

INTERNATIONAL SECURED TRANSACTIONS

ROMANIA

By

Gabriela Anton
Vilau & Mitel
Bucharest, Romania

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Table of Contents

A. INTRODUCTION	1
i. Legislation	1
ii. Terminology	1
iii. Examples of Financing Practices	2
B. OBJECTIVES OF THE SECURED TRANSACTIONS REGIME	2
C. BASIC APPROACHES	3
i. In General	3
ii. Summary and Recommendations	5
D. CREATION	5
i. Basic Elements of Security Right	5
ii. Security Agreement	7
iii. Summary and Recommendations	9
E. PUBLICITY	9
i. Public Registration for Non-Possessory Security in Movable	9
ii. Debtor Dispossession and Equivalent Control Mechanisms	12
iii. Third-Party Effect of Publicized Security Rights	13
iv. Summary and Recommendations	13
F. FILING SYSTEM	13
i. Key Design Issues	13
ii. Other Basic Elements	14
iii. Summary and Recommendations	15
G. PRIORITY	15
i. Concept of Priority	15
ii. Principle of Priority	15
iii. Exceptions to Principle of Priority Acquired through Fulfillment of Publicity Requirements	16

H. PRE-DEFAULT RIGHTS AND OBLIGATIONS OF PARTIES	16
i. Rights and Obligations of Debtor in Possession of Asset.	16
ii. Rights and Obligations of Creditor if Debtor Has Possession	17
iii. Rights and Obligations When Asset Is Held by Creditor	17
I. DEFAULT AND ENFORCEMENT	18
i. In General	18
ii. Taking Possession of Encumbered Asset	19
iii. Sale of Asset	20
iv. Distribution of Sale Proceeds	23
J. INSOLVENCY	23
i. In General	23
ii. Protection of Secured Creditor in Case of Debtor’s Bankruptcy	23
K. CONFLICT OF LAWS AND TERRITORIAL APPLICATION	24
i. In General	24
ii. Conflict-of-Law Rules for Creation, Publicity, and Priority.	25
iii. Effect of Subsequent Change in Connecting Factor	25
iv. Conflict-of-Laws Rules for Enforcement	26
L. CONCLUSION	26

ROMANIA

Gabriela Anton
Vilau & Mitel
Bucharest, Romania

A. INTRODUCTION

i. Legislation

In Romania, the legislation relevant to secured transactions includes:

1. Title VI of Law Number 99 of 1999;¹
2. The Civil Code;
3. The Commercial Code;
4. Ordinance Number 51 of 1997, regarding leasing;²
5. Title VI of Law Number 99 on Consignment;³
6. Law Number 153 of 1937, regarding warrants and deposits;⁴ and
7. The Regulation for the Organization and the Functioning of the Electronic Archive of Security Interests in Movable Property, approved by Government Decision Number 802/1999.⁵

ii. Terminology

Romanian legal scholars previously adopted a narrow definition of securities (also termed “guarantees”)⁶ as a specific means that would create for the creditor

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- 1 Law Number 99 of 1999, published in the *Official Gazette of Romania*, Part I, Number 236, of 27 May 1999, as amended and completed.
 - 2 Ordinance Number 51 of 1997, republished in the *Official Gazette of Romania*, Part I, Number 9, of 12 January 2000, as amended and completed.
 - 3 Law on Consignment, published in the *Official Gazette of Romania*, Part I, Number 173, of 30 July 1934.
 - 4 Law Number 153 of 1937, published in the *Official Gazette of Romania*, Part I, Number 81, of 7 April 1937.
 - 5 Regulation for the Organization and the Functioning of the Electronic Archive of Security Interests in Movable Property, published in the *Official Gazette of Romania*, Number 499, of 15 October 1999, as amended and completed.
 - 6 For the purpose of this chapter, the concepts of guarantee and security are used interchangeably.

a special position towards unsecured creditors.⁷ The legal institution suffered a natural evolution and currently the concept of security in the Romanian legal regime means the measure of ensuring the performance of a certain obligation⁸ Title VI of Law Number 99 defines a security⁹ in a broad functional sense as any act having as object or effect the creation of a security interest or right¹⁰ in movables.¹¹

iii. Examples of Financing Practices

The Romanian legal system acknowledges various types of financing. The main lenders in the Romanian financing sector are the banks, which developed a broad range of financial instruments, such as inventory and equipment-acquisition finance, inventory and receivable revolving loans, long-term or medium-term loans, investment finance, and project finance.

B. OBJECTIVES OF THE SECURED TRANSACTIONS REGIME

The purpose of secured transactions is to ensure creditor protection. A proper secured transactions regime is a prerequisite for attracting foreign investors, especially in markets in which lenders and borrowers have little experience.

The main objectives of the Romanian security legal framework are to increase efficiency in the performance of civil and commercial obligations and to employ a comprehensive and unitary system regarding the creation, registration, and enforcement of the security.¹²

7 Statescu and Barsan, *Civil Law. The General Theory of Obligations* (1999), at p. 399.

8 Statescu and Barsan, *Civil Law. The General Theory of Obligations* (1999), at p. 397; Stancu, "Viewpoints Regarding Guarantees of Performance of Commercial Obligations", *Commercial Law Review*, Number 6/2007, at p. 41.

9 The United Nations International Trade Law Commission (UNCITRAL) Draft Legislative Guide on Secured Transactions, Vienna, 25 June-12 July 2007 (hereinafter, the "UNCITRAL Guide") uses the term "security". The European Bank for Reconstruction and Development (EBRD) Model Law on Secured Transactions uses the term "charges". Although both terms are appropriate, and perhaps the use of the term "charges" more neutral and more adaptable, for the purposes of this chapter and given that the Romanian legislator followed article 9 of the United States Uniform Commercial Code, "security" will be used.

10 For the purpose of this chapter, "interest" and "right" will be used interchangeably.

11 Such is the conclusion of a combined interpretation of articles 1 and 2 of the Title VI of Law Number 99.

12 Belu Magdo, "The Security Agreement in Movable Property", *Commercial Law Review*, Number 1/2007, at p. 10.

C. BASIC APPROACHES

i. In General

a. *Purpose-Oriented Approach*

The UNCITRAL Guide takes a purpose-oriented approach to the issue of security. What types of agreements serve securitization aims? The Guide cites:

1. Devices designed for and openly denominated as security;
2. Title (ownership) devices combined with various types of contractual arrangement; and
3. Integrated, comprehensive security devices that comprise a functionally defined generic concept of a security right.

