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# Sale or Collection of Assets Levied Upon

Konstantinos D. Kerameus\*

## I. INTRODUCTION

As a rule, monetary enforcement on both movables and immovables includes three stages, i.e. levy, sale and distribution of the proceeds.<sup>1</sup> In dealing with the second stage,<sup>2</sup> we have to examine the position taken by the various legal systems *vis-à-vis* a series of typical issues connected with the sale (or other realization) of the assets levied upon. These issues refer to methods of averting, postponing or transforming an envisaged forced sale to more lenient forms of satisfaction of money claims, to the conditions for obtaining the highest bid possible at the auction, and finally to the transfer of ownership to the highest bidder and his protection against third parties. Attention also has to be paid to important deviations between enforcement on movables and enforcement on immovables.

## II. CENTRAL EUROPEAN SYSTEMS

German law includes a general provision under which the court of execution, i.e. the *Rechtspfleger*,<sup>3</sup> may decline or temporarily suspend an act of execution if the act, "by giving full consideration to the need to protect the creditor, would pose due to entirely special circumstances a hardship which cannot be reconciled with morality."<sup>4</sup> Beyond this general rule, the sale may, subject to an arrangement of time payments, be postponed up to one year for both movables and immovables;<sup>5</sup> in the latter case, however, requirements are more demanding since there must be a perspective that the forced sale may be avoided altogether, i.e. that the creditor may be satisfied during the period of postponement.<sup>6</sup> While no private sale to be arranged by the parties themselves is provided, the *Rechtspfleger* may allow the

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1. See, e.g., Amonn, *Grundriss des Schuldbetreibungs- und Konkursrechts* (4th ed. Bern 1988) 157; Hattori & Henderson, *Civil Procedure in Japan* (New York 1985) § 11-16 *sub* 7a; *Vescovi Report* 25.

2. Which has come to be identified, in the common language, with the entirety of enforcement: Couture, *Fundamentos del derecho procesal civil* (3d ed. Buenos Aires 1958, repr. 1985) 466/467.

3. § 828 ZPO in conjunction with the law of Nov. 5, 1969, as modified by the law of Jun. 27, 1970 (*Rechtspflegergesetz*) § 20 no. 17 ZPO, whereby the authority has been transferred to the judicial curator (*Rechtspfleger*).

4. § 765a par. 1 ZPO.

5. § 813a ZPO, *Gesetz über die Zwangsversteigerung und die Zwangsverwaltung* of Mar. 24, 1897, RGB. 1897, 97 (*in der Bekanntmachung vom 20.5.1898*: in the following abbreviated as ZVG) § 30a-30d.

6. Blomeyer, *Zivilprozessrecht. Vollstreckungsverfahren* 357 (Berlin, Heidelberg and New York 1975); also Baur & Stürmer, *Zwangsvollstreckungs-, Konkurs- und Vergleichsrecht I* no. 35.21 (12th ed. Heidelberg 1995).

transfer of a movable under levy to a particular person, including the creditor, at a fixed price.<sup>7</sup> With respect to movables there must be a minimum period of one week between levy and public auction,<sup>8</sup> with respect to immovables a minimum period of six weeks between notification and occurrence of the public auction.<sup>9</sup> The lowest allowed bid is treated differently with regard to movables and immovables. In the former case, it must amount to at least half of the usual market value of the object.<sup>10</sup> In the latter case, it basically depends on the value of real rights, regularly mortgages, that enjoy priority *vis-à-vis* the creditor and continue to subsist on the immovable even after the auction, plus the execution costs.<sup>11</sup> If, however, the bid does not cover at least 7/10 of the market value of the immovable, the knocking down may be refused.<sup>12</sup>

