

AT A GLANCE

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SECURITISATION IN RUSSIA: SOME LEGAL ISSUES

OVERVIEW

Mayer Brown has already advised on several securitisation transactions in Russia.

There is significant further originator interest in securitisation, especially for consumer and mortgage loans, car loans and leases in terms of asset classes on one hand, and in Rouble denominated securities on the other hand.

LEGAL CONSIDERATIONS

Although securitisation transactions in Russia have not yet been tested in the courts, there is certain common understanding as to the implementation of Russian law into securitisation transactions and its interpretation in the context of cross-border deals.

Further, a development in the Russian market was facilitated by the use of Russian mortgage certificates («Закладная») as collateral in Russian mortgage securitisations. In brief, the mortgage certificate is a registered certificate that certifies the rights of its holder to (i) seek performance of its monetary claim without providing any other evidence of the existence of its claim, and (ii) to pledge the property encumbered with mortgages.

(1) CHOICE OF LAW

In recent transactions, Russian law was chosen for the assignment of receivables and foreign law has governed the remaining transaction documentation.

As a general rule, 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 Seller and the Originator are free to choose the law applicable to the sale agreement. In the similar way as it is provided for in the Rome Convention, the Russian law stipulates that the mandatory rules of the Russian substantive law can not be derogated (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 Seller or Originator has its principal place of business (Section 1186, 2; 1211 of the Civil Code).

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

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(2) TRUE SALE

Under Russian law, an assignment is valid upon of the agreement of the Assignor and Assignee. There is a written form requirement for those contracts, where a legal entity is a party. In the case where the receivables contract contains a prohibition, the assignment will be ineffective. Under Russian law the contractual prohibition has an absolute effect and extends to third parties. For factoring transactions, however, there is an express statutory permission for such agreements – only the liability for contractual breach will result. The assignment agreement must be made in the same form as the agreement for the underlying receivables.

Notification of the Debtor is not a prerequisite for perfection of the assignment, although it is advisable Debtor to be notified in order to avoid discharging or setting-off. It is notable that 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.

As such, a True Sale is achieved when the assignment agreement reflects the parties' intention that the receivables are transferred by absolute assignment rather than by way of security interest and also the legal requirements concerning assignment agreements are met.

Generally, the receivables have to be sufficiently identifiable to be assigned. The contract should contain details of the Debtor, legal grounds of the underlying debt and the assignment, maturity date and the amount of assigned receivables. Agreement on assignment of receivables under a continuing covenant shall identify the period which relates to such receivables. There was no clear statutory statement as to whether future

receivables can be assigned. Previous court practice indicated 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 upon their occurrence in the future and provided that such future receivables are sufficiently identified. At present, with regard to factoring transactions, the Civil Code expressly provides that future claims may be validly assigned. Recently the Supreme Arbitral Court of the Russian Federation in its Information letter No. 120 dated October 30, 2007 recognized the validity of assignments of future receivables referring to Articles 340, 454 and 455 of the Civil Code.

The Supreme Arbitral Court also confirmed the validity of assignments at parts of dividable receivables. Such agreements that provide for assignment of one or part of receivables under a contract are recognized to be valid.

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 seller (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.

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(3) TRANSFER OF COLLATERAL

Ancillary rights, e.g. mortgages and pledges, pass automatically with the assignment. However, certain re-registration requirements have to be fulfilled. It is advisable the re-registration to be carried out by the new creditor, 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”

Under Russian law the insolvency administrator is entitled to challenge transactions under certain circumstances provided for in the bankruptcy legislation. Key examples include cases where,

(i) the transaction was performed within the six month prior to the commencement of insolvency proceedings and where the transaction granted the Purchaser greater benefits than the other creditors of the Originator;

(ii) where interested parties, especially affiliates, were involved, and the transaction may be prejudicial to the Originator and its creditors; and

(iii) where the assignment prevents the Originator remaining solvent.

When banks and other credit organisations act as Originator, the question of assigning at “fair value” has to be particularly addressed. For example, a sale done within 3 years prior to commencing 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 credit-worthiness of securitisation transactions under Russian law.

In case the insolvency of the Seller is caused by actions of the Purchaser (being its major or sole shareholder, the entity entitled to give mandatory instructions to the seller) the Purchaser shall incur subsidiary liability alongside the Seller for its debts.

(5) DATA PROTECTION

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

On the other hand the Russian Civil Code requires the Seller to provide to the Purchaser all relevant documents to enable Purchaser to exercise his rights. Consequently it must also be possible to disclose certain amount of important information.

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

(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.

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(7) TAXATION

The Double Tax Treaties with, amongst others Germany, Luxembourg, 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 seems to be VAT taxable when it is performed in Russia, except in the situation where an Originator is a bank. Banking operations are not subject to Russian VAT.

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