authority, it is also necessary to appoint or employ them as a result of a fair and open appointment process, which requires that vacancies and application processes are announced publicly. Appointments should only be on merit. Assessment of merit should be based on candidates' qualifications, as documented by examinations, training, performance appraisals, etc. It should be determined by appointment committees that are constituted of properly qualified individuals, who should be practising enforcement agents as well members of other legal professions. Were appointment processes to operate on any other basis, appointments could possibly be made on a corrupt basis or result in the appointment of unsuitable individuals. In both cases, the efficacy of and public confidence in enforcement processes could be undermined. Open and fair competition for appointments is thus intended to promote and maintain high standards in enforcement agents and public and party confidence in the work they carry out. Legal education should include legal studies at adequate institutions, of an adequate length to be effective, which conclude with final exams or assessments. The stage of practical education should begin with professional training followed by vocational training under the responsibility of senior colleagues. Enforcement agents should acquire a satisfactory level of basic knowledge concerning information technology and digital assets during their legal studies, practical education and continuing professional education.

Recommendation 85 – Mediation by enforcement agents

(1) Where the creditor consents, enforcement agents should be permitted to promote the settlement of an enforcement process by seeking to mediate between the parties to the process.

(2) Where mediation is used to try to settle the enforcement process, it should only concern the enforceable instrument. It should not be permitted to consider points of contention relating to the dispute that was resolved by the judgment which forms the basis of the enforcement process.

(3) Enforcement agents may recommend that the creditor and debtor enter into an agreement under which the debtor satisfies the enforceable instrument by instalments (an instalment agreement). They may do so where there is good reason to believe that

(a) the debtor is unable to fully satisfy enforcement measures in a reasonable period of time;

(b) the debtor intends to abide by the instalment agreement; and

(c) the debtor can reasonably be expected to comply with the instalment agreement.

Comments

1. The promotion of settlement is an integral aspect of dispute resolution, and that includes enforcement processes. To facilitate that, enforcement agents ought to be trained and permitted to promote settlement between creditors and debtors. They should particularly be able to facilitate mediation between them with the creditor's consent. Such consent is needed as the question whether or not to seek to resolve any dispute over enforcement or to conclude the enforcement process via

a negotiated settlement depends on the creditor's view as to the prospects of effective and complete enforcement being achieved. This is not to say that a debtor may not approach either the creditor or the enforcement agent with an offer to take part in a settlement process.

2. Any settlement process consented to by a creditor may only consider issues concerning settlement of the enforcement process. It cannot go behind that process and raise issues determined by the judgment that underpins the enforcement process. To do so would amount to a collateral attack on the underlying judgment. This limitation is intended to avoid the need for judicial intervention in the settlement process.

3. Typical issues that may be subject to settlement are provided for in para. III. Typically, a debtor may seek agreement on the time and manner in which enforcement will take place. This is likely to be particularly pertinent where possession of residential property is sought via enforcement and the debtor's family reside in the property. It may be all the more pertinent where one or more members of the debtor's family are vulnerable (see Rec. 57). Another typical issue that may be subject to agreement between creditors and debtors, particularly where it is evident that a debtor may not be able to satisfy the enforceable instrument in its entirety or only if given time to do so, is whether enforcement should be made subject to an instalment plan. In some cases, it may be to both the creditor's and debtor's advantage to agree to such an approach.

4. Where the creditor consents to a settlement, an enforcement agent may also seek to agree a time and manner in which a debtor and, where relevant, any of their vulnerable family members, will voluntarily deliver possession of movables or their habitual residence to the agent (see Recs. 55(1), 57(1), 49(5)).

Recommendation 86 – Professional duties of enforcement agents and their staff

(1) All enforcement agents and their staff should be subject to the same professional duties. The professional duties should be analogous to those imposed on court staff, including those relating to data protection and security and confidentiality. They should also be required to be covered by appropriate professional and public liability insurance.

(2) If enforcement agents working on the basis of legal design used in the private sector cannot use court accounts to deposit funds they have collected as part of an enforcement process, they should be required to deposit them in an account that offers the same level of protection as a court account.

(3) The duties specified in paras. (1) and (2) should be subject to supervision by a competent authority (see Rec. 82(7), (8) and (9)(b)).

Comments

1. Enforcement agents and their staff, whether working on the basis of public or private sector legal design, exercise public authority. It is essential therefore that they are subject to the same professional duties and obligations. Given the nature of their responsibilities, those duties and obligations should be comparable to those imposed on court staff.

2. Due to the nature of personal information that enforcement agents and their staff deal with in carrying out their duties, it is particularly important that they are subject to, and abide by, data protection and data security requirements and that they maintain the confidentiality of information relating to creditors, debtors and third parties. It is also essential that they have sufficient insurance, which can be resorted to where there is, for instance, a breach of any of their obligations and duties, which causes harm to a party to enforcement proceedings or to a third party.

3. Funds obtained as part of an enforcement process should be securely kept. In particular, they should be deposited in an account that cannot itself be subject to an enforcement process or other form of seizure. As a general rule, such funds should therefore be kept in an account administered for or on behalf of a court. However, where that is not possible, enforcement agents ought to deposit such funds in a designated bank account that provides the same level of protection as that provided by a court account. Legislators may need to make provision for the establishment and status of such bank accounts.

4. The carrying out of the obligations and duties imposed under this Recommendation should be subject to the regulatory supervision process established under Rec. 82.

Chapter XII. Costs

Introduction

Enforcement proceedings, as with civil litigation in general, result in creditors and enforcement organs incurring costs. These costs may relate to fees charged by enforcement organs. They may also relate to costs incurred by enforcement agents, whether public or private sector, in carrying out the enforcement process. Different types and levels of costs are likely to arise depending on the specific enforcement procedure or measure applied. Additional costs may also be incurred where enforcement measures are combined or where enforcement outside the jurisdiction is required.

This Chapter provides a short series of recommendations intended to promote the development of a clear, simple and predictable approach to enforcement costs. It is intended to ensure that such costs as are incurred are no more than necessary and proportionate, and that as a general rule they should be borne by the debtor. Flexibility is provided for to a limited extent as the recommendations enable a degree of differential pricing for costs where enforcement is carried out by private sector enforcement agents. This is provided for to promote an effective market. Provision is also made for enforcement funding. Such provision is to be consistent with the approach generally taken by a State to the funding of civil litigation.

Recommendation 87 – Regulation of enforcement costs

(1) Enforcement costs should be regulated to ensure that parties only pay costs determined by law.

(2) Debtors should be subject to the same level of enforcement costs irrespective of whether enforcement is carried out by public sector or private sector enforcement agents.

(3) Private sector enforcement agents may be permitted to charge creditors higher fees than are charged by public sector enforcement agents where that is necessary to promote effective private sector provision. Creditors should, however, only be able to recoup such expenses from debtors within the limit provided by para. (2).

(4) Creditors and private sector enforcement agents should be permitted to negotiate enforcement charges in exceptional circumstances only. Where appropriate, public sector enforcement agents should be enabled to determine the exact amount to be paid according to the circumstances of the case within a framework regulated by law (framework fees).

(5) The limitations imposed on private sector enforcement agents' fees should apply to all such agents, including those that are members of a partnership, a limited company or similar legal entity, as well as those that are integrated within such organisations (see Rec. 82(3) and (8)(c)).

(6) Parties may challenge by opposition enforcement agent's fees (see Recs. 76-78).

Comments

1. Enforcement costs ought to be regulated. This is intended to ensure that parties to enforcement proceedings are only liable for those costs that are determined by law, and as a consequence should only be liable for costs that are necessary and proportionate (see Rec. 89, below). Examples of such costs include fees payable to land registers when changes to them need to be made further to the enforcement process; lawyers' fees where they are involved in the pursuit of enforcement; experts' costs, *e.g.*, where they are required to value assets subject to public sale, etc.

2. As a general rule, enforcement costs should be the same irrespective of whether enforcement is carried out by public or private sector enforcement agents. However, to promote an effective private sector service in the provision of enforcement agents, States may permit private sector agents to charge higher rates than public sector enforcement agents.

3. Where a creditor engages private sector enforcement agents and they charge higher costs than public sector ones, creditors should bear the differential cost of enforcement. They may not therefore recoup the difference between public and private sector enforcement from the debtor. Debtors may only be made liable to pay the rates charged for public sector enforcement. This approach helps facilitate party autonomy on the part of the creditor, *i.e.*, it enables them to choose private sector enforcement and bear its higher costs where they conclude that such a means of enforcement is likely to be more efficient, timely or effective than public sector enforcement.

4. In exceptional cases, creditors and private enforcement agents may negotiate individual fees for enforcement. They may do so, for instance, where extraordinary measures need to be taken to effect enforcement and their cost is significantly higher than provided for by law. Exceptional circumstances may also arise where a creditor can demonstrate that they have a particular and valid interest in achieving full and speedy satisfaction so that proportionality can be set aside. For public sector enforcement agents, the law should, in appropriate cases, set a discretionary framework giving some leeway to responsibly determine the concrete amount within the framework given according to the special circumstances of the case.

5. Care needs to be taken where the individual negotiation of fees is concerned. Agreements concerning such fees could place undue pressure on an enforcement agent to act in ways that undermine their neutrality and independence: factors which are essential in individuals who are invested with public authority. This may be a particularly problematic issue where very high fees are negotiated or where higher fees are payable contingent on success. In extreme cases, it may be difficult to draw a clear line between void or voidable fee agreements and cases of corruption.

Recommendation 88 – Enforcement fees – clarity and predictability

(1) Enforcement fees should be set out in regulations. They should be simple, clear and concise.

(2) Fees for specific actions carried out by enforcement organs should be set by reference to a limited number of factors. Those factors should include: the amount of debt subject to enforcement; how difficult effective enforcement is likely to be; the average time taken to effect enforcement; any additional time required to effect enforcement that arises from special circumstances; and any particular urgency.

(3) Enforcement fees should be made public. Information concerning such fees should be made available by the courts, enforcement organs and agents, procedural codes, and judicial and professional websites.

(4) Parties to enforcement proceedings should be provided with advance information about the likely cost of enforcement. They should particularly be informed of the cost of any specific enforcement procedure or measure that an enforcement agent intends to take before it is taken. This information should be provided by the enforcement organ or by enforcement agents engaged to give effect to enforcement.

(5) Enforcement organs should ensure that creditors are updated concerning the ongoing cost of enforcement proceedings.

(6) The amount of estimated enforcement costs should be included as a monetary sum recoverable where the creditor has an enforceable instrument for monetary enforcement. Where the creditor has an enforceable instrument for non-monetary enforcement, the sum should be recoverable through a provisional seizure of the debtor's assets pending payment.

Comments

1. Enforcement fees, like enforcement procedure generally, should be set out in simple, clear and concise rules. Such an approach promotes their accessibility. It is also helps promote predictability. Complex, unclear and technical rules tend to promote unpredictability and can lead to technical arguments and satellite litigation over costs. A lack of predictability not only reduces access to enforcement, it can also undermine the provision of funding for enforcement, *e.g.*, a lack of predictability can reduce the provision of legal expenses insurance and may increase the cost of third-party funding.

2. To promote simplicity and predictability, enforcement fees should be set by reference to a limited number of factors. The more factors involved in setting such fees, the greater the chance is that they will be complex. Relevant factors should include the value of the debt subject to enforcement and the time likely to be taken to effect enforcement. The latter factor should be considered by reference to how difficult it may be to effect enforcement. Taking account of such factors ought, if done properly, to ensure that enforcement fees are set at a proportionate level.

3. Enforcement fees must be made public, consistently with the open justice or publicity principle. Such transparency also enables the level at which such fees are set to be subject to public scrutiny and accountability.

4. To enable parties to enforcement proceedings to understand the potential and ongoing costs of enforcement, they should be provided with relevant fee information. It should be provided in advance of enforcement proceedings commencing, where possible. Furthermore, they should be kept updated with cost information during the progress of enforcement proceedings. Advance and ongoing notice is intended to enable parties to exercise their autonomy over the enforcement process.

5. Where parties to enforcement proceedings are represented by lawyers or other professions, information should be provided to them rather than directly to the parties.

6. To facilitate the efficient and complete resolution of enforcement, para. (6) makes provision for the costs of enforcement to be recoverable without a creditor having to take separate steps at the conclusion of the enforcement process. It thus provides for recovery of the advance estimate of such costs by including them in the amount to be recovered where monetary enforcement is being carried out and through provisional seizure of assets where non-monetary enforcement is being carried out.

Recommendation 89 – Proportionality of enforcement costs

(1) Enforcement costs should be both sufficient to facilitate the effective enforcement of all types of debt and, in so far as possible, proportionate to the remedy sought.

(2) Costs that are unnecessarily or improperly incurred or otherwise disproportionate should be borne by the enforcement organ or agent responsible for incurring them.

Comments

1. Enforcement costs should be subject to the proportionality principle. They should, however, nevertheless be sufficient to enable enforcement to be effected properly. One consequence of this is that while enforcement organs and agents should strive to ensure that their costs are proportionate, that should not undermine the provision of effective measures to secure the enforcement of enforceable instruments that concern low-value debts.

2. To ensure that costs are proportionate, enforcement organs and agents should carefully consider the steps to be taken to secure effective enforcement. Where they incur unnecessary or disproportionate costs in taking enforcement action, they should bear such costs.

Recommendation 90 – Allocation of enforcement costs

(1) Debtors should generally be liable to pay the costs of enforcement, including those enforcement costs incurred by a creditor's legal representatives. Where a debtor cannot pay any of the enforcement costs, the creditor should be liable to pay them.

(2) Enforcement fee notes should be enforced together with the enforceable instrument. Payment of such fees should have priority over payments made in fulfilment of the enforceable instrument.

(3) Creditors or third parties who are responsible for any enforcement costs that are incurred unnecessarily should be liable for their reimbursement.

(4) Enforcement organs or other competent authorities may request from creditors payment of security of enforcement costs or advance payment of any such costs before enforcement procedures or measures are commenced. They may do so only where a debtor's solvency is in doubt. Creditors may seek reimbursement of such payments further to para. (1).

(5) Where enforcement costs arise or are agreed after enforcement has been effected, they should be enforced separately.

Comments

1. As a general rule, enforcement costs should be borne by the debtor. This reflects the fact that enforcement measures are required due to the debtor's failure to satisfy a judgment or other enforceable instrument against them voluntarily. Where and to the extent that they cannot be borne by the debtor, enforcement costs should be paid by the creditor. A debtor should, however, only be liable to pay for enforcement costs that are necessarily incurred. Where they are incurred unnecessarily, payment of such costs should be the responsibility of the party that incurred them.

2. Enforcement organs or other competent authorities may seek payment of security of enforcement costs. They may also seek payment in advance of such costs being incurred. They may only do so where there is a good reason to believe that a debtor is unlikely to be able to bear such

costs because there are doubts about their solvency. Where creditors are required to take such steps, they may seek reimbursement from the debtor.

3. To enable enforcement costs to be recovered in a speedy and straightforward manner, they should generally be enforced with the enforceable instrument. If, however, such costs arise or are incurred after enforcement has been effected, it may be necessary to take separate steps to enforce them (see Rec. 10(1)).

Recommendation 91 – Funding enforcement costs

Generally applicable rules concerning litigation funding, including legal aid and fee waivers, should apply to enforcement proceedings.

Comments

1. Enforcement is an essential aspect of the litigation process, whether enforcement procedures or measures are treated as forming part of a State's civil procedure code or are set out in a separate code of enforcement. To ensure that a party can access the enforcement procedure effectively, a State's general rules concerning litigation funding ought to apply to enforcement proceedings. This includes provision of fee waivers concerning enforcement organ fees, which should be provided on an equivalent footing to any kinds of legal aid or fee waivers applicable to civil court proceedings.

2. This Recommendation applies to any form of funding mechanism that is permissible within a State. It therefore applies, as relevant, to access to legal aid schemes as well as private funding mechanisms, such as contingency fee agreements, third-party litigation funding, and legal expenses insurance funding.

3. Funding should be made available to creditors, debtors and third parties.

PART II. ENFORCEMENT OF SECURITY RIGHTS

Background and introduction

Most States provide for the extension of credit with immovable assets as encumbered assets, with the rules varying from State to State. In addition, there is a growing recognition in many States that the availability of low-cost credit for small and medium-sized enterprises based on movables as encumbered assets can have significant economic benefits, by helping those business to grow and create jobs, by improving standards of living, by promoting stability and by contributing to overall economic growth. It is also well recognised that the adoption of a modern secured transactions regime for movable assets by a State can play a key role in promoting low-cost secured credit in that State. In order to be effective, such a regime must not only provide efficient mechanisms for creating security rights and making them effective against third parties and rules for establishing the priority of such security rights vis-à-vis persons holding competing claims to the encumbered assets, but must also include efficient mechanisms for enforcing the security rights.

In the case of movables, modern secured transactions regimes typically reflect three basic principles applicable to the enforcement of security rights. The first principle is that the secured creditor should have significant discretion in determining the method of enforcement – whether the method is non-judicial (that is, action without the involvement of a court or other public authority) or by way of public authority and, if the secured creditor chooses to enforce non-judicially, the methods of obtaining possession of the encumbered assets and disposing of them (*e.g.*, by an auction open to the public or a private negotiated sale or other disposition). The second principle is a strong preference for non-judicial enforcement, on the ground that such enforcement tends to be much more efficient and less expensive than enforcement by judicial proceedings. The third principle is that the disposition of encumbered assets must be conducted in a manner that is fair to the interests of all affected parties, including the grantor, the debtor (if different from the grantor), any guarantors of the secured obligation and any other persons holding a security right or other property interest in the encumbered assets. This last principle is generally realised by requiring that all aspects of the disposition be subject to a standard of commercially reasonable conduct and good faith. The recommendations set forth below are based on these three principles.

In the case of immovables, security rights regimes also typically incorporate rules for enforcing security rights. Some modern regimes provide for enforcement both non-judicially and by way of public authority, but most current regimes require that enforcement over movables be by public authority.

The law governing security rights is a topic addressed by domestic law in most States. In addition, when the encumbered assets are movable property, the topic is also addressed by instruments promulgated by UNIDROIT and its sister organisations. UNIDROIT, notably, has promulgated the Cape Town Convention and its Protocols and the Model Law on Factoring, both of which contain important rules about security rights. More generally, the United Nations Commission on International Trade Law (UNCITRAL) has promulgated a large number of related instruments that address security rights in some or all types of movable property – the United Nations Convention on the Assignment of Receivables in International Trade (2001), the UNCITRAL Legislative Guide on Secured Transactions (2007) (the "UNCITRAL Legislative Guide"), the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010), the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013), the UNCITRAL Model Law on Secured Transactions (2016) (the "UNCITRAL Model Law"), the UNCITRAL Model Law on Secured Transactions: Guide to Enactment (2017), and the UNCITRAL Practice Guide to the Model Law on Secured Transactions (2019). Most of those instruments – including the two broadest – the UNCITRAL Legislative Guide and the UNCITRAL Model Law – contain extensive materials about enforcement of security rights. These instruments were discussed and debated by representatives

and experts from a vast number of States and a large variety of legal traditions and adopted by consensus, indicating their wide acceptability.

As a result, these Best Practices are not written on a clean slate in terms of setting international best practice standards for enforcement of security rights in movables. Accordingly, these Best Practices do not recommend practices that are inconsistent with those instruments. However, deference to the existing instruments does not mean that the portions of this Part addressing movables consist merely of transplanting standards from those instruments. Rather, the primary focus of those instruments is the substantive law of secured transactions. In contrast, the goal of this segment of the Best Practices is to identify best practices that can apply to *enforcement* of security rights. Importantly, the goal is to speak not only to States that have enacted substantive secured transactions law in line with UNCITRAL's recommendations (or the law of which was already aligned with those recommendations) but also, and perhaps more importantly, to those States with substantive law of secured transactions that is not aligned with the emerging international standards, but which may consider reforming enforcement practices so that they better match the economic and social policies of secured transactions (even if such States do not otherwise reform their secured transactions laws to align with international standards). Thus, this Part looks to UNCITRAL and UNIDROIT instruments for guidance and precedent but has not treated those instruments as rigid frameworks for the method of presentation of best practices in the area of enforcement. Moreover, many of the existing instruments embodying standards for enforcement focus more on general principles than on providing detailed guidance. Accordingly, this Part includes not only articulation of basic principles previously adopted by existing instruments (although not necessarily presenting them in the same way), but also, when appropriate, going beyond those precedents to address issues that those instruments did not address or to further elaborate upon issues that they did address.

It should also be noted that the existing international instruments referred to in the preceding paragraphs do not address security rights in immovable property (real property). Accordingly, the recommendations in the Part concerning enforcement of security rights in immovable property are informed by practices in various legal systems but do not reflect the results of any prior work by UNIDROIT or its sister organisations.

The structure of Part II is designed to be functional and user-friendly, with the chapters organised, to a great extent, upon the actions in the enforcement process and the types of encumbered assets involved.

Chapter I. General principles

Recommendation 92 – General principles

(1) Enforcement of security rights may comprise several distinct actions, including obtaining possession of immovable or tangible movable encumbered assets, disposing of all types of encumbered assets by sale or otherwise, and collecting encumbered assets consisting of receivables and other rights to payment.

(2) A creditor should be able to enforce a security right in assets either by way of public authority ("judicially") or without applying to such an authority ("non-judicially").

(3) All rights and obligations concerning the enforcement of security rights in encumbered assets must be exercised in good faith and in a commercially reasonable manner.

Comments

1. Together, paragraphs (1)-(3) set out the basic premises of the recommendations concerning enforcement of security rights. Paragraph (1) is important because it recognises that enforcement is not a unitary concept but, rather, may consist of several different actions depending on the nature of the encumbered assets. Each of those actions is the subject of recommendations that follow. Paragraph (2) states a fundamental principle of the recommendations concerning enforcement of security rights – that a state should allow secured creditors to enforce security rights not only by means of the judicial system but also non-judicially, subject to the recommendations that follow. Non-judicial enforcement may have several advantages. One such advantage is speed; a secured creditor may have the capacity to proceed more quickly to obtain possession of encumbered assets and dispose of it than is the case for judicial enforcement systems. Since many items of encumbered assets will lose value over time, this advantage will often have economic value. A second advantage, present particularly when the secured creditor has specialised expertise as to the type of encumbered assets involved, is that the secured creditor may be better situated to maximise the proceeds of disposition of those encumbered assets.

2. Paragraph (3) sets out the basic requirement that all rights and obligations concerning enforcement of security rights be carried out in good faith and in a commercially reasonable manner. The enforcement of security rights in encumbered assets may have serious consequences for the debtor, grantor and other parties affected such as junior secured creditors and co-owners of the encumbered asset. This applies in particular where, as in these recommendations, enforcement regimes provide for broad party autonomy and decrease the involvement of state institutions. Therefore, many jurisdictions, either by way of statutory law or by way of case law, require secured creditors to act in good faith and in a commercially reasonable manner in the exercise of their rights. A secured creditor who exercises its rights in a manner that is inconsistent with the requirement of good faith and commercial reasonableness may be exposed to liability for damages. The design of such liability rules is left to national legislatures.

3. The requirement of commercial reasonableness is not only an essential feature of national enforcement frameworks but is also widely accepted in international and transnational guides with respect to movables. Both the UNCITRAL Model Law on Secured Transactions (2016) and the UNCITRAL Legislative Guide on Secured Transactions (2007) impose the same objective standard. While this Best Practices Guide does not prescribe a definition of commercial reasonableness it is widely understood to refer to the behaviour of a reasonable person under the circumstances of the specific case at hand. It should be noted that the behaviour of a reasonable person may cover a range of different alternative actions.