Only in exceptional cases may an envisaged forced sale be transformed into compulsory management.<sup>13</sup> It seems now to be established that transfer of ownership to the highest bidder occurs through an official act rather than as a private conveyance. This qualification has prevailed with regard to movables by virtue of court decisions,<sup>14</sup> and with regard to immovables through statutory pronouncement.<sup>15</sup> As far as garnishment is concerned, the garnished claim is transferred to the garnishor according to his choice for collection or in lieu of payment at nominal value;<sup>16</sup> in exceptional cases the court may order a different kind of disposal instead of a transfer, for instance sale at an auction or free sale of the garnished claim.<sup>17</sup>

Austrian law, while following in general the German pattern,<sup>18</sup> deviates from it in three important points: First, there is no general clause on debtor protection or suspension of the auction like in Germany.<sup>19</sup> Second, the compulsory management of an immovable goes before its forced sale so long as the median profit out of the management covers the claim seeking enforcement.<sup>20</sup> Third, again with regard to immovables, the lowest allowed bid is more closely connected than in Germany to the appraised value of the immovable. The lowest bid is computed

7. See Blomeyer, *supra* note 6, at 210-11.

8. § 816 par.1 ZPO.

9. § 43 par. 1 ZVG.

10. § 817a par. 1 ZPO.

11. § 44 par. 1. ZVG. See Blomeyer, *supra* note 6, at 363-65.

12. § 74a par. 1 ZVG. See Blomeyer, *supra* note 6, at 381-84.

13. *Id.* at 385 (two consecutive unsuccessful attempts at forced sale).

14. *RG Jan. 21, 1938*, RGZ 156, 395 (398-99); *BGH Nov. 11, 1990*, BGHZ 55, 20 (25).

15. § 90 ZVG. See also *RG Jan. 28, 1905*, RGZ 60, 48 (54-55); *BGH Jul. 4, 1990*, BGHZ 112, 59 (61); See Blomeyer, *supra* note 6, at 206-07; Rosenberg, Gaul & Schilken, *Zwangsvollstreckungsrecht* § 53 III 1 b p. 622-24 (11th ed., Munich 1997). For the equal treatment of movables and immovables in this respect see *RG Jan. 21, 1938*, *supra* note 14, at 399.

16. § 835 par. 1, 2 ZPO.

17. § 844 ZPO. See Blomeyer, *supra* note 6, at 244; Stein, Jonas & Brehm, *Kommentar zur Zivilprozessordnung VI* (21st ed., Tübingen 1995) § 844 no. 8-14 ZPO.

18. With minor exceptions, e.g. with regard to the length of periods of time between levy, notification and auction: §169 par. 2, §184 par. 1 no. 1, §273 par. 1 sent. 1 EO.

19. Holzhammer, *Österreichisches Zwangsvollstreckungsrecht* 21-22 (3d ed., Vienna & New York 1989). For the German rules see *supra* notes 4-6.

20. § 201-203 EO; Neumann, Lichtblau, Heller, Berger & Stix, *Kommentar zur Exekutionsordnung II* 1418-20 (4th ed., Vienna 1972). *Cf. also*, for Liechtenstein, art. 132 EO.

as a fraction of the appraised value, depending on the kind of the particular immovable:<sup>21</sup> the claims of secured creditors who enjoy priority *vis-à-vis* the charging creditor, rather than having a direct impact on the lowest allowed bid as in Germany,<sup>22</sup> merely open the way to a complaint against the knocking down.<sup>23</sup> And under adoption of a French rule,<sup>24</sup> the highest bid at which the immovable has been knocked down may still be improved on within fourteen days, provided that the new offer exceeds the highest bid by at least one-fourth.<sup>25</sup>

In Switzerland the public character of ownership transfer through knocking down has been also established by the courts.<sup>26</sup> The relevant periods of time obviously have a different length.<sup>27</sup> There are two salient points of Swiss law: A debtor with financial difficulties without his fault may apply for a postponement of the forced sale for up to seven months during which he pays by installments under a schedule determined by the execution officer; there is a frequent use of this device in practice.<sup>28</sup> Further, Swiss law also adheres, with regard to both movables and immovables, to the principle that the lowest allowed bid must cover all real rights with priority *vis-à-vis* the charging creditor (*Deckungsprinzip*).<sup>29</sup>