The Romanian legal system acknowledges the existence and regulates the application of all such devices carrying security functions.

b. *Instruments Traditionally Designed for Security*

Under Romanian law, all creditors benefit from the general security in movables, which does not confer, however, any priority or special rights to the creditors against the debtor.¹³ The Civil Code refers to the right of creditors to satisfy their interests out of the debtor's entire patrimony if the latter is insolvent. However, such creditors are treated as unsecured creditors, holding only a general right over the debtor's estate, and they must give priority to secured creditors. Furthermore, in case of the debtor's insolvency, such creditors have the right to receive compensation proportionally with the other unsecured creditors and only out of the remaining proceeds resulting from the seizure and sale of the debtor's assets.

The ancient security instrument created by the Civil Code and still applicable is the ordinary pledge with dispossession¹⁴ (*gaj cu deposedare*), where the grantor effectively gives up possession of the encumbered asset to the secured creditor or to a third party agreed on by the parties. The return of the encumbered asset to the grantor usually extinguishes the pledge. This type of security tool has two main disadvantages. First, the pledged assets are taken out from the business and not used for their commercial purpose; second, they expose the secured creditor to a risk of damage to the encumbered assets.

¹³ Civil Code, articles 1718 and 1719.

¹⁴ Under the UNCITRAL Guide, the subject of the pledge is called a collateral, in contrast to the Romanian legal practice that uses the term "pledge" to identify the contract.

Given the disadvantages of securities regulated by the Civil Code and in view of the need for modern tools to secure transactions, Title VI of Law Number 99 introduced flexible means of securing the performance of obligations. Currently, both tangible and intangible movables may be the subject of a security or pledge agreement, and Romanian law recognizes possessory as well as non-possessory pledges.

The new category of securities created by Title VI of Law Number 99 is the real movable guarantee (*garantie reala mobiliara*). Such a guarantee may be created without dispossession of the asset by debtor. This type of security is different from the so-called “assimilated operations”, which encompass a broad number of legal agreements. Assimilated operations are:

1. Assignments of receivables;
2. Conditional sales and other judicial acts aimed at securing performance of an obligation with a movable;
3. Rentals, including leasing, of movables for a term beyond one year;
4. Consignment agreements relating to movables, if the value of the movable to be sold, as established in the consignment agreement is higher than the equivalent in Romanian lei of 1,000; and
5. Warrants and deposit documents.¹⁵

c. *Use of Title*

Certain agreements relating to title to movable property that may serve security purposes, such as a seller’s retention of title, are not effective in practice in Romania, given the difficulty of monitoring movable property. Under Romanian law,¹⁶ the holder in good faith of a movable is presumed to be the owner until the contrary is shown. Thus, the debtor may always dispose of his movables, regardless of the title that the creditor reserved, the subsequent receivers of the movable being considered owners in good faith. The real movable guarantee offers better protection in this situation as the creditor may follow the movable into the hands of subsequent receivers or holders.

An alternative mechanism of securitization is the retention right, where the creditor has the right to keep the movable until the debtor performs his obligation. Thus, the title is not transferred. The strength of this security (*debitum cum re iunctum*), lays in the possibility to oppose general unsecured debtors as well as subsequent privileged secured creditors. However, such right subsists only for the duration of the detention.

¹⁵ Law Number 99, article 2.

¹⁶ Civil Code, article 1909.

ii. Summary and Recommendations

Title VI of Law Number 99 modernized the Romanian secured transactions system by two means, namely:

1. It provided the possibility to create a security right without the debtor's dispossession; and
2. It expanded the range of movables that may be the subject of the security agreement.

Title VI of Law Number 99 has aligned Romanian legislation with the legal systems of other jurisdictions.

D. CREATION

i. Basic Elements of Security Right

a. *Obligations to Be Secured*

Security rights are accessory to and dependent on the obligation they secure. Title VI of Law Number 99 makes reference to the securitization of the performance of a "civil or commercial obligation".¹⁷ Future obligations also are allowed to be secured,¹⁸ in which case the security right will emerge only when the main obligation arises.¹⁹ The future obligation should be considered as the obligation that, although not yet real, is sufficiently described so as to be determinable.²⁰ The Romanian approach closely follows the UNCITRAL Guide, which calls for the possibility to secure a future obligation, determined or determinable when determination is needed.

b. *Assets to Be Encumbered*

Law Number 99 allows for a broader category of assets to be used for security purposes, including both tangible and intangible movable assets.

The assets which fall outside the scope of Law Number 99 are land and buildings. Furthermore, buildings and the construction materials that cannot be separated from buildings may not be the subject of a security agreement.²¹ Law Number 99 does not apply in an assignment of inheritance rights and intellectual and industrial property rights.

17 Title VI of Law Number 99, article 1, paragraph 1.

18 Law Number 99, articles 10 and 20.

19 Law Number 99, article 20, paragraph 1.

20 RizoIU, "Introductory aspects regarding the subject of the security agreement", *Romanian Business Law Review*, Number 1 of 2006, at p. 140.

21 Law Number 99, article 6, paragraph 3.

Law Number 99 describes in detail the assets that may be the subject of security in Romania.²² Pursuant to article 6 of Law Number 99, the following assets may be the subject of a security agreement:

1. Inventory;
2. Balance of the deposit accounts and saving accounts opened with banks or other financial or credit granting institutions;²³
3. Certificates of deposit and bills of lading;
4. Shares in joint-stock companies and limited-liability companies;²⁴
5. Rights in exploitation of mineral resources and exploitation of public services;
6. Rights resulting from patents, copyright, trade marks, and other intellectual property rights;
7. Secured rights in receivables;
8. Negotiable instruments documenting a right to receivable;
9. Universality of movables, current and future;
10. Forest, crops, minerals, and hydrocarbons;
11. Insurance policies;
12. Rights from leasing movables or land;
13. Equipment, installations, and agricultural vehicles;
14. Rights to transactions with movables or ensuring services that may be assigned by the holder;
15. Movables that are leased or are the subject of a leasing operation for a period exceeding one year; and
16. Any other assets.

