

At a glance

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Securitisation in Russia: Some Legal Issues

Overview

Russia has already experienced several successful securitisation transactions of future flow, e.g. Gazprom International S.A., Russia International Card Finance S.A., Alfa Diversified Payment Rights Finance Company S.A., and also of existing receivables, e.g. Russian Auto Loans Finance (RALF), Eurasia Structured Finance No. 1, S.A., Russian Consumer Finance No. 1 S.A.. There is significant further originator interest in securitisation, especially for natural resources-based deals, offshore credit card remittances and auto loans and leases.

Legal considerations

A distinctive feature of Russian law is the fact that civil activity of the government and government agencies is regulated by the same provisions as applied to legal entities (Section 124 of the Russian Civil Code – hereinafter the “Civil Code”). Thus, assignment under contract, concluded with the government and government agencies shall comply with the general requirements as to the form of such assignment.

(1) Choice of law

Russian international private law requires an “international element” for the application of international private law principles (Sections 1186, 1210 of the Civil Code). Hence, on cross-border securitisations, which always have a foreign element, the purchaser and the originator are free to choose the law applicable to the sale agreement. But, following the provisions of the Rome Convention, Russian law stipulates in such cases that the mandatory rules of Russian substantive law can not be derogated from (Section 1192, 1193 of the Civil Code).

In the absence of contractual choice, the contract will be governed by the law of the country with which it is most closely connected. This will be usually the country, where the assignor has its principal place of business (Section 1186, 2; 1211 of the Civil Code).

When choosing a foreign law to govern an assignment agreement, it has to be stressed that if the underlying receivables contract is governed by Russian law, Russian law will also govern the issues of assignability, set-off and discharge by the debtor as well the relationship between the assignee and the debtor (Section 1216, 2 of the Civil Code).

(2) True sale

Under Russian law, an assignment is valid upon the agreement of the assignor and assignee. The assignment agreement must be concluded in writing where a legal entity is a party. In the case where the receivables contract contains a prohibition on assignment, the assignment will be ineffective. Under Russian law, a contractual prohibition on assignment has an absolute effect and extends to third parties. For factoring transactions, however, Russian statutory law provides expressly that assignment is permitted notwithstanding a contractual prohibition on assignment and so only liability for breach of contract will arise upon an assignment made in violation of a contractual prohibition.

Notification of the assignment to the debtor is not a prerequisite for perfection of the assignment, although it is advisable to notify the debtor in order to avoid the debtor being able to discharge or set-off its debt with the assignor. The assignee may notify the debtor, but it has to provide to the debtor proof of the assignment, e.g. a copy of the assignment agreement.

Generally, the receivables have to be sufficiently identifiable to be assigned. The contract should contain details of the debtor, the legal basis for the underlying debt and the assignment, and the amount of the assigned receivables. There is no clear statutory statement as to whether future receivables can be assigned. Previous court practice indicates that only already existing claims may be assigned. Nevertheless, there is a strong alternative view that assignments dealing with receivables that do not yet exist may become effective. At present, with regard to factoring transactions, the Civil Code expressly provides that future claims may be validly assigned. Accordingly, it is widely expected that the courts will move to recognise the validity of assignments of future receivables as well.

In cases where a receivables contract is backed by rights over collateral, the rules with respect to the transfer of the respective collateral have to be followed when structuring a true sale.

Under Section 112 of the Federal Law “On insolvency” the insolvency officer is entitled to assign receivables of the assignor (subject to insolvency procedure), though such assignment shall be approved by creditors. The terms and conditions of such assignment are as follows:

- (i) receipt of monetary funds as consideration for the assigned receivables shall be not later than 15 days from the date of the relevant agreement;
- (ii) receivables shall be transferred only upon receipt of consideration; and
- (iii) certain receivables (the trade in which is restricted) may be sold only through closed tender. Hence, assignment of distressed debt might be possible in Russia.

(3) Transfer of collateral

Ancillary rights related to a receivables contract, e.g. mortgages and pledges, are transferred automatically with the assignment of the underlying receivables; however, certain re-registration requirements have to be fulfilled. It is advisable that any registration is carried out by the assignee, as his title over the receivables and the collateral is the subject of the re-registration.

The rights of a beneficiary under a suretyship agreement are transferred automatically.

Security interests in mortgage loans require relevant entries to be made in the United Register of Transactions and Rights in Immovable Property.

(4) Claw-back and “suspect periods”

An insolvency administrator in Russia is entitled to challenge transactions in the circumstances provided under Russian insolvency legislation. Key examples include cases where,

- (i) the transaction was performed within the six months prior to the commencement of insolvency proceedings and where the transaction granted the assignee greater benefits than the other creditors of the assignor;
 - (ii) where interested parties, especially affiliates, were involved, and the transaction may be prejudicial to the assignor and its creditors; and
 - (iii) where the assignment prevents the assignor remaining solvent.
- Where the assignor is a bank or other credit organisation, the question of assigning at “fair value” has to be addressed. For example, a sale done within 3 years prior to the commencement of insolvency proceedings may be challenged, where its conditions are materially worse than those of similar transactions.

It is notable that “non-petition” clauses are not yet a proven mechanism for enhancing creditworthiness of securitisation transactions under Russian law.

In cases where the insolvency of the assignor is caused by actions of the assignee (where the assignee is a major or the sole shareholder of the assignor or where the assignee is entitled to give mandatory instructions to the assignor) the assignee shall incur subsidiary liability (“secondary liability”) alongside the assignor for its debts. In such circumstances, the insolvency administrator may demand consolidation of the assets of the assignee with those of the assignor where the assets of the assignor are not sufficient to settle all the claims of its creditors.

(5) Data protection

There is no special consumer data protection legislation in Russia. However, several types of confidential data are protected under Russian Law, for example, commercial secrets, tax secrets and personal data which has commercial value due to the fact that it is unknown to third parties.

However, upon an assignment the Russian Civil Code requires that the assignor provides to the assignee all relevant documents to enable the assignee to exercise his rights with respect to the assigned receivables. Consequently it must also be possible to disclose certain amount of important information.

Banks are limited by strict banking secrecy rules, but only concerning client information, e.g. deposits and account movements. Hence, the debtor’s data is not subject to bank secrecy rules.

(6) Regulatory

Under Russian Law, neither the purchasing nor the servicing of receivables requires a license.

There are also no restrictions on money transfer and currency exchange. Some restrictions imposed by the Russian central bank are only applicable on originators Russian banks.

(7) Taxation

The double tax treaties with, amongst others Germany, Luxembourg, the Netherlands, USA and the United Kingdom allow for the reduction of the withholding tax to zero upon compliance with certain procedural requirements.

Under Russian tax law, there are no stamp duties or other taxes or fees when assigning receivables other than when mortgages have to be re-registered and certain registration costs thereby incurred.

The servicing of receivables is VAT taxable when it is performed in Russia.

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