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SECURITISATION IN TURKEY: SOME LEGAL ISSUES

OVERVIEW

Mayer Brown LLP has already advised on various securitisation transactions of diversified payment rights (DPR) and trade receivables out of Turkey.

It is likely that the booming lending expansion in Turkey, particularly in the field of mortgage and consumer lending, will motivate banks to shift some of the risks to the international capital markets.

LEGAL CONSIDERATIONS

This overview focuses on highlighting the most relevant legal issues when structuring off-shore true sale securitisations.

Although outside the scope of this overview, the regime for onshore residential mortgage securitisation transactions has been established with the newly enacted Law on Housing Finance No. 5582. In brief, the Law governs publicly listed RMBS with Turkish issuers, who have to be licensed by the Capital Markets Board of Turkey. The use of the Law for the purposes of cross-border true sale securitisations has so far been restricted.

(1) CHOICE OF LAW

Under Turkish law, parties to a contract are free to choose the law which will govern their contractual relationship as long as there is a "foreign element" to the relationship. However, enforcement of any contractual obligations in Turkey would be subject to, among other things, the public policy rules of Turkey as described below.

The choice of foreign law as the governing law of the contractual relationship will be recognised and enforced in Turkey except to the extent that recognising and giving effect thereto would be against the public policy rules of Turkey and provided that the provisions of the International Private and Procedure Law of Turkey (Law No. 5718) are observed.

When choosing foreign law to determine an assignment agreement, if the underlying contract is governed by Turkish law, Turkish law will also govern issues of assignability, set-off and discharge by the debtor in a securitisation contract as well as the relationship between the assignee and the debtor.

(2) TRUE SALE

An assignment, which shall be executed in writing, is valid between the assignor (in a securitisation contract, the originator) and assignee (in a securitisation contract, the SPV). It is valid even when a contractual prohibition on assignment is included within the underlying receivables contract, provided the debtor has given its prior consent. As mentioned above, it must be stressed that an assignment is null and void when it occurs despite a prohibition of law.

In general, the right of the debtor to discharge or to set-off may be limited by notification to the debtor, prior to or after the assignment, preferably in writing, with the assignor having to notify the debtor. It is assumed in practice that if the debtor has not been notified and the assignor defaults, the assignee may notify the debtor with a power of attorney from the assignor. Of course, a waiver of such notification is possible when it is explicitly agreed in the underlying receivables contract.

A true sale is achieved when the assignment agreement is concluded based on the true intent of the assignment and "at arm's length". For the purposes of minimising challenging or re-qualification risks of the true sale, it is advisable to obtain an opinion by an independent certified accountant.

The receivables (existing and future) have to be sufficiently identifiable when assigning.

In the cases where a receivables contract is backed by rights over collateral, the rules with respect to the transfer of the related security type (ancillary rights in respect of independent collateral, e.g. guarantees) must be satisfied when structuring a true sale.

(3) TRANSFER OF COLLATERAL

Ancillary rights, e.g. mortgages and pledges, pass automatically with the assignment. Certain registration requirements must be fulfilled, however. It is advisable that the registration is carried out by the assignee, as exercise of title over the receivables and the collateral is subject to registration.

As mentioned above, mortgages are automatically transferred. There is no system in place for automatic updating, however, and any updated to the registration must be made by application to the appropriate land registry office. In the case where a transfer of mortgage-backed receivables requires a re-registration with different local land registers, the assignee must submit the application for re-registration to all applicable registries. The registrar is obliged to carry on and assure the re-registration of the new creditor's title with the respective local land register where such application is made.

(4) CLAW-BACK AND "SUSPECT PERIODS"

The transactions which are vulnerable to challenge vary in terms of the legal protection afforded to different types of rights and interests under Turkish law, and depend upon factors such as whether they are "at arm's-length", are fraudulent or are conducted between affiliates. Depending on the type of transaction, the "suspect period", i.e. the period of time within which these transactions have been conducted, vary from one to five years.

"Non-petition" clauses are not yet a proven mechanism for enhancing credit-worthiness of securitisation transactions. A general principle of Turkish civil law restricts a counterparty from giving up its rights before they arise; although it can be argued that a "non-petition" clause should be treated as lawful due to the contractual freedom provided under Turkey's Law of Obligations (Law No. 818), due to this general principle, the "non-petition" clauses may not be enforceable under Turkish law.

(5) DATA PROTECTION

Where there are no specific data protection requirements provided by law, the general provisions of Turkish law prevail with respect to data protection. Accordingly, pursuant to the general provisions of Turkish law, unregulated entities are prohibited from divulging information if the dissemination of such information would constitute a wrongful act or be deemed to be unfair competition.

Under Turkish law, banks are prohibited from disclosing documents and information relating to their clients to third parties other than to official authorities specifically authorized to demand confidential information from banks pursuant to Turkish law.

In terms of banking secrecy under Turkish law, one can assume that banking secrecy rules are deemed to be complied with to the extent that the disclosure of the loan and related information does not infringe on rules regarding disclosure of information concerning the borrower's deposits and account movements. This is the case, for example, where the borrower has given its consent to the disclosure. Standard banking services agreements usually include such provisions which pre-authorize banks to disclose the confidential data of clients for certain purposes.

(6) REGULATORY

Under Turkish law neither the purchase nor the servicing of receivables requires a license.

There are no restrictions on money transfer and currency exchange, except for certain declaration, periodic reporting and exports-related repatriation obligations as described in the Council of Ministers' Decree numbered 32. Furthermore, debt owed to foreign entities must be reported to the Turkish Central Bank for statistical purposes. No particular regulatory obstacles exist for Turkish counterparties when they participate in cross-border transactions.

(7) TAXATION

The double tax treaties Turkey has with The Netherlands and the United Kingdom restrict the percentage of withholding for the transactions between the counterparts of these countries. The double tax treaty executed with the Netherlands provides a maximum limit of 15 % for interest income arising from the transactions between the parties resident in Turkey and Netherlands. Such limitation is 10 % in the double tax treaty with the United Kingdom.

Under Turkish tax law, there are no taxes when assigning receivables other than stamp taxes (except where the securitisation transactions benefit from certain exemptions granted to financing arrangements). Certain registration fees must be paid at the land registry when transferring ownership of real estate; however, no such fees are due when registering the assignee as the new beneficiary of a mortgage in the land registry.

Under Turkish tax law, the assignor is not obliged to charge VAT. However, if the particular transfer qualifies as a service, the service fee may be VAT taxable. This may be the case where the assignee takes the credit and collection risk for consideration, e. g. a discount in the purchase price (except where the securitization transactions benefit from certain exemptions granted to financing arrangements).

The servicing of receivables is VAT taxable at a rate of 18 % when servicing is performed in Turkey.

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