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SECURITISATION IN SERBIA: SOME LEGAL ISSUES

OVERVIEW

It is likely that a securitisation transaction in Serbia will take place soon. The following factors might support the Serbian banks in entering into securitisation transactions: (i) the favourable Serbian banking environment, (ii) outstanding growth in Serbia of mortgage and SME loans, (iii) strong competition among Serbian banks, (iv) existing lending caps, (v) mandatory reserves imposed on leasing companies, and (vi) the banks' aim to refinance with foreign capital markets.

LEGAL CONSIDERATIONS

Due to the lack of a proven track record for securitisation transactions in Serbia, 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 offshore SPVs (special purpose vehicle) could be used for the purposes of Serbian-based securitisation transactions.

A cross-border transaction involving a Serbian originator can be structured by way of a single-tier or a two-tier model. In the first case, the purchasing SPV can be established either on-shore or off-shore. In the second case, the purchasing SPV should be set up in Serbia and the holding company, usually an orphan company, would be located in a securitisation friendly and tax favourable jurisdiction which itself has an established double tax treaty with Serbia, e.g. The Netherlands.

Taking into consideration the relevant provisions of Serbian law on foreign exchange transactions, a single-tier model (with an off-shore purchasing SPV) may only be used for the purchase of receivables that are derived from (a) foreign credit transactions in which Serbian banks or other resident entities are the lenders (such assignment may only be performed under the conditions prescribed by the National Bank of Serbia) and (b) foreign trade transactions of Serbian companies (which transactions may only be performed under the conditions prescribed by the Government of the Republic of Serbia). On the other hand, purchase of receivables deriving from credit operations of Serbian banks with their domestic clients may be performed only by using a two-tier model with an on-shore SPV purchasing the receivables.

SECURITISATION IN SERBIA: SOME LEGAL ISSUES

(1) CHOICE OF LAW

Pursuant to Serbian law, the parties to an international transaction may choose foreign law to govern their contractual relationship, including the sale and assignment of receivables. There are certain restrictions on the parties' choice of law, however, where Serbian real estate is the subject of the contract. Notwithstanding that the assignment agreement is governed by foreign law, issues relating to the underlying receivables such as assignability, discharge and set-off by a debtor (the underlying obligor in a securitisation deal) or the relationship between the assignee and the debtor will continue to be governed by Serbian law. In the case of a two-tier model transaction, the assignment agreement must be governed by Serbian law as it will be concluded between two local entities.

(2) TRUE SALE

In the absence of special securitisation legislation in Serbia, a true sale can be achieved by way of sale and assignment of receivables under Serbian civil law. Serbian law provides that both legal and/or equitable (silent) assignment may be used for transferring the legal and beneficial title in the receivables to the assignee.

An assignment agreement is valid upon the conclusion of an agreement between the assignor (originator in a securitisation deal) and assignee (purchaser in a securitisation deal) unless the underlying receivables contract or statutory provisions prohibit assignment. According to the Foreign Exchange Law, an assignment agreement related to an assignment of receivables derived from foreign trade and foreign credit transactions has to be signed by the debtor.

A legal assignment under Serbian law might be perfected by the assignor, or by the assignee together with the assignor, by serving a notice on the debtor. In contrast, a silent assignment does not require notification to the debtor; however, the debtor remains entitled to discharge its payment obligation by payment to the assignor and can set-off its obligations against the obligations owed to it by the assignor following the assignment. Furthermore, a silent assignment may not eliminate the risk of potential subsequent sales of the assigned receivables by the assignor to *bona fide* purchasers. According to Serbian law, so long as the debtor is not notified of the assignment, the assignee will not be able to sue the debtor directly.

It remains to be seen whether, in practice, a silent assignment can be transformed into a legal assignment by allowing the assignee to notify the debtor of the assignment in certain predefined cases, e.g. delinquency or default. Serbian law permits the assignment of future receivables to the extent that the parties and the contractual terms are identified or identifiable at the time of the assignment.

(3) TRANSFER OF COLLATERAL

By virtue of a valid sale and assignment, any related collateral is transferred automatically with the assigned receivables. Nevertheless, depending on the nature of the security, consideration needs to be given to the re-registration of the collateral. For instance, when transferring loans secured by mortgages, the assignee has to re-register the mortgage with the land registry. Note that the costs of re-registration depend on the value of the assets which are the subject of the mortgage security.

