

At a glance

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Securitisation in Slovakia: Some Legal Issues

Overview

It is likely that due to the outstanding growth of residential mortgage and unsecured consumer lending during the last few years, Slovakia will experience first securitisation transactions soon.

The following factors might support Slovak banks entering into securitisation transactions: (i) implementation the Capital Requirement Directive and the Financial Collateral Directive, (ii) relatively favourable legal and tax environment, and (iii) the banks' aim to refinance with capital markets.

Legal considerations

Securitisation transactions are new to Slovakia and in the absence of any special Slovak securitisation law, previous experience gained in other Central and Eastern European countries in cross-border contractual arrangements might influence the first securitisation deals.

Tailored to the needs of a particular transaction, both on- and off-shore SPVs (special purpose vehicle) could be used for the purposes of Slovak-based securitisation transactions.

(1) Choice of law

Pursuant to the provisions of the International Private and Process Act, the parties to an assignment agreement are free to choose foreign law to govern the sale and assignment of receivables, provided that a "foreign element" is present in their contractual relationship (for example, where the purchaser is located outside Slovakia).

When foreign law governs the assignment agreement, however it must be noted that if the underlying receivables contract is governed by Slovak law, Slovak law will determine issues of assignability, rights of set-off and discharge and the relationship between the assignee and a debtor (the underlying obligor in a securitisation transaction). To the extent the debtor is a consumer, the choice of foreign law will be disregarded where the proposed foreign law affords the consumer less protection than Slovak law.

(2) True sale

Under the law of Slovakia an assignment agreement is valid when the assignor (the originator in a securitisation transaction) and the assignee (the purchaser or SPV in a securitisation transaction) agree to its terms. The agreement must be concluded in

writing, otherwise the agreement will be invalid. If the underlying receivables contract contains a prohibition on assignment, the assignment will be ineffective.

If Slovak law governs the assignment agreement, no consent of a debtor is required for a valid assignment. In addition, no notification of the debtors is needed for the perfection of the assignment. However, in order to terminate the debtors' right to discharge or set-off its obligation against the assignor's obligations, the debtor must be notified about the assignment. The assignee may also give notification to the debtor but it must provide evidence of the assignment to the debtor, e.g. a copy of the assignment agreement.

Slovak law permits the assignment of future receivables, provided that (i) the future receivables are sufficiently identified at the time of the assignment and the parties' intention to assign such future receivables is expressly stated, and (ii) the description of the receivable which is the subject of the assignment is periodically updated, e.g. by way of updating of the list of receivables subject to the assignment that is attached to the assignment agreement. In any event it is advisable to update the list of assigned receivables whenever they arise.

It is notable that pursuant to the provisions of the Banking Act of Slovakia, a bank cannot assign its receivables without the client's consent, unless the client is in default of its payment obligations for 90 calendar days and the outstanding debt has not been redeemed.

(3) Transfer of collateral

Ancillary rights, e.g. mortgages and pledges, are transferred to the assignee automatically with the assignment of the related receivable. When a security is provided by a third party, the assignor is required to notify the third party of the assignment for enforcement purposes.

When the assigned receivables contract is backed by a mortgage, the assignment agreement needs to be notarised and registered with the land registry. It must be emphasised that the assignment will be valid without registration, but in order to perfect the enforcement right of the assignee, the assignee as new mortgagee over the real estate (land) must be registered with the land registry.

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4) Claw-back and "suspect periods"

Under Slovak law preferential transactions or those made at an under value within one year prior to the commencement of insolvency proceedings may be challenged by the assignor's insolvency administrator. When such transactions are concluded between affiliated companies, a "suspect period" of three years applies. The "claw-back period" regarding fraudulent transfers is five years.

(5) Data protection

Pursuant to Slovak data protection law, the assignor is entitled to disclose information to the assignee or third parties with respect to the underlying receivable provided that the individual's prior consent is obtained. No consent is required if the processing of personal data is necessary for (i) the performance of a contract to which the individual is a party, or (ii) the protection of statutory rights and legitimate interests of the party transferring the personal data.

Slovak data protection law permits the transferring of personal data within the European Union.

With respect to banking secrecy regulation, Slovak law provides that banking secrecy is deemed to be kept confidential as long as the disclosed information is connected with the assigned title of the receivables and its documentation.

(6) Regulatory

Under Slovak law the purchasing and servicing of receivables requires a trade license for "free trade", but there are no special professional or other skills or qualifications required by the licensee.

"Passporting" of banking activities is allowed under Slovak law.

There are also no restrictions on money transfer and currency exchange in Slovakia.

(7) Taxation

Certain double tax treaties allow withholding tax duty to be minimised, provided that certain procedural requirements are met.

Slovak tax law does not impose any stamp duty or documentary taxes on the sales of receivables.

Pursuant to Slovak tax legislation, no VAT should be levied on the transfer of receivables.

The servicing of receivables triggers VAT under Slovak law to the extent such servicing is performed within Slovakia.

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