

At a glance

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Securitisation in Poland: Some Legal Issues

Overview

Poland has an established special securitisation framework, created by the Banking Act and the Law on Investment Funds. Its aim is to facilitate Polish bank loan securitisations by Polish securitisation funds. According to this special legislation, securitisations of Non-Performing Loans (NPL) are also permitted.

The securitisation transactions which have been already carried out in Poland (e.g. "RLPL", "ROOF", Dominet Bank loan securitisation), have cross-border implications.

It is notable that the Polish special securitisation legislation will be amended in 2007 in the course of the implementation of the Basel II Accord. For instance, synthetic securitisations will be expressly allowed pursuant to the new law. Furthermore, it is envisaged that the restrictions on re-transferring purchased receivables will be abolished.

Legal considerations

Under the special Polish securitisation framework, it is expected that cross-border securitisations rather than on-shore deals will dominate the Polish securitisation market in the near future.

(1) Choice of law

Provided that a "non-Polish element", e.g. an off-shore SPV (special purpose vehicle), underlies the assigned receivables contract, the parties may derogate from non-mandatory rules of Polish law and choose a law other than that of Poland to govern their assignment agreement.

Even if the parties choose a foreign law to govern the assignment agreement, the mandatory rules of the Polish law will determine the issues of assignability, enforceability rights of set-off and discharge of obligations.

Poland is a party to the Rome Convention of 1980 on law applicable to contractual obligations. However, although the Rome Convention was ratified by Poland, it is still not in force. It is expected to come into effect after completion of ratification processes undertaken by other member states of the convention. Hence, once it comes into force, choice of law issues will be governed by the Rome Convention.

(2) True sale

Under Polish law an assignment agreement is valid upon the agreement between an assignor (normally the originator in a securitisation transaction) and an assignee (the purchaser or an SPV in a securitisation transaction) except when the assigned receivables are secured by a mortgage, in which case the transfer of the mortgage is required for the assignment to be effective.

Generally there are no special formalities required, unless otherwise agreed in the underlying receivables contract; however, if the underlying receivables contract was in writing, the assignment agreement should also be in writing.

If the underlying receivables contract prohibits assignment and such prohibition was known to the assignee, the assignment will be ineffective.¹ Such contractual prohibition has an absolute effect; hence, the assignment will also be ineffective in relation to third parties.

When Polish law governs the assignment agreement between an assignor and an assignee, neither consent nor notification of a debtor (the underlying obligor in a securitisation transaction) are prerequisites for validation or perfection of the assignment. Nevertheless, it is prudent to notify the debtor in order to avoid the debtor discharging its obligation by paying the assignor or setting-off against the assignor.

Pursuant to the special securitisation framework, when banks are transferring loan receivables to Polish securitisation funds, debtors (even if they are not borrowers) have to give their written consent to the assignment. Additionally, 14 days following the completion of the transfer, the originator bank must serve a written notice upon the debtors.

There is no barrier to securitisation of future receivables under Polish law provided that the receivables may be identified or identifiable with sufficient certainty, e.g. the debtor, the creditor and the assigned receivables are identifiable.

A true sale is achieved where an assignment agreement is validly existing, it is perfected against debtors and third parties and it is performed "at arm's length" (see also section (4) below).

¹ It is notable that according to Supreme Court decision, in the case where the assignment was made on the basis of invoices which did not indicate that the assignment was prohibited and the prohibition was only included in the receivables contract which was not delivered to the assignee, the assignment is still effective.

Additionally, under the Polish special securitisation legislation, securitisation funds are restricted from re-transferring the purchased receivables back to the assignor and an assignor is prohibited from acquiring investment certificates/notes from a fund to which the assignor has sold receivables. There is also a prohibition under Polish law which restrains buy-back options.

(3) Transfer of collateral

Under Polish law ancillary rights are transferred automatically to the assignee with the assignment of the underlying receivables. To validly transfer mortgages and registered pledges, however, the parties have to comply with relevant re-registration procedures. When the assignee does not conduct business activity in Poland, the transfer of a registered pledge may be impossible.

(4) Claw-back and “suspect periods”

Pursuant to Polish insolvency law, assignments undertaken to defraud the assignor’s other creditors may be challenged within five years after the transfer is concluded. Intra-group assignment agreements may also be challenged if the transfer was conducted within six months prior to the commencement of insolvency proceedings. A “suspect period” of one year prior to the initiation of insolvency proceedings applies for transactions at undervalue.

(5) Data protection

According to the Personal Data Protection Act, personal data may be processed under certain conditions, which include, inter alia, obtaining consent of a person whose data is to be processed and notifying the General Inspector for Personal Data Protection.

There is an exception to the restriction described in the previous paragraph with respect to the use and dissemination of personal data according to the rules of the special securitisation legislation for loan receivables which have been originated and transferred by a Polish bank.

The transfer of data protected by banking secrecy regulations might be effective when conducted in compliance with the Banking Act.

(6) Regulatory

Under Polish Law the purchasing and servicing of receivables are business activities free of licensing requirements when they are performed under the general legislation and not pursuant to the special securitisation regime.

The “passporting” of banking services is possible under Polish law.

There are also no restrictions on money transfer and currency exchange in Poland where the parties involved are members of the EU, EEA or OECD and it is a cross-border transaction.

(7) Taxation

The double tax treaty with France allows the withholding tax on interest earned in Poland to be reduced to zero, provided that certain procedural requirements are met, i.e. a tax residence certificate of the interest recipient is provided.

It is also important to note that, under the new double taxation treaty between Poland and the United Kingdom, which is in force beginning with 1st January 2007, withholding tax of 5% will be collected in Poland on interest paid by Polish companies to United Kingdom lenders. An exception is the zero per cent withholding tax on interest arising out of bank loans.

Under Polish tax law, if only one of the parties is liable to pay VAT or is VAT exempted, no stamp duty will be payable on a sale and transfer of Polish receivables.

The purchase of receivables, if it is interpreted as a “factoring service” by the Polish Tax Authority, will attract VAT. The sale of receivables may not be treated as a VAT exempted “financial intermediary service” hence, VAT of 22% would be applicable.

The servicing of receivables seems to trigger VAT under Polish law when it is performed within Polish territory.

With regard to securitisation of NPLs there are certain tax advantages such as (i) an exemption from Polish corporate income tax of the amount of the outstanding NPL when sold by a Polish bank to a securitisation fund, (ii) an exemption from corporate income tax duty for the securitisation fund, and (iii) a tax deduction in favour of the bank assignor in respect of the loss on the sale of the NPL receivables calculated on the difference between the purchase price paid and the amount of the NPL receivables.

Contact

Dr. Ralf Hesdahl, rhesdahl@mayerbrownrowe.com
Dr. Jörg Wulfken, jwulfken@mayerbrownrowe.com
Frankfurt/Main: Mayer, Brown, Rowe & Maw LLP
Bockenheimer Landstrasse 98-100, 60323 Frankfurt am Main
Tel.: +49 (0)69 79 41 0, Fax: +49 (0)69 79 41 100

Bruce Bloomingdale, bbloomingdale@mayerbrownrowe.com
Dominic Griffiths, dgriffiths@mayerbrownrowe.com
London: Mayer, Brown, Rowe & Maw LLP
11 Pilgrim Street, London EC4V 6RW
Tel.: +44 (0)20 7248 4282, Fax: +44 (0)20 7248 2009

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