4. The obligation of good faith is similarly seen as an essential feature of most national enforcement frameworks and, indeed, of the exercise of private rights in general, and is also reflected in the UNCITRAL Model Law and Legislative Guide. It is generally agreed that good faith is the subjective counterpart to the more objective standard of commercial reasonableness, although the contours of the good faith obligation may vary somewhat from state to state.

5. While requirements of both good faith and commercial reasonable are recommended, their application to issues that arise in the context of enforcement may not significantly differ. There is considerable factual overlap of both requirements even though one is an objective test (commercial reasonableness) and the other a subjective one (good faith). A secured creditor acting in good faith will usually exhibit commercially reasonable behaviour and vice versa.

6. While, as stated in detail in Recommendations 121-123, most of the recommendations in this Part may be waived or varied by agreement of the relevant parties, the obligations of good faith and commercial reasonableness are mandatory and not subject to contrary agreement. However, the parties to a transaction may agree that a certain way of exercising rights and obligations

conforms with those standards, unless doing so is manifestly contrary to standards of commercial reasonableness and good faith.

Chapter II. Secured creditor's right to obtain possession of tangible movables after default

Recommendation 93 – Secured creditor's right to obtain possession of tangible movables upon default on the secured obligation

After default, a secured creditor should be permitted to obtain possession of tangible movables that are encumbered assets without a prior court decision on the secured obligation.

Comments

1. *Source.* Model Law on Secured Transactions (MLST), Article 77.

2. Recommendation 93 provides that the secured creditor's right to possession of tangible movables is triggered by a default on the secured obligation. The failure to pay the obligation when due should constitute default unless the parties have agreed to the contrary, such as by providing a "grace period" after such a failure before it constitutes default. Other events that constitute default may also be set out in the security agreement. Occurrence of those events will also entitle the secured creditor to take possession of the encumbered assets.

3. Recommendation 93 also provides that the right of the secured creditor to take possession of tangible movables upon default on the secured obligation is not dependent on the secured creditor first obtaining a court decision with respect to that obligation. Rather, it is the default itself, not a court decision, that is the condition of the right to obtain possession. This is important because obtaining a judicial decision about the underlying secured obligation would often be time-consuming, even when there is no material dispute about the facts, during which time the economic value of the encumbered assets and, thus, the likely amount received in disposition of it by the secured creditor, would decrease. Thus, a requirement of a prior judicial decision concerning the underlying obligation would increase the creditor's risk of not being made whole by the proceeds of disposition, with the likely effect of increased cost of credit or reduced availability of credit.

Illustration

4. D, a bakery, borrowed a sum of money from L, a lender. Pursuant to the loan agreement, D must repay the loan in full no later than 1 July and D's commercial oven is an encumbered asset for D's repayment obligation. Under the loan agreement, failure of D to repay the loan when payment is due constitutes default. D fails to repay the loan by 1 July. L should be able to obtain possession of D's commercial oven from D without first obtaining a judgment on the repayment obligation.

Recommendation 94 – Secured creditor's right to obtain possession of tangible movables either judicially or non-judicially

Subject to Recommendation 95, the secured creditor should be permitted to obtain possession of tangible movables that are encumbered assets pursuant to Recommendation 93 either by way of public authority ("judicially") or without applying to such an authority ("non-judicially").

Comments

1. Source. Model Law on Secured Transactions (MLST), Article 77.

2. Recommendation 94 provides a secured creditor with two options for obtaining possession of tangible movables pursuant to Recommendation 93. First, the secured creditor may obtain possession of an encumbered asset non-judicially. Alternatively, the secured creditor may seek to obtain possession by application to a court or other authority.

3. The right of a secured creditor to obtain possession of tangible movables without first applying to a court or other authority is an important economic component of secured credit. Encumbered assets can increase the availability of credit or lower its cost only if the secured creditor's rights with respect to the encumbered assets can enable it to reduce or eliminate the loss that would otherwise result from the debtor's default. Yet, the time and cost involved if the secured creditor must apply to a court to obtain an order granting the creditor possession of the encumbered assets (and, thus, making it possible for the secured creditor to dispose of it) diminish the secured creditor's ability to reduce or eliminate the loss by disposing of the encumbered assets and applying the proceeds to the secured debt. After all, a secured creditor will typically incur expenses including legal fees in applying to a court and the extra time involved in obtaining relief from a court or other authority will often result in a diminution of the value of the encumbered assets. Thus, inefficient, costly, and long processes will negatively impact on the availability and the cost of credit, as the secured creditor will anticipate and discount the expected costs of enforcing the security rights.

4. Importantly, however, the secured creditor's option to obtain possession of tangible movables without applying to a court or other authority is subject to limits for the protection of grantors described in [Recommendations 95-99]. These recommendations assure that the secured creditor may obtain possession non-judicially only if (i) the grantor has agreed in writing that the secured creditor will have this right, (ii) reasonable notice of default has been given to the grantor, (iii) the creditor acts in a reasonable manner and does not engage in aggressive behaviour or continue to attempt to obtain possession of the encumbered assets notwithstanding resistance, and (iv) the repossession is in conformity with any applicable consumer protection law.

Recommendation 95 – Conditions that must be satisfied for the secured creditor to obtain possession of tangible movables non-judicially

The secured creditor should be permitted to obtain possession of tangible movables that are encumbered assets non-judicially only if:

(a) there is prior agreement by the grantor, expressed in the security agreement or otherwise in writing, that the secured creditor may do so in the event of default, and

(b) the secured creditor has previously given reasonable notice to the grantor indicating that the grantor is in default and that the secured creditor is permitted to obtain possession non-judicially. No such notice is required if the encumbered assets are perishable or may decline in value speedily.

Comments

1. Source. Model Law on Secured Transactions (MLST), Article 77(2).

2. Under subparagraph (a), the grantor's agreement that the secured creditor may obtain possession of the encumbered assets non-judicially is required in order for the secured creditor to proceed in that manner. Typically, the grantor's agreement will be sought at the outset of the transaction and evidenced by a provision to that effect in the security agreement. Of course, a grantor who has not initially agreed to non-judicial repossession in the security agreement may agree subsequently in writing.

3. Subparagraph (a) provides important protection for the grantor. The requirement that the grantor agree to the possibility of non-judicial repossession of the encumbered assets by the secured creditor will have the effect of making the grantor aware that its default may trigger repossession of the encumbered assets by the secured creditor without the necessity of applying to a court. This can have the dual effect of preventing surprise on the debtor's part when repossession follows default without a judicial hearing and creating an incentive on the part of the debtor not to default on its obligation. In addition, the requirement of agreement by the grantor means that the grantor can decline to enter into a secured transaction under which non-judicial repossession is possible. (Of course, in cases in which the grantor declines to agree to that possibility, the response of the creditor is likely to be raising the cost of credit or declining to extend credit at all.)

4. Subparagraph (b) provides additional protection to the grantor against unfair, surprising and inaccurate repossessions. First, the requirement that the grantor be given reasonable notice of default can prevent situations in which a grantor is surprised by the repossession of its tangible movables that are serving as encumbered assets because it is unaware that the secured creditor believes that the grantor has defaulted. In such a case, the advance notice of default before the secured creditor may repossess the encumbered assets can provide time in which the grantor may be able to correct any factual mistakes by the secured creditor or otherwise seek to convince the secured creditor that the grantor is not in default. Similarly, the requirement of reasonable notice of default enables the grantor to be fully aware that its actions or inactions have triggered the secured creditor's right to take possession of the encumbered assets. This may be particularly important for defaults other than the failure of the grantor or other obligor to pay the secured obligation when it is due in situations where the grantor may be unaware of the existence of those defaults or be aware of the underlying facts but hopeful that the secured creditor will not utilise the opportunity to declare the grantor in default. Finally, the requirement that the notice state that the secured creditor is entitled to obtain possession of the collateral without applying to a court or other authority provides still another reminder to the grantor of the consequences of default. In all cases, the time between the notice of default and the secured creditor's repossession of the tangible movables can be used by the grantor to cure its default or negotiate a settlement or compromise with the secured creditor.

5. In order to meet the aims that the notice is intended to achieve, the notice should be given in an efficient, timely and reliable manner so as to protect the grantor or other interested parties. Thus, the notice required by this Recommendation must be given a reasonable amount of time in advance of the secured creditor's attempt to obtain possession of the encumbered assets to enable the grantor or other interested parties a sufficient time to react in furtherance of the policies. But, at the same time, the Recommendation should not be read to require such a long time period between the notice and the right of the secured creditor to take possession that it undermines the right of the secured creditor to exercise its remedies or jeopardises the secured creditor's ability to realise on the assets to receive maximal value without unreasonable delay.

6. In addition, in order to meet the aims of the notice requirement described in comment paragraph (4), the content and language of the notice should be sufficient to communicate clearly to the grantor both that the grantor is in default and that, as a consequence, the secured creditor may obtain possession of the encumbered assets non-judicially.

Illustrations:

a. D, a bakery, borrowed a sum of money from L, a lender. Pursuant to the loan agreement, D must repay the loan in full no later than 1 July and D's commercial oven is an encumbered asset for D's repayment obligation. Under the loan agreement, signed by D, failure of D to repay the loan when payment is due constitutes default. The agreement also provides that, in the event of default, L may obtain possession of the commercial oven non-judicially. D fails to repay the loan by 1 July. If D defaults on its repayment obligation and L gives D reasonable notice indicating that D is in

default and that L is permitted to obtain possession non-judicially, L should be able obtain possession of the oven without applying to a court or other authority.

b. Same facts as Illustration a except that the loan agreement does not provide that L may obtain possession of the oven non-judicially in the event of D's default. After the loan was made, D signed a separate agreement indicating that L was entitled to obtain possession of the oven in the event of D's default without applying to a court or other authority. If D defaults on its repayment obligation and L gives D reasonable notice indicating that D is in default and that L is permitted to obtain possession non-judicially, L should be able obtain possession of the oven without applying to a court or other authority.

c. Same facts as Illustration a except that L does not give D reasonable notice indicating that D is in default and that L is permitted to obtain possession non-judicially. L should not be able obtain possession of the oven without applying to a court or other authority.

Recommendation 96 – Conduct of secured creditor when seeking to obtain possession of tangible movables non-judicially

The secured creditor should be required to act in a reasonable manner in seeking to obtain possession of tangible movables that are encumbered assets non-judicially. Aggressive behaviour in seeking to obtain possession of the encumbered assets should be prohibited, as should continuing to attempt to obtain possession of the encumbered assets notwithstanding resistance to that attempt by the grantor or other person otherwise in possession of the encumbered assets.

Comments

1. *Source.* Model Law on Secured Transactions (MLST), Article 77(2)(c), which states that the secured creditor is entitled to obtain possession of an encumbered asset after default without applying to a court or other authority only if "at the time the secured creditor attempts to obtain possession of the encumbered asset, the person in possession of the encumbered asset does not object."

2. The language of this Recommendation is more prescriptive than the somewhat vague standard in the MLST. First, this Recommendation requires that the secured creditor act in a reasonable manner in seeking to obtain possession of the encumbered assets. This is consistent with the requirement stated in [Recommendation 92] that a secured creditor must always act in a reasonable manner in enforcing its security right. What constitutes acting in a reasonable manner will, of course, vary depending on the commercial context. In many states, actions that constitute a "breach of the peace," a "breach of public order," or the like are considered inherently unreasonable.

3. Second, the secured creditor may not use aggressive conduct in obtaining possession of the encumbered assets. This is the case even in the absence of overt resistance by the grantor. After all, aggressive conduct by the secured creditor may itself intimidate the grantor into not resisting. What constitutes aggressive conduct depends on the context; however certain conduct is likely to be considered aggressive in any context. For example, a secured creditor who threatens to resort to violence if the grantor resists the creditor's actions in taking possession of the encumbered assets has engaged in aggressive conduct, as does a secured creditor who brandishes a weapon or acts in other ways that are designed to make the grantor too fearful to resist the secured creditor's actions in taking possession of the encumbered assets.

4. Third, the standard is violated if the secured creditor continues its attempts to obtain possession of the encumbered assets notwithstanding the resistance of the person possessing it. This protects both the public order and the safety of both the grantor and those acting on behalf of

the secured creditor in obtaining possession of the encumbered assets. Of course, if the secured creditor ceases its efforts to obtain possession of the encumbered assets non-judicially upon encountering resistance from the grantor, the secured creditor has not lost the opportunity to obtain possession of the encumbered assets. Rather, it may still do so through the process referred to in Recommendation 97 below.

Recommendation 97 – Secured creditor's right to seek expeditious relief to obtain possession of tangible movables

If the grantor (or other person in possession of the encumbered assets) resists an attempt by the secured creditor to obtain possession of tangible movables that are encumbered assets non-judicially in accordance with this Chapter, the secured creditor may seek expeditious relief pursuant to Recommendation 120.

Comments

As discussed in comment 1 to Recommendation 92, there are significant advantages to a system that provides for non-judicial enforcement of security interests. Accordingly, it is important to provide mechanisms that allow for the speedy and fair resolution of disputes about such enforcement that do not unnecessarily dilute those advantages. See Recommendation 120 for those mechanisms.

Recommendation 98 – Limits on taking possession of excess encumbered assets

If there are multiple items of encumbered assets, and the net amount that can reasonably be expected to be realised by disposition of all of those items pursuant to Recommendations 100-106 would be significantly in excess of the amount of the secured obligation, and the secured creditor without additional burden or expense can obtain possession of a smaller set of those items that would nonetheless assure satisfaction of the secured obligation and any related costs, including expenses of repossession and disposition, the secured creditor's right to obtain possession non-judicially should be limited to such a smaller set of items of encumbered assets.

Comments

1. Source. This Recommendation has no antecedent in MLST, which does not address the issue. It is added here because it provides specific guidance as to how the secured creditor's general obligation of good faith applies in the context of secured obligations that might be characterised as "oversecured". It is also consistent with the general principle of commercial reasonableness.

2. The Recommendation applies when there are multiple encumbered assets and it is clear that the expected net value to be realised by disposition of all of them would be significantly higher than the amount of the debt that they secure. In accordance with the obligation of good faith and commercial reasonableness, in such a case the secured creditor should not take possession of (and subsequently dispose of) all of the encumbered assets if it is clear that taking possession of, and disposing of, a smaller set of collateral would be no more burdensome for the secured creditor and would clearly realise an amount sufficient to satisfy the claims secured by the encumbered assets. The impact on the grantor of excessive repossession would be unreasonable and would create unjustified costs for the grantor in losing the encumbered assets (even if money equal to the excess amount realised is eventually returned to the grantor). In particular, an excessive repossession and disposition of items whose disposition was not necessary to ensure the full satisfaction of the secured obligation might debilitate the position of the grantor in successfully running an ongoing business activity or in satisfying its other debts. Thus, even though the secured creditor is generally entitled to take possession of and dispose of all of the encumbered assets in order to satisfy the secured

obligation, there are circumstances when a partial, selective, and non-excessive action is commercially reasonable, and taking possession of significantly more assets may be inconsistent with the obligation of good faith.

Recommendation 99 – Applicability of additional measures for the protection of consumers

The secured creditor's right to obtain possession of tangible movables that are encumbered assets non-judicially should be subject to any additional measures provided for the protection of consumers in the relevant State.

Comments

1. Source. Model Law on Secured Transactions (MLST), Article 1(5).

2. States employ a variety of legal techniques to provide extra protection to consumers in credit transactions, both secured and unsecured. In the context of secured credit, this sort of protection may involve mandated disclosures or other measures to assure that consumers have an opportunity to understand the transactions they are entering into, limits on the assets that can serve as encumbered assets, limits on the secured creditor's right to take possession of the encumbered assets, etc. This Recommendation does not endorse any particular technique for protecting consumers, leaving that to the policies of the enacting state. A state should recognise, however, that some protections for consumers may concomitantly increase risk for creditors, and the result of such an increase in risk may be higher cost of credit or lower availability of credit. Thus, in deciding its techniques for protecting consumer debtors, states should strive for an optimal balance of protections and availability of credit at reasonable cost. Of course, such a balance will inevitably differ from state to state.

Chapter III. Secured creditor's right to realise on encumbered assets consisting of movables after default

Section 1. Disposition of encumbered assets

Recommendation 100 – No necessity of judgment

After default, a secured creditor should be permitted to dispose of encumbered assets consisting of movable assets without the necessity of first obtaining a judgment on the secured obligation.

Recommendation 101 – Choice of judicial disposition or non-judicial disposition

The secured creditor should be permitted to dispose of encumbered assets that are movable property either

(a) by application to [a court or other authority to be specified by the enacting State] ("judicially"); or

(b) without applying to a court [or such other authority] ("non-judicially").

Recommendation 102 – Methods of non-judicial disposition

When the secured creditor elects to dispose of encumbered assets under Recommendation 101(b):

(a) The secured creditor should be permitted to dispose of the encumbered assets by any method [reasonable under the circumstances] that it selects, including sale, lease, license, or other method of disposition.

(b) The secured creditor should be permitted to select the manner, time, place and other aspects of the method of disposition, including whether to dispose of encumbered assets individually, in groups or altogether, and whether the method of disposition will be public (such as by an auction, which may be an online auction) or private (such as by a negotiated sale to a third party), so long as that selection is reasonable under the circumstances. The law should remove impediments to, and otherwise accommodate, technological advances that may improve the efficiency and effectiveness of dispositions of encumbered assets (such as online auctions).

Recommendation 103 – Notice of intended disposition

(1) At least [ten (10)] days before disposing of the encumbered assets, the secured creditor should be required to give written notice of its intention to do so unless the encumbered assets are perishable, may decline speedily in value, or is of a kind sold on a recognised market.

(2) The notice of intention to dispose of the encumbered assets should be given by the secured creditor to:

(a) The grantor;

(b) Any other person liable for the secured obligation;

(c) Any other person with a right in an encumbered asset who informs the secured creditor of that right in writing at least [ten (10)] days before notice is sent to the grantor;

(d) [in a state in which notice of a security right may be registered in a registry to which the secured creditor has access, any other secured creditor who has registered such a notice at least [seven (7)] days before the notice is sent to the grantor]; and

(e) Any other secured creditor from whom the disposing secured creditor took possession of the encumbered assets.

(3) The notice of intention to dispose of the encumbered assets should contain, in the language of the security agreement or another language that is reasonably expected to inform the recipient of its contents:

(a) A description of the encumbered assets;

(b) In the case of a public disposition, the time, place, and manner of that disposition;

(c) In the case of private disposition, a date after which the encumbered assets will be disposed of;

(d) A statement that the grantor or any other person with a right in the encumbered assets may terminate the enforcement process by paying or otherwise performing the secured obligation in full, including interest, and the reasonable cost of enforcement, so long as payment or performance occurs before the secured creditor disposes of the encumbered assets or enters into a contract to do so; and

(e) A statement, as of the date of the notice, of the amount necessary to be paid to terminate the enforcement process.

Recommendation 104 – Right of buyer or other transferee

If a secured creditor disposes of encumbered assets non-judicially:

(a) The buyer or other transferee should acquire the grantor's right in the encumbered assets free of the rights of the disposing secured creditor and any competing claimant, except rights that have priority over the right of the enforcing secured creditor.

(b) If the disposition is by way of lease or license, the lessee or licensee should be entitled to the benefit of the lease or license during its term except as against creditors with rights that have priority over the right of the enforcing secured creditor.

(c) If the disposition is not in compliance with Recommendations 100-103, the buyer or other transferee, lessee, or licensee should nonetheless acquire the rights described in paragraphs (a) and (b) unless it had knowledge of such non-compliance that materially prejudiced the rights of the grantor or another person.

Recommendation 105 – Distribution of proceeds of disposition

(1) The secured creditor should be required to distribute the proceeds of that disposition in the following order until no proceeds remain:

(a) To itself in reimbursement for reasonable costs of repossession and disposition;

(b) To any holders of preferential claims required to be paid first under the law of the applicable state;

(c) To itself in satisfaction of the secured obligation;

(d) To any subordinate competing claimant that, prior to distribution of proceeds, notified the enforcing secured creditor of its claim, to the extent of the amount of that claim; and

(e) To the grantor.

(2) The enforcing secured creditor may elect, at any time, before or after payment of either creditor under paragraph (1), to deposit the surplus to a judicial authority, a deposit fund or another person or entity authorised to receive funds, for distribution to the remaining competing claimants.

Recommendation 106 – Liability for deficiency

If the proceeds applied to the secured obligation under Recommendation 105(1)(c) are insufficient to satisfy that obligation, the debtor, along with any other person liable for the secured obligation, should remain liable for the deficiency.

Comments to Recommendations 100-106

1. Source. Recommendations 100-102 are based on UNCITRAL Model Law, art. 78, paras. 1-3, 81. See, also, the UNCITRAL Legislative Guide, Chapter VIII, paras. [48, 57-59]; and the Cape Town Convention, arts. [8-10]. Support for the establishment of expeditious judicial proceedings may be found in the UNCITRAL Model Law, art. 73, paras. 2-3 and Article 74; and the UNCITRAL Legislative

Guide, Chapter VIII, para. 19, 32, 37, 59 and Recommendation 138. Recommendation 103 is based on the UNCITRAL Model Law, art. 78, paras. 4, 5 and 8; and the UNCITRAL Legislative Guide, Chapter VIII, paras. 38-47. Recommendation 104 is based on UNCITRAL Model Law, art. 81; and the UNCITRAL Legislative Guide, Chapter VIII, para. 77. Existing international models for Recommendations 105-106 are: the UNCITRAL Model Law, art. 79; and the UNCITRAL Legislative Guide, Chapter VIII, paras. 24, 61-62 and Recommendations 152-153.

2. Modern secured transactions regimes typically afford the secured creditor the option of enforcing its security right with the help of a court or other authority specified by the State (referred to for convenience in these comments as a "judicial proceeding") or on its own, without the assistance of a court or other authority (referred to for convenience in these comments as a "non-judicial process"). This choice belongs to the secured creditor alone. Thus, if the secured creditor wishes to proceed by non-judicial process, the debtor or grantor may not require the secured creditor to proceed by judicial proceeding.

3. Non-judicial processes tend to be much more efficient and less costly than judicial proceedings. Thus, secured creditors often will elect to proceed using a non-judicial process. However, as noted below, situations also exist in which a secured creditor may prefer to proceed by judicial process.

4. In order to promote the availability of low-cost credit, States should consider establishing expedited judicial proceedings for the enforcement of security rights (*e.g.*, proceedings requiring only limited production of evidence and an abbreviated schedule for conducting discovery, filing pleadings and holding a hearing). Such a proceeding is designed to provide an incentive to prospective secured creditors who might be deterred by the prospect of having to undergo an extended and expensive judicial proceeding if they need to enforce their security rights. This form of expedited proceeding should not be confused with the expedited process described in Recommendation 120 to resolve disputes concerning enforcement by non-judicial process.

5. If the secured creditor elects to proceed by judicial proceeding, all aspects of the resulting disposition of the encumbered assets are to be determined by rules established by the court or other authority. The creditor nevertheless may wish to avail itself of this option, for example, in a situation where the debtor is known to be litigious and the secured creditor wishes to proceed in a manner that best insulates it from potential liability to the debtor. The recommendations preserve that option for the secured creditor.

6. If the secured creditor elects to proceed by non-judicial process, the method, manner, time, place and other aspects of the sale or other disposition, lease or license (including whether to sell or otherwise dispose of, lease or license encumbered assets individually, in groups or altogether) are to be determined by the secured creditor. However, it is important to bear in mind that this broad discretion given to the secured creditor should be tempered and that all aspects of the sale must be subject to a reasonable standard of conduct and good faith. It should be noted that some States have additional limitations for out-of-court sales of encumbered assets based on the status of the grantor (*e.g.*, if the grantor is a consumer) or of the asset (*e.g.*, if the asset is a homestead).