### III. ROMANIC LEGAL SYSTEMS

In France, under the new law on enforcement, the forced sale of a movable may not take place before a month has lapsed after levy. Within this time the debtor may search for a voluntary sale whose terms have to be consented to, at least tacitly, by the creditor.<sup>30</sup> If this attempt fails, a public auction will take place. There is no appraisal of the movables levied upon,<sup>31</sup> and the auction stops as soon as the highest bid has become large enough to cover the claims of the creditors (charging and

21. The fraction oscillates between 2/3 for land and 1/3 for mines: § 151 par. 1, 154 par. 3, § 244 EO; see Holzhammer, *supra* note 19, at 153.

22. See *supra* note 11. In this respect, Liechtenstein (art. 99 EO) adheres to a middle way between Germany and Austria.

23. § 190-193 EO; see Holzhammer, *supra* note 19, at 154-57.

24. French (old) CCProc. 708. See Neumann, Lichtblau, Heller, Berger & Stix, *supra* note 20, at 1396.

25. § 195-199 EO, in particular § 195 par. 2, § 196 sent. 1 EO. Also under Liechtenstein law: Liecht. EO arts. 126-130.

26. *BG June 12, 1912*, BGE 38 I 312 (313-14); Oct. 16, 1967, BGE 93 III 39 (42-43).

27. Between ten days and two months with respect to movables (SchKG art. 122 par. 1), between one month and three months with respect to immovables (SchkG art. 133 par. 1). See Amonn, *supra* note 1, at § 28 no. 51.

28. SchkG art. 123. See Fritzsche & Walder, *Schuldbetreibung und Konkurs nach schweizerischem Recht I* § 29 no. 9-15 (3d ed., Zurich 1984).

29. SchkG arts. 126, 127, 141. See Fritzsche & Walder, *supra* note 28, at § 30 no. 6, § 31 nos. 26, 27.

30. Law No. 91-650 of July 9, 1991 art. 52 par. 1-4; Decree No. 92-755 of July 31, 1992 arts. 107, 108. See Croze, *La loi no. 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution: les règles spécifiques aux différentes mesures d'exécution forcée et mesures conservatoires*: 66 *Sem. jur.* I 3585, 231-42 (240 no. 51) (1992).

31. See Vincent & Prévault, *Voies d'exécution et procédures de distribution* (18th ed., Paris 1995) no. 257, 30 c; also Decree No. 92-755 of July 31, 1992 arts. 90, 94, 101, 113 *e contrario*.

intervening) and the costs.<sup>32</sup> Only rarely does the levy on movables seem to lead to an actual auction.<sup>33</sup>

Enforcement on immovables, on the other hand, is much more formal and complicated.<sup>34</sup> It is based on a document drawn by the creditor's attorney and containing the conditions of sale, including the starting price for the auction (*cahier des charges*).<sup>35</sup> It is filed in the court clerk's office and subject to objections by the parties and modification by the court.<sup>36</sup> The auction may be postponed "but only for serious and duly justified reasons"<sup>37</sup> and also if one year's rental income from the property will be sufficient for payment of the debt.<sup>38</sup> It must be conducted in court, and all parties are represented by their attorneys;<sup>39</sup> a slightly simplified form of auction depends on the agreement of the parties (conversion into voluntary sale).<sup>40</sup> The knocking down is pronounced by the court in its judgment.<sup>41</sup> If no bid is forthcoming, the property is struck down to the levying party for the minimum bid mentioned in the *cahier des charges*.<sup>42</sup> In principle, the purchaser acquires the prior owner's title, subject to its infirmities; all mortgages are, however, cancelled and the mortgagees retain only a preference upon distribution of the purchase price.<sup>43</sup> Within ten days after the knocking down a new bid is allowed if it exceeds the price already obtained by at least ten per cent (*surenchère*).<sup>44</sup>