Furthermore, as the value of the encumbered assets sometimes significantly exceeds the amount of the secured obligation,²⁵ Law Number 99 permits the over-collateralization, the permission to place several securities over the same encumbered asset.²⁶

22 RizoIU, "Introductory aspects regarding the subject of the security agreement", *Romanian Business Law Review*, Number 1 of 2006, at p. 9.

23 RizoIU, "Introductory aspects regarding the subject of the security agreement", *Romanian Business Law Review*, Number 1 of 2006, at p. 17.

24 Company Law, Law Number 31 of 1990.

25 Final Report, Administrative, Regulatory, and Legislative Institutions that Grant Assistance in Regard to the Credit Market, Bucharest, December 2000, at p. 32, referring to Article 69 of Title VI of Law Number 99.

26 Law Number 99, article 22, paragraph 1.

The UNCITRAL recommendation in relation to the assets' identification is to be general, but specific enough for the parties and third parties to identify the subject of the security agreement. Law Number 99 allows the creation of security over an individualized asset or over an asset that is generally individualized, or even over a universality of assets, including business goodwill.

The assets may be described by reference to gender, object by object or even using the generic formula of "all present and future assets",²⁷ or it may refer to all assets which belong to a generic type. In such cases, the parties may identify more precisely the assets at a later stage. Law Number 99 provides that the debtor may request a confirmation from the creditor with respect to the value of the obligation which is secured or a detailed list of the assets which are encumbered. To this end, the debtor must submit to the creditor a list of assets with their estimated value, for confirmation. The creditor should provide comments to the list within 30 days; otherwise, the list will be deemed tacitly accepted by the creditor.

If the security is created over the credit balance of a bank account, Law Number 99 requires a precise identification of the bank account. The security agreement also may contain elements related to the duty of care as well as certain representations in relation to the encumbered assets.

c. Proceeds

A security right over encumbered asset extends over its proceeds, including its fruits (such as rental payments or dividends), as well as its products (such as the transformation of the raw material into a finished product), or any of its replacements. If the movable is sold, the security right over the movable transforms into the security right over the proceeds obtained from the sale. Article 12 of Law Number 99 defines "proceeds" as any value obtained.

Law Number 99 recognizes the right of the secured creditor to gather the proceeds, but on behalf of the debtor. Such proceeds must first cover the expenses made by the secured creditor with the preservation of the assets, then interest, and finally the value of the secured obligation.²⁸

ii. Security Agreement

a. Definition

In a very broad sense, a security agreement may be defined as an agreement in which the debtor undertakes that, in case he does not perform the obligations resulting from the main agreement, he will allow the creditor to satisfy his interests by enforcement over determined movables that constitute the

²⁷ Law Number 99, article 16, paragraph 1; and point 165 of the UNCITRAL Guide.

²⁸ Law Number 99, article 10, paragraph 1, and article 12.

subject of the security agreement. A security agreement creates two principal rights in favor of the creditor, namely:

1. A right to follow the movable in the hands of debtor or any third-party holder; and
2. A priority right.

b. Minimum Elements

The elements to be included in a security agreement are the following:

1. The intent of the parties to create a security right;
2. The parties, capable of and consenting to the transaction;
3. A description encumbered assets; and
4. The maximum value of the secured obligation.

c. Formalities

Under Romanian law, a security right arises only from a security agreement.²⁹ Consistent with the idea of simplifying as much as possible the process for creating a security right, but also increasing the certainty of such operations, a security agreement must be documented in the form of a written act, and not necessarily in the form of an authenticated act, the only condition being that the debtor sign it.³⁰

Law Number 99 allows the use of any form of communication which stores the information and which can be reproduced in a tangible form and which may not be changed unilaterally. This allows the conclusion of contracts by electronic means, provided that the signature complies with the requirements of Law Number 99 455/2001 on electronic signatures.

A security agreement is accessory to the agreement having as its object the main obligation. The rights arising from a security agreement may be assigned, if not agreed otherwise by the parties. Article 43 of Law Number 99 provides that a security right may be assigned through an assignment contract that must be proven only by a written and signed document, without any additional formalities. The only exception is an oral transfer accompanied by transfer of possession.

Law Number 99 adds as a special case a security right in traded instruments, constituted only according to the rules of the capital market.³¹ The security is instituted only through the blocking of the mentioned securities by the national regulatory agencies on the stock exchanges.

29 Law Number 99, article 13.

30 Law Number 99, article 14, paragraph 2.

31 Law Number 99, article 13, paragraph 2.

iii. Summary and Recommendations

The core of the legal institution of the security is the accumulation and availability of finances and credit, and the legislator needs to be careful in weighing the advantages and disadvantages of the legal framework surrounding this institution.

Law Number 99 mirrors the UNCITRAL Guide's approaches reflecting the normal expectations of grantors and secured creditors that a security right in encumbered assets automatically extends to its identifiable proceeds without the need for parties to so provide in their security agreement.

E. PUBLICITY

i. Public Registration for Non-Possessory Security in Movables

a. *In General*

Under Romanian law, a security right is effective between the parties on its creation. However, the security right may be applied against to third parties only by fulfilling certain formalities.

In the case of pledges created pursuant to the Civil Code provisions, a security becomes fully effective on delivery of possession of the encumbered asset. Furthermore, Law Number 99 created a system of public registration, the Electronic Archive for Security Interests in Movable Property (hereinafter, the "Archive") which is mandatory in order for the security to receive a priority rank and be applicable against third parties. This system serves three main purposes, namely, it:

1. Achieves third-party effectiveness;
2. Contributes to efficient and fair-rank priority; and
3. Represents an objective source of information about the assets available.

The Law provides for a single and consolidated registry.³²

b. *Notice and Document Filing*

They are many types of registry systems in various jurisdictions, such as:

1. The title registration system (which includes the registering of the title and encumbrances on the title);
2. The document registration system (which serves to evidence the existence of particular security devices and that implies that the registrar

³² Law Number 99, articles 49 and 53.

checks the security related documentation and only afterwards issues a registration certificate); and

3. The notice registration system (which aims essentially at ensuring third-party effectiveness and priority, disregarding any other potential security related information purposes).