7. Modern secured transactions regimes often recognise that a variety of methods for disposing of encumbered assets are available to a secured creditor depending upon the circumstances. These methods may include, without limitation:

(a) A public auction conducted under the supervision of a court (to be distinguished from a judicial process);

(b) A public auction conducted by the secured creditor or by a third party in the business of conducting public auctions;

(c) A negotiated private sale to a third party, which may or may not need an authorisation or confirmation by a court; or

(d) Any other method that is commercially reasonable given the nature of the encumbered assets and other relevant circumstances.

In each case, a secured creditor may dispose of the entire asset or, if commercially reasonable, a limited interest, such as a lease or license.

8. Modern secured transactions regimes generally adopt the principle that a secured creditor should have the choice to realise on encumbered assets in a manner which the creditor believes is likely to maximise its recovery. This principle is based on the recognition that, because the creditor initially made the decision to extend credit based on its evaluation of the value of the encumbered assets, it is in a good position to determine how best to dispose of it in a way that realises the encumbered assets' economic value. In many situations, this will be a sale of the encumbered assets, either at a public auction or in a private negotiated sale. However, depending on the nature of the encumbered assets, a sale may not be the best way in which to realise the economic value of the encumbered assets. For example, if the market for the sale of the assets comprising the encumbered assets is temporarily depressed, it may be that a short-term lease of the encumbered assets to a third party would be commercially sensible, thereby allowing the secured creditor to postpone a sale of the encumbered assets until the market recovers. Such a result would also typically be in the best interests of the debtor and any guarantors, since their liability to the secured creditor will be reduced by the proceeds generated by the disposition, including the proceeds of a short-term lease as well as any future sale of the encumbered assets. In the case of encumbered assets consisting of intellectual property, such as a valuable patent, a license of the encumbered assets to a third party may be a desirable alternative.

9. Best practices for disposition of encumbered assets should be sufficiently flexible to take into account the impact of evolving technology. A principal example is the practice, which has become prevalent in some States recent years, of conducting public sales of encumbered assets using an Internet platform ("online dispositions"). Such sales can be either hybrid (in which case a physical venue exists where bidders can inspect the encumbered assets or attend the auction simultaneously with online bidders) or purely online. In States where online dispositions have become prevalent, Internet platforms have emerged that specialise in particular types of assets, and often have substantial subscriber bases comprised of persons or entities who are interested in bidding at auctions of those types of assets.

10. One advantage of an online disposition over a more traditional auction (in which the bidders must be physically present) is that an online disposition can significantly expand the number of bidders by including those that are unable or unwilling to travel to the physical location where the sale is being held. A second advantage is that online dispositions can reduce the potential for collusion among bidders that might otherwise exist in a traditional sale, because bidders can be isolated in separate "virtual rooms" during the sale.

11. As with other methods of disposition, such as private sales or judicially conducted sales, the mere fact that a higher price could have been obtained in an online auction does not mean that the disposition was commercially unreasonable.

12. In States where online dispositions are in wide use, judicial decisions have overwhelmingly found that such online dispositions can satisfy the test of commercial reasonableness under the applicable law governing dispositions of encumbered assets. Based on such decisions, the following characteristics of online sales can be identified as contributing to their commercial reasonableness:

(a) Engaging the services of an auctioneer who is experienced in advertising and conducting online auctions of the type of assets to be sold.

(b) To the extent possible, making sure that the online sale is consistent with the standard practices among dealers in the type of assets to be sold.

(c) Using an established online Internet platform that already has a wide subscriber base in order to attract bidders.

(d) Ensuring that proper notice of the auction is sent sufficiently in advance of the sale, including a suitable description of the encumbered assets and instructions for conducting physical inspection (if available).

13. Online auctions represent one example of how modern technology can enhance the process of disposing of encumbered assets. No doubt other examples will emerge in the future. Best practices should be sufficiently flexible to accommodate technological advances that aid in the disposition of encumbered assets in a way that is consistent with the rights and obligations of all affected parties. A more detailed discussion of online auctions may be found at Recommendation 52.

14. Modern secured transactions regimes generally recognise that the secured creditor may be the bidder at a public auction (either by bidding cash or by offsetting the secured obligation against the purchase price of the encumbered assets), but may not be the purchaser at a private sale (unless the collateral is of a kind that is customarily sold on a recognised market or the subject of widely distributed standard price quotations). The reason for this approach is that a public auction, by its very nature, affords protections to the grantor and competing claimants that a fair price will be obtained. As noted above, the secured creditor may effect the purchase either by bidding cash or "credit-bidding" all or any portions of the secured obligation (*i.e.*, treating the extinguishment of all or a portion of its secured obligation as the purchase price at the auction).

15. Regardless of whether a disposition of encumbered assets is conducted pursuant to a judicial proceeding or non-judicially, one of the cornerstones of this process is the requirement that notice of the proposed sale or other disposition be given to the grantor, the debtor and other affected parties, who will consequently have the opportunity to object to the disposition or pursue any relief or remedy available to them. See Recommendation 103 for this requirement in the context of non-judicial disposition.

16. However, there are a number of exceptions to the requirement of notice. One exception is where the encumbered assets are perishable, such as in the case of farm produce. In this case, delaying the proposed disposition in order to provide notice could result in damage to the goods and a decrease in their value, a result that would be harmful not only to the secured creditor but to the grantor, the debtor and holders of junior security rights as well. A second exception is where the encumbered assets are the subject of a recognised market, as is often the case with commodities, as well as with securities and financial assets traded on exchanges. In this situation, the existence of the market provides reasonable assurance to all parties that the price received by the secured creditor upon a sale is fair, and nothing is to be gained by delaying the sale in order to provide notice.

17. The parties entitled to notice, listed in Recommendation 103(2), have an interest in the proposed disposition of the encumbered assets. This would, of course, include the debtor, whose obligation to the secured creditor will be reduced by the proceeds of the disposition. It will also include: the grantor of the security right (if different than the debtor); any person with a right in the encumbered asset that informs the secured creditor of that right in writing at least a short period of time (to be specified by the enacting State) before the notice is sent to the grantor; any other secured creditor that registered a notice with respect to a security right in the encumbered asset at least a short period of time (as specified by the enacting State) before the notice is sent to the grantor; and

any other secured creditor that was in possession of the encumbered asset when the enforcing secured creditor took possession.

18. However, the secured creditor's ability to identify the parties having a competing interest in the encumbered assets will depend, in part, on whether the relevant State has a searchable public secured transactions registry. When such a registry is available, the law should not require the secured creditor to perform searches beyond the registry, and other creditors that have not recorded their security right prior to enforcement should not be entitled to receive notice, even if the enforcing secured creditor may have knowledge of such other creditors. When such a registry is not available, other competing creditors or claimants should notify the secured creditor to inform it of their existing competing rights, according to Recommendation 103(2)(c) in order to ensure their interests are recognised in enforcement. The enforcing secured creditor should not be required to perform any searches of court records for identifying judicial lien creditors. Judicial lien creditors may enforce their liens against the secured creditor either by providing notice to the secured creditor before enforcement of the secured creditor's security interest in the encumbered assets (if registration of the judicial lien in a registry is not required, and subject to the priority rules of the enacting state) or by registering the judicial lien in the secured transactions registry, when such registration is available.

19. It is also essential that the notice of a proposed disposition contain sufficient information to enable the parties receiving the notice to make informed decisions concerning the disposition, and that the notice be delivered to the recipients in sufficient time to enable them to implement these decisions. These matters are addressed in Recommendation 103 (1) and (3).

20. It is essential to an efficient and well-functioning secured transactions regime that third parties be willing to acquire assets from enforcing secured creditors, thereby generating proceeds which the secured creditor can apply to the secured obligation. Thus, it is important that the law define, in an unambiguous way, the rights that are acquired by these third parties.

21. Recommendation 104 addresses this issue in the context of non-judicial disposition. Where the disposition takes the form of a sale, the buyer or other transferee acquires all of the grantor's right in the encumbered assets, free of the rights of the enforcing secured creditor and any competing claimant, except rights that have priority over the right of the enforcing secured creditor. Thus, for example, if the encumbered assets that are being sold pursuant to a public sale are subject to a security right that has priority over the security right of the enforcing creditor, the buyer at such a sale would take ownership of the assets subject to such senior security right. In like manner, if, prior to the public sale, the secured creditor has leased the encumbered assets to a third-party lessee for a lease term that extended beyond the date of the public sale, such lease would be unaffected by the sale, unless the assets are subject to a security right that is senior to the rights of the enforcing security creditor.

22. Recommendation 104(c) addresses the situation in which the disposition fails to comply with the requirements of the applicable recommendations. Here, the rule is that the rights of the buyer, transferee, lessee or licensee are unaffected by such non-compliance, provided that it does not have knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person. This Recommendation is essential to encourage parties to be willing to acquire assets from a disposing secured creditor, whether in a judicial proceeding or a non-judicial disposition process.

23. Recommendation 105(1) addresses the question of how proceeds or other realisations of enforcement actions are to be distributed and prescribes the order of application of proceeds where the secured creditor enforces its security right pursuant to a non-judicial process. The proceeds are first applied to any preferential claims accorded priority by the law of the State (such as wages or taxes), and then are applied in satisfaction of the secured obligation owing to the enforcing secured

creditor (but only after deducting the reasonable costs of enforcement incurred by the enforcing secured creditor).

24. If there are any proceeds remaining after satisfaction of preferential claims and the secured obligations, the enforcing secured creditor must turn over these proceeds to the holder of any competing claim that is subordinate to the claim of the enforcing secured creditor (such as the holder of a junior security right), but only if such subordinate claimant has notified the enforcing secured creditor of its claim prior to the distribution of this surplus by the enforcing secured creditor. Any balance remaining after this application must be remitted to the grantor.

25. If the enforcing secured creditor is uncertain as to what parties are entitled to receive any surplus remaining after satisfaction of the secured obligation, or if the secured creditor wishes to avoid any dispute as to how it distributed such surplus, the secured creditor may pay the surplus into a competent judicial or other authority, or to a public deposit fund or another person or entity to be specified by applicable law for distribution in accordance with the provisions of this Law on priority (Recommendation 105(2)).

26. Recommendation 106 embodies the principle that the debtor and any other person liable for the secured obligation remains liable for any deficiency owing on the secured obligation after application of the net proceeds of enforcement. Note that, for specific kinds of financings structured as "non-recourse" or involving protected individuals, certain States have enacted rules liberating the debtor of the deficiency upon realisation on the encumbered assets. This may also be the case when the creditor accepts the encumbered assets in full satisfaction of the secured obligation (see Section 2 below).

Illustrations

a. A secured creditor (SC) has made a loan to a borrower (B) secured by a security right in B's inventory of raw materials and finished goods. B has defaulted under its loan agreement with SC, and SC wishes to enforce its security rights. After considering the various alternatives available to SC to realise on its encumbered assets, SC has determined that the most efficient and effective method of enforcement is to conduct a negotiated sale of the inventory to a third party engaged in a business similar to B's business. SC may pursue this method of enforcement even though other methods of enforcement, such as a sale via a judicial proceeding or a non-judicial public auction, are available to SC.

b. SC has elected to conduct a non-judicial private sale of encumbered assets owned by its borrower (B). The encumbered assets consist of plastic resins. Because these assets are not of a type that are perishable, may decline in value speedily or be sold on a recognised market (as described in Recommendation 103(1)), SC is required to give the notice prescribed by Recommendation 103. However, if the encumbered assets consisted of perishable produce, by reason of Recommendation 103(1), SC would not be required to give notice.

c. In a situation where multiple secured creditors exist, secured creditor No. 1 (SC1) has enforced its senior security right in the encumbered assets owned by B by means of a non-judicial public auction sale of the encumbered assets. Purchaser (P) is the successful bidder the sale. Another secured creditor (SC2) holds a security right in the encumbered assets that is subordinate to SC1's security right. Under Recommendation 104, P would acquire the assets free from the rights of B, SC1 and SC2. If, in the same example, SC2's security right was senior to SC1's security right, P would acquire the assets from of the rights of B and SC1, but still subject to the rights of SC2. SC1 has conducted a non-judicial public sale of encumbered assets securing an obligation in the amount of EUR 1,000,000 owing by B. SC1 has also incurred reasonable enforcement costs of EUR 20,000 in connection with recovering possession of the encumbered assets and storing them pending the sale, and the costs of the auctioneer hired to conduct the sale. The applicable State law accords a priority

over a security right to taxes owing to the State, which in this case are EUR 15,000. Another creditor (SC2) has notified SC1, prior to the distribution of the sale proceeds, that it holds a junior security right in the encumbered assets to secure an obligation in the amount of EUR 30,000. The proceeds of the sale are EUR 1,500,000. Under Recommendation 105, SC1 would be required to disburse the proceeds as follows:

(1) SC1 may first reimburse itself for the EUR 20,000 of enforcement costs;

(2) SC1 would then disburse EUR 15,000 to the State to pay the priority claim for taxes;

(3) SC1 would then reimburse itself for the EUR 1,000,000 credit representing the secured obligation;

(4) SC1 would then disburse EUR 30,000 to SC2; and

(5) SC1 would then disburse the remaining EUR 435,000 proceeds to B.

Section 2. Acquisition of encumbered assets in total or partial satisfaction of the secured obligation

Recommendation 107 – Secured creditor's right to acquire one or more encumbered assets in total or partial satisfaction of the secured obligation

As an alternative to disposition of encumbered assets, the secured creditor should be permitted to acquire one or more encumbered assets in total or partial satisfaction of the secured obligation in accordance with the procedure described in Recommendations 108-109.

Recommendation 108 – Required proposal

(1) The secured creditor may, after the occurrence of an event of default under the secured obligation, send a written proposal to acquire one or more encumbered assets in total or partial satisfaction of the secured obligation to the parties listed in Recommendation 103(2).

(2) The written proposal should include the following information:

(a) A statement that the grantor or any other person with a right in the encumbered assets may terminate the enforcement process by paying or otherwise performing the secured obligation in full, including interest, and the reasonable cost of enforcement;

(b) The amount required, as of the time the proposal is sent, to satisfy the secured obligation, including interest and the reasonable cost of enforcement;

(c) The encumbered assets that the secured party proposes to acquire, and the amount of the secured obligation that is proposed to be satisfied;

(d) A date, no earlier than ten (10) days after the recipient receives the notice, after which the secured creditor will acquire the encumbered assets in total or partial satisfaction of the secured obligation.

Recommendation 109 – Conditions for acquisition of encumbered assets

If the secured creditor's proposal is to acquire the encumbered assets in total satisfaction of the secured obligation, the acquisition occurs automatically on the date specified pursuant to

Recommendation 108(2)(d) unless before that date the secured creditor receives an objection in writing from any person entitled to receive the proposal under subparagraph a. If the secured creditor's proposal is to acquire the encumbered assets in partial satisfaction of the secured obligation, the acquisition occurs only if the secured creditor receives the consent in writing of all parties referred to in Recommendation 108(1) by the date specified pursuant to Recommendation 108(2)(d).

Recommendation 110 – Right of grantor to request proposal

The grantor may invite the secured creditor to make a proposal under Recommendation 108.

Comments to Section 2

1. Source: Recommendations are based upon the UNCITRAL Model Law, art. 80; and the UNCITRAL Legislative Guide, Chapter VIII, paras 65-70 and Recommendations 156-159.

2. Section 2 introduces an alternative procedure for the efficient enforcement of security rights that has been adopted by many States as part of the modernisation of their secured transaction regimes. There often are situations in which both an enforcing security creditor, the grantor, the debtor and other interested parties recognise that it is in their best interests to avoid the enforcement costs of a sale, whether pursuant to a judicial proceeding or a non-judicial process, and to permit the secured creditor to retain the encumbered assets. Under this approach, the secured obligation is reduced by the value of the encumbered assets. This may result in the full satisfaction of the secured obligation, while in other situations the secured obligation may only be partially reduced (with the result that the debtor remains liable for the balance of the secured obligation). This practical economic approach is embodied in Section 2.

3. In order for this procedure to be utilised, a number of conditions must be satisfied. The first condition is that this agreement be reached only after the debtor is in default in its secured obligation and the secured creditor is entitled to enforce its security right. The debtor is not permitted to agree to this procedure in its security agreement with the secured creditor, or even any time after the security agreement is entered into but prior to the occurrence of a default. This safeguard is designed to ensure that the debtor does not agree to the procedure when it is seeking to obtain the funds from the secured creditor and may be in a disadvantageous negotiating position vis-à-vis the secured creditor.

4. The second condition is that this arrangement must be consensual: the grantor, the debtor and other affected parties must agree to both the procedure and the amount by which its secured obligation is being satisfied. The manner in which this consent must be evidenced depends upon whether the proposed acquisition is in full or partial satisfaction of the secured obligation. If the proposal is for the acquisition of an encumbered asset in full satisfaction of the secured obligation, the encumbered asset is deemed acquired unless the secured creditor receives an objection in writing from any person entitled to receive the proposal within [a short period of time to be specified by the enacting State] after the proposal is received by that person. On the other hand, if the proposal is for the acquisition of the encumbered asset in partial satisfaction of the secured obligation, the acquisition is deemed to have occurred only if the secured creditor receives the consent in writing of all persons entitled to receive the proposal within [a short period of time to be specified by the enacting State] after the proposal is received by each of them.

5. Section 2 also prescribes the parties to whom notice of the proposed acquisition must be given. Note that notice must be given to the holders of junior security rights in the encumbered assets, so long as such holders have registered their interests in a public registry (if available) or have otherwise provided notice to the enforcing creditor, to give them the opportunity to pay the

secured obligation if they believe that the encumbered assets is worth more than the secured obligation. Recommendation 110 provides that the debtor may request the secured creditor to make a proposal and that, if the secured creditor agrees to do so, it must proceed as provided in Recommendations 108-109.

Illustration:

Secured creditor (SC) has made a loan of EUR 1,000,000 to a borrower (B). The loan is secured by a large printing press, which SC believes to have a fair market value approximately equal to the amount of the secured obligation. SC wishes to enforce its security right in the printing press, but does not wish to go through the costly and time-consuming process of a judicial proceeding or even the lower costs associated with a non-judicial process. Therefore, SC proposes to B that SC acquire title to the printing press, in exchange for which the secured obligation would be satisfied. B agrees that this procedure would be in its best interest, because it avoids that risk that a judicial or non-judicial enforcement could realise less than the full amount of the secured obligation, in which case B would remain liable for the deficiency.

Section 3. Other rules concerning disposition of encumbered assets

Recommendation 111 – Right to take over enforcement from another secured creditor

Notwithstanding commencement of enforcement by another secured creditor with respect to an encumbered asset, a secured creditor whose security right in that encumbered asset has priority over that of the enforcing creditor should be able to take over enforcement from the enforcing secured creditor at any time before the enforcing secured creditor disposes of the encumbered assets, enters into an agreement to do so, or acquires the encumbered assets in total or partial satisfaction of the secured obligation. In doing so, the senior creditor may elect a different enforcement method.

Comments

1. *Source:* Recommendation 111 is based upon the following existing international models: the UNCITRAL Model Law, art. 76; and the UNCITRAL Legislative Guide, Chapter VIII, para. 13, 36.

2. Modern secured transactions regimes seek to maximise the extent to which a debtor may use its assets to obtain credit. Thus, these regimes typically will recognise the ability of an owner to grant more than one security right in an asset. Sometimes, the holders of these multiple security rights will enter into an agreement (commonly known as an "intercreditor agreement" or "subordination agreement") that confirms or alters that priority of the multiple security rights, or modifies the rights of the holders of such security rights (such as by restricting the ability of the junior secured creditor to enforce its security right). However, modern secured transactions regimes generally also recognise that, in the absence of an agreement restricting its right to enforce, the holder of a junior security right may enforce its security right when it is entitled to do so under the terms of its security agreement with the grantor, regardless of whether the senior security right is in default. This principle encourages creditors to extend secured credit to a debtor on a subordinate basis, thereby maximising the debtor's ability to utilise its assets to obtain credit to the fullest extent.

3. It is also important that the senior secured creditor have a right to supervise and administer an enforcement process relating to the assets in which it holds a senior security right. The senior secured creditor will be entitled to receive the first, and possibly the only, proceeds of the sale of the encumbered assets, and therefore should have the ability to determine how the sale should be conducted. Thus, Recommendation 111 sets forth the principle that if a junior secured creditor commenced an enforcement process (regardless of whether the senior secured creditor has also

commenced enforcement), the senior secured creditor should have the right to commence enforcement of its security right, which includes the option to take over and conduct the disposition process initiated by the other creditor.

4. Recommendation 111 also provides that, once a senior secured creditor takes over an enforcement process, it may change the form of the process and utilise any remedy available to it under the law. For example, if the enforcement process commenced by the holder of the junior security right is a non-judicial public sale, the holder of the senior security right may elect instead to sell the encumbered assets via a private negotiated sale.

Illustrations:

1. Secured creditor No. 1 (SC1) has extended credit to a borrower (B), secured by a security right in B's equipment. The equipment is also subject to a junior security right in favour of Secured creditor No. 2 (SC2). B is in default in the payment of the secured obligation, and SC2 has commenced a process to enforce its security right by means of a public sale, to be held on 15 May. SC1 learns of the impending sale and elects to take over the enforcement process. SC1 believes that the public sale scheduled by SC2 is the most effective procedure for enforcing a security right in the equipment, and therefore notifies SC2 on 10 May that SC1 has decided to take over (supervise) the public sale process. From that time forward, SC1 has the right to conduct the public sale.

2. In a different example, if SC1 determines that a private negotiated sale of the equipment to a third party would be the most effective method of enforcing SC1's security right. Therefore, SC1 notifies SC2 on 10 May that SC1 has decided to take over the enforcement process, calls off the public sale and proceeds to conduct a private sale of the equipment in accordance with the recommendations governing the conduct of private sales.

Recommendation 112 – Right of grantor or others to terminate enforcement

The grantor, any other person liable for the secured obligation, or any other person with a right in the encumbered assets should be entitled to terminate enforcement of the security right by the secured creditor by paying or otherwise performing the secured obligation in full, including the reasonable cost of enforcement, at any time before the secured creditor sells or otherwise disposes of the encumbered assets, enters into an agreement to do so, or acquires the encumbered assets in total or partial satisfaction of the secured obligation.

Comments

1. Source: Recommendation based upon the UNCITRAL Model Law, art. 75; and the UNCITRAL Legislative Guide, Chapter VIII, paras. 22-24.

2. It is axiomatic that a secured creditor may not enforce its security right if the secured obligation has been paid in full. This raises the question as to whether, once a secured creditor has commenced an enforcement process, the debtor or another affected party has the right to halt the enforcement process by fully satisfying the secured obligation.

3. Recommendation 112 addresses this situation and provides that the grantor, any other person with a right in the encumbered asset, or the debtor each has the right to terminate an enforcement process simply by paying the secured obligation (plus reasonable costs incurred by the secured creditor in connection with the enforcement process) in full at any time prior to the earlier of (i) the sale or other result contemplated by the enforcement process and (ii) the conclusion of an agreement by the secured creditor of an agreement by the secured creditor to sell or otherwise dispose of the encumbered assets.

