

Briefing

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Trade Finance in Romania: Taking Security over Oil in Storage Terminals

Trade finance is generally not very developed in Romania, at least by comparison with other EU Member States and developed and emerging markets. In this briefing, we set out certain remarks in relation to taking security over oil products which are in storage in oil terminals in Romania, which should be considered in the context of an oil products trade finance transaction.

General principle for taking security. Under Romanian law, present and future (or contingent) obligations can be secured by mortgages over movable assets such as present or future tangible assets which can include crude oil and other petroleum products ("Oil Products").

Security instrument. A mortgage over movable assets such as Oil Products is validly created by means of a contract under private signature (no notarization being necessary) and its enforcement is subject to the perfection thereof - that is when (a) the mortgage becomes effective (i.e. once the secured obligation is born and the mortgagor owns the mortgaged assets) and (b) all publicity formalities are completed. In case of several movable mortgages, a perfected movable mortgage will rank prior to a non-perfected mortgage irrespective of the time of execution.

It is important to highlight for the purpose of trade finance transactions that a movable mortgage created over future assets becomes effective in relation to such assets only at the time when the mortgagor becomes the owner of those future assets.

Description of mortgaged property. The mortgaged assets should be described precisely enough under the mortgage agreement to enable a reasonable identification of the actual assets. Such description can be made by way of lists of assets, by determining a specific class of assets, or by indicating criteria such as quantity or other specific formulas to this end. In case of universalities, the description thereof should include the content and nature of the assets therein. A generic description of the mortgaged property such as "all movable property" or "all present and future movable property of the mortgagor" is no longer sufficient under the new security interests regime regulated by the Romanian Civil Code in force since 2011.

As concerns Oil Products stored in a Romanian oil terminal, for the purposes of avoiding commingling of the assets (which may even mean transfer of ownership to the oil terminal) and ensuring ownership over the Oil Products remains with the trader, the Oil Products should be stored in clearly identified dedicated oil tanks. Details about the location and identification of the tanks, quantity and type of the Oil Products, shipments and others are set out under the holding (warehouse) certificates issued by the relevant oil terminal upon receipt of the Oil Products in storage (and countersigned by the trader and the financier, if applicable). The movable mortgage agreement should include a description of the Oil Products in particular by reference to these holding certificates which have all details of the Oil Products and, of course, should be updated from time to time to reflect the changes to the certificates using pre-agreed mechanisms.

Registrations. A movable mortgage over assets such as the Oil Products will be subject to registration with the Romanian Electronic Archive for Movable Security Interests ("Electronic Archive") and, if such mortgage also covers various receivables under contracts related to such Oil Products (e.g. storage, sale, or purchase thereof), also subject to notices of the mortgage to be made to the mortgagor's counterparties thereunder. The initial registration of a mortgage with the Electronic Archive can be carried out by any party to the mortgage agreement, while any amendments to the initial registration necessary to reflect new Oil Products and holding certificates and/or to extend the duration of the registration, can only be made by the mortgagee.

Priority. The ranking of a movable mortgage is generally determined by the time of the publicity formalities being performed (i.e. the registration with the Electronic Archive), irrespective of the time when the secured obligations are born. The registration with the Electronic Archive maintains its priority for a period of five (5) years and may be renewed before the lapse of such period, if applicable.

Enforcement. As for all security interests, the enforcement of a mortgage is subject to the secured obligation being certain, liquid and payable and subject to the procedures set out under the Romanian Civil Code and/or the Civil Procedure Code (including, without limitation, authorisations by relevant Romanian court and enforcement officer, registration of the commencement of the enforcement with the Electronic Archive, notices to other creditors, if applicable).

There are two main means of enforcement of mortgages over assets such as Oil Products, which are rather frequently used in practice: (i) the sale of the mortgaged assets using "commercially reasonable" methods, as customary for the assets (in relation to the Oil Products, ideally by means of a tender to limit the challenges), and (ii) the taking over the mortgaged assets on account of the debt (debt set-off, which can be effected if (a) mortgagor has agreed to such measure in writing after the default has occurred, and (b) other concerned or affected parties do not oppose).

In case the mortgage covers also receivables (in connection with the Oil Products), the enforcement may be carried out (i) by taking over the title to the receivables, (ii) by notifying the obligor to make the payments under the mortgaged receivables directly to the mortgagee; or (iii) by the direct sale of the receivables.

Under Romanian law and in line with other jurisdictions, enforcement of mortgages and other security interest is suspended upon commencement of insolvency proceedings.

Final notes. From a practical perspective, the holding certificates issued by the oil terminal should give additional comfort to the financier by including an undertaking by the oil terminal not to release the Oil Products without the prior approval by the financier and by confirming that the quantity of Oil Products set out in the certificate is free from any charges or deductions (such as (mandatory) technological consumption and sludge).

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