Law Number 99 adopts the last system, which enhances accessibility, flexibility, and efficiency. In this system, the registrar's role is minimal. In this sense, the registrar does not need to scrutinize and compare the content of the notice or its conformity with the document creating the security right.

c. Timing of Registration

A security right may be registered either prior to or after its creation. The practical consequence of the timing of the registration lays in acquiring the priority ranking.

d. Required Content of Registered Notice

The registration of the security is performed through the initial security notice. Any changes may be registered through the modifying security notice and specific operations, such as assignment or termination of the security, are registered through separate notices.

The modifying security notice refers to the registration of changes in relation to the description of the encumbered asset, the name of the debtor or of the creditor, the rectification of any material errors, and any other modification required by law. The special operations subject to separate registrations are:

1. The assignment of the receivable secured with the assets specified in the registration notice;
2. If the security is maintained only as to part of the assets encumbered under the initial registration notice;
3. The extension of the security to other assets;
4. The extending of the initial registration notice;
5. The extinguishment of the initial registration notice due to the performance of the secured obligation or the creditor waiving his security;
6. The annulment of the security; and
7. The intention to create a registration notice.

The elements that the registry notice should contain are the following:

1. Identification of the debtor;
2. Identification of the creditor;
3. List of encumbered assets;

4. Registry number and series of the title regarding the encumbered assets;
5. Data on the principal immovable, if the encumbered assets are accessories thereof and if the secured obligation is conditional;
6. Expiry date of the security, according to the security agreement; and
7. Maximum value of the secured obligation (optional).

Within 24 hours from the notice registration, the party which applied for the registration must inform the other party and provide a copy of the registration notice.

e. Protection of Remote Transferees of Encumbered Assets

If the asset is sold through a public sale at a price below 1,000, the secured creditor may not claim the assets from a third-party acquirer, even if the security was registered and the buyer was informed of its existence. In such case, the third party acquires the asset free of any encumbrances. If the sale was not public, the creditor may claim asset from the third party acquirer or any other subsequent buyers.

If the asset which was constituted as a collateral was sold for a price exceeding 1,000, the creditor who has registered its security over that asset may recover the asset from the third party acquirer and the latter cannot defend himself against the creditor.³³

To prevent such situations and protect both the buyer and the secured creditor, the debtor has the obligation to inform the buyer on any encumbrances over its sold assets and to provide the buyer with a certificate issued by the Archive that attests the existence of encumbrances over the asset or a statement of the creditors which releases the asset from the security. Should the debtor breach this information obligation, the secured creditor may ask for compensation for damages of at least 500.

f. Linkage to Registries of Immovables

Law Number 99 establishes that, if the security right is created over movables that are attached to immovables, the registration notice should mention the description, the address, and the registration in the documents of publicity for the immovables.³⁴

g. Linkage between General Registry and Asset-Specific Registry

Certain movables are subject to specific rules governing the creation of securities, in which case Law Number 99 will not apply, giving precedence to the

³³ Law Number 99, article 38.

³⁴ Law Number 99, article 35.

special regulation. Such special regulations apply to security rights over equities traded on the capital market and registered by simple registration in the registries that serve the capital market or any other financial market and security over ships and aircraft.³⁵

In addition, pursuant to the Commodities Exchange Regulation,³⁶ the security and assignment agreement having as its object receivables traded on the commodities exchange market must be registered with the Archive and notified to the debtor.

h. Private Registration or Publication

According to Law Number 99,³⁷ only the authorized operators, as well as the agents of authorized operators, may perform registration in the Archive. There is a single registry, but many authorized private operators may carry out registration activities.

i. Registration and Enforcement

A security agreement which is registered in the Archives constitutes a writ of execution which may be enforced without prior formalities or court intervention.

ii. Debtor Dispossession and Equivalent Control Mechanisms

a. Debtor Dispossession as Substitute for Registration

Law Number 99 provides that, if the debtor is dispossessed, the possession of the movable by the creditor equals registration in the following cases:

1. A security over the tangible movable does not exceed 300; and
2. A security over sums of money, equity, or titles over goods, including deposit certificates and negotiable bills of lading, as well as checks and promissory notes, which may be made public through endorsement.³⁸

b. Quality of Possession

To qualify as registration in the cases permitted by Law Number 99, the possession must be public, in the sense that the secured creditor must make the undeniable existence of the possession known to the third parties.³⁹

35 Law Number 99, article 30, paragraph 1, letters c and d.

36 Stock Exchange Regulation, article 36.

37 Law Number 99, article 2.

38 Law Number 99, article 30, paragraph 1, letters a and b.

39 Law Number 99, article 30, paragraph 2.

iii. Third-Party Effect of Publicized Security Rights

The registration of a security pursuant to Law Number 99 creates protection towards third parties, as any subsequent creditors may not claim lack of knowledge in relation to such right.⁴⁰ However, registration in the Archive does not validate an invalid security agreement.

iv. Summary and Recommendations

Law Number 99 requires minimal formalities for the registration of the security right. It is in line with the flexible approach adopted by the UNCITRAL Guide. Even more, the virtualization of the registry system that eases registration procedures already is fully in place in Romania.

F. FILING SYSTEM

i. Key Design Issues

a. Authority to File and Signature

Any interested party may file for registration of a security notice. Of course, the party most interested in filing is the secured creditor.⁴¹

However, registration may be performed as well by the debtor. The creditor or the debtor may act through representatives, designated by power of attorney in authenticated (notarized) form. When a receivable is assigned, the interested parties are the assignor, the assignee, or the former or present creditor.

b. Grantor-Based or Asset-Based Index

Law Number 99 institutes a grantor-based security index (plus a security index based on automobile vehicle series numbers).⁴²

c. Filing Process and Fees

The notice of intent to register may be filled free of charge through any means and using a standardized document.

The registration notice, however, is taxable with a fee charged by the authorized operator. The fees are established by the operators based on free competition principles.

40 Law Number 99, article 29, paragraph 3.

41 Law Number 99, article 31, placing the burden of registration over the consignor in the case of the consignment agreement.