Illustrations

1. Secured creditor (SC) has commenced an enforcement process in the form of a non- judicial public auction of the encumbered assets schedule for 15 May. The secured obligation consists of an unpaid loan in the principal amount of EUR 500,000 made by SC to the borrower (B). Either B, the grantor of the security right (if different than B), or any other person who has a right in the encumbered assets, has the right to terminate the enforcement process by paying the secured obligation in full, together with the reasonable costs that SC has incurred in setting up the sale or otherwise relating to the enforcement of its security rights, prior to the sale on 15 May.

2. If, in the example above, SC had elected to proceed by a private sale, and had, on 10 May, entered into an agreement to sell the encumbered assets to a third party, then B, the grantor of the security right (if different than B), or any other person who has a right in the encumbered assets, would only have the right to terminate the enforcement process by paying the security obligation in full, together with reasonable enforcement costs, prior to the signing of the agreement on 10 May.

3. If, on the other hand, SC had elected to dispose of the encumbered assets by leasing or licensing them to a third party, and had entered into a lease or license agreement with such third party, then B, the grantor of the security right (if different than B), or any other person who has a right in the encumbered assets, would have the right to terminate the enforcement process by paying the outstanding balance of the secured obligation (after applying any lease or license payments received by SC), together with enforcement costs, prior at any time during the term of the lease or license. However, in this circumstance, the rights of the lessee or licensee must be fully respected by B (or other person who has terminated enforcement), and SC would no longer be entitled to receive any lease or license payments paid after satisfaction of the secured obligation.

Chapter IV. Enforcement of security rights over rights to receive payment and credit instruments (including issues on automation)

Introduction

This Chapter presents best practices for the enforcement of security rights over rights to payment and credit instruments, including contractual receivables, negotiable instruments, rights to payment of funds credited to a bank account, and securities. As described below, this Chapter has a broader scope of application than other international instruments, which have otherwise limited their approach.

The United Nations Convention on the Assignment of Receivables in International Trade (CAR) applies to "receivables", which are defined therein as a "contractual right to payment of a monetary sum", including parts of and undivided interests in receivables, as well as receivables from any type of contract.

In contrast, the UNCITRAL Model Law on Secured Transactions (MLST) has adopted a broader approach to intangible movables. It initially does so by defining a receivable as "*a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security*." Thus, it clarifies that a "receivable" is not limited to those obligations arising from contract but can be envisaged as any type of monetary obligation. Additionally, although the MLST excludes other intangible movables from the definition of a receivable, it nonetheless regulates such types of encumbered asset, by applying different rules, particularly concerning publicity and priority. Intermediated securities, while excluded from the application of the MLST, are specifically addressed under the UNIDROIT Geneva Convention. Collectively, these international instruments adopt broadly

consistent enforcement principles, despite more noteworthy differences in their choices of publicity and priority rules, which justifies the choice of this Chapter to adopt a more general approach.

This Chapter begins by addressing receivables as the benchmark for enforcement, extending its principles to other rights to payment used as encumbered assets, whether monetary or non-monetary, and regardless of their source or form. Where necessary, specific best practices are introduced to accommodate the unique characteristics of each type of encumbered asset. The Chapter also adopts a functional approach, applying to any form of interest that links a right to payment or a credit instrument as encumbered assets to the satisfaction of a secured claim, regardless of whether such right is considered a lien or a transfer of title under national law. Finally, the Chapter explores the role of automation and digital technology in the creation, transfer and enforcement of such rights, including their potential to enhance efficiency and transparency in enforcement.

Existing international models:

UNCITRAL Model Law on Secured Transactions

UNCITRAL Legislative Guide on Secured Transactions

Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements

United Nations Convention on the Assignment of Receivables in International Trade

Draft Common Frame of Reference, Book III, Chapter 3: Remedies for non-performance & Chapter 6: Set-off

OAS Inter-American Secured Transactions Model Law

UNIDROIT Model Law on Factoring

Recommendation 113 – Realisation on the encumbered assets post-default

(1) After default on the secured obligation, a secured creditor whose encumbered asset is a right to payment (including a right to payment of funds credited to a bank account, a negotiable instrument or a security) should be permitted to realise on the encumbered asset (by disposition or collection) without the necessity of first obtaining a judgment on the secured obligation.

(2) If the secured creditor elects to realise on the encumbered asset by disposing of it, this should be permitted either judicially or non-judicially, in accordance with any method, manner, time, place and other aspects of the method of disposition that it selects, but subject to the same general rules and limitations laid out for enforcement of security rights on movable property, as applicable (see Recommendations 100-106).

Comments

1. Source. UNCITRAL Model Law, articles 59, 61-63 and 82.

2. Paragraphs (1) and (2) clarify – following main international instruments (UNCITRAL Legislative Guide, 93 ss, and MLST) - that the general rules for the realisation of encumbered assets should apply to any type of encumbered asset, including intangible movables, such as rights to receive payment and negotiable instruments. This is because most intangible movables may be sold, leased, licensed, or otherwise acquired by the creditor in total or partial satisfaction of the secured obligation, in a similar way to tangible movables. For instance, a negotiable instrument (*e.g.*, a bill of exchange) that has not yet been collected can be assigned to a new creditor for a monetary value (*e.g.*, by endorsement or another available method); the same applies to contractual receivables in

general, before payment, even though they are not represented by a negotiable instrument. For example, future receivables arising from a real estate lease agreement may represent a steady future cashflow that can be given a present, monetary value and sold to a new creditor, who will be able to collect such rent flow as it becomes due by the tenant. Whenever such methods of enforcement are used, disposal will remain subject to the general rules on disposition of tangible movables, as better described in Recommendations 100-106.

3. Nonetheless, certain rules do not easily apply to the enforcement of security rights in all intangible movables, particularly the right to payment of funds credited to a bank account or arising from intermediated securities. Therefore, special rules for these assets are advisable and commonly adopted in jurisdictions, and are referenced, as applicable, in further recommendations in this Chapter.

Recommendation 114 – Collection on encumbered assets post-default

(1) In addition to any available method of disposition, after default on the secured obligation, the secured creditor should be entitled to realise on the encumbered assets by collecting payment directly from the relevant obligor, at its due date.

(2) If payment collected from the obligor is monetary, the secured creditor should apply the proceeds received in discharge of the relevant secured obligations up to the amount actually collected.

(3) If payment collected from the obligor is a non-monetary, tangible or intangible movable, the secured creditor may further dispose of the asset according to the general rules on enforcement.

(4) Collection by the secured creditor is subject to the terms of the underlying agreement or instrument and should be performed in good faith and in a commercially reasonable manner.

(5) In the event of default by the obligor, the secured creditor is entitled to enforce any personal or property right that secures or supports payment of the encumbered assets.

(6) Collection of payment by the secured creditor is conditioned to providing notice of the security right to the obligor, but should not require prior notice of the grantor nor the setting of an additional period for performance by the grantor.

(7) Use of proceeds, upon collection, should also respect the order of distribution and rules on priority for enforcement of tangible movables, in accordance with Recommendations 104 through 106.

Comments

1. *Source:* UNCITRAL Model Law, articles 59, 61-63 and 82.

2. Whenever the encumbered asset is a right to payment (which may include, for example, a contractual payment obligation or an amount due under a negotiable instrument), an additional and common method of enforcement would be collection from the obligor of the receivable or negotiable instrument, in which case the collected monetary proceeds will be used by the secured creditor to satisfy the secured obligation, as described in paragraphs (1) and (2). It is worth noting that, according to Recommendations 104 through 106, if the amount actually collected is larger than the secured obligation (including any costs, charges and accessories thereof), the excess is distributed to the competing, junior, creditors and final surplus is then transferred to the grantor; otherwise, if the amount actually collected falls short of the secured obligation, the debtor will continue liable for the deficiency.

3. The secured creditor should dispose of any tangible or intangible movables received by realisation of its encumbered assets, according to the general rules of enforcement, such as when the performance of the obligation assigned as encumbered assets, by the obligor, occurs by means of a payment in kind; or if the encumbered asset is a right to receive an asset, other than a monetary receivable. The latter occurs when the encumbered asset is a negotiable document representing tangible movables, as may be the case with warehouse receipts and bills of lading representing commodities or merchandise stored in a warehouse or transported by sea, land or air.

4. Paragraph (4) clarifies that the secured creditor would be required to collect according to the underlying contract or instrument, and in good faith and in a commercially reasonable manner. First, as the type of encumbered asset would in most cases arise from a contract or another instrument, it is implied that payment will be subject to the rules and conditions specified in such agreement or instrument (for example, rules on the date, means and currency of payment). The creditor should take all reasonable measures to collect timely and in a sufficient – though not abusive – manner. The creditor should not collect poorly because this would harm the grantor (and other creditors). The methods of realisation should be designed and operate to maximise the net amount realised from the encumbered assets, for the benefit of the debtor, the secured creditor and other creditors with a right in the encumbered assets.

5. Paragraph (5) clarifies that the right to collect a payment due by the obligor includes the right to realise on any personal or property right that secures or supports payment thereof (see art. 82(3) of the MLST). For instance, if the encumbered asset is a negotiable instrument secured by a security right in a tangible movable, the secured creditor may, in the event of default by the obligor, realise on the tangible movables securing the negotiable instrument. Likewise, if a bill of exchange contains a third-party personal guaranty, the secured creditor may collect from the obligor, but also from the guarantor, according to the rules applicable to such guaranty.

6. Paragraph (6) represents a deviation from the general recommendations on enforcement of tangible movables. No prior notice to the grantor would be required for collection, differently from what is required for disposal and other methods of realisation. This is because the ability of the secured creditor to collect upon maturity, in lieu of the grantor, is a consequence of the security agreement, once notice has been given to the obligor (*i.e.*, upon notice, the obligor must pay to the secured creditor regardless of default by the grantor or a third-party secured debtor). Nevertheless, a notice of the creation of the security right should be given to the obligor under the receivables or instruments used as encumbered assets, so that the obligor is instructed to pay its obligation to the secured creditor. This notice should be given prior to collection if the obligor was not already notified before.

Recommendation 115– Collection of payment before default

(1) Before default of the secured obligation, provided the grantor has consented in the security agreement or otherwise, the secured creditor may collect payment directly from the relevant obligor and keep the amount received as cash collateral or apply it in discharge of the relevant secured obligations, according to the security agreement.

(2) If the proceeds collected within a certain period are in excess of the secured obligations or of the amount the secured creditor is authorised to keep or set-off in that same period, the excess should be released to the grantor of the encumbered assets, provided that there are no other creditors entitled to receive payment in accordance with the rules on the use of proceeds and priority (see Rec. 105).

Comments

1. Source. UNCITRAL Model Law, articles 59, 61-63 and 82(2).

2. This Recommendation covers a situation where the obligation used as an encumbered asset generates payments while there is no default of the secured obligation. It is a very common occurrence with receivables financing.

3. Though it is not, strictly speaking, an enforcement mechanism, the advance collection of receivables by the secured creditor is usually used to either supply an encumbered asset for the secured obligation in the form of a cash deposit or to allow an accelerated amortisation of the secured obligation. In either case, it enhances credit risk of the transaction.

4. Such collection depends upon the agreement of the grantor, which is usually granted in the security agreement, but may be also agreed afterwards. In any case, receivables collected in excess must be transferred to the grantor.

Recommendation 116 – Defences of the obligor and of third parties

(1) The obligor who suffers collection by the secured creditor should be entitled to raise any defence or rights of set-off against the secured creditor that:

(a) arise directly from its obligation (including in the instrument where the obligation was agreed, or any other instrument that was part of the same transaction); or

(b) would otherwise be available against the grantor at the time the obligor received notification of the security right.

(2) The obligor's rights and defences against the secured creditor may be limited by the following:

(a) a non-assignment provision contained in the instrument giving rise to the encumbered assets should not limit effectiveness of the security agreement nor the secured creditor's ability to realise on the encumbered assets;

(b) the obligor may agree with the grantor or with the secured creditor not to raise against the secured creditor certain defences and rights of set-off, except if arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the obligor;

(c) defences that are exclusive to the relationship of the obligor and the grantor may not be enforced against the secured creditor, such as any modifications to the obligation that occur after the obligor received notification of the security right, any right of set-off against the grantor that is not related to the transaction from which the obligation originated, or any right to recover payments on the grounds of a subsequent default by the grantor to perform under the transaction from which the obligation originated;

(d) the law may establish that, upon assignment of certain types of rights of payment, such as under negotiable instruments, all of the obligor's personal defences held against the grantor may be unenforceable against *bona fidae* secured creditors.

(3) Defences should be available to the grantor, any other person with a right in the encumbered asset, and the obligor in case the secured creditor does not comply with its obligations in enforcing the security right.

Comments

1. Source. UNCITRAL Model Law, articles 64-71; Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930), article 17, UNIDROIT Model Law on Factoring.

2. This Recommendation covers remedies and defences that would be enforceable against the secured creditor upon realisation on the encumbered assets.

3. Paragraph (1) contains a list of defences available to the obligor should the secured creditor collect on the encumbered assets. In sum, the obligor should retain against the secured creditor all defences (including a right to set-off amounts) that were available against the grantor (to whom the obligor originally owned payment) at the time the obligor was notified of the security agreement. However, certain exceptions apply, which are mainly designed to protect *bona fide* assignees, especially when the encumbered assets are in the form of negotiable instruments.

4. The first exception, which is implied in Paragraph (1), is that defences acquired by the obligor after receiving notice of the security agreement will not be enforceable against the secured creditor, unless it derived from the same transaction where the obligation used as an encumbered asset originated. For instance, if at the time of receiving notice the obligor had previously notified the grantor to enforce a right to set-off based on a different and unrelated agreement, such set-off will be enforceable against the secured creditor; however, after being noticed if the security agreement, the obligor will no longer be able to set-off such credit against the secured creditor, as it is unrelated to the agreement that originated the encumbered asset.

5. Other exceptions are described in more detail in Paragraph (2). Subparagraph (a) describes the principle that a credit can be assigned by its creditor (or used as an encumbered asset) despite any prohibitive provision included in the agreement that originated it.

6. Subparagraph (2)(b) establishes the principle where the parties may agree that certain defences or remedies would not be enforceable against assignees of an obligation. This kind of provision may be agreed directly with or simply to the benefit of the assignee and is often used to increase commercial value of receivables that are intended to be traded in the market, such as in factoring transactions. Such agreements are limited by the principle of good faith, so that exceptions for the obligor's remedies would not apply in the event of fraudulent acts by the assignee (or, in this case, secured creditor).

7. Subparagraph (2)(c) clarifies that certain defences are by their nature exclusive to the relationship between the obligor and the grantor and do not extend to third-party assignees or secured creditors. These include any modifications agreed between the obligor and the grantor, without the consent of the secured creditor, after the obligor was notified of the security agreement. It also includes a prohibition for the obligor to claim recovery of payments already collected by the secured creditor on the grounds that the grantor failed to perform under the agreement that originated the obligation used as an encumbered asset.

8. The cases mentioned in subparagraph (2)(c) are mere examples of the principle, so that other more specific cases may exist. For instance, another example would be that a debtor D owes money to the secured creditor SC, and such obligation is secured by grantor G by using as an encumbered asset a future payment owed by obligor O to G. So, while D owes the secured obligation to SC, SC is also entitled, upon default, to collect against O, by realising on the security right granted by G. After entering into the security agreement, G and O (both being legal entities) merge together. A merger of a debtor and a creditor would normally entail termination of all rights and obligations between the merged entities, as it is usually not allowed that a person would owe obligations to oneself. However, G is securing the obligation of D, this effect does not extend to SC, so that even though the agreement terminates, the obligation used as an encumbered asset survives to the benefit of SC, who would still be able to collect upon the merged entity (resulting of O+G) upon default of D.

9. Subparagraph (2)(d) also contains a broader, usually legal exception to defences, which is normally applicable to negotiable instruments. For instance, this is referred to in article 17 of the

Geneva Convention of 1930 on Bills of Exchange and Promissory Notes, which states that "*persons sued on a bill of exchange cannot set up against the holder defences founded on their personal relations with the drawer or with previous holders, unless the holder, in acquiring the bill, has knowingly acted to the detriment of the debtor*". This is intended to allow the negotiable instruments to survive independently from any relationship originating the instrument or underlying agreement and often referred to as the autonomy principle.

Recommendation 117 – Disposition of funds deposited in a bank account

(1) A security right in a right to payment of funds credited to a bank account where the holder is not the secured creditor can be enforced by requesting the deposit-taking institution to credit funds on behalf of the secured creditor, according to the security agreement or another agreement entered for such purpose with the participation of the deposit-taking institution.

(2) Where the deposit-taking institution has neither consented with the security agreement, nor otherwise agreed with the secured creditor on the enforcement of the security right, the secured creditor is only entitled to enforce its security right over an account to which it is not the account holder pursuant to an order of a court.

(3) Unless otherwise agreed by the deposit-taking institution with the secured creditor, or if the secured creditor becomes the account holder, the deposit-taking institution retains a right to set-off for amounts due by the grantor against the amounts deposited in the bank account.

Comments

1. Source. UNCITRAL Model Law, articles 69 and 82 (4).

2. Differently from most cases where a third-party owed obligation is used as an encumbered asset, bank accounts impose a particularity in which currency is attributed to an account managed by a deposit-taking institution, against which the account holder has a credit. Because the credit held against deposit-taking institutions is of a special nature and usually subject to strict regulations by the Central Bank or other authority, it is determined that such institutions must formally agree with the use of funds deposited as encumbered assets.

3. This may be formalised by the deposit-taking institution participating in the security agreement, but would most often occur in a separate agreement, entered between the grantor, the deposit-taking institution, and the secured creditor, often referred to as a "control agreement" or a "bank escrow agreement". Such agreement will contain the conditions upon which the secured creditor will be entitled to access the funds deposited and the deposit-taking institution would be authorised to proceed according to the secured creditors instructions, including to transfer funds to another account appointed by the secured creditor. If such an agreement does not exist, then the deposit-taking institution would not be bound to the security agreement, unless the secured creditor obtains a court order.

4. The deposit-taking institution also generally has a right of set-off against the funds deposited in any account it manages – such right is used for collection of fees and other duties owed by the account holder towards the institution, but may also be enforced if the account holder defaults another obligation (such as a loan) owed to the deposit-taking institution, even if unrelated to the specific account where the funds are deposited. For that reason, control agreements entered with the purpose of using funds deposited in bank accounts as collateral often limit the institution's right to offset against the account used as an encumbered asset.

5. A different situation where funds deposited to a bank account may be used as an encumbered asset would be the addition or change of the account holder, so that the secured

creditor becomes a holder of the account where the funds are deposited. This results in a different approach to enforcement, as the secured creditor would be able to use and enforce directly on the funds credited to such account without need of cooperation of the grantor or deposit-taking institution, which is why such scenario is exempted in each of the paragraphs in this Recommendation.

Recommendation 118 – Disposition of intermediated securities

(1) When encumbered assets are in the form of securities credited to a securities account or rights thereto (*i.e.*, intermediated securities), which account is maintained by an intermediary institution, the secured creditor may enforce its rights by any of the methods under Recommendation 113 or by:

(a) appropriation of the encumbered securities as the secured creditor's own property and setting off their value against, or applying their value in or towards the discharge of, the relevant obligations, provided that the security agreement provides for realisation in this manner and specifies the basis on which the securities are to be valued for this purpose; or

(b) operation of a close-out netting provision; or

(c) use of the encumbered assets, subject to the duty to replace it by delivering to the grantor, not later than the discharge of the relevant obligations, equivalent or other replacement encumbered assets as provided for under security agreement.

(2) Encumbered securities may be realised, and a close-out netting provision may be operated subject to any contrary provision of the security agreement, without any requirement that prior notice of the intention to realise or operate the close-out netting provision shall have been given to the grantor, debtor, or obligor (in each case, if other than the grantor).

(3) Where the intermediary institution has not been notified of the security agreement, nor has it otherwise agreed with the secured creditor on the enforcement of the security right, the secured creditor is only entitled to enforce its security right over a securities account to which it is not the account holder pursuant to an order of a court.

Comments

1. *Source*: UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva Securities Convention), articles 11, 12 and 31-38.

2. Intermediated securities are specific kinds of dematerialised securities whose ownership is ascertained by means of a deposit (or similar mechanism) at a securities account maintained by an intermediary institution, often more generally referred to as a financial market infrastructure (FMI) operator, or, more specifically, a central securities depository (CSD). A CSD is usually overseen by the Central Bank or another market regulation authority and performs, for intermediated securities, a similar role of that of banks for funds deposited in bank accounts. In other words, CSDs generally hold fiduciary ownership of securities in security accounts held by the true beneficiary owners.

3. As occurs with funds in a bank account, paragraph (3) determines that intermediary institutions receive a specific form of instruction when securities deposited in the grantor's account are used as encumbered assets. According to article 12 of the Geneva Securities Convention, this may be achieved by a designated entry in favour of the secured creditor in the systems of the intermediary (*i.e.*, a method similar to a security right notice being registered at a registry) or by an agreement entered between the grantor, the intermediary institution, and the secured creditor (*i.e.*, a "control agreement", as described in the commentary to Recommendation 117). If neither

an entry in favour of the secured creditor nor a control agreement exist, then the intermediary institution would not be bound to the security agreement, unless the secured creditor obtains a court order.

4. A different situation where intermediated securities may be used as encumbered assets would be the transfer of such securities to an account held by the secured creditor, as provided under article 11 of the Geneva Securities Convention. In such scenario, the secured creditor becomes the holder of the securities and may freely dispose of the securities for realisation on the encumbered assets.

5. Paragraph (1) clarifies that enforcement on intermediated securities may be performed by disposal of the securities or by collecting on payment obligations deriving from the securities (in each case, according to Recommendation 113), but also by appropriation, by use of the encumbered assets or by operation of a close-out netting provision.

6. Appropriation is a viable mechanism for intermediated securities as they would normally have a market value that can be directly offset against the secured obligation by the secured creditor taking ownership of the securities. An alternative to ownership would be the temporary use of the securities, where recurring payments such as dividends can be collected by the secured creditor and applied in discharge of the secured obligation. Finally, a closeout netting provision is a specific provision that results in acceleration of obligations mutually due by the grantor and the secured creditor followed by an offset of obligations, which results in a balance payable by one party to the other.

7. Paragraph (2) clarifies that enforcement on intermediated securities does not require any prior notice of the grantor (or of the debtor or obligor, each if other than the grantor) before disposal of or any other form of realisation on the encumbered assets. This is intended to adapt to the fast dynamics of capitals and financial markets and is also justifiable by the fact that intermediated securities are publicly tradable interests that have a market value determination. This rule is similar to that applicable to tangible movables if the encumbered assets are perishable, may decline speedily in value, or is of a kind sold on a recognised market.

Recommendation 119 – Enforcement with use of automation

(1) Automated systems can be implemented by the parties to realise the encumbered assets and collect the payment both before or after default, in compliance with corresponding recommendations in this Chapter.

(2) Automated systems for collection should be designed and operated in a manner that ensures defences or rights of set-off can be effectively exercised, with technical solutions aimed at suspending or stopping the automated enforcement as necessary.

(3) Automated systems can also be implemented to enforce against funds deposited in a bank account pursuant to Recommendation 117 and intermediated securities pursuant to Recommendation 118, in which case specific solutions may be created within existing capital markets infrastructures and other systems supervised by a governmental authority, such as the central bank/competent authorities/sector regulators.

Comments

1. The enforcement of receivables offers an environment particularly permeable and receptive to the use of digital technology and the application of technological solutions to enhance the effectiveness of enforcement.

2. The most promising areas are related to the automation of certain actions in the enforcement of receivable, an effective and centralised use of information, and even the implementation of automated enforcement driven by smart contracts (in a very limited and fit-for-purpose sense) and conducted in platforms/DLTs.