In general, the creditor may not become owner or beneficiary of or otherwise sell the debtor's immovable property without complying with the requirements and procedures provided for by the law;<sup>45</sup> such *clause de voie parée* is prohibited.<sup>46</sup> Case law has, however, reduced the prohibition only to stipulations inserted into the

32. Law No. 91-650 of July 9, 1991 art. 53 par. 1; Decree No. 92-755 of July 31, 1992 art. 115.

33. See the information furnished by Vincent & Prévault, *Voies d'exécution et procédures de distribution* no. 211 p. 157 (15th ed., Paris 1984).

34. Garsonnet & Cézard-Bru, *Traité théorique et pratique de procédure civile et commerciale* IV/1 no. 332 p. 705 (3d ed., Paris 1913). Also in Italy: Cappelletti & Perillo, *Civil Procedure in Italy* 332 (The Hague 1965).

35. (Old) CCProc. art. 688. See Vincent & Prévault, *supra* note 31, at no. 373, 374.

36. (Old) CCProc. arts. 689-91. See Vincent & Prévault, *supra* note 31, at no. 384-390.

37. (Old) CCProc. art. 703, particularly par. 1 sent. 1. See Vincent & Prévault, *supra* note 31, at no. 398.

38. C. Civ. art. 2212; Herzog & Weser, *Civil Procedure in France* 579 (The Hague 1967).

39. (Old) CCProc. art. 704. See Vincent & Prévault, *supra* note 31, at no. 383, 400.

40. (Old) CCProc. arts. 744-748e. See Vincent & Prévault, *supra* note 31, at no. 468-74.

41. See Vincent & Prévault, *supra* note 31, at no. 406.

42. Decree No. 67-167 of Mar. 1, 1967, JO Mar. 5, 1967, art. 13; Herzog & Weser, *supra* note 38, at 581.

43. (Old) CCProc. art. 717 par. 1, 3; Herzog & Weser, *supra* note 38, at 582; Vincent & Prévault, *supra* note 31, at no. 412-16.

44. (Old) CCProc. art. 708. See Vincent & Prévault, *supra* note 31, at no. 417-30.

45. C. Civ. art. 2088; (old) CCProc. art. 742. Similar rule in Belgium: JudC art. 1626; Watelet, *Les saisies conservatoires et les voies d'exécution: Krings a.o., Le Code judiciaire* (Travaux de la Faculté de droit de Namur no. 2) 197-98 (Namur & Brussels 1969).

46. Vincent & Prévault, *supra* note 31, at no. 63; Garsonnet & Cézard-Bru, *supra* note 34, at no. 38, 1<sup>o</sup> p. 107-11.

initial contract itself; subsequent stipulations entered into after the debt became due are considered valid.<sup>47</sup> The same is true, as far as movables are concerned, with regard to the *pactum commissorium*.<sup>48</sup>

Belgian law differs from French law in two respects, both concerning execution on immovables: First, the auction is conducted before a notary rather than the court,<sup>49</sup> and the notary also draws the *cahier des charges*.<sup>50</sup> Second, numerical limits are provided for the amount of a new bid after the property has been knocked down.<sup>51</sup>

Italian law, on the other hand, is marked by several features that grant it a special place within the family of Romanic legal systems. Generally, there is in all kinds of monetary enforcement a larger and earlier participation of the judge who is called on to decide about the form of realization of the assets levied upon.<sup>52</sup> Such form also includes the possibility of assigning the asset to the charging creditor or to any other creditor possessing an enforceable instrument.<sup>53</sup> While the forced sale of movables takes place within a public auction,<sup>54</sup> immovables may be sold either this way or through filing bids with the clerk of the court (*vendita senza incanto*).<sup>55</sup> The latter alternative is more frequent.<sup>56</sup> As far as immovables are concerned, an eventual new bid after the knocking down must be at least one-sixth more than the price already obtained,<sup>57</sup> and the judge of execution may transform an unsuccessful auction into judicial administration that purports to satisfy the creditors by installments within a period of up to three years.<sup>58</sup> In 1991, the postponement of a forced sale on the ground that it led to an unjust price was provided for.<sup>59</sup>