42 Law Number 99, article 49, paragraph 4.

d. Duration of Effectiveness of Filed Notice

The notice of intent is valid for two months. If the intention is not formalized as security by the notice registration within the two-month validity period, the notice of intent loses effect.⁴³

The registration is valid for five years, after which the registration expires. The registration notice may be renewed for another five years or a lesser period.⁴⁴

To the extent the secured obligation is fulfilled, the creditor has the obligation to cancel the registration notice within 40 days from such fulfillment. If the secured creditor does not submit a notice of cancellation of the registration within this period, he is liable to compensate the debtor for damages.⁴⁵

ii. Other Basic Elements

a. Public Access to Database

Access to the database is free of charge and open to the public.⁴⁶ However, authorized operators are allowed to charge for searching and copying information in the Archive.

b. Public or Private Operator

Operators that are entitled to file security notices are privately authorized operators⁴⁷ that carry out their activities on the basis of free competition. They are monitored by the Body of Operators and by the Ministry of Justice, which is designated as Supervising Authority pursuant to article 3 of Government Ordinance Number 89/2000.

c. Effect of Registry Error and Allocation of Risk

Pursuant to article 49, paragraph 2, of Law Number 99, authorized operators are not responsible for the accuracy of the data that the parties include in the registry notice. If the data provided in the notice filed with the Archive does not correspond with the security agreement, the data as included in the notice prevails as to the third parties.

Furthermore, according to article 49, paragraph 3, of Law Number 99, the data base of the Archive correctly reflects only the information introduced

43 Law Number 99, article 56.

44 Law Number 99, article 44.

45 Law Number 99, article 61.

46 Law Number 99, article 54.

47 Government Ordinance Number 89/2000, on Certain Measures to Authorize Operators and Register in the Archive.

and updated. If authorized operators commit errors in introducing the data communicated by the parties to the security agreement, they are liable pursuant to the Government Ordinance Number 89/2000 and under general principles of law. Damages caused by such errors are to be covered using insurance or a guarantee letter which operators are bound to have in place. To the extent damages are not entirely covered by insurance or guarantee letter, the operator must cover damages pursuant to the general rules of civil liability.

iii. Summary and Recommendations

Law Number 99, together with the Regulation, provide detailed information on the filing procedure, and they offer a comprehensive guidance on the registration process.

G. PRIORITY

i. Concept of Priority

One of the fundamental concepts in securities is “priority rank”. This concept is relevant once the security goes through the publicity procedures, i.e., registration in the Archive or any other means that Romanian law provides. The chronological registration order determines rank, i.e., the priority order in case of enforcement.

The importance of the priority rank becomes critical if one asset is encumbered with co-existing securities. If the debtor does not willingly perform the secured obligation, the priority rank establishes the hierarchy according to which the creditors may satisfy their rights against the debtor. The Romanian legal system accomplishes the main goals put forward by the UNCITRAL Guide.

ii. Principle of Priority

Law Number 99 sets forth the principle of the priority order based on the rank established according to the moment of registration in the Archive or according to any other publicity means established under Romanian law.

There is an interdependency between the publicity requirement and the priority rank, the former being the *sine qua non* condition of the latter. Once the publicity requirement is fulfilled, the securities are governed by the rules pertaining to the priority ranking. The underlying principle of this framework of rules is *qui prior tempore potior jure*. Hence, the earlier the registration, the more “preferred” the ranking. When the security right arose does not carry much significance; a prior security agreement may be overcome if the subsequent security agreement was registered first.

iii. Exceptions to Principle of Priority Acquired through Fulfillment of Publicity Requirements

Law Number 99 puts forward a series of exceptions to the rule of priority ranking.⁴⁸ The first exception refers to a security constituted in favor of a seller who does not receive the full price of his asset on the sale or the creditor who financed the purchase of the asset subject to the security. The seller of the asset and the creditor financing the purchase of the asset are treated as privileged creditors. Privileged creditors receive a priority rank ahead of the possible previous securities that were constituted over the same asset if they satisfy the following conditions:

1. They registered their security in the Archive before the debtor takes possession of the respective asset; and
2. They notified the previous secured creditors on the sale and the registration of their security.

The second exception is the security over the crops or the products obtained following exploitation of crops. According to Law Number 99, a creditor that makes available the necessary funds for producing crops, in the period of the plants growing or in the six months before harvest, is a privileged creditor. On registration with the Archive, the security over the crop or its products created in favor of a privileged creditor has priority against other previous securities.

The third exception refers to animal production and derived food products. A creditor financing the acquisition of nutrition, medicine, or hormones necessary for feeding or treatment of animals is deemed a privileged creditor. The security has priority against any other security constituted over the same asset.

H. PRE-DEFAULT RIGHTS AND OBLIGATIONS OF PARTIES

i. Rights and Obligations of Debtor in Possession of Asset

The rights and the obligations of a debtor are assessed in relation to the encumbered asset. Throughout the duration of the security agreement, the debtor has the right to administer the asset and to dispose of them, as well as of their fruits and products.⁴⁹ This specific right is an extension of the rule according to which a debtor may unlimitedly dispose of an encumbered asset. Any contractual clause that is contrary to or limits a debtor's right to dispose of an encumbered asset is null and void. The acts of disposition are valid even

⁴⁸ Law Number 99, article 33.

⁴⁹ Law Number 99, article 21, paragraph 1.

when the security agreement includes clauses that prohibit transfer or that declare the transfer equivalent to non-performance of the obligation, regardless of whether the subsequent holder was or was not aware of the clause.⁵⁰

The legal protection granted to the creditor if the debtor transfers an encumbered asset to a subsequent owner is the right to follow the encumbered asset in the hands of whomever holds it and enforce rights against a third-party acquirer. Moreover, if there is a specific peril for the creditor that the debtor is likely not to fulfill his secured obligation, the encumbered asset may be seized⁵¹ in favor of the creditor by following the judicial enforcement procedure.⁵²

Throughout the duration of the security agreement, the debtor has the obligation to preserve the asset and use it as a good owner, as well as to keep a precise account of the asset and of its products. Law Number 99 expressly states that, when the debtor holds possession of an encumbered asset, its transfer, destruction, degradation, or depreciation due to negligence triggers the debtor's responsibility for damage caused.⁵³ The minimum amount of damages is 500.

ii. Rights and Obligations of Creditor if Debtor Has Possession

In accordance with Law Number 99,⁵⁴ an encumbered asset may be inspected by the creditor during business hours so as not to affect the debtor's activity. If the debtor observes that the encumbered asset is not properly preserved or if the debtor takes notice of any other act or fact that may increase the difficulty or impede the enforcement of the security agreement, the creditor is entitled to consider the secured obligation as due and proceed to enforcement.