3. The use of automated means to partially or totally automate the enforcement procedures should comply with the applicable rules and follow the relevant best practices for enforcement to the full extent. Automation is not intended to override or infringe upon applicable legislation or safeguards aimed to protect the debtor's and the creditor's interests and rights. To that end, automated systems should be designed, deployed, and implemented in compliance with the applicable rules for enforcement.

4. Automated enforcement procedures should prioritise transparency and traceability, allowing all parties to monitor the process effectively, and trace actions as necessary. Stakeholders should be informed about how automated decisions are made and should be allowed to intervene when justified. To illustrate the above-proposed areas for the application of technology, four aspects can be further discussed.

5. As to the possibility of generating and delivering required notices on an automated basis, refer to Recommendation 35. As to the general risks and concerns applicable to the Enforcement Procedure of Monetary Claims by Third-Party Debts, see Subsection 1.3 – Introduction.

6. Second, the design and development of centralised electronic database/registers where the assignment of receivables for security purposes, the creation of security rights, and the outright assignment are annotated.

7. To that end, automated enforcement systems can be particularly effective when used in connection with escrow accounts and intermediated securities. Systems implemented in multiple jurisdictions facilitate transactions with various types of receivables, including credit card receivables and commercial payment invoices. These systems usually operate through accredited market infrastructures (for example, authorised or supervised by central banks or other competent authorities), which function similarly to centralised security depositories for financial assets tradable in capital markets. The existence of such specific systems can allow each receivable to be electronically registered as a single digital entry, thereby becoming a tradable digital asset intermediated through the system. This approach ensures more transparency in current receivables markets, prevents duplicate registrations/assignments and facilitates effective enforcement, by allowing centralised and online monitoring across accredited infrastructures. Automation processes may include features such as:

- automatic listing of receivables as they are generated;
- linking receivables to information available through private APIs or public services (*e.g.*, matching registered receivables and corresponding digital VAT invoices from government systems);
- registering security rights and other transactions;
- directing payment by the debtor to the current beneficiary account when due;
- identifying transactions and beneficiaries at any time;

- assigning the receivable or assigning ownership rights in the receivable in case of enforcement, and

- releasing of any excess proceeds to the grantor.

8. Third, a more sophisticated scenario enabled by technology is the possibility of programming and executing the enforcement by automated means. A smart contract (in the sense of a self-executing system) is triggered by the communication of default (an input in the system that instructs the execution of pre-programmed actions in case of default) and immediately executes the preprogrammed actions: delivery of notice where needed, initiation of the payment to the secured creditor, and blocking of any attempt to pay to the grantor. All these actions are initiated and completed without human intervention. Therefore, they are automatic and successive without delays or additional inputs. The smart contract can self-execute certain actions if it is fed with the relevant data and can interact with the systems of the intervening parties (account debtor) to initiate and complete payment by preparing and performing a funds transfer.

9. The use of the smart contracts described above can occur within a platform that is either centralised or distributed (DLT-based systems that operate on a multilateral basis).

10. Although most of the scenarios described above apply to enforcement carried out without recurring to a court or another authority, enforcement procedures by way of authority should also be expeditious and to the full extent possible based on the use of automated systems for notifying, requesting, or enforcing security interests in the encumbered assets in conformity with the applicable recommendations. They may also benefit from existing systems, such as those created for intermediated securities, which can provide special access to courts and enforcement authorities to allow them to input and effect enforcement orders directly into the system.

Chapter V. Expeditious relief to support non-judicial enforcement

Recommendation 120 – Expeditious relief to support non-judicial enforcement

(1) A concentrated, expeditious and simple procedure to support non-judicial enforcement that is being carried out pursuant to the Recommendations in Part II to obtain possession of tangible movables or dispose of tangible movables or immovables or intangible movables (including digital assets) should be established. The procedure should be available only on the application of a person who claims that their rights are affected by a dispute concerning the non-judicial enforcement of security rights.

(2) An applicant should give formal notice of their application to the respondent and any third party in possession of the tangible movables or control of intangible movables, except where such notice would frustrate the application's purpose. See, *e.g.*, Recommendation 103 (excusing pre-disposition notice in certain circumstances).

(3) To support non-judicial enforcement of security rights a court may

(a) order compliance with the rules applicable to non-judicial enforcement; or

(b) grant a regulatory provisional measure;

failing which, the court may promote settlement endeavours in so far as it deems appropriate.

(4) Any order or measure granted should direct compliance within a short period of time.

(5) An order may be granted only where it will enable non-judicial enforcement of the rights and obligations under a security agreement to progress in accordance with the non-judicial enforcement

process. The order may not convert a non-judicial enforcement process to a judicial enforcement process.

(6) An order or regulatory provisional measure may be granted where all facts relevant for the applicant's case are either undisputed, not credibly disputed or proven. Such orders or measures may be granted subject to conditions.

(7) A regulatory provisional measure may be granted on an application under this procedure where it can be considered expeditiously and in a summary manner while taking account of the factors applicable to applications for such measures under Recommendation 73.

(8) Any order or regulatory provisional measure granted may be enforced by the court upon a party's application. An enforcement application should be made only when it is apparent that the subject of the order or measure is unwilling to comply with it. Non-compliance with an enforcement order may result in proceedings for contempt of court or equivalent judicial proceedings the aim of which is to secure the proper administration of justice. Notwithstanding the foregoing, the court may not convert a non-judicial enforcement proceeding into a judicial enforcement proceeding.

Comments

1. This Recommendation provides a means by which persons who are engaged in, or are the subject of, non-judicial enforcement, as provided for in Part II, may seek the court's support to conclude that process or direct that it proceed in conformity with the rules governing that process. Hence, it is only available on the application of a person who claims their rights are affected by a dispute concerning non-judicial enforcement of a security right.

2. This procedure is separate from any expedited procedure that may be available to effect or support enforcement that is being carried out by or on behalf of a public authority. Where a secured creditor who is a party to a dispute about non-judicial enforcement no longer wishes to pursue enforcement non-judicially and instead prefers judicial enforcement, recourse may be made to a court for directions on how to proceed by way of enforcement by public authority.

3. The procedure available under this Recommendation should be speedy and should also provide for expeditious implementation of any order or measure granted. It should also be simple and concentrated, *e.g.*, persons who seek this form of assistance must not do so in a piecemeal fashion, and the court should ensure that all relevant matters on which assistance is required are, in so far as possible, comprehensively dealt with at the same time.

4. The Recommendation provides three means by which the court may support the non-judicial enforcement of security rights. It makes provision for the court to order compliance with the rules applicable to non-judicial enforcement. It provides access to regulatory provisional measures, such as orders requiring parties to do or to refrain from doing something, which are otherwise available under Recommendation 73. Other typical examples of such measures that the court may, therefore, grant are: search orders, orders providing for the transfer of goods to a third party who will hold the property pending conclusion of the non-judicial enforcement process when it will be transferred to the party entitled to it, delivery or transfer of control or possession of secured property, etc. In situations where a secured creditor is seeking expedited resolution of a dispute, the court may, particularly, order a debtor to provide information to the applicant about all those facts that are necessary to assure compliance with the rules governing non-judicial enforcement of security rights, including those relating to obtaining possession of encumbered assets and disposing of encumbered assets. It may also prohibit parties from taking any actions that undermine effective performance of the security agreement. Finally, and consistently with the promotion of settlement endeavours within enforcement generally, it also provides for a court (consistently with the general role that the judiciary may have to engage in settlement endeavours within any specific jurisdiction), in so far as

is appropriate in the circumstances, to take actions to promote settlement of any dispute concerning compliance with the rules applicable to non-judicial enforcement. Promotion of settlement may, depending on the circumstances, include the promotion of speedy, low-cost mediation or arbitration.

5. Examples of orders that could be made under this process include those that require a debtor: to provide necessary information about movables, receivables or rights affected; to desist from taking actions to prevent a creditor or third party from entering buildings, business premises or land to secure possession of movables; to refrain from hindering a creditor or a third party from disposing movables, receivables or rights; or to refrain from taking actions to diminish the value of the security right. Similarly, the court could promote compliance by the secured creditor with the rules governing taking possession of tangible movables non-judicially and disposing of it, or of intangible movables, non-judicially.

6. Access to a judicial procedure under this Recommendation is to ensure that the non-judicial enforcement process, consistently with the aim of this Recommendation, is not frustrated. It is thus intended to be exercised to enable the court to preserve and promote the smooth running of non-judicial enforcement. Given this, it should generally be relied upon when facts relevant to an applicant's case are either undisputed or not the subject of credible dispute. Where matters are the subject of credible dispute, the court should not engage in a detailed examination of the disputed matters. In such situations it may, however, make orders or grant measures subject to relevant conditions. Examples of when court intervention is appropriate are:

(i) When it is clear from the facts that the preconditions for the secured party's entitlement to take possession of the encumbered assets have been met, the court should order the debtor to turn over the encumbered assets to the secured party or make it available to the secured party;

(ii) When it is clear from the facts that the preconditions for the secured party's entitlement to take possession of the encumbered assets have not been met, the court should so state and direct the secured party to cease attempts to take possession non-judicially until the conditions have been satisfied;

(iii) When it is clear from the facts that the secured party is not entitled to dispose of the encumbered assets in the manner proposed, the court should so state and direct the secured party not to do so;

(iv) When it is clear from the facts that the secured party is entitled to dispose of the encumbered assets in the manner proposed, the court should so state and direct the debtor not to interfere with the disposition.

It is not the intention of this recommendation to impose a burden of proof on any party to the proceeding. However, the court may take into account that it is typically easier for one party or the other to prove certain types of facts. For example, the court may consider that it is generally easier for the debtor to prove that the secured obligation has been paid than it is for the secured creditor to prove that it has not been paid.

7. Parties should only apply for enforcement measures when it becomes clear that a party is unwilling to comply voluntarily with the rules governing non-judicial enforcement of security rights or an order made or provisional measure granted under this process (see para. (3)(a) or (b)). As a rule, the party entitled to apply for enforcement should have the right to choose enforcement measures working *in personam* that enforce the other party's conduct as required by the rules governing non-judicial enforcement of security rights and the terms of the security agreement or applicable law. Ultimately, compliance with orders or measures taken under this process should be secured through proceedings for contempt of court or equivalent judicial proceedings the aim of

which is to secure the proper administration of justice. The court could motivate the offending party to comply with an enforceable order against them via the possibility of contempt proceedings or through contempt proceedings having been taken.

8. The purpose of this Recommendation is not to provide a grantor or secured creditor with a new right to assert claims that would interrupt the enforcement process but rather to provide an expedited method to address disputes that arise during the enforcement process that (based on the facts alleged) would require judicial intervention during that process. Existing mechanisms providing such intervention, however, are often time-consuming and unwieldy. This Recommendation addresses that concern by providing the framework of a procedure that enables those disputes to be resolved expeditiously and thus enables the non-judicial enforcement to proceed smoothly. See comment paragraph 6. As a result, this Recommendation does not mandate early judicial intervention in disputes that would otherwise wait until the completion of the enforcement process for resolution. Thus, for example, if a grantor asserts that a secured creditor is disposing of the encumbered assets in a commercially unreasonable manner (and, thus, in a manner that risks generating a lower amount of proceeds), typically resolution of that dispute can wait until after enforcement is complete. This is because, even assuming the truth of the assertion, any harm to the grantor can be redressed by reducing any claim by the secured creditor to recover a deficiency from the grantor or by awarding damages to the grantor or any other party harmed by the method of disposition. Only if there is sufficient reason to believe that the secured creditor will be unable to satisfy such a money judgment or if there are other circumstances indicating that the grantor or another party would suffer irreparable harm by waiting for redress until the enforcement process is complete is there a need for early judicial intervention. When there is such a need, Recommendation 120 provides a method for structuring that intervention in an expedited manner.

Chapter VI. Variation of the rules governing the enforcement of security rights

Recommendation 121 – No waiver or variation of obligations of good faith and commercial reasonableness

The obligations of good faith and commercial reasonableness imposed in this Part may not be waived unilaterally or be varied by agreement at any time. The parties may agree that a certain way of exercising rights and obligations conforms with those obligations unless this is manifestly not the case.

Comments

1. Due to the importance of the requirements of good faith and commercial reasonableness, they should be mandatory. Thus, they can neither be waived nor contracted out of by the parties. This is in line with the UNCITRAL Model Law on Secured Transactions (2016), Article 3(1), and the UNCITRAL Legislative Guide on Secured Transactions (2007), recommendation 132.

2. As both good faith and commercial reasonableness are imprecise legal terms, they can create uncertainty for the parties at various stages, in particular at the time of contracting and at the time of enforcement. Such uncertainty risks to decrease the availability of credit and to increase the cost of finance. In order to support the parties in attempts to minimise the legal uncertainty created it is recommended to allow the parties to agree on what actions are to be considered to satisfy those obligations. The parties may do so expressly in dedicated contractual clauses. It should also be sufficient that an interpretation of the contractual stipulations reveals that the parties intended such an agreement even if there is no express wording to this effect. Such agreements cannot, however, be used to circumvent the requirements of good faith and commercially reasonable behaviour. Agreements between the parties are, therefore, invalid in cases where they manifestly exceed the boundaries of those standards.

Recommendation 122 – Post-default waiver or variation of other rights and obligations by debtor or grantor

Subject to Recommendation 121, and limited to the time after default, the debtor and the grantor may unilaterally waive their rights or vary by agreement any of their rights and obligations concerning the realisation of encumbered assets.

Comments

1. Many jurisdictions and international instruments restrict the private autonomy of debtors and grantors to waive their rights or vary them by agreement to the time after default. This reflects concerns that creditors with a strong negotiation position would otherwise pressure weakly negotiating debtors and grantors into accepting economically suboptimal and unfair contracts. These concerns are particularly directed at the time before default. It is perceived that this is not relevant any more after default. Hence, it is generally accepted that debtors and grantors should be equipped with the private autonomy to waive or vary their rights and obligations once default has occurred. Against this background, this Recommendation allows debtors and grantors to waive their rights unilaterally and vary their rights and obligations by way of contract only after default and subject to the mandatory standards of good faith and commercial reasonableness as detailed under Recommendation 121.

2. It should be noted that the specific recommendations of this Guide on regulating the enforcement of security rights in encumbered assets at times allow specific deviations and options. Such deviations and options are not limited by this Recommendation.

3. This Recommendation is generally in line with the UNCITRAL Model Law on Secured Transactions (2016), Article 72(3), and the UNCITRAL Legislative Guide on Secured Transactions (2007), recommendation 133. The Recommendation differs only slightly from the UNCITRAL instruments in that it also allows to vary obligations by way of contract after default. It seems consistent to extend party autonomy post-default not only to the debtors' and grantors' rights but also to their obligations. This should only apply, of course, where the other party consents and, therefore, requires a contractual basis. The unilateral waiver of obligations in enforcement is foreign to all jurisdictions and should not be allowed. Examples of acceptable variations post-default include the following (note that while some of these variations are already recommended in other parts of this Guide they are still mentioned here as they may have been excluded under the initial contract): opting for a private, but adequately marketed sale instead of a public auction; establishing a creditor's right to acquire an asset at market price instead of selling it; imposing a sensible maximum time period for the liquidation of an asset; excluding certain types of assets from realisation if a specific price threshold cannot be achieved; agreeing on the way in which possession is obtained; allowing a secured creditor to acquire the encumbered assets if the prize is determined by a neutral expert. An example of an unacceptable variation (as usually not commercially reasonable) is waiving retransfer of the surplus proceeds of the encumbered assets.

4. It may be noted that some consideration was given to allowing more private autonomy for the time before default sets in. Arguments for widening private autonomy in this period could be an increase in credit available and a reduction of the cost of credit in those cases where debtors, grantors and creditors can use such autonomy for mutually beneficial contracts. Given that the focus of this Guide is on established Best Principles, the decision was, however, taken not to further pursue this in this Guide.

Recommendation 123 – Waiver or variation of other rights and obligations by secured creditor

Subject to Recommendation 121, the secured creditor may unilaterally waive or vary by agreement its rights as regards the enforcement of security rights in encumbered assets. Subject to Recommendation 121, and in the case of obligations owed to the debtor or grantor limited to the time after default, the secured creditor may also vary by agreement its obligations as regards the enforcement of security rights in encumbered assets.

Comments

1. While Recommendation 122 addresses the waiver and variation of rights and obligations of the debtors and grantors, this Recommendation focusses on the rights and obligations of the secured creditors. In this case, there are no concerns as regards the suboptimal or unfair exercise of private autonomy before the time of default. Consequently, this Recommendation allows for the unilateral waiver or contractual variation of rights of the secured creditor concerning the enforcement of security rights in encumbered assets at all times. This is in line with the UNCITRAL Legislative Guide on Secured Transactions (2007), recommendation 134. The private autonomy afforded by this Recommendation does not only concern the relationship between the secured creditor and the debtor or grantor. It also extends to relationships between creditors, for example intercreditor agreements, in which secured creditors coordinate their enforcement efforts.

2. In addition, this Recommendation addresses the variation of the secured creditor's obligations. These are not addressed, neither positively nor negatively, in the UNCITRAL instruments. Consistent with the argument made above that there are no concerns but expected advantages from allowing party autonomy post-default as regards the debtor or grantor, this Recommendation allows the variation of the secured creditor's obligations after default and subject to the mandatory standard of commercial reasonableness. Allowing such variation before default would undermine the protection afforded by Recommendation 122 to the debtor and grantor. Otherwise, the secured creditor could free itself of obligations protecting the debtor and grantor before default. The restriction to the time after default is, however, not necessary as regards intercreditor relationships as they are not subject to the concerns of undue pre-default negotiation asymmetries. As explained above, a unilateral waiver of obligations should never be considered, including the time post-default.

Recommendation 124 – No adverse effect on third parties

A variation of rights and obligations by agreement may not adversely affect the rights of any person not party to the agreement.

Comments

The exercise of private autonomy by debtors, grantors and secured creditors should not negatively affect third persons that are not party to the relevant agreement. Such negative effects would be both economically suboptimal and morally difficult to justify. This principle is accepted in all jurisdictions and international instruments. Hence, this Recommendation is in line with the UNCITRAL Legislative Guide on Secured Transactions (2007), recommendation 135 Sentence 1. For example, debtors, grantors and secured creditors cannot override property rights of third parties. In particular, they cannot adversely affect security rights of third parties. It should be noted, however, that this principle is limited to affecting rights. Also including negative commercial effects beyond legal rights would risk that the protection afforded would get out of hand and cause negative impacts on the cost of finance.

Recommendation 125 – Burden of proof

A person challenging the validity of a unilateral waiver or agreement for inconsistency with Recommendations 121 to 124 has the burden of proof.

Comments

This Recommendation mirrors the UNCITRAL Legislative Guide on Secured Transactions (2007), recommendation 135 Sentence 2. In many cases, the burden of proof would already lie with the person challenging the waiver or agreement. In these cases, the Recommendation only serves as a clarification. In all other cases, this Recommendation reduces the uncertainty ex ante caused by the requirements of the relevant recommendations, in particular the vagueness of commercial reasonableness. It is expected that this contributes to the availability of finance.

Chapter VII. Enforcement of security rights in immovables

Introduction

The recommendations below contain best practices regarding enforcement of security rights on immovables. Although rules applicable to the use of movables and immovables as encumbered assets may vary extensively, especially on the matters of creation and publicity, for which no specific international standard exists, rules on repossession and on disposal are usually similar to those applicable to tangible, non-fungible movables, whose recommendations have already been outlined.

The recommendations in this section have thus considered the general principles of the UNCITRAL Model Law on Secured Transactions, by adapting such principles to the reality of immovables as encumbered assets, and have also taken into account the common challenges and best practices found both in Common Law and Civil Law jurisdictions. In each instance where the recommendations would be essentially similar to those already outlined for movable property, the corresponding references where included, together with specific variations.

One important principle to be considered is the so-called functional approach. In many States, a difference exists between security mechanisms based on a property interest (*i.e.*, a lien) and on transfer of title as security (whether or not on a fiduciary basis). Although this difference is more often found regarding immovables, many States (especially in Civil Law jurisdictions) also know such a difference for movable property, which has motivated the adoption of a functional approach in the UNCITRAL Model Law on Secured Transactions. Such functional approach is also adopted in the recommendations on immovables contained in this section. In general terms, it means that this section does not adopt either a *lien* or a *title* theory, but rather considers any form of right according to which an immovable is linked as an encumbered asset to the satisfaction of a secured claim to be a security right on such immovable property. Whether such security right would be considered a *lien* or a *transfer of title* under any State legislation would not variate the recommendations contained below, which are intended to apply evenly regardless of the form or theory adopted by each State. Accordingly, none of the remedies available to a creditor hereunder, including non-judicial forms of disposal of the encumbered assets, should be conditioned on such creditor having or receiving title to the encumbered assets under its security right.

Recommendation 126 – Commencement of enforcement upon default

(1) When the encumbered asset is an immovable, before the creditor can claim possession thereof and proceed with enforcement, the grantor and the debtor should be notified of the default and allowed a reasonable period to pay the full amount of the secured obligations and overdue interest, penalties and charges to the creditor.

(2) If default remains uncured, the secured creditor should be entitled to receive possession of the immovable and to collect on or dispose of the encumbered assets without a prior court decision on the secured obligation.

(3) The rights of the creditor are subject to defences and limitations on the creditor's remedies, as provided for by substantive law to protect debtors and grantors, especially when the encumbered asset is the grantor's residence. Such defences or limitations should be limited, reasonable and clearly stated in the law.

Comments

1. After default, a secured creditor should be authorised to enforce its security right on the encumbered assets, either by disposing of it or by collecting from third parties that may be paying rent (*e.g.*, in case of a leased building). In either case, the creditor should also have the right to obtain possession of the immovable property.

2. It is often the case that substantive law or the credit agreement would allow the creditor to accelerate the debt upon default (*i.e.*, determine that the entire indebtedness is due immediately, even if a part of the debt had benefited from a term to be paid in the future or in instalments). This should also be allowed to the creditor without need of a judgment on the merits of the secured obligation, but the debtor and the grantor should have the right to seek relief from a court and obtain a stay in case they can present evidence that default has not occurred.

3. Certain protections, however, may be accorded by State laws to the grantors and debtors.

4. For instance, before commencing an enforcement process, it is recommended that the debtor and the grantor (if a different person than the actual debtor) should be notified of the default and given an opportunity to pay the debt and other applicable charges, thus avoiding commencement of enforcement. A cure period should generally be available for all debtors, as immovable property is usually of a higher value and not subject to rapid deterioration or risk of loss. In this sense, allowing a short cure period for repayment may be an effective measure of coercion for the debtor to pay without incurring in enforcement costs and other charges that would be applicable in case the debtor elects to repay the debt later during the enforcement procedure. Such period should be determined by substantive law as a reasonable timeframe to allow for payment (*e.g.*, generally 10 to 20 days) before enforcement begins and States may elect to condition the creditor's taking of possession to the expiration of the cure period.

5. States may also wish to grant certain debtors additional protection, such as when the encumbered asset is the debtor's or grantor's residence. These may include a longer cure period (such as 30 days or more) and a right to avoid acceleration of the debt in case of default, in which case the loan would be reinstated provided that the debtor pays solely the amount in arrears (*i.e.*, "arrearages") to the creditor within the cure period. Reinstatement of the loan should require the debtor to also pay the creditor's accrued interest and any of the creditor's out-of-pocket expenses, such as attorneys' fees, inspections and publication costs. These protections will be more often adopted for residential properties that are actually occupied by the grantor, but a State may decide to extend them to other protected groups or situations, such as consumer loans and, more broadly, acquisition financing.