#### IV. SPANISH LEGAL FAMILY

Under Spanish law, the rules on sale and collection of assets are essentially the same with regard both to movables and immovables.<sup>60</sup> Unless there is an agreement by the parties as to the value, the movables under levy are evaluated by experts

47. Cass. civ. Mar. 25, 1903, D. P. 1904. I. 273, 276, n. Guénée; *idem* Dec. 26, 1961, D. 1962. 381, n. Voirin.

48. C. Civ. art. 2078. See Cass. req. May 8, 1934, S. 1934. I. 342; Vincent & Prévault, *supra* note 31, at no. 64.

49. JudC art. 1580 par. 1; Watelet, *supra* note 45, at 203, 204.

50. JudC art. 1582 par. 2; Watelet, *supra* note 45, at 203.

51. JudC art. 1592 par. 2; Watelet, *supra* note 45, at 206.

52. CC Proc. arts. 530, 552, 567, 569.

53. *Id.* at arts. 505-507, 530 par. 4, 552-54, 589, 590.

54. See *id.* art. 534 (subject to the sale through a commissioner); *id.* arts. 503, 532, 533.

55. *Id.* arts. 570-75.

56. Satta & Punzi, *Diritto processuale civile* no. 406, 744 at n. 29 (12th ed., Padua 1996).

57. CCProc. art. 584. See Satta & Punzi, *supra* note 56, at No. 417.

58. CCProc. arts. 591-95. See Satta & Punzi, *supra* note 56, at no. 422.

59. Law No. 203 of July 12, 1991, JO no. 162 of the same day, art. 19. See Tarzia, *La sospensione della vendita forzata immobiliare a prezzo ingiusto: 1991*, Riv. Dir. Proc., 1090-93; Carpi, *La miniriforma dell' esecuzione forzata: 46*, Riv. trim. dir. proc. civ. 1173, 1183-84 (1992).

60. LEC arts. 1481-1531. See López, *Grundlinien der spanischen Zwangsvollstreckung*, 92 ZJP 285, 300 (1979).

appointed by the parties and by the judge.<sup>61</sup> The same procedure is followed upon a creditor's petition with respect to immovables as well.<sup>62</sup> Most characteristic is the way the consecutive public auctions are conducted: In the first auction only bids covering at least two-thirds of the evaluation are allowed.<sup>63</sup> Failing this, a second auction follows at a starting price reduced by twenty-five percent, and bids are again allowed at two-thirds of the new price determination.<sup>64</sup> If the second auction attracts no such bid the creditor may always request assignment to him at the same price (2/3 of the reduced evaluation) or compulsory management or else, a third auction, this time without minimum bid constraints.<sup>65</sup> The legal qualification of the knocking down is debated, nevertheless the Supreme Court seems to also require delivery for the transfer of property to the highest bidder.<sup>66</sup> In particular with regard to immovables, the *Ley de enjuiciamiento civil*, following the Romanic principle, would have the mortgages cancelled after the knocking-down; however, in 1946 the Law on Mortgages reversed the principle and adopted the subsistence of real rights.<sup>67</sup> The legal qualification of the forced sale is also discussed in Latin America, namely with respect to the question whether the judge, pronouncing the knocking down, operates as the debtor's representative or in substitution.<sup>68</sup>