The right may be exercised only when the creditor has a reasonable commercial basis to believe that the encumbered asset was or is about to be placed in danger or there is the possibility that payment is about to be impeded.⁵⁵

iii. Rights and Obligations When Asset Is Held by Creditor

When an encumbered asset is held by the creditor, the fruits and the interests related thereto will be calculated first against the expenses with its normal preservation, i.e., insurance costs and payment of taxes, then against the

50 Law Number 99, article 21, paragraph 2.

51 The seizure of an encumbered asset as ordered by a court under Romanian law is similar to the "attachment" procedure in Common Law.

52 Law Number 99, article 21, paragraph 2.

53 Law Number 99, article 41.

54 Law Number 99, article 11, paragraph 2, letter a.

55 Law Number 99, article 11, paragraph 2, letter a.

interests of the secured receivables, and finally against the quantum of the secured obligation. The parties to the secured agreement may make a contractual stipulation in this sense.⁵⁶

A creditor undertakes the obligation to reconstitute the encumbered asset when it is in his possession, being held responsible for damage caused to the previous debtor through deterioration, unjustified delay in the restitution of the asset, or unjustified refusal to accept payment of the secured obligation. The creditor has the right to receive compensation for expenses in relation to the takeover and preservation of the encumbered asset. Up to the point when such expenses are paid, a creditor has the right to retain the encumbered asset.

Although the secured obligation is fulfilled by the debtor and the creditor does not voluntarily reconstitute the asset, the debtor may have the choice of a personal claim or a claim for restitution. Under the personal claim, the debtor is required only to prove the valid existence of a security agreement and the valid performance of the main obligation secured. A personal claim is subject to a statutory limitation of three years. Under a claim for restitution, a debtor has the obligation to prove his ownership title over the asset. A claim for restitution is typically not limited in time.

I. DEFAULT AND ENFORCEMENT

i. In General

a. Creditors' Rights

A creditor under a security agreement benefits from an *in rem* right that entitles him to take two paths to satisfy his interests, namely, to:

1. Follow the encumbered asset in the hands of a third party; and
2. Enforce his rights over the encumbered asset against other, lower ranked or unsecured creditors.

b. Enforcement Procedure

A creditor may start enforcement proceedings if the debtor is in breach of the secured obligation or if he has commercially reasonable grounds to believe that the encumbered asset was or is about to be put into danger or that payment is about to be impeded. A creditor may follow the procedure governed by the Civil Procedure Code or the procedure governed by Law Number 99.

A security agreement created pursuant to Law Number 99 represents a writ of execution, and no prior action in the court of law is necessary for the creditor to start the enforcement procedure.

⁵⁶ Law Number 99, article 16, paragraph 2.

The procedure governed by the Civil Procedure Code applies in any case of enforcement of rights against movables, and it represents the general framework applicable for the enforcement procedure. The typical enforcement procedure under the Civil Procedure Code is the sale of the assets by public auction. Law Number 99 has created a more flexible and modern procedure for the enforcement of creditors' rights secured by a security agreement governed by the Law.

ii. Taking Possession of Encumbered Asset

a. *Creditor's Right to Take Peaceful Possession*

A creditor may peacefully take possession of the encumbered asset or its proceeds, as well as over documents that attest to ownership title over the encumbered asset. A creditor may take possession whether the asset is held by the debtor or by a third party (including a third-party acquirer).

To benefit from this right, a creditor must include a specific clause in the security agreement. Law Number 99 is extremely formalistic in this respect and provides the exact wording of the clause as well as the font to be used. The clause should read:

In case of non-performance, the creditor may use its own means to take possession over the encumbered asset.⁵⁷

The right of taking possession peacefully means that the creditor is entitled to take the asset using his own means and without the need to recourse to state authority. A debtor, as well as any third party holding the asset, has the obligation to allow the creditor to carry out such action.

b. *Taking Possession of Encumbered Asset with Aid of Enforcement Authorities*

When the parties fail to include the contractual clause to allow the taking of possession by a creditor or when it is impossible for a creditor to take peaceful possession of the asset, the creditor must ask the help of the bailiff, the bank bailiffs, or other enforcement authorities.⁵⁸

To benefit from the intervention of enforcement authorities, a creditor must submit an enforcement request, a certified copy of the registration notice, a copy of the security agreement, and a description of the encumbered asset. Within 48 hours from receipt of the request, the bailiff will proceed to the

⁵⁷ The clause must be written in capital letters in a size of 12 points. In the absence of this formulation, a creditor loses the right to peacefully take possession of the encumbered asset. Law Number 99, article 63, paragraph 4.

⁵⁸ Statute of Bank Bailiffs of 8 November 1999, published in the *Official Gazette of Romania*, Number 565, of 19 November 1999.

place where the encumbered asset is located, take the asset in possession, and hand it over immediately to the creditor. If a debtor resists these actions, the bailiff is entitled to request police assistance.

According to Law Number 99,⁵⁹ a creditor must bear the transportation and deposit-related costs and all expenses and associated risks. An alternative method available for a secured creditor to realize its security right is sale of the encumbered asset while in the debtor's possession.⁶⁰ In such circumstances, a purchaser of the encumbered asset is entitled to take possession according to the rules mentioned above. A purchaser of an encumbered asset acquires it free of encumbrances, and a creditor-seller distributes the price according to rules established for sale of the encumbered asset.

However, it is possible that the parties agree differently within the security agreement. Thus, the parties may agree that the debtor will remain in possession of the asset acting as a lessee; in such case, a debtor will continue to use the asset after the forced execution. An acquirer of the asset following sale must observe the right of the debtor to continue the lease of the asset, as agreed by debtor and creditor.