6. General defences should be available to grantors and debtors, including defences based on the extinction of the secured debt (*e.g.*, that the debt was already paid) or that the debt is otherwise undue partially or in its entirety. Defences should be limited to reasonable and credible allegations and limitations to the use of defences should be clearly stated in the law, to allow predictability and reasonable duration of the enforcement procedure. Further guidance on the use of relief by the parties is provided in Recommendation 120.

Recommendation 127 – Secured creditor's right to possession after default

(1) After default, a secured creditor whose encumbered asset is an immovable should be entitled to receive possession of the immovable directly or to appoint a third-party who will take possession and manage the immovable, for the purpose of proceeding with enforcement of its secured credit against the encumbered asset. This right should not be conditioned on a prior court decision on the secured obligation nor on the creditor having become the owner of the property.

(2) When the encumbered asset is the grantor's residence, a reasonable delay may be established, during which the grantor is not obligated to deliver possession to the creditor. The conditions for obtaining and the maximum duration of a delay in accordance with the preceding paragraph should be clearly stated in the law.

(3) In the event the grantor does not voluntarily deliver possession to the creditor when due, the creditor may seek eviction by means of expeditious relief pursuant to Recommendation 120, provided that the creditor complies with the conditions in this Chapter.

(4) If the immovable is occupied by a lessee or another third party:

(a) the creditor has the right to collect any rent due immediately upon default and continue to do so until the default is cured according to Rec. 126(1); and

(b) any lease or other occupancy agreements that are senior to the security right or otherwise effective against the creditor according to substantive law should remain in force.

(5) Taking possession should not be a condition to disposal of the asset, and any purchaser of the immovable upon disposal by the creditor should have the right to obtain possession directly from the grantor, in the same manner available to the secured creditor, if the latter has not obtained possession during enforcement.

Comments

1. As enforcement may be time-consuming and the encumbered assets may deteriorate, secured creditors should be allowed to take control and possession of the encumbered assets while enforcement is pending. This may be particularly important to the creditor in the case of income-producing rental property.

2. Taking possession should be allowed for the creditor as an immediate consequence of an uncured default. No judgment on the secured obligation should be required, but merely the creditors' assertion that the debt is in default and remains uncured – both the debtor and the grantor should have the right to seek relief by a court and obtain a stay in case they can present evidence that default has not occurred. Possession of the asset should also not be conditioned on the creditor having or receiving title (*i.e.*, legal ownership) to the property.

3. States may wish to grant certain debtors a longer period to vacate the property if it is an occupied residential building, or determine an automatic stay, so that eviction may not occur during certain times of the year (*e.g.*, before or during winter, in countries with cold weather). These protections will be more often adopted for residential properties that are actually occupied by the grantor, but a State may decide to extend them to other protected groups or situations, such as consumer loans, home equity loans and acquisition financing. In any case, the stay period should not extend for longer than necessary to complete enforcement and disposal of the immovable property. Grounds for obtaining a stay and its maximum extension should be laid out clearly in the law so as to avoid any doubt about which situations could benefit or not from such rules.

4. Two methods of taking possession should be allowed: (1) to take direct possession of the immovable, by obtaining physical control, to be delivered by the grantor to the creditor; or (2) to obtain the appointment of a third party who will take possession and manage the immovable on behalf of the creditor. Such third party may be a judicial receiver or custodian appointed by a court (see Chapter VII of Part I).

5. Appointment of a judicial receiver or custodian may be chosen by the creditor to avoid accounting and maintenance duties and potential liability that inhere in becoming a creditor in possession, although it has the disadvantage of requiring an application to a court. However, it may also be useful when the creditor believes the grantor will not voluntarily deliver possession of the property.

6. Although creditors may take possession of vacated properties directly by changing the locks, most immovable properties used as encumbered assets will be expected to be occupied, and taking of possession by the creditor would require either that the occupant voluntarily vacate the property or that the creditor obtain an eviction order before a court or another authority. Differently from movables, non-judicial repossession of an occupied immovable is not possible without full cooperation of the occupant, since the personal property of the occupants must be removed so that the property can be vacated, both of which cannot be imposed unilaterally by the creditor without obtaining an order from a competent authority.

7. However, if the property is leased, taking of direct possession is not necessary and the creditor may collect immediately and directly from the tenant.

8. If the debtor or grantor resists delivering possession, or otherwise refuses to turn over to the creditor essential records or information to allow collection of rent, the creditor may thus need to apply for a court order granting possession and copies of the essential records. Such application should be granted expeditiously and, provided enough evidence is presented by the creditor, a relief should be granted before hearing of the defendant.

9. Whenever the property is occupied by a tenant (*e.g.*, an agreement under which the tenant pays rent to the landlord for occupying the property), the secured creditor should have the right to collect rent from the tenant in accordance with the existing agreement and the proceeds obtained until conclusion of the enforcement should be applied in discharge of the secured obligation. The creditor may not obtain termination of any lease that is senior to its security right according to substantive law - for instance, substance law may determine that a lease that is entered into before the creation of the security right and that is notified to the secured creditor or recorded in a registry will be senior to the security right. The extent to which senior leases may be enforced against the creditor may be limited by enforcement law – for instance, law may limit continuance of existing leases for a maximum number of years after enforcement, even if the contractual lease term would be longer. In cany case, the creditor should have the option to terminate leases expressly subordinated to the creditor's security right or entered into (or extended) after the creation of the security on the immovable, except if the creditor has agreed to the extension or continuation of such leases in the event of enforcement (also known as a non-disturbance clause). Termination of leases should not be automatic and should depend on a notice by the creditor to the tenants. In each case, other conflicting rights may exist on the immovable, which should be subject to substantive law on priority among property interests.

10. If the creditor cannot or decides not to obtain possession of the immovable, it can still proceed with enforcement. In such case, the immovable can be disposed of with the condition that the purchaser obtains possession directly from the debtor or grantor. As a successor to the secured creditor in its right to obtain possession, a purchaser should be entitled to use the same remedies available to the secured creditor at the time of disposal of the immovable, including expeditious relief.

Recommendation 128 – Disposition of the encumbered assets post-default

(1) After default and any applicable cure period according to Recommendation 126, the secured creditor should be permitted to dispose of the encumbered assets either judicially or non-judicially without a prior court decision on the secured obligation. At any time after default, the creditor and the debtor may also agree on the transfer of the immovable to the creditor in partial or full satisfaction of the debt, provided that there is no opposition by competing claimants.

(2) Disposition of the encumbered assets should be preceded by an independent appraisal of its current forced sale value, obtained by the secured creditor with a reasonable timeframe before commencing enforcement, which should serve as a reference for enforcement, except when an appraisal value for enforcement purposes is established by agreement of the creditor and the grantor. The results of an appraisal should be communicated to the debtor and the grantor.

(3) A challenge on the grounds that the appraisal value is unfair or unreasonable, or otherwise on the value of the immovable, should neither prevent the secured creditor from exercising its right of disposal, judicially or non-judicially, nor should it be sufficient cause for a stay in enforcement. However, any abuse may be considered ex post in determining damages due by the secured creditor to the grantor for improper disposition of the encumbered assets.

(4) In the case of non-judicial disposal, the creditor may proceed in accordance with any method, manner, time, place and other aspects of disposition deemed reasonable under the circumstances that it selects, provided that any such methods must have been clearly laid out in the security agreement. Disposition of the encumbered assets will also be subject to the same general rules and limitations laid out for enforcement of security rights on tangible movables, as applicable (see Recs. 100-102 and respective commentary).

(5) If the immovable is the grantor's residence, or the grantor is protected under another law, such as consumer or family protection statutes, methods of disposition available to the creditor may be limited and additional safeguards ensured to the grantor, but non-judicial enforcement should not be limited entirely.

(6) At least [ten (10)] days before disposing of the encumbered assets non-judicially, the secured creditor should be required to give notice of its intention to the persons described in Rec. 103(2), and the contents of the notice should comply with paragraph 7 of the same Recommendation.

(7) The grantor, any other person liable for the secured obligation, or any other person with a right in the encumbered assets should be entitled to terminate enforcement of the security right by the secured creditor by paying or otherwise performing the secured obligation in full, including the reasonable cost of enforcement, at any time before the secured creditor sells or otherwise disposes of the encumbered assets, enters into an agreement to do so, or acquires the encumbered assets in total or partial satisfaction of the secured obligation.

Comments

1. After the period in which the debtor may cure the default (in which arrearages may apply, according to Recommendation 126), the creditor should be allowed to immediately proceed with enforcement.

2. A current, independent appraisal should be generally obtained by the creditor before disposal of the encumbered assets, which should be considered a reference for disposal. The appraisal should consider a forced sale value for the property (*i.e.*, an amount expected to be obtained in a quick disposal in an auction scenario) and should reflect current market conditions (*i.e.*, depending on

market price volatility, an appraisal should be obtained within 6 months or, in a stable market, up to a year before commencement of the enforcement). The period and rules for obtaining an appraisal may be varied by agreement (*e.g.*, a security agreement can determine a reference sale value to be updated according to a market index, waiving the need to obtain an updated appraisal prior to enforcement) and specific rules may be also addressed in bank or capital markets regulations, to be observed by certain lenders subject to regulated markets. Rules may include that the appraiser be officially recognised by a court or another authority, or registered with a professional union, or otherwise be an agreed upon or provenly experienced professional. However, the secured creditor should not be bound to such appraisal and the appraisal value should not be considered a minimum sale value, but a mere reference that the secured creditor should pursue in good faith in its disposal efforts, unless contractually agreed otherwise. In the security agreement or any time prior to disposal, the grantor and the secured creditor may agree upon the valuation of the encumbered assets, in which case an appraisal should not be required for enforcement. A further challenge on the methods or results of the appraisal, or otherwise related to the reference value considered for disposal of the encumbered assets, should not give rise to a stay in enforcement. If fraud or abuse by the secured creditor can be proven, there should be no impact on the disposal of the encumbered assets, but a claim for damages may be brought by the grantor against the secured creditor.

3. All methods of disposition should be available to the creditor, at its reasonable choice, including non-judicial enforcement. Enforcement methods should be clearly laid out in the agreement, especially the alternatives for non-judicial enforcement, in order to ensure that the grantor and the debtor understand the encumbered assets may be foreclosed without recourse to a judicial authority.

4. Before disposing of the encumbered assets non-judicially, the creditor must notify the debtor, the grantor and other persons with an interest in the encumbered assets with information on the encumbered assets, the time, place and manner of disposition, and a statement regarding the right of redemption of the encumbered assets and the amount necessary to terminate enforcement.

5. In general, the creditor should not be allowed to retain the encumbered assets in satisfaction of the debt without the grantor's consent, but a payment in kind should be allowed any time after default, provided there is no opposition by other creditors. To that extent, States may wish to impose an obligation on the enforcing creditor to notify competing claimants before accepting the encumbered assets in full or partial satisfaction of the debt, in a similar way as provided for movable assets under Recommendation 108, which is derived from the UNCITRAL Model Law on Secured Transactions. In some jurisdictions, a creditor may be allowed to bid against the asset in an auction, by offering partial or full satisfaction of the debt; or, otherwise, the creditor may have the power to receive the asset in satisfaction of the debt subject to a specific appraisal, in which case, should the encumbered assets exceed the value of the debt, any such excess must be paid by the creditor to the grantor or to competing claimants, in accordance with the order for distribution of enforcement proceeds.

6. In cases such as when the debtor or the grantor is protected under consumer or family protection statutes, or when the encumbered assets is the sole residence of the grantor, the State should consider limiting the methods and conditions for disposal by the creditor, as well as ensure additional safeguards to the grantor. Such limitations may include: (1) rules on the time, place, and manner of sale (for example, the time may be restricted to 8 a.m. to 5 p.m. local time, during working days, or the place must usually be a public venue or a venue open to the public, either physical or online); (2) mandatory disposition by means of an auction; (3) mandatory procedures or instructions with regard to qualifications of bidders, presentation of bids, conduct of the auction, announcements to bidders, posting of deposits by successful bidders, and the time allowed for final payment of the price; (4) mandatory independent appraisal of the property, other than a pre-

arranged contractual valuation, or minimum bid amounts acceptable at auction; (5) mandatory contractual provisions; (6) mandatory duties of information due to the grantor and the debtor.

7. It is, however, not recommended to limit non-judicial enforcement completely, even if the grantor or debtor is of a protected type. Some States provide for semi-public forms of disposal as an alternative to ensure additional safeguards to the debtor, such as by requiring the intervention of a notary public or a registrar to oversee enforcement and conduct non-judicial sale of the encumbered assets.

8. Paragraph (7) outlines the right of redemption, which permits that the debtor or the grantor regain possession of the property and terminate enforcement any time prior to completion of the enforcement procedure by the creditor. This can be achieved by paying the secured obligation in full, including any expenses so far incurred by the creditor.

Recommendation 129 – Distribution of proceeds

(1) The proceeds obtained either upon disposal or collection after reimbursement for reasonable costs of repossession and disposition should be distributed by the enforcing creditor in respect of the priority ranks of creditors, as set out in Recommendation 105, and any surplus should be ultimately returned to the grantor.

(2) The enforcing secured creditor may elect, at any time, before or after payment of other creditors under paragraph (1), to deposit the surplus with a judicial authority, a deposit fund or another person or entity authorised to receive funds, for distribution to the remaining competing claimants, subject to any requisites of State law.

(3) If the disposal proceeds are insufficient to satisfy the secured obligation and incurred expenses, the creditor may bring a personal action against the debtor for the deficiency, but States may limit personal action and waive the creditor's right to seek payment of any deficiency where the immovable corresponds to the sole residence of the grantor, or the grantor is protected under consumer or family protection statutes.

Comments

1. The proceeds from enforcement should be distributed to the creditor to the extent necessary to pay the debt in full, including any expenses incurred with enforcement. If there are remaining proceeds, they are distributed to creditors having subordinate priority in the descending order of their priority, as further detailed in the general recommendations on enforcement of security rights on movables (see Recommendation 105). If there is a surplus following the distribution of proceeds, it is transferred to the debtor or grantor (if different from the debtor).

2. If the enforcing secured creditor is uncertain as to what parties are entitled to receive any surplus remaining after satisfaction of the secured obligation, or if the secured creditor wishes to avoid any dispute as to how it has distributed such surplus, the secured creditor may pay the surplus into an account held by a competent judicial or other authority, or to a public deposit fund or another person or entity to be specified by the enacting State for distribution in accordance with the provisions of this Law on priority

3. If the proceeds are insufficient to pay in full the debt, the creditor may bring a personal action against the debtor for the deficiency. However, the right for a personal action may be waived by agreement (*e.g.*, under a so-called "non-recourse clause") or otherwise limited by a State, notably if the immovable corresponds to the sole residence of the grantor or the grantor is protected under consumer or family protection statutes. Also note that, in the case of a third-party grantor, or if a third-party acquired the immovable subject to the security right, unless such third-party has

expressly become personally liable for the debt, a personal action for the deficiency can only be brought against the debtor.

Recommendation 130 – Relief available to the debtor or grantor, and rights assured to a purchaser

(1) The debtor and the grantor should not have a right to force judicial enforcement if the creditor has chosen to pursue non-judicial enforcement in a manner authorised by law.

(2) The debtor and the grantor should have the right to seek relief from a court and obtain a stay of the enforcement procedure on the grounds that no default has occurred to justify enforcement or that the creditor has waived default.

(3) The debtor and the grantor should also have the right to seek relief from a court to obtain compliance by the creditor with the rules on enforcement, however, a stay of the enforcement should only be granted in the case of failure by the creditor to comply with the rules on providing prior notice, in accordance with Recommendation 126, or else, when there is sufficient evidence that the secured creditor would not have sufficient financial capacity to provide money damages as compensation to the debtor or grantor after enforcement.

(4) If a secured creditor disposes of encumbered assets non-judicially, the buyer or other transferee should acquire the grantor's right in the encumbered assets free of the rights of the disposing secured creditor and any competing claimant, except rights that have priority over the right of the enforcing secured creditor. If the disposition is by way of lease, the lessee should be entitled to the benefit of the lease during its term except as against creditors with rights that have priority over the right of the enforcing secured creditor.

(5) A bona fide purchaser or lessee of the enforced immovable should be protected from pending and future action by the debtor or grantor, whose sole relief should be damages owed by the creditor, except if: (a) a stay had been granted by a court, or (b) notice of disposal has not been properly served to the debtor or the grantor, or (c) the purchaser or lessee had prior knowledge of noncompliance that materially prejudiced the rights of the grantor or another person.

Comments

1. If the creditor institutes a non-judicial enforcement proceeding, the debtor should not be entitled to force its conversion to a judicial procedure, unless there is evidence that the non-judicial procedure is improperly conducted by the creditor. Conversely, the creditor is always entitled to, before disposal of the encumbered assets, modify the means of enforcement, for instance, by resorting to judicial enforcement, even if non-judicial enforcement has commenced.

2. The debtor or grantor (if a different person than the debtor) should be entitled to contest in court the asserted basis for the creditor's action, based upon a claim that there has been no default in payment or performance of other covenants, or that the default had been waived by the creditor.

3. Except for a failure to provide proper notice (either of beginning of enforcement or of disposal), a stay should generally not be obtained by the debtor or grantor, especially when the secured creditor is able to provide money damages as compensation. This might be the case for financial institutions and professional creditors, who are often subject to strict governmental oversight and must comply with capitalisation requirements. However, even in situations in which injunctive relief might otherwise be appropriate, such as that the creditor is unlikely to have sufficient financial capacity to provide money damages as compensation to the debtor or grantor after enforcement, general requirements for granting injunctive relief (such as proof that the petitioning party will suffer irreparable harm if the proposed enforcement proceeding is allowed to

go forward, proof that the petitioning party is likely to succeed on the merits of the case, and the posting of a bond required by a party seeking injunctive relief) should nevertheless be satisfied.

4. If the enforcement is properly executed, the buyer will take ownership to the encumbered assets according to the priority of the security right that is enforced. Thus, any subordinate interests (liens, mortgages, leases, etc.) should be cancelled and will no longer encumber the property in the hands of the buyer.

5. Unless a stay has been obtained to avoid enforcement or noticed was not properly served, a debtor's remedy should most often be a judicial action to seek damages from the enforcing creditor, in the event of a failure to properly follow enforcement procedures. If a bona fide purchaser has bought the encumbered assets at the enforcement sale, courts should reject attempts by the debtor to reverse the sale, in which case damages should be the sole available remedy, except in case the purchaser was aware of a material noncompliance by the secured creditor, in which case the purchaser would no longer be considered bona fide.

PART III. ENFORCEMENT ON DIGITAL ASSETS

Introduction

Digital assets have gained increasing popularity and play a progressively more significant role in creating and transferring value in contemporary economies. For example, in recent years, *cryptocurrencies* and *non-fungible tokens* have entered the lexicon and the investment portfolios of the general public. Different sub-classes of digital assets may have distinctive characteristics such as operational features, holding methods and commercial uses, and have differing degrees of analogy to existing asset classes. A cryptocurrency, for example, is very different from a data set, although both can have value that can be transferred. This particular characteristic explains why digital assets, broadly defined, are relevant in the context of enforcement and of these Best Practices.

The concept of "digital asset" is, however, neither uniform nor undisputed. Jurisdictions have responded in different ways. Some legal systems have already enacted specific legislation providing for a definition of "digital assets" generally, or for specific purposes. In other jurisdictions, in the absence of specific legislation, courts have recognised that certain digital assets can be made the subject matter of legal claims, while others have rejected claims or relief for particular assets, whether for public policy reasons (*e.g.*, the type of asset involved is illegal under domestic law) or on doctrinal grounds (*e.g.*, the asset is not recognised as property and so cannot be the subject of proprietary remedies). Legislators and courts have furthermore addressed important issues regarding how general private law applies to digital assets. These include, for example, the legal nature of digital assets (as property or otherwise), the nature of the relationship between an asset-holding platform (operator) and its account holder, and the determination of the location of digital assets. As may be expected, there is not yet any consensus. The difficulties are exacerbated by digital assets not being a single, monolithic category.

The issues listed above fall outside the scope of these Best Practices. They are deferred to the applicable domestic law, guided as necessary by reference to instruments developed at the national level and the supranational level (such as the UNIDROIT Principles on Digital Assets and Private Law (UNIDROIT DAPL Principles)). Instead, these Best Practices focus solely on matters of enforcement and adopt a pragmatic approach. The key consideration in this Part III is not so much the form or legal characterisation of digital assets under substantive law, but rather whether they have economic value that can be relevant for and realised in the enforcement context.

Following this pragmatic approach, these Best Practices are based on the assumption that digital assets are susceptible to enforcement. As such, the recommendations provided in Part I and Part II of these Best Practices are relevant to enforcement on digital assets.

The inclusion of a dedicated Part III on Enforcement on Digital Assets is intended to reflect the growing economic importance of digital assets and to provide additional guidance for enforcement when digital assets are involved.

Such features include the decentralised nature of these digital assets, which may impede or exclude recourse to freezing or attachment orders for enforcement purposes. In addition, enforcement may require the involvement of the debtor and a third party, such as a custodian, calling for detailed requirements regarding cooperation with the public authority or secured creditor engaged in enforcement. The delocalised nature of the assets may also make the identification of the appropriate competent public authority more difficult or require cross-border collaboration.

The recommendations in this Part are particularly designed for one of the most common subclasses of digital assets in the current commercial context – controllable digital assets (see Principle 2(2) of the UNIDROIT DAPL Principles) – in so far as features of these assets may present challenges not

typically encountered when dealing with other types of assets. While most cases currently prevalent in commerce will fall into this narrower category of controllable digital assets, a variety of other assets in digital form may be relevant to enforcement, insofar as they have economic value or can be realised in value through the enforcement process. This could be the case, for example, for databases, data sets, tokenised rights to payment in supply chains, or other electronic transferable records. Digital assets linked to another asset, whether the asset is tangible or intangible, may raise different considerations and may be subject to specific rules that would prevail over the general ones (See Principle 4 of the UNIDROIT DAPL Principles and, in particular, Illustrations 4 and 5). Where these assets present characteristics that are similar to controllable digital assets, the recommendation in Part III may provide guidance for enforcement; otherwise, the recommendations in Part I and II should be considered, with any necessary adaptation related to the digital aspect of the asset against which enforcement is sought.

The recommendations in this Part intend to provide guidance on how enforcement measures can be deployed, or adapted where necessary, to target controllable digital assets effectively at the enforcement stage. The recommendations are designed to be capable of adoption and implementation, regardless of how a particular legal system defines, classifies or locates controllable digital assets. Further, and in line with the UNIDROIT DAPL Principles, the recommendations are also technology and business model neutral, *i.e.*, they do not favour any particular asset type or technology. While the commentary refers to, and uses examples that draw on, specific technologies, *e.g.*, blockchain or distributed ledger, this has been done only to clarify the application of the recommendations, and also in acknowledgement of the fact that to date most enforcement measures are targeted at digital assets based on such technology.

Following an opening general recommendation (Recommendation 131), this Part is then divided into two sections. The first section addresses enforcement on digital assets by way of public authority (Recommendations 132-140) and the second section addresses enforcement of security rights in digital assets (Recommendation 141) which covers both enforcement by way of public authority and non-judicial enforcement.

Recommendation 131 – General enforcement law applies to digital assets

(1) [Enforcement law/legal systems] should recognise that digital assets are susceptible to enforcement. / *Alternative text:* Digital assets should be susceptible to enforcement.

(2) Where enforcement against digital assets proceeds by way of public authority, the recommendations in Part I apply, as further specified by the recommendations in Chapter 1 of this Part.

(3) Where digital assets are the object of a security right and enforcement of such a security right proceeds other than by way of public authority, the recommendations in Part II apply, as further specified by the recommendation in Chapter 2 of this Part.