In the event the assigned claim is secured by a pledge over tangible movable assets and such pledge is registered with the register of pledges, a re-registration of the pledge is also required for the valid transfer of the same. This approach also applies to receivables secured by a pledge over shares or other securities (i.e. re-registration of pledge with the Central Registry of Securities is required for the valid transfer of the collateral). Finally, with respect to an assignment of secured claims, an assignment agreement must be verified by the local court with the cost of such verification dependent on the value of the contract.

(4) CLAW-BACK AND "SUSPECT PERIODS"

An assignment can be set aside in the following circumstances: (i) it was concluded three months prior to the insolvency of the assignor, provided the assignor was insolvent at the time of the assignment and the assignee knew or should have known about the insolvency of the assignor, (ii) the assignment was concluded during the period between the notice of insolvency and the commencement of insolvency proceedings, (iii) the assignment was concluded five years prior to the insolvency of the assignor and the assignor intended to defraud its creditors, provided the assignee knew or should have known at the time of the assignment that the assignor had such intention, or (iv) the transaction was concluded at an undervalue two years prior to the commencement of insolvency proceedings of the assignor.

(5) DATA PROTECTION

There are no strict personal data protection requirements in Serbia and generally speaking, commercial activities remain outside the personal data protection legislation. It is advisable for Serbian originators who anticipate participating in securitisation deals to obtain the consent of the relevant individuals prior to a sale and assignment which contains personal data.

Serbian law restricts the disclosure of information relating to the names of a bank's clients and the banking transactions concluded by those clients.

(6) REGULATORY

Under the law of Serbia, purchasing receivables is not a regulated activity. There are no licensing requirements for the purchase of bank loans as long as the purchaser does not provide financing, take deposits, or use deposits from the public to fund the purchase, and the assigned loans are fully drawn-down. According to a conservative view, a banking license is required if a purchaser acquires bank loans from a bank originator. According to the new law on banks, a banking license is only required for granting credit and not for the purchase of receivables deriving from credit activities.

Pursuant to Serbian law, servicing performed within the territory of Serbia is not a licensed business activity. In any event, coordination with the National Bank of Serbia is recommended when purchasing and servicing bank loans.

Serbia has enacted a new Law on Foreign Exchange Operations which inter alia regulates foreign credit transactions. Under the new law, foreign credit transactions are subject to obligatory reporting with the National Bank of Serbia.

It is highly unlikely that a foreign SPV would be able to directly purchase receivables deriving from loans and credits granted by a local bank to its local clients. In any event, any agreement on the purchase of receivables deriving from a foreign credit or foreign trade transaction would need to be signed by the debtor. It may be possible to structure around the reporting requirements relating to foreign credit transactions by using a two-tier SPV structure where (i) an on-shore SPV is funded by a loan made by an off-shore SPV, (ii) the on-shore SPV is a subsidiary of the offshore SPV and (iii) such loan qualifies as "additional funding" for the purposes of the law on foreign credit transactions.

Although the "additional funding" by its nature represents a kind of interest free loan granted to a Serbian company by its founder, such financing is not considered to be a loan in the spirit of the new Law on Foreign Exchange Operations. As a consequence, "additional funding" is not subject to obligatory reporting with the National Bank of Serbia as is the case with "regular" commercial or financial loans. The funds received by the bank from the parent company on the basis of "additional funding" must be declared by the on-shore SPV as payments of "additional funding" to the local commercial bank where an on-shore SPV keeps its account and through which it receives funding.

(7) TAXATION

According to the Serbian law on value added tax which adopts the 6th VAT Directive of the European Union, the securitisation of loan receivables may be treated as a VAT-exempted transaction if it can be characterised as a transfer of monetary claims (rather than as an assignment of rights). In case the substance of a transaction cannot be structured in a way which clearly leads to the conclusion that no VAT applies, it might be advisable to seek guidance from the Serbian Ministry of Finance on a case-by-case-basis.

There are also no stamp duties (financial transaction tax) levied on the assignment of receivables, other than stamp duties arising upon the re-registration of collateral, e.g. mortgages.

The servicing of receivables performed in Serbia is subject to VAT at 18 percent.

The double tax treaties with certain jurisdictions, e. g. France, Germany and The Netherlands, might allow a reduction of the withholding tax on interest to zero, provided certain procedural requirements are met.

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