A secured creditor's right to take possession of an encumbered asset must be exercised in strict observance of procedural rules. The consequences of breaching such rules are that the creditor is liable to pay an amount equivalent to 30 per cent of the value of the secured obligation (even if the creditor may prove a lesser or no damage), as well as any other damages caused by taking possession in bad faith, and the secured creditor has the obligation to return the encumbered asset.

iii. Sale of Asset

a. In General

After a creditor takes possession of the asset, he may proceed with sale of the asset. If the parties to the security agreement agreed on a certain method to sell encumbered assets, the sale must take place pursuant to the agreed method. If the parties did not agree on a particular method of sale, the sale may take place using any method which is done in a reasonable commercial manner and complies with Law Number 99.

Law Number 99 does not prescribe a limited manner of selling the assets; it merely indicates the principles to be observed within such procedure as well as certain methods deemed compliant with Law Number 99.

⁵⁹ Law Number 99, article 68, paragraph 2.

⁶⁰ Law Number 99, article 65.

b. Principles Governing Sale of Encumbered Asset

The sale of an encumbered assets must be based on the observance of the good faith and reasonable commercial practices.

The principle of good faith in the exercise of procedural rights is a common principle of the enforcement procedure, which also applies for the specific enforcement procedure for securities regulated by Law Number 99.

The principle of a sale in a reasonable commercial manner applies specifically to the procedure regulated by Law Number 99. The entire enforcement procedure must take place during a reasonable period of time.

The creditor is allowed to purchase the asset himself, to the extent this possibility is expressly provided in the security agreement. If there is no such specific provision, the creditor may acquire the asset only if he participates in the sale with third parties.

c. Creditor's Obligation to Notify Sale

A creditor must comply with certain formalities before sale of the asset. A creditor must notify the sale to the debtor, to creditors with inferior priority ranks, and to the owner, if he is not the debtor.

The notification must mention the place, day, hour, and sale method. The notification must be received at least five days before the sale. The notification may be made in any manner that ensures proof receipt. A creditor is discharged from the obligation to notify if the encumbered asset is perishable; in such circumstance, the sale may be made without informing the persons indicated by the Law. If the subject of the sale is represented by receivables, notification must be sent to the bank where the account is held.

Within five calendar days from the receipt of the notification, the debtor, other creditor, and the owner of the asset may oppose its sale in court.⁶¹ The court must settle the opposition, within three calendar days, by a decision subject to appeal. The appeal may be filed within three calendar days from its communication, but it will not suspend enforcement proceedings. The appeal decision is final and irrevocable.

If the court finds that the sale method proposed by the creditor breaches the provisions of Law Number 99, the court will set the appropriate sale conditions and rules, and it will approve the sale to be performed in accordance therewith.

A debtor also may use this period to pay its debts to the secured creditor, as well as any further expenses incurred by the creditor for taking the possession of the asset and during the sale procedure. In such event, a creditor has the obligation to accept payment, cease immediately any forced execution

⁶¹ Law Number 99, article 75, paragraph 1.

measure, and return the asset to the debtor. If a creditor does not voluntarily cease enforcement, the court may find that the debtor has satisfied his payment obligation and stop the procedure.

Law Number 99 sanctions a creditor who performs the sale procedure in breach of legal provisions. A creditor who fails to observe the law is liable to pay the debtor either an amount equivalent to 30 per cent of the value of the secured obligation at the moment of the sale or of the difference between market price and the sale price, depending on which is higher, as well as any additional damages incurred by the debtor. The market price of the asset will be determined by evaluation, both debtor and the creditor being entitled to appoint an evaluator. If, after payment of damages to the debtor, there are proceeds remaining from the sale, the creditor may keep such amounts towards the secured obligation's payment. A creditor may not recover the part of the secured obligation which is not paid from the remaining proceeds.

d. Enforcement of Security over Some Assets

Law Number 99 has established specific enforcement rules for certain types of securities, i.e., bank accounts, documentary titles, and receivables.

When the subject of a security consists of the credit balance existing in bank accounts, a creditor must notify the bank, indicating his intention to seek satisfaction from the bank account. The creditor must provide the bank with a copy of the security agreement. On the same day it receives the notification, the bank must check the registration of the security agreement in the Archive, including its priority rank, and the authenticity of the debtor's signature. Once it has received notification, the bank blocks the account, and it may not accept any payment orders from the account; it may only receive payments to the account.

If, pursuant to the priority order regulated by Law Number 99, another creditor has a higher priority rank over the account, the bank must first pay the creditor with the higher priority rank, even if its secured obligation is not due. The bank is not liable for payments thus made as long as it strictly observes the legal provisions and the instructions received from the creditor with the notification. Furthermore, the bank must inform the debtor, within 24 hours, about any such action. The bank will free the debtor's accounts as soon as the amounts claimed by the creditor are paid.

If the security is represented by documentary titles which attest the rights over some movable assets, such as deposit receipts, warrants, and bills of lading, a creditor may sell the assets attested by the titles, using the procedure set forth by Law Number 99.

A creditor secured with rights over receivables may resort to peacefully gaining possession of the documents which specify these rights or their assignment.

A creditor taking possession of documents attesting receivables may receive payments due to the debtor until full payment of the secured obligation.

In the case of assignment of the receivables, an assigned debtor must be notified in writing about the assignment. The notification may be made by simple written notice, by court, or by a document authenticated by a notary public. The notification should mention the assigned receivable, payment amount, name of the assignor, and payment method and place. After receipt of notification, an assigned debtor may make the payments only in accordance with the notification instructions.

iv. Distribution of Sale Proceeds

The proceeds of sale are distributed in accordance with the mandatory priority order established by Law Number 99. The priority order is:

1. The costs of the procedure for preservation, taking possession, and sale of the assets; and
2. The interest and then the payment of the secured obligations in accordance with their priority rank, even if not certain obligations are not due yet.