Comments

1. This first best practice crystallises the main policy decision guiding Part III of this instrument in relation to enforcement on digital assets.

2. As indicated by Paragraph (1), digital assets should be susceptible to enforcement. The key message is to support the applicability of the existing enforcement system to digital assets. Thus, as a general rule, the State's (pre-)existing enforcement mechanisms should be applied, insofar as possible and subject to necessary modification, to digital assets.

3. Paragraphs 2 and 3 specify that, in principle, the recommendations provided in Parts I and II of these Best Practices should be applicable to enforcement against digital assets, supplemented by the specific recommendations included in this Part III. Though those best practices are particularly well suited for controllable digital assets, the recommendations purposely do not provide a definition, and the language is sufficiently flexible to be applied to the evolving landscape of assets in digital form.

4. While the Recommendations in this Part apply mainly to enforcement by way of public authority, the final Recommendation also addresses non-judicial enforcement of security rights on digital assets.

5. The following examples describe situations falling within the scope of enforcement proceedings involving digital assets covered by this Part III.

(a) A claim for damages has led to a monetary judgment and the enforcement may require garnishment of a cryptocurrency account maintained by a custodian.

(b) A contract provides for the sale of a Non-Fungible Token (NFT), an example of which may be any of the following:

- The NFT is an in-game object that can be employed by a player's avatar and traded across game-worlds.
- The NFT represents a piece of graphic art but purports to give its holder no intellectual property nor other rights in the artwork.
- The NFT represents a seat in a sports club stadium and purports to entitle the token holder to occupy the seat for a certain time.

Pursuant to non-delivery, the acquirer institutes a claim and the debtor is ordered to deliver or transfer the NFT in accordance with the contract. The debtor does not voluntarily comply, and the acquirer seeks enforcement of the order.

(c) A cryptocurrency exchange is hacked and several accounts are compromised. The account holder sues to recover their digital assets or, alternatively, to be compensated with the pecuniary equivalent (that means, as in illustration (a) above, a monetary judgment).

6. As illustrated by the examples above, the mode of enforcement would depend upon the content of the obligation to be performed pursuant to the enforceable instrument. This distinction is assumed in the recommendations below but only leads to different or specific solutions where necessary. For instance, the transfer of control over the digital assets relevant for the enforcement proceedings, depending on the circumstances, to whom and on which grounds, may enable the seizing of such assets and may be the mode to enforce the order to perform the contractual obligation to deliver the agreed digital assets. While the action required is the same (transferring control by the debtor or by third party, if necessary and feasible), the content of the obligation to be performed pursuant to the enforcement instrument differs (examples (a) and (b)). Alternatively, the obligation underlying the enforceable instrument (*e.g.,* obligation to deliver) might be satisfied by the subrogation in the debtor's contractual position vis-à-vis a custodian or in an exchange platform (example (c) above).

7. The application of general enforcement law does not exclude the application, in practice, of adaptations to ensure effective enforcement. With this acknowledgement, these recommendations are aligned with the UNIDROIT DAPL Principles, which in Principle 18 (Procedural law including enforcement) take a similar approach, as explained in the commentary to that Principle. Other

international instruments on enforcement have also stressed the need to ensure that if existing rules and enforcement procedures apply to digital assets, they should be "adapted to digital assets" (*e.g.*, Art. 40, UIHJ (International Union of Judicial Officers) Global Code of Digital Enforcement, 2021).

8. The general rules may simply apply with adjustments on how a specific enforcement measure works in practice; the special characteristics of digital assets may however require additional considerations in the selection of the most appropriate measures, adequate to such characteristics and suited to other assets with similar features, or may require a combination of existing measures to achieve an effective outcome (see further Recommendation 132).

9. As anticipated in the Introduction and further explained in each recommendation where necessary, the distinctive features of digital assets that have been considered relevant for enforcement include the following:

(a) The identification of the parties involved may be difficult (*e.g.*, because of the use of pseudonyms) or may require the cooperation of third parties. Courts dealing with cases where enforcement has involved digital assets have acknowledged the difficulty in identifying relevant parties. As noted by courts, although the amounts held at every address are in the public domain, the identity of the parties is not, and therefore the relationship between the digital addresses and any associated persons may be elusive. Therefore, although the digital assets may be "located" and "held" by an identified holder, and the transactions can be traced, the public addresses cannot be connected to an identified party to the proceedings.

(b) It is also difficult to find and trace the digital assets themselves. Certain digital assets can implement privacy features that hinder traceability or make it more costly. In fraudulent or unauthorised transactions, digital assets can become untraceable or, at least, traceability would require expert services (*e.g.*, chain analytics) or third parties' cooperation.

10. Mechanisms to enable gaining control over the digital assets may need to be adapted to account for distinctive features, including the following:

(a) Digital assets can be held under different holding models. This will be relevant to identify who has to cooperate for the purposes of enabling the enforcement actions. Current models include, first, those where users can hold their own assets directly with a wallet native to the protocol. The user is responsible for securing the wallet. Second, users can hold digital assets in a wallet protected with a simplified verification method (for example, a wallet with a two-step verification protocol, facial recognition, or another simplified verification method of this type). Third, users can hold digital assets in an internet-based wallet offered by a third-party provider. Finally, users can hold digital assets with a custodial wallet provider. The role of the custodian and the legal nature of the relationship between the user and the custodian will be relevant to aspects of enforcement typically related to seizure and disposition.

(b) The speed with which digital assets can be transferred, together with the fact that the value of some classes of digital assets may be highly volatile, may have an impact on the realisation of value and may render enforcement fruitless or costly. These characteristics make the case for the use of speedy methods of gaining control, to counter the risk of dissipation or fluctuation of value that may render realisation unsatisfactory. The high volatility of digital assets or the difficulty in determining adequate exchange rates or certain valuation criteria may render the valuation of digital assets challenging. It is true that digital assets may not necessarily be more volatile than other types of assets (*e.g.*, specific types of financial instruments). Accordingly, courts and enforcement agents may rely on existing rules, methods, and criteria applicable to other assets facing similar complexities in valuation.

A different problem would arise when there is no market for the class of digital assets on which enforcement is sought. Again, this is not a new problem in legal systems.

11. As noted in the Introduction, the recommendations in this Part do not take a position on the legal nature of digital assets, as there is no harmonised approach. Applicable domestic laws determine the legal nature. As the legal nature, and in particular the "property status" of the digital assets, may affect the availability of certain remedies and rights of action, legislators should take this issue into particular consideration for the purposes of enforcement.

12. There are multiple examples of conflicting and disparate legal treatment of digital assets in comparative law and case law. Sometimes the legal categorisation is explicitly addressed and resolved; in other cases, the discussion about the legal nature, in particular the "property status", is simply approached indirectly in deciding on the applicability of various actions that may presume the legal nature of the asset (property or not, tangible or intangible, etc.). Thus, courts have had to discuss whether bitcoins were "money" and thus capable or incapable of being the subject of an action of conversion under forum law. In such cases, the courts discussed whether bitcoins' features made them a fitting subject for an action of conversion or, on the contrary, insofar as the forum law traditionally required for a conversion action to be exercised that the object be capable of physical possession, whether the action should be denied. Similarly, legal categorisation would also have decisive effect in relation to the granting of a freezing order in respect of a quantity of digital assets, or an asset preservation order; the viability of such orders would depend upon the recognition of digital assets as property and thus subject to proprietary injunction.

13. Another potential factor that may have an impact on enforcement is that some legal systems have introduced a characterisation of certain types of digital assets for the purposes of financial regulation. Thus, digital assets such as bitcoins or cryptocurrencies may be characterised as "money" which entails regulatory implications, but may also have consequences in enforcement (*e.g.,* bitcoin account treated in the same way as a bank account). In other jurisdictions, that categorisation may be refused.

14. In some jurisdictions, the lack of corporeality of digital assets may be an obstacle and doubts on the capability of digital assets of being controlled in an exclusive manner by a person render uncertain their legal categorisation and even prevent the claimant from segregating bitcoins (or other digital assets) held by an exchange in an insolvency proceeding and seeking a proprietary remedy. Conversely, in other jurisdictions court decisions have held that digital assets and, in particular, for instance, bitcoins, possess characteristics such as value, scarcity, and disposability, thus meeting the criteria of an object of rights and constituting virtual property. As a result, enforcement rules, property injunctions, or orders were considered to be applicable to digital assets.

15. In line with the UNIDROIT DAPL Principles (specifically, Principle 3), and as already explained in the Introduction above, these recommendations do not prescribe a specific classification of digital assets. For the purposes of enforcement, the rationale behind acknowledging the application of general enforcement rules, procedures, and measures is that digital assets are of value and can be subject to enforcement. Principles of functional equivalence and technology neutrality support this key assumption.

Chapter I. Enforcement on digital assets by way of public authority

Recommendation 132 – Effective enforcement measures against digital assets, including those that apply to the debtor personally

(1) Effective enforcement on digital assets requires the proper selection of measures that should take into account and be suitable for the different ways that digital assets are held or transferred. In

some cases, a combined application of various measures may be required, including measures that apply to debtors personally.

(2) Adequate and proportional measures to ensure cooperation by the debtor and third parties in the disclosure of information for identifying and locating digital assets, or for tracing, seizing, transferring or disposing of them, pursuant to Recommendations 133 to 138, should be provided to render enforcement on digital assets more effective.

(3) Consideration should be given to agency and receivership as they may be particularly effective measures to facilitate enforcement against digital assets.

Comments

1. Recommendation 132 elaborates on the necessity to select enforcement measures that are fit for the purpose of enforcement against digital assets. The selection of measures should focus on effectiveness and suitability to the specific features of digital assets. Paragraph (1) highlights the potential relevance of using measures that apply to debtors personally (sometimes called *in personam* measures; see Recommendation 64 in Part I), in contrast to the more common enforcement measures that apply to the assets directly (sometimes called *in rem* measures). Combining modes of enforcement may be particularly appropriate in cases of complex transactions (see Recommendation 61 in Part I). Nonetheless, even if the combination of measures may be advisable in some circumstances, it needs to be acknowledged that in some cases the best remedy would not in fact be such combined application but rather a specific measure, *e.g.*, receivership.

2. Even if *in personam* measures are the last resort, it must be stressed that *in personam* measures can be particularly relevant where the assistance of the debtor or third parties (*e.g.*, custodians) is beneficial or even decisive for enforcement on digital assets. Should the debtor voluntarily disclose the information related to the identification and the location of the digital assets relevant for enforcement, the enforcement is of course made easier and more practical. If the debtor is not cooperative, *in personam* measures ordering the debtor to disclose may be sufficient. Otherwise, identification and location need the assistance of experts or the cooperation of third parties.

3. Paragraph 2 of this Recommendation underlines the relevance of the cooperation of the debtor and third parties in the disclosure of information to ensure effective enforcement on digital assets, which will be dealt with in more details later in the Section. The Recommendation highlights the importance of providing adequate and proportional measures to reach this goal throughout the entire procedure (from identification and location of the assets to the actual tracing, seizing, transferring or disposing of them). While these terms may appear to be repetitive, they are all listed in a descriptive way, to capture the different terminology and approaches in legal systems.

4. For the purposes of transfer and seizure, the assistance of the debtor in providing the key, enabling the transfer or facilitating the taking of control over the digital assets, is instrumental and irreplaceable in many cases (*e.g.*, when attempts to discover or break the key can be technically unfruitful or too costly). *In personam* measures can, however, fail and become ineffective if the debtor (or the third party) refuses to cooperate or resists sanctions for non-cooperation. Such sanctions may be not sufficiently dissuasive (penalties or fines) or be too invasive (detention or imprisonment). Specific difficulties may arise if the debtor is unknown, or against debtors lacking separate legal personality (such as may be the case for DAOs). In some cases, *in personam* measures can be inadequate even when the debtor might be willing to cooperate, if the debtor is not in a position, or declares not to be in a position, to comply (*e.g.*, the debtor declares to have forgotten or lost the private key).

5. As there are different holding models for digital assets, in some cases *in personam* measures must be substituted by or jointly applied with *in rem* measures. The confiscation of devices or digital equipment (cold wallets, servers, laptops) to search and access relevant information for the location, seizure or transfer, could be necessary. To a certain extent, even in such cases, sometimes the cooperation of the debtor may be necessary (or at least convenient) to streamline enforcement (*e.g.*, disclosing access codes or passwords protecting the devices). The intervention of experts forcing the access to relevant information could in that sense overcome the uncooperative behaviour of the debtor.

6. Even if the digital assets have been identified and located, various enforcement measures might be necessary to prevent dissipation or unauthorised disposition by the debtor pending determination of the value or pending disposition. To that end, freezing orders can be effective measures to prevent the disposition of the digital assets. The nature and availability of freezing orders may vary from one legal system to another. While in some jurisdictions, freezing orders are *in personam* measures, in others they operate *in rem*. The debtor, the custodians, and other intermediaries may be situated in different States, and in States other than the country of the court ordering the injunction. In the absence of uniform solutions and common treatment, enforcement can be rendered ineffective or unsatisfactory if the enforcement measures fail to prevent the disposition.

7. The distinctive features of digital assets, as described above, may call for a combination of various enforcement measures for the sake of effective enforcement, as is also necessary for enforcement in other assets with similar characteristics. However, that is not always the case, and in certain situations enforcement can be relatively simple and straightforward without the need to combine various enforcement measures (for example, receivership could be an adequate measure to be applied as a single effective measure (see further comment 12 below)). Therefore, it is recommended that adequate and proportional measures be provided for by law (irrespective of whether they are the general measures already used for assets that are similar to the specific type of digital assets involved) and that they be enforced and applied in a manner that takes into consideration the characteristics of digital assets so as to render the enforcement practical, possible, and effective (be it by using one measure or combining more than one measure).

8. As stated in Paragraph (2), effective enforcement requires adequate and proportional measures. It was discussed above in explaining Paragraph (1) that the combination of several measures may be necessary to achieve enforcement goals in an effective way. Given the characteristics of digital assets, it has been also noted that measures working *in personam* may be even more relevant and adequate for effective enforcement. The identification and the tracing of digital assets may largely be facilitated by the cooperation of the debtor in disclosing such information relevant for the enforcement proceeding. Again, without the cooperation of the debtor, locating and tracing digital assets can be done by experts, but that increases costs and may entail delays. Prolonging the process for the identification and the location also increases the risk of dissipation or unauthorised disposal. Measures such as freezing orders that operate *in personam* in some jurisdictions might be necessary to prevent such risk.

9. For access, seizure, and transfer of digital assets by taking control, the necessary cooperation of the debtor or of third parties assisting these actions is key. In the absence of such cooperation, enforcement might be rendered unfeasible, highly costly, or totally fruitless. Due to the need for assistance by the debtor and third parties, *in personam* measures, even if not always exclusively, gain special relevance for effective enforcement.

10. *Illustration. If cryptocurrency is held in a cold wallet, the ability to transfer the asset would usually require physical possession of or access to the wallet, as well as any associated PINs or passwords that must be used to access the stored data. The cooperation of the debtor – voluntary or forced – is needed for initial disclosure of the existence of the cryptocurrency held in a cold wallet,*

and for access to the relevant information stored in the wallet. If the wallet is protected by a private key system, the debtor will also be required to cooperate in making access possible and divulge the key, or the enforcement organ may need to seek the assistance of an expert or third party to gain access.

11. Court decisions dealing with enforcement in digital assets provide examples of how measures working *in personam* can be instrumental to effective enforcement. Thus, courts have issued *in personam* orders to ensure the cooperation of the debtor, for instance, by ordering the defendant to provide the password to his crypto-wallet to the insolvency administrator, by ordering the defendant to transfer the cryptocurrencies to the relevant court's account directly in the courtroom, or by ordering the holders of the password phrases to the security wallet to transfer those phrases to the court in sealed envelopes.

12. As further discussed in Recommendation 138 on sanctions, dissuasive measures should be available in order to compel the debtor to cooperate. Thus, non-compliance of the defendant triggers the application of sanctions, from fines to imprisonment.

13. Paragraph (3) serves as a reminder that agency and receivership may be effective measures for enforcement generally (see Chapter VII of Part I), as thus may also be useful for enforcement on digital assets. Authorising courts to appoint a third party as a receiver to secure any payments due to the debtor, manage the debtor's assets or dispose of them in order to satisfy the creditor's interest could overcome some of the challenges associated with enforcement on digital assets. That may be particularly useful where the debtor fails to take cooperative steps to facilitate enforcement or is unable, given the circumstances, to do so. The fluctuating value of digital assets could also be another relevant factor to consider in resorting to receivership.

14. Agents or receivers do not act for public authorities. They only act for debtors. As such they may act in the debtor's place both within and outside the jurisdiction. In doing so they may secure the co-operation of third parties, *e.g.*, of custodians who hold the debtor's assets, including those who are not otherwise subject to the enforcement organ or enforcement court's jurisdiction. [State practice has been known to support the actions of foreign receivers even in the absence of formal cooperation agreements.]

Recommendation 133 – Duty of disclosure and of cooperation of the debtor

(1) The recommendations in Chapter IV of Part I, should apply to enforcement involving digital assets to the full extent that they are adequate and suited to the characteristics of digital assets. Proportionate and effective means of obtaining information on all the debtor's digital assets that could be subject to enforcement, including digital assets held by third persons, should be established.

(2) The debtor has the duty to cooperate with the enforcement organ in disclosing information related to the digital assets that might be relevant for the purposes of enforcement proceedings, subject to all recognised privileges of civil procedure and in conformity with general practices. This duty to cooperate may require the disclosure of information related to the identification and the location of digital assets, providing written and oral statements, and the production of documents and data, as well as facilitating the search for information stored on electronic devices or available in digital systems.

(3) Due to specific technological requirements or any other technical reasons, assistance by technical experts may be necessary to ensure full and effective compliance with disclosure obligations.

(4) The mechanisms and measures for the disclosure of digital assets should be proportionate and adequate for the purposes of enforcement, taking into consideration, among other factors, the

protection of third parties' rights, the risk of exposure of trade secrets and confidential information, cybersecurity risks, and privacy issues. Should less costly and less invasive measures be available to ensure effective and sufficient disclosure, they should be given priority over more costly or invasive alternative measures.

Comments

1. The traditional tension between full disclosure and the protection of debtor's privacy and data reappears in the context of enforcement on digital assets. The challenge is to strike an adequate balance between the interests of creditors and debtors.

2. As a starting point, Recommendation 133(1) states that the provisions of Chapter IV of Part I apply to enforcement involving digital assets to the full extent that is adequate and suited to the characteristics of digital assets. This Recommendation applies to digital assets the fundamental principle of proportionate and effective disclosure by the debtor with the enforcement authorities. Should the debtor be cooperative in disclosing, on a voluntary basis, assets that satisfy the enforcement needs, neither a declaration of assets nor any other mechanisms of disclosure should be utilised.

3. Considering the characteristics of digital assets, the duty of the debtor to disclose would be the primary way to obtain information about such assets, but it is not the only one. For certain classes of digital assets, the assistance of public authorities or private agencies with access to information related to, or records regarding the debtors' assets, may be available. The Regulation of the European Parliament and of the Council on Markets in Crypto-assets amending Directive (EU) 2023/1114 (MiCA) provides an example where cooperation among authorities, including exchange of information, is contemplated. Some domestic jurisdictions are also considering measures to gather information on digital asset transactions for certain purposes, in particular, for taxation or in the context of anti-money laundering measures. Thus, both individuals and third parties located in the enacting jurisdiction could be obliged to disclose certain information about amounts and transactions in digital assets (usually higher than a minimum threshold) during the fiscal year. Certain intermediaries may be subjected to disclosure or reporting obligations concerning transactions in digital assets under applicable rules on anti-money laundering. These emerging obligations may facilitate disclosure and contribute toward promoting transparency in the market, including for the purposes of enforcement.

4. Additionally, enforcement authorities may be empowered to request data from public registers, either with full public access or subject to restricted access. In theory, this source seems to be limited in relation to digital assets. Nonetheless, to the extent that digital assets can be registered (for different purposes) in some jurisdictions in existing registers (*e.g.*, registers on intellectual property rights, security interest registers, movable registers, commercial registers, etc.), this option may become more relevant. Registration of digital assets in such registers may be a prerequisite for gaining certain legal effects (*e.g.*, tokens representing interests in immovable property) or as an additional side annotation complementing the main registered record (*e.g.*, for information purposes, as a warning for users to check other sources, or as a disclaimer as to the integrity of the register records). For instance, if a right in an immovable asset has been tokenized, the land registry could include a side annotation to that effect.

5. In disclosure, special attention needs to be paid to the protection of third-party rights, the risk of exposure of trade secrets and confidential information, cybersecurity risks, and privacy issues. Should disclosure be likely to compromise third parties' interests, entail a threat to cybersecurity of any system involved, or raise privacy concerns, these considerations must be taken into account in assessing the adequacy, extent, and proportionality of the disclosure. For instance, where facilitating access to devices pursuant to 133(2) *in fine* the device or the system could be exposed or the security compromised, as the access control mechanisms are deactivated to enable control.

6. The technological complexity involving certain actions required in relation to digital assets or the lack of expertise of the debtor to effectively and voluntarily perform such cooperative actions may render technical support necessary for the debtor to cooperate. The debtor, even when willing to cooperate, may need the assistance of technical experts to fully comply with its duty. Although the need for special expertise is not unique to enforcement against digital assets, as analogous needs may arise in general enforcement, in the digital asset context, specific types of expertise are required and may be required more often than in other contexts.

7. There are different models for expert appointment in different jurisdictions. Models may differ regarding the role of enforcement organs in identifying and appointing such experts, as well as in the allocation of costs. Considering the need for technical expertise in cases involving digital assets and the type of required expertise, clear rules on locating, appointing, and bearing the cost of expert advice will avoid delays and difficulties in digital asset enforcement proceedings. Such rules may be either the general rules applicable for all proceedings, when suitable, or specific to the digital asset context.

8. Technical experts should have the obligation not to disclose information obtained to the creditor or third parties other than the enforcement agent. Given that a large amount of data and information concerning the debtor's private activities may be obtained by the technical expert invited to assist the creditor, it is advisable that such data and information not be shared with the creditor but only with the enforcement organ.

Recommendation 134 – Duty of disclosure and of cooperation of third parties

(1) Third parties that provide services related to the issuance, custody or transfer of digital assets should have the duty to cooperate, by disclosing information upon request by the enforcement organ for the purposes of enforcement.

(2) The request for cooperation should specify the required information to be disclosed to the full extent possible to ensure the effectiveness of enforcement, taking into consideration third parties' rights, costs of disclosure and other relevant factors.

(3) The requirements of proportionality and adequacy pursuant to Recommendation 133(4) remain essential.

Comments

1. Paragraph (1) extends the duty of cooperation in disclosing relevant information for the purposes of enforcement to third parties. Similarly to Part I, this Recommendation requires the cooperation of third parties without regard to the debtor's prior participation in disclosure (see Recommendation 15, Comment 3). Whether the debtor has cooperated or not and without the need to exhaust this possibility first, the cooperation of selected third parties may be requested and even considered more effective and appropriate. As a matter of fact, third parties' cooperation may be instrumental to identify and trace digital assets, even when the debtor *is* willing to cooperate.

2. In the digital assets context, third parties include a variety of intermediaries and service providers, including custodians, that to the extent of their engagement in the custody or the transfer of digital assets, have information relevant to enforcement. For example, third parties may have information related to the identification of parties involved, as well as information related to specific digital assets and transactions on digital assets. For the purposes of providing information, intermediaries other than custodians who "obtain and maintain the digital assets for the client" (as per the definition of custodians in Principle 10 of the UNIDROIT DAPL Principles), may also have relevant information for enforcement. Therefore, their cooperation is also necessary.