#### V. SCANDINAVIAN COUNTRIES

Scandinavian systems are marked by a large intervention of enforcement authorities that, *inter alia*, conduct the forced sale of the debtor's assets. In Sweden since 1988 there have been twenty-four joint enforcement authorities (*Kronofogdemyndigheten*) dealing with all claims of money, be they private or public. In Denmark, private claims are enforced through the assistance of sheriffs while public dues are handled by the public bailiffs.<sup>69</sup> In Finland, enforcement authorities are developed on two levels: the executive officers who also conduct forced sales,<sup>70</sup> and the chief executive officers who, among other things, function as the first instance of appeal. In general it is expected from the enforcement authority to decide on the method to be used, i.e. levy on movables or immovables, garnishment of earnings or other debts.<sup>71</sup>

Rules on realization of assets are rather flexible. Thus in Sweden the enforcement authority may sell properties even privately if a better price is

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61. LEC arts. 1483, 1484. See López, *supra* note 60, at 301.

62. LEC art. 1494 par. 1; see Ramos Méndez, *Derecho procesal civil II* 1085-86 (5th ed., Barcelona 1992).

63. LEC art. 1499.

64. LEC art. 1504.

65. LEC arts. 1505, 1506. See López, *supra* note 60, at 301; Ramos Méndez, *supra* note 62, at 1089-91.

66. See López, *supra* note 60, at 301.

67. *Ley hipotecaria* of Feb. 8, 1946, BO del E. 58 and 59 of Feb. 27-28, 1946, arts. 131, 133 par.

2. See López, *supra* note 60, at 302; Ramos Méndez, *supra* note 62, at 1091-93.

68. See Couture, *supra* note 2, at 469-70.

69. Enforcement of Taxes and Excise Taxes Act No. 278 (1976) (Den.).

70. Enforcement Act, no. 37 (1895) § 3: 2 (Fin.).

71. Sweden: Jacobsson, *Enforcement Proceedings in Sweden*, 1997 *Revue Hellénique de Droit International* (RHDI) 483, 487-8, 510. Finland: Koulu, *Enforcement in Finland*, 1997 RHDI 537, 561.

promised by a private than a public sale.<sup>72</sup> And in Finland the executive officer will wait for a bid by any interested party; if no such bid is forthcoming the asset levied upon is assumed to be worthless.<sup>73</sup> The general feeling is that forced sales are concluded at below-value prices.<sup>74</sup> Numbers and frequency of actual forced sales are quite disparate. They are low in Finland where 7,000 immovable cases were reported for 1995, as opposed to about 160,000 instances of earnings garnishment in the same year.<sup>75</sup> Even lower-profile enforcement activity was reported for Denmark one year later (1996): 2,164 compulsory auction sales as opposed to 14,262 in 1990.<sup>76</sup> In order to simplify and speed up enforcement there, the chapter of the first Administration of Justice Act<sup>77</sup> on execution and compulsory sale was replaced by a new chapter on enforcement in 1976.<sup>78</sup>

## VI. COMMON LAW

In England, the levy on goods operates as a threat or sanction of a possible sale and usually leads to some mode of compromise between the creditor and the debtor rather than to an actual sale.<sup>79</sup> It is reported that only one in two hundred warrants actually results in seizure and sale.<sup>80</sup> With respect to immovables, the process of enforcement by way of charging order on a debtor's land has the effect of imposing a kind of mortgage on the land and, therefore, results in an indirect rather than a direct method of enforcement.<sup>81</sup> Within these practical considerations it is not surprising that there are no specific rules concerning the actual conduct of sale. The Committee on the Enforcement of Judgment Debts recommended that the goods be brought to sale by private contract as well, as an alternative to public auction.<sup>82</sup> For the rest, it is provided that the court may stay execution if there are special circumstances which render it inexpedient to enforce the judgment or order or if the applicant debtor is unable for any cause to pay the money.<sup>83</sup>

In the United States the forced sale of an asset levied upon is more frequent, and the prevailing concern is to protect the debtor against an inadequate or unfair price at the execution sale. In general, inadequacy of the price if not accompanied

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72. Jacobsson, *supra* note 71, at 507-08. See generally, Gregow, Utsökningsrätt 177-197 (2d ed., Lund 1990).

