

# At a glance

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## Securitisation in Croatia: Some Legal Issues

### Overview

It is expected that a special securitisation law will come into effect in 2008.

However, it is more likely that off-shore securitisations will open up the market. The following factors might support the Croatian banks entering into securitisation transactions: (i) existing lending caps, (ii) relatively favourable legal and tax environment, and (iii) the banks' aim to refinance with capital markets.

### Legal considerations

As Croatian law recognises a legal concept of assignment of a whole business or undertaking, it can be assumed that this will facilitate the structuring of whole business securitisations and the securitisation of pools of future receivables.

#### (1) Choice of law

To the extent that a contractual relationship involves a foreign element, the counterparties are free to choose foreign law to govern their contract, for example, where the assignee (in a securitisation context, a purchaser SPV) is located outside Croatia.

When choosing foreign law to determine an assignment agreement, if the underlying contract is governed by Croatian law, Croatian law will also govern issues of assignability, set-off and discharge by the debtor (in a securitisation context, the underlying obligor/customer) as well the relationship between the assignee and the debtor. Croatian law will also apply when transferring rights related to real estate situated in Croatia.

#### (2) True sale

Under Croatian law, an assignment is valid upon the execution of a valid agreement between the assignor (in a securitisation context, an originator) and assignee. According to Croatian law, there is no requirement for concluding assignment contracts in writing. However, as the assignment is subject to the underlying receivables contract, the assignment contract should follow the form of the underlying contract. In the event that an assignee attempts to enforce an assigned receivable arising from an enforceable document (e.g. certain notarised documents or court decisions) against the obligor, it must be capable of proving by a public or notarised private document that the receivable has become its asset. Therefore, in connection with securitisation transactions, the best practice is to have a written, notarised assignment agreement.

If Croatian law governs the assignment agreement, neither the consent nor the notification to the debtor is necessary for validation of the assignment. However, notifying the debtor extinguishes the debtor's rights of discharge or set-off in relation to the assignor. Furthermore, such notification ensures that the assignee's rights against possible later assignments of the same receivables contract are protected. Either the assignor or the assignee may notify the debtor of the assignment.

Croatian law does not prohibit the valid assignment of future receivables, provided that the future receivables are sufficiently clearly identified at the time of the assignment. This can be achieved by stating the identity of the assignor, the identity of the debtor and the legal basis of the receivables, for example, a specific loan agreement or invoice.

In summary, a true sale can be achieved when the assignment agreement is valid, perfected and is concluded "at arm's length" (see also below section (4)).

#### (3) Transfer of collateral

Ancillary rights, e.g. mortgages and pledges, pass to the assignee automatically with the assignment of the rights under the underlying contract.

Where an underlying receivables contract is backed by a mortgage, the assignment agreement and/or a statement of transfer of the mortgage will need to be notarised and the assignee's rights entered on the land register. At the latest, this must be completed prior to the enforcement of the mortgage by sale of the relevant real estate.

Where a pledge right relating to the assigned receivables has been registered on the register of security interests over movables and rights kept by the Croatian Financial Agency, the assignee as new creditor needs to register his title to the collateral for the assigned assets for evidence and enforcement purposes.

#### (4) Claw-back and "suspect periods"

Under Croatian law there are "hardening periods" varying between one month and ten years. For example, transactions made at an undervalue within four years prior to submitting a proposal for commencement of an insolvency procedure may be challenged by the assignor's insolvency administrator and/or insolvency creditors. The "suspect period" regarding fraudulent transactions is ten years.

The insolvency administrator and the insolvency creditors are entitled to make use of their rescission right within two years of the opening of the insolvency proceedings with respect to the assignor.

#### (5) Data protection

Pursuant to Croatian personal data protection legislation, which relates only to natural persons, the assignor may disclose information regarding the assigned contract to an assignee or any other party related to the transaction, provided that (i) the debtor has consented or (ii) in certain other limited circumstances provided by the law.

The Croatian Personal Data Protection Law also provides that personal data, subject to certain assumptions, may be transferred cross-border and processed in another jurisdiction to the extent this jurisdiction can ensure an adequate level of protection.

An additional restriction on the transfer of consumers' personal data is found in the Consumers' Protection Law, which prohibits providing third parties with such data unless the consumer gives prior explicit and written approval.

In respect of banking secrecy pursuant to Croatian law, the disclosure of information regarding loan agreements must not reveal information about a borrower's (i.e. the debtor's) deposits, account balance, account movements and all data, facts and circumstances which the bank has acquired through providing services to the borrower and in performing operations with the borrower. However, this restriction may be waived with the borrower's written consent.

#### (6) Regulatory

Under Croatian law, the purchase and servicing of receivables are considered to be business activities free of licensing requirements.

Foreign banks may provide cross-border lending or receivables purchasing activities in Croatia without being licensed by the Croatian National Bank.

Croatian law imposes certain restrictions on money transfer and currency exchange. In addition, the opening of foreign bank accounts by a Croatian resident, other than by banks, is only possible with prior approval from the Croatian National Bank.

#### (7) Taxation

Some of the double tax treaties in force for Croatia (for example, with The Netherlands and Ireland) allow for minimisation of the withholding tax duty provided that certain procedures are complied with.

Under Croatian tax law, there is no stamp duty on the sale of receivables unless the assignment agreement is executed before a notary public.

Under Croatian tax law, the transfer of receivables is a VAT exempted transaction.

The servicing of receivables triggers VAT under Croatian law to the extent such activities are (i) performed within Croatia and (ii) not considered a banking service provided by a bank.

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