3. The duty of disclosure by third parties is typically related to the identification of users and digital assets, but it is not limited to this. Disclosure can refer to any information relevant for the enforcement proceedings.

4. For example, specific information may be required in order to find digital assets – namely, internet browser history, internet browser extensions, cryptocurrency wallet downloads, identification of non-custodial wallets, transfers between bank accounts and exchanges or other money transmitters, emails that evidence login and transaction confirmations, logs from multi-factor authentication applications, and other mobile device applications. Should such information be obtained, forensic consultants can assist in tracing digital assets; ultimately, however, the investigation may only lead to identifying those persons who have used a public key address, while the identity of any given actor that authorised a transaction may not be traceable.

5. To the full extent possible so as to ensure the effectiveness of the enforcement, it is recommended to take into consideration third parties' rights, costs of disclosure and other relevant factors. In order to minimise the burden and costs on third parties and ensure effectiveness, the request for information should specify in as much detail as possible, considering the circumstances of the case and the available information at that time, the information that the third party is required to provide, verify, or confirm. An example of an unreasonable, disproportionate, and probably highly inefficient measure would be a judicial order addressed to a crypto-asset trading venue or to various venues operating in a market, with no specific, reasonable connection to the case, requiring details of all transactions of the debtor's account over the last several months.

6. The Recommendation does not impose a general requirement for a judicial order to request disclosure from third parties. Such an order would only be required, as per the general recommendations, where the third party's privacy was at stake, where the third party refused to cooperate in disclosing the required information, or where the action required from the third party required judicial involvement. For example, while the production of standard-form documents may be straightforward and could be easily done without judicial involvement, the position may be different when the party should provide an account of events by way of formal deposition.

7. The market for digital assets is largely global. This may give rise to difficulties in identifying and contacting third parties abroad and, more importantly, in attracting their cooperation for the purpose of enforcement. Absent access to instruments of judicial cooperation, these specificities of digital assets may constitute additional challenges for enforcement on these assets.

Recommendation 135 – Civil search measures to discover digital assets

(1) Enforcement organs should be able to obtain authorisation from a court or relevant authority to search for digital assets when the debtor, or a relevant third party, refuses to consent to such a search without justification.

(2) The authorisation required under paragraph (1) should include an order to the effect that:

(a) the debtor or third party be requested to provide the information necessary to grant access to digital storage, or

(b) an expert be appointed to access digital storage and disclose any relevant information to the enforcement organ.

(3) Authorisation to search should only be granted upon it being demonstrated that the proposed search measure is proportionate and appropriate.

(4) The proportionality and appropriateness of search measures and actions should be evaluated taking into consideration the specific risks arising from such a search in a digital environment, in particular, but not limited to, third parties' rights, protection of trade secrets and confidential information, cybersecurity risks, and privacy issues.

Comments

1. Paragraph (1) states that authorisation by a court or competent authority is required to conduct a search without the debtor's consent to obtain relevant information about digital assets in the context of enforcement. In this case, the information can be necessary simply to locate and identify digital assets or to render seizure and transfer effective – *e.g.*, private keys. If the digital assets are held in pseudonymous accounts, the identification of digital assets held by the debtor may require additional information that must be provided by the debtor or a third party, or obtained with appropriate search measures from protected devices or systems. More critical is the need to access information that is instrumental for taking control over the assets, such as a private key.

2. As these measures are more invasive, a judicial order is a prerequisite for a forced search of devices storing information (on physical premises) or access to protected data stored in accounts, digital systems or wallets. This is equivalent to the order required for a search under Part I (see Recommendation 17).

3. The search for information on electronic devices or in digital systems (*e.g.*, cloud accounts, user accounts, etc.) may expose the system to security vulnerabilities, compromise confidential information, or affect third parties' interests. Hence, these factors should be taken into due consideration to ensure that measures are proportionate and adequate as well as effective and fit-for-purpose.

4. *Illustration. Forced access to the information stored on an electronic device to search for information related to digital assets should not imply that all private files of debtors (e.g., pictures) are exposed, as they are evidently not relevant to enforcement, and confidential data (passwords to other unrelated services) would inevitably be put at risk. For example, using an "imaging order", the computer experts are only allowed to make an "image" of the debtor's electronic devices. These "images" are then later keyword-searched for relevant materials so that no one will unnecessarily look through all the debtor's electronic information.*

5. Special risks arising from the search for digital assets or digitally stored information related to digital assets (*e.g.*, private keys) should be more carefully considered and prevented. The provision of information concerning the asset might include the means of obtaining control over the asset. Once a person is in possession of the private keys, it can control the assets. Therefore, consideration of a search order in respect of such assets could require simultaneous consideration of the requirements for a seizure order. It is true that this situation is not unique to digital assets (*e.g.*, it could occur in the case of a private safe in the possession of the debtor, opened to verify its contents, though this act implies the possibility to practically seize such contents). This situation, however, might occur more frequently, with greater speed, and in a less controllable and usually automated manner when digital assets are involved. Therefore, safeguards should be adopted to avoid that the acts directed at obtaining disclosure and aimed at searching for information concerning digital assets might expose such assets to unauthorised transfer or other actions that may compromise the enforcement results or otherwise infringe rights. Once the private key is revealed, digital assets' control is exposed and subject to the person holding the key. Therefore, special safeguards are to be put in place to ensure that search measures are neither entailing authorised access and subsequent use of the discovered information nor exposing confidential information to third parties.

Recommendation 136 – Duty to cooperate of the debtor for seizure and transfer

(1) Further cooperation from the debtor may be required in order to effectively and efficiently seize digital assets. Seizure of digital assets for the purposes of enforcement may require the cooperation by the debtor to disclose or make available relevant information for the enforcement authorities to gain control over the digital assets or to convey control over the digital assets.

(2) Further cooperation from the debtor may be required in order to effectively and efficiently transfer the digital assets. Transfer of digital assets for the purposes of enforcement may require the cooperation by the debtor to disclose, provide, or make available relevant information for the enforcement authorities to transfer the digital assets, for example to transfer control over the digital assets.

Comments

1. Paragraphs (1) and (2) acknowledge that the cooperation of the debtor, which was already mentioned in relation to locating and tracing digital assets (duty to disclose), becomes even more important in rendering seizure and transfer effective. Transfer of control over digital assets is the usual mechanism to enable seizure and transfer.

2. These recommendations follow the concept of "control", as a factual concept, of the UNIDROIT DAPL Principles (namely, Principle 6).

3. If the digital asset is linked to another asset, either tangible or intangible, the seizure and transfer rules applicable to the linked asset will apply. This recommendation is thus in line with Principle 4 of the UNIDROIT DAPL Principles. The illustrations provided by the UNIDROIT DAPL Principles are useful here as well.

4. Illustration *(from Principle 4, UNIDROIT DAPL Principles). A system may be established for trading quantities of tokenised gold. An investor may hold a digital token which evidences a proprietary right in a fractional share of specifically identified gold.* Whether a sale and transfer of the token passes the seller's proprietary right in the gold depends on the rules that apply to the transfer of movable assets (gold) in the applicable legal system, depending upon whether the system for the transfer of ownership is consensual or based on the transfer of possession (*traditio*) of the asset.

5. Illustration. In an enforcement case, the defendant was reluctant to cooperate in transferring Bitcoins. The court ordered that the computers and other necessary equipment seized from the defendant be brought into the courtroom, where the defendant was instructed to immediately transfer all the Bitcoins in front of the court, with the judge warning that failure to comply would lead to the charges of contempt and result in the defendant's arrest. Later, when the receiver traced more cryptocurrency wallets of the defendant, the latter again refused to cooperate with the court and hand over codes, usernames and passwords to access those cryptocurrency wallets. The defendant was imprisoned for contempt of court and was condemned to two months in prison, which could be shortened if he complied with court orders.

6. The cooperation of the debtor may be necessary to enable transfer of control over the digital assets by means of subrogation (or novation) in the contractual position of the debtor in a platform, or in a system for the purposes of accessing, seizing, and transferring the digital assets.

7. In ensuring that the seizure is practically effective, bearing in mind the attributes and characteristics of digital assets, access by the enforcement organ to the asset might not be sufficient, as the digital asset has to be contextually removed from the control of the debtor, for example where an enforcement organ transfers a cryptocurrency from the debtor's cold wallet to the enforcement

organ's own wallet. In order to ensure that seizure is effective, the mechanisms implemented to transfer control must entail that the debtor loses control, or at least exclusive control, over the digital assets at stake. Otherwise, such measures would be ineffective and unfruitful. In this respect, special consideration should be paid to the definition of exclusivity of control in Principle 6 of the UNIDROIT DAPL Principles.

8. The duty of cooperation of the debtor may be crucial, and irreplaceable, in some cases due to the holding method employed for the digital assets. Under a model of cold wallets – *e.g.*, when the key is stored on a USB device kept in a safe – the cooperation of the debtor is essential to reveal and provide the key for the transfer and cannot be replaced.

9. *Illustration. The defendant alleges that he could not recall the seed phrase (unique twelve-word password(s)), had only one record of the seed phrase, had not given evidence concerning the location of the piece of paper, had not given evidence why he considered that the location was "safe", and, in the event that the piece of paper that recorded the defendant's seed phrase were lost, the Bitcoins would, in effect, be destroyed, as they would not be able to be accessed. In the enforcement proceedings, the court was requested to issue an order on the seed phrases for the security wallet bearing the relevant address at stake, that was believed to contain a quantity of Bitcoins. The security wallet is a "2 of 2" wallet, which means that two out of two signatories need to authorise a transaction to make a transfer therefrom. As a result, the Bitcoins are accessible only by two people entering their respective seed phrases into certain software. If any seed phrase is lost, forgotten or corrupted, the Bitcoins will become inaccessible, which would amount to the destruction of Bitcoins. Therefore, protection of the seed phrases is of the utmost importance to avoid the court's jurisdiction being vitiated. The safe storage of each of the seed phrases for the security wallet will ensure that in the event either of them is unable to authorise a transaction in accordance with the further guidance of the court, the seed phrases can be accessed; used to restore the signatory wallets in respect of the security wallet, and then the required transaction can be executed.*

Recommendation 137 – Duty to cooperate of third parties for seizure and transfer

Third parties providing services relevant for the issuance, holding, custody, or transfer should have the duty to cooperate with enforcement organs in enabling the seizure and the transfer of digital assets as necessary.

Comments

1. The debtor may be uncooperative, or the holding model of the digital assets may require the cooperation of third parties providing relevant services in holding, custody or transfer.

2. The cooperation of third parties may be necessary where:

(a) the debtor does not cooperate and the cooperation of the third party can be sufficient for effective enforcement;

(b) the debtor cannot cooperate or is unable to provide the required information or perform the required actions to pass control; or

(c) the holding model, the relevant agreement under which the third party provided its service, or some technological consideration renders the cooperation of the debtor insufficient or ineffective.

3. Beyond third parties who are clearly engaged in custody and transfer and, therefore, can enable the transfer or the freezing of accounts and wallets, it is now being debated in some jurisdictions which other third parties might have "fiduciary duties" or a "duty to cooperate".

4. [Illustration: X claims to be the owner of some Bitcoin with a very high total value. The Bitcoin is held at two addresses on the blockchain. However, the private keys have been lost in a hack, likely stolen. Without its private keys, X cannot access its assets or move them to safety. X contends that the defendants - developers who control and run the four relevant Bitcoin networks – could easily secure X's assets, e.g., by moving them to another address that X could control.]

5. Illustration. [Intermediary X] announced that it "routinely freezes accounts that are identified as having suspicious activity occurring in line with our security policies and commitment to ensuring that users are protected while using our platform".

6. For tax purposes, authorities are implementing measures to facilitate the seizure of digital assets in payment of tax debts. That may include an investigation plan to detect and prevent fraud and money laundering activities and special actions targeted at tracing, locating, and seizing digital assets. Under such actions, the custodian would be requested to transfer the keys to the authority and freeze the wallet or account to prevent further transfer of the seized digital assets. Upon request of the authority, the digital assets will be disposed of and the resultant amount transferred to the tax authority.

Recommendation 138 – Sanctions for non-cooperation

If a debtor (including a legal person's representative) or a third party without a legitimate reason refuses to cooperate, they should be subject to adequate and proportionate sanctions, as provided for in Recommendation 65.

Comments

1. Recommendation 138 parallels Part I (see Recommendation 18), in providing for sanctions in case the debtor or third party refuses, without justification, to cooperate as required under Recommendations 133-34 and 136-37.

2. Sanctions can include fines or other penalties to be paid to the creditor (*e.g.*, astreinte) and, in serious cases, imprisonment. The criteria relevant to the assessment of sanctions is detailed in Recommendation 65 of Part I.

Recommendation 139 – Enforcement authorities: technological and organisational systems

(1) Only those judicial officers or enforcement agents authorised by law in each jurisdiction should be able to gain control over digital assets for enforcement purposes.

(2) Enforcement authorities should have adequate technological and organisational systems, to gain control, maintain custody, transfer or dispose of digital assets.

(3) Systems under paragraph (2) should be designed and operated to ensure sufficient standards of reliability, safety and cybersecurity.

(4) Effective measures should be adopted to ensure that the systems under paragraph (2) guarantee separation of assets in custody, enable identification and tracing of digital assets, and prevent unauthorised disposition or transfer.

Comments

1. This Recommendation underlines the additional challenges for enforcement authorities associated with enforcement on digital assets that flow from the distinctive characteristics of these

assets. More specifically, it foresees the necessity for dedicated systems to deal with digital assets against which enforcement is sought.

2. The first paragraph states that only specifically designated public authorities should be dealing with digital assets in the enforcement process. Since, in the process of taking control of digital assets, technological actions and the participation of third parties for performing technical processes may be necessary, that cannot mean that control is gained by non-authorised parties.

3. As indicated in paragraph (2), technological infrastructure should be implemented and deployed for enforcement agents to perform their functions in relation to digital assets. That may require equipping enforcement organs with necessary devices and systems (wallets), concluding the service agreements with relevant service providers to that end, developing user manuals, and ensuring training.

4. As prescribed in paragraph (3), all these mechanisms and systems should be designed and operated in conformity with sufficient standards of security, adequacy, and reliability, considering the intended use and the risks involved.

5. Certain regulations on the use of artificial intelligence (AI) for selected uses, including law enforcement, such as the European Union Regulation on AI ("AI Act"), set out requirements for the application of AI in some areas. In principle, the infrastructure necessary for enforcement on digital assets does not seem to fall under these high-risk uses. However, in the future, other regulations may be applicable.

6. Especially critical is to ensure that the mechanisms and systems for the enforcement agents to gain control and dispose of digital assets for enforcement purposes meet certain requirements: separation of assets in custody, identification and tracing of digital assets, and prevention of non-authorised disposition. Reference to control is not necessarily linked to national law provisions tying legal effects to control, but more practical aspects of actions towards control of the asset (as a functional ability of the enforcers).

7. Thus, enforcement agents would perform their functions under the same standards or conduct and with the same level of safety and legality.

Recommendation 140 – Valuation, transfer as a way of payment and liability rules

(1) Criteria and methods for valuating digital assets should reflect the characteristics of digital assets, including volatility, lack of well-functioning market, etc. Criteria and methods available for assessing the value of assets other than digital assets but with similar characteristics may be relied upon.

(2) Where a recognised market for the category of digital assets subject to enforcement exists, it should be used to determine the value of the digital asset.

(3) The transfer of the digital assets to the creditor as a way of payment should be permitted.

(4) Clear rules on the liability of enforcement agents for any action related to the seizure, custody, valuation and transfer or realisation of digital assets should be specified.

Comments

1. The general rules, methods and criteria for valuating assets apply to digital assets. Particularly relevant would be those rules and criteria for the valuation of assets that may be deemed functionally, substantially, or operationally similar to digital assets (fluctuating value, lack of

organised markets, inexistence of pricing benchmarks, etc.). Therefore, despite potential challenges the criteria and procedures for valuating digital assets should be selected to maximise value realisation expectations.

2. A recognised market may include a well-recognised trading venue, an exchange, or a platform suitable for negotiation, transfer, and disposition of one or several subclasses of digital assets. Equivalent markets may enable the transfer of fungible assets at prices that are not fixed by individual negotiations.

3. Considering the characteristics of volatility, lack of pricing benchmarks, or absence of recognised markets for certain subclasses of digital assets, efforts to maximise the realisation of value may be limited. Therefore, the creditor's right may be more effectively satisfied with the transfer of control over the digital assets as a way of payment (See Recommendation 28, comment 8).

Chapter II. Enforcement of security rights in digital assets

Recommendation 141 – Effective enforcement of security rights in digital assets

(1) Enforcement of security rights in digital assets should be subject to the rules applicable to the enforcement of security rights in movables. In particular, the requirements of good faith and commercial reasonableness should apply with regard to enforcement of security rights in digital assets as provided for in Recommendation 92(3).

(2) More specifically, the enforcement of security rights in digital assets should be allowed to proceed either by way of public authority or through non-judicial means, subject to paragraph (3).

(3) Where enforcement of security rights in digital assets proceeds non-judicially and the secured creditor does not have control over a digital asset held by a custodian, enforcement of the security right cannot proceed without a court order, unless otherwise agreed to by the custodian.

Comments:

1. Recommendation 141 announces the point that enforcement methods for the enforcement of security rights in movables apply to the enforcement of security rights in digital assets (paragraph (1)), which reiterates the general principle governing Part III (see Recommendation 131). Paragraph 2 specifies that both enforcement by way of public authority and by non-judicial means are contemplated, here paralleling the opening recommendation of Part II (see Recommendation 92(2)). Paragraph (2) does signal a limitation to non-judicial enforcement provided in paragraph (3).

2. This recommendation is aligned with Principle 17 of the UNIDROIT DAPL Principles, which recognises that generally available methods provided for under general enforcement law, including enforcement by way of public authority, apply to digital assets. In practice, the Recommendation means that secured creditors should not be prevented from availing themselves of the remedies and rights that may exist under the applicable law. Moreover, courts should not prevent creditors from enforcing their secured rights in digital assets solely on the grounds that the collateral is a digital asset.

3. Paragraph (3) is based on Principle 17(2) UNIDROIT DAPL. It refers to the situation where enforcement of security rights in digital assets proceeds other than by way of public authority and the secured creditor does not have control over a digital asset that it is held by a custodian. In such a case, enforcement of the security right cannot proceed without a court order, unless otherwise agreed to by the custodian.

4. Paragraph (3) makes a distinction according to the method used to make security rights effective against third parties, insofar as it can have an impact on enforcement. Where a security right is made effective against third parties by control, the secured creditor can more easily enforce the security right, as it holds control over the digital asset. Conversely, if a security right is made effective against third parties by a method other than control (e.g., by registration), the secured creditor needs the cooperation of the debtor or a third party in control of the digital asset. That is the case where a custodian holds the digital asset, and the method used for effectiveness was other than control. In this situation, the custodian would have to act on the instructions of the secured creditor. However, the custodian may be unwilling to follow such instructions if, for example, the secured creditor is unknown at the time of enforcement. Applicable law may also provide a right for the custodian to refuse to act on the creditor's instructions, unless it has agreed to do so. The secured creditor would have to obtain a court order. Thus, for instance, pursuant to Article 82(4) of the UNCITRAL Model Law on Secured Transactions, unless the bank has agreed to act on the instructions of the secured creditor, enforcement of a security right over a bank account cannot proceed non-judicially.

5. Paragraph (3) contemplates these situations depending upon the method used to make the security right effective. A security right in a digital asset can be made effective against third parties by control of the digital asset if a custodian maintains the digital asset for the secured creditor (Principle 15 and Principle 10(2) UNIDROIT DAPL). In these cases, the custodian would typically owe some duties to the secured creditor. These can include the duty to change the control of the digital asset upon being instructed by the secured creditor (Principle 11(1) UNIDROIT DAPL). Then, the custodian may have agreed to act accordingly, and non-judicial enforcement is feasible. However, if the method used for effectiveness was other than control, the custodian would not owe duties to the secured creditor and, therefore, it may refuse to follow the instructions of the secured creditor. In those situations, the secured creditor needs to obtain a court order to proceed.

6. *Illustration:* A multi-signature arrangement includes the debtor, the secured creditor and the custodian acting on behalf of the secured creditor. Upon default, the arrangement is triggered, and the secured creditor may take control of the digital asset because the two parties can act in concert to change the control. In such arrangements, enforcement can proceed non-judicially.

7. Paragraph (4) repeats the fundamental principle that good faith and commercial reasonableness apply to the enforcement of security rights, which obviously includes security rights in digital assets.

8. As explained in the commentary to Recommendation 92(3), all rights and obligations concerning the enforcement of security rights should be exercised in good faith and in a commercially reasonable manner. In fact, the specific characteristics of digital assets might enable enforcement in ways that depart from such standards due to the distinctive characteristics of digital assets. Holding methods and the methods for making the security right effective against third parties (*e.g.*, by giving control to the secured creditor or a custodian) may facilitate abusive enforcement actions without proper notification or lead to irreversible effects. The difficulties in valuation and the volatility of prices require that a proper selection of time, manner, and method is made to maximise the price. The disparities in their legal characterisation that may have an impact on enforcement methods (right to payment, movable property, securities, etc.) could lead to uncertainty as to how to realise the value or which mode of enforcement to apply.

9. Therefore, acknowledging the application of general reasonable standards of conduct in the digital assets field is important. The volatility of the value of certain digital assets or the lack of a market to realise that value might lead to enforcement actions that do not maximise the price of realisation or that seem unreasonable given the circumstances. Hence, the method, manner, place, time and other aspects related to the grantor or to the assets (considering the particular characteristics of digital assets) must be subject to the general conduct standards. Likewise, as

mentioned before, when the security right is made effective against third parties by transfer of control, there is a risk that the right is enforced very effectively without complying with the requirements provided by the law (such as notification, or priority rules).

10. Enforcement of security rights in digital assets can be facilitated by automated enforcement systems, based on self-executing arrangements that automatically liquidate a digital asset if a predetermined condition occurs (for instance, if the collateral-to-loan ratio falls under a specific threshold) – Principle 17(6) UNIDROIT DAPL. Legislators should provide that automated enforcement systems function in a manner that respects the requirement of commercial reasonableness or good faith.

11. Notwithstanding the foregoing, secured transactions law typically imposes certain requirements for secured creditors to enforce their rights. Among them, applicable laws may require that affected parties are notified. These requirements would also, in principle, apply to security rights in digital assets, except if they fall under any of the exceptions to such requirements. An example is when the asset may speedily decline in value, as Article 78(8) of the UNCITRAL Model Law on Secured Transactions provides for. Provided that digital assets, or certain types of digital assets (cryptocurrencies), may highly fluctuate and then speedily decline in value, existing exceptions in the laws can apply to such digital assets, if they are drafted in a broad way, without the need for adaptation or new provisions. Another exception is when assets are sold on a recognised market. The notion of recognised market, for the purposes of applying the exception, is a functional one. It refers to those markets where assets traded are fungible and prices are not subject to individual negotiation. Stock exchanges and commodity markets fall under this category, but the concept is not linked to fixed types of markets but rather to certain characteristics. Some digital assets are traded and can be sold on recognised markets. Yet, certain types of digital assets may be analogous to specific types of assets subject to bespoke enforcement procedure. For example, pursuant to the Geneva Securities Convention, securities can be sold for enforcement without notice. Then, the exception to the notification requirement which applies to specific types of assets subject to bespoke enforcement procedures may also apply to such digital assets.