73. Koulu, *supra* note 71, at 562-63.

74. Finland: *ibidem*; Denmark: Christensen, Is the system of civil enforcement up-to-date? Trends of development and review in Denmark, 1997 RHDl 521, 527.

75. Koulu, *supra* note 71, at 539.

76. Christensen, *supra* note 74, at 522, 527.

77. Act no. 90 of Apr. 11, 1916 (in force since 1919)(Den.).

78. Act no. 258 (1976) (in force since Jan. 1, 1977) (Den.). See Christensen, *supra* note 74, at 523 n. 7, 8.

79. Jacob, The Enforcement of Judgment Debts, in The Reform of Civil Procedural Law and Other Essays in Civil Procedure 291 (London 1982).

80. White, The Administration of Justice 214 (2d ed., Oxford 1991).

81. Jacob, *supra* note 79, at 295; The Supreme Court Practice 1997 1 O.50/1-9/4 p. 808. See Charging Orders Act (1979) § 1 (1).

82. Payne Report (Committee on the Enforcement of Judgement Debts, Report: Cmnd. no. 3909, London 1969) par. 698, 699.

83. R.S.C.O. 47 r. 1 (1).



by procedural irregularities does not lead to setting the sale aside.<sup>84</sup> In particular with regard to real estate, several jurisdictions either grant the debtor the right to repurchase the land from the buyer at the execution or foreclosure sale for the amount bid by him (statutory right to redeem) or provide for a further public sale at higher bids.<sup>85</sup>

## VII. FORMER SOCIALIST COUNTRIES

In the former Socialist countries the sale through state or cooperative commercial organizations was either the only admissible method of realization of a debtor's movables, as in Russia<sup>86</sup> and Czechoslovakia,<sup>87</sup> or was combined with an auction, as in Bulgaria,<sup>88</sup> Poland,<sup>89</sup> and Hungary.<sup>90</sup> If the sale is unsuccessful the chattel may be assigned to the creditor on his motion at a percentage of the evaluation,<sup>91</sup> if no creditor asks for the assignment the levy is cancelled and the chattel is freed from execution.<sup>92</sup> With regard to immovables, their auction is conducted by the enforcement officer who in Poland is supervised by the judge.<sup>93</sup> The auction is a derivative mode of acquisition of ownership. Mortgages are terminated but all servitudes remain intact. The order (usually by the enforcement officer, in Poland by the court) transferring the ownership is an enforceable instrument for obtaining possession of the property.<sup>94</sup> If the first auction is unsuccessful the creditor may request either a second auction or the assignment of the property to him.<sup>95</sup> As far as the collection by the garnishor is concerned the garnishee in most former Socialist countries may voluntarily pay directly to the garnishor,<sup>96</sup> but in Bulgaria however, he may pay only to the enforcement officer.<sup>97</sup> If the garnishee does not pay, an action may be brought against him by the garnishor on the basis of the garnishment itself.<sup>98</sup>

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84. See Riesenfeld, *Cases and Materials on Creditors' Remedies and Debtors' Protection* 89 no. 2, 3 (4th ed., St. Paul, Minn. 1987). In Canada, recently, *Compagnie pétrolière impériale Ipée v. Russo* (c.s.) Recueil de jurisprudence du Québec 2536-2540 [1992]: the forced sale of a house was set aside (a) for collecting a claim less than \$10,000, and (b) at a price less than 50 percent of the official evaluation.