Only after a creditor with the superior rank receives full payment may the distribution continue with payment of the creditor in rank. Any remaining proceeds must be handed over, within three days from finalization of the distribution process, to the debtor or its representative. If such payment does not take place, the remaining amounts will be placed in a bank account opened for the debtor, and the debtor will be notified accordingly. The priority order established by Law Number 99 is imperative, and any contractual provisions to the contrary are null and void.⁶²

J. INSOLVENCY

i. In General

To evaluate the extent to which secured creditor interests are protected in case of the debtor's insolvency or bankruptcy in Romania, Law Number 99 should be read in conjunction with Law Number 85/2006 on the insolvency procedure (hereinafter, the "Insolvency Law").

ii. Protection of Secured Creditor in Case of Debtor's Bankruptcy

A creditor receives payment of his obligation from the proceeds of the encumbered asset before any inferior ranked or unsecured creditor.⁶³ To

⁶² Law Number 99, article 79.

⁶³ Law Number 99, article 9.

effectively exercise his right, a creditor may commence the enforcement procedure in accordance with the Civil Procedure Code or, if the debtor is insolvent, in accordance with the Insolvency Law. A debtor is deemed insolvent if he is unable to pay his debts for a period exceeding 30 days.

The commencement of the insolvency procedure automatically suspends judicial or extra-judicial procedures for the realization of the securities constituted over the encumbered assets.⁶⁴ Exceptionally, a secured creditor may ask for a waiver from the suspension in two instances.⁶⁵

First, when the value of the secured obligation is fully covered by the collateral, waiver from the suspension rule may be granted when the security's object is either not of decisive importance to the proposed restructuring plan or is part of a functional assembly and, through its detachment and separate sale, the value of the remaining assets is not diminished.

Second, when the value of the secured obligation is not fully covered by the collateral, waiver from the suspension may be obtained when the value is diminished or in real danger of suffering a significant decrease, if it is diminished as a result of the accumulation of interest, delay penalties, and any penalties of a receivable with superior rank or if the encumbered asset is not insured against loss or damage.

In these cases, the judge may refuse the creditor's request by proposing alternative protection measures, such as the payment of installments to the creditor that would cover any decrease of the value or novation of the secured obligation by giving the creditor additional securities or replacing the encumbered asset with another asset that satisfies the creditor's interests.

The proceeds resulting from the sale of encumbered assets will be distributed according to the following priority order:

1. The expenses connected with the sale of the assets, including with preservation and administration, as well as payment of fees of the liquidator and the other persons employed for the procedure; and
2. The secured obligation, including the principal, interest, penalties, and expenses.

K. CONFLICT OF LAWS AND TERRITORIAL APPLICATION

i. In General

The existence of a foreign element qualifies an agreement between the parties as an international private agreement. The foreign element may be the

⁶⁴ Insolvency Law, article 36.

⁶⁵ Insolvency Law, article 39.

nationality of any of the parties or the location of the encumbered asset. In such cases, it is important to determine which is the applicable law governing the security agreement.

The conflict of laws is governed by Law Number 105 of 1992, regarding the private international law relations, as well as by Law Number 99.

ii. Conflict-of-Law Rules for Creation, Publicity, and Priority

a. In General

Pursuant to Law Number 105/1992, the creation, transfer, or extinction of security rights are governed by the law of the country where the asset is located at the moment the respective right arises. The publicity requirements are governed by the law of the country where such publicity is made.

b. Tangible Asset or Negotiable Instrument Held by Creditor

The validity of such security, as well as the registration formalities and the priority order, is governed by the law where the respective asset is located.

c. Negotiable Instrument Not Held by Creditor

The validity of such security, as well as the registration formalities and the priority order, is governed by the law where the debtor is headquartered or domiciled at the time of its creation.

iii. Effect of Subsequent Change in Connecting Factor

a. Movable Tangible Assets Relocated in Romania

A security created abroad over an encumbered tangible asset which is subsequently relocated in Romania maintains its priority rank and opposability as to the third parties if it complies with certain requirements.

Such security must be registered with the Archive in Romania before the extinguishment of the priority rank acquired in accordance with the law of the place where the encumbered asset was located and within 60 days from the date the asset was brought to Romania, or within 15 days as of the date the creditor took notice of the fact that the asset was brought into Romania.⁶⁶

Prior to the fulfillment of these publicity requirements, the security agreement will not be opposable as to subsequent owners or lessees of an encumbered asset not aware of its existence. Therefore, persons who acquire in good faith an encumbered asset that is the subject of a security agreement constituted abroad are entitled to keep the asset if it was purchased during

⁶⁶ Law Number 99, article 91, paragraph 1.

the period from the moment when the asset entered Romania until the moment when the security agreement was registered with the Archive.

b. Movable Tangible and Intangible Assets Relocated Abroad

The validity of such security, as well as the registration formalities and the priority order, is governed by the law of the place where the debtor is located at the moment of the security creation. Such place is considered to be the professional headquarters, the domicile, or the residence of the individual (*lex domicilii*) or the headquarters of the legal entity (*lex societatis*).

c. Change of Headquarters or Domicile of Debtor or if Security Is Created in Favor of Person Abroad

In such circumstances, the priority rank obtained in Romania maintains its effectiveness abroad when the security agreement is registered abroad. Thus, the security agreement must be registered before the date when, according to Romanian law, the priority rank extinguishes and within 60 days from the date the debtor moves abroad or from the date the debtor created the security right in favor of person located abroad, or within 15 days from the date the creditor was aware of the fact that the debtor moved abroad or that the debtor created a security right in favor of a person located abroad.⁶⁷

If the country where the debtor moves does not have a security publicity system and the asset is not held by the creditor, the security has an inferior rank compared with the security over an account payable in Romania or security over a tangible movable asset or over a negotiable instrument created at the time the asset was in Romania.

iv. Conflict-of-Laws Rules for Enforcement

The enforcement of a security agreement with a foreign element is made according to the rules of the place where the asset is located at the moment of the enforcement (*lex loci executionis*). This rule applies regardless of the law applicable to the security agreement.

L. CONCLUSION

Although Title VI of Law Number 99 succeeds in covering most of the concepts related to the security, it lacks in certain chapters a systematic coherence. The various aspects that circumscribe the notion of securities are treated at several and unrelated parts throughout the body of Title VI. Taking due notice of the UNCITRAL Guide's recommendations, a systematic rearrangement of Title VI is suggested.

⁶⁷ Law Number 99, article 94.

From a substantial point of view, Law Number 99 meets the requirements of a modern, efficient, and flexible securities regime. It is adaptable not only to Romanian economic realities but also to international demands of transparency and expediency.