85. Riesenfeld, *supra* note 84, at 138-44, in particular 138.  
 86. CCProc. art. 398.  
 87. CCProc. arts. 328, 329.  
 88. CCProc. arts. 367.  
 89. CCProc. arts. 866, 867.  
 90. Stalev Report at 34.  
 91. 75 percent in Poland: CCProc. art. 875; 80 percent in Bulgaria: CCProc. art. 371; 90 percent in the former German Democratic Republic: ZPO § 122 par. 1.  
 92. *Id.* See also Russia: CCProc. art. 398 par. 6; Czechoslovakia: CCProc. art. 330.  
 93. CCProc. art. 972.  
 94. Bulgaria: CCProc. arts. 384-86; Poland: CCProc. arts. 998-1003.  
 95. Russia: CCProc. arts. 403, 404; Poland: CCProc. arts. 982-985; Bulgaria: CCProc. arts. 381, 382.  
 96. Russia: CCProc. art. 388 par. 1. In other countries the same is true with respect to the garnishment of earnings (Czechoslovakia: CCProc. art. 291; Poland: CCProc. art. 881).  
 97. CCProc. art. 391 par. 3.  
 98. Russia: CCProc. art. 394 par. 2; Czechoslovakia: CCProc. art. 292; Poland: CCProc. art. 887. In Bulgaria, an order of the enforcement officer is required to that effect: CCProc. art. 393.

## VIII. FAR EASTERN COUNTRIES

In Japan, under the new Civil Execution Law,<sup>99</sup> a movable may be converted into money either at public auction or by other methods of sale.<sup>100</sup> The *bona fide* purchaser acquires good title even if the debtor was not the owner.<sup>101</sup> With regard to immovables, the creditor may choose between compulsory sale and compulsory management; both methods are handled by the court of execution.<sup>102</sup> Most sales are effectuated by public auction, although the court may determine another method.<sup>103</sup> At public auction, it is up to the court to decide whether to accept the highest bid or not.<sup>104</sup> The purchaser becomes owner only upon payment of the price, in contrast to the previous Code of Civil Procedure that relied on the court ruling to accept the bid.<sup>105</sup> The sale at auction is considered as a regular sales contract, the state being a mere middleman.<sup>106</sup> As a rule, mortgages and other lien rights are terminated by the forced sale and their holders are referred to preferential satisfaction.<sup>107</sup> Under Chinese law the People's Court may also, on delivering the property levied upon for realization by the relevant work units, choose between auction or other sale.<sup>108</sup>

## IX. CONCLUSION

Rules on forced sale have become more flexible in recent years. In an increasing number of legal systems the court in its discretion may deviate from the public auction and choose the alternative of less formal methods of sale. Even beyond this particular issue, the most recent enactments on enforcement have broadened the discretionary power of the court. There remain, however, several issues at which the various legal systems are divided, particularly with regard to execution on immovables. Most important here is the issue whether mortgages and other lien rights persist or perish after knocking down the real estate to the highest bidder. Such differences pertain decisively to the corresponding legal rules on property and clearly aspire to a harmonious cooperation between property law and law of enforcement as a major concern in this area.

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99. Law no. 4 (1979), (effective Oct. 1, 1980) (Japan) (in the following abbreviated as CEL), art. 134; *see also* Civil Execution Rules (Supreme Court Rules no. 5 of Nov. 8, 1979, effective Oct. 1, 1980) art. 121.

100. Hattori & Henderson, *supra* note 1, at § 11-18 with n. 89.

101. CC art. 192. *See* Hattori & Henderson, *supra* note 1, at § 11-18 with n. 88, 93.

102. CEL, *supra* note 99, art. 43 par. 1, 2, art. 44 par. 1. *See* Hattori & Henderson, *supra* note 1, at § 11-24 to 11-25.

103. CEL art. 64. *See* Hattori & Henderson, *supra* note 1, at § 11-25.

104. CC arts. 69-71. *See* Hattori & Henderson, *supra* note 1, at § 11-26 at n. 153, 154.

105. CEL art. 79. *See* Hattori & Henderson, *supra* note 1, at § 11-26 with n. 156.

106. Hattori & Henderson, *supra* note 1, at § 11-18 n. 92.

107. CEL arts. 59, 87; CC art. 295, 325, 356, 367. *See* Hattori & Henderson, *supra* note 1, at § 11-26 to 11-27.

108. Civil Procedure Law of Apr. 9, 1991 art. 226 sent. 2.

