

AT A GLANCE

SEPTEMBER 2007

SECURITISATION IN THE UKRAINE: SOME LEGAL ISSUES

OVERVIEW

Following the conclusion of the first securitisation transactions in the Ukraine, it is expected that further mortgage and consumer loans, SME loans and credit card remittances will drive the market. This trend will be facilitated by the favourable banking environment, the increased confidence of Ukrainian banks with foreign funding and the significant amounts of outstanding residential and consumer loans.

Further, a newly enacted regulation of the National Bank of Ukraine (No. 235 of 22 June 2007) effective 19 October 2007 caps the interest rate of foreign lending at 200 basis points above LIBOR and introduces a compulsory registration regime for borrowing with longer maturities than overnight. All these measures of the National Bank of Ukraine, tailored with the goal to slow down the lending expansion which relies mainly on foreign financing, will likely lead to alternative ways of exploring foreign financing sources such as securitisation.

LEGAL CONSIDERATIONS

Under Ukrainian law, securitisation transactions involve consideration of a number of issues, but these are not insurmountable. For example, Ukrainian law does not specifically regulate the assignment of future receivables, but when details relating to the underlying receivables are identifiable (for example, the receivables payment

amounts, contract date, title and the identity of debtor), future receivables can be effectively assigned. In addition, strict currency control regulation must be taken into account.

(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 the Ukraine.

When choosing foreign law to determine an assignment agreement, if the underlying contract is governed by Ukrainian law, Ukrainian law will also govern issues of assignability and the debtor's rights of set-off and discharge, as well as the relationship between the assignee and the debtor (in a securitisation context, the underlying obligor/customer).

(2) TRUE SALE

Under Ukrainian law, an assignment is valid upon the agreement of the assignor (in a securitisation context, the originator) and the assignee. A contractual prohibition on assignments in an underlying contract has absolute effect, i.e. the prohibition is effective against third parties. However, this prohibition would have no effect where there is an assignment to a party that is considered to be a credit institution under Section 73 of the Civil Code of Ukraine.

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Neither the specific consent of nor notification of the assignment to the debtor is a prerequisite for a valid assignment.

The assignment of receivables must be in the same form as the underlying receivables contract; however, in any case the assignment must be documented by a written agreement. This document must identify the underlying contract, the relevant security documents and the identity of the debtor. The agreement must also comply with the underlying contract. Where the underlying receivables are secured by a mortgage and the underlying receivables agreement has been notarised, the assignment agreement must be certified by a notary in order to be valid.

The assignment is perfected by notification to the debtor and registration with the Movables Pledge/Encumbrances Register. After being notified, the debtor cannot discharge his payment obligation by paying the assignor and/or may not set-off in respect of the assignor's obligations. The notice to the debtor must specify the assigned receivables and identify the assignee. Notice can be given by the assignor or the assignee (but in this case, preferably under a power of attorney granted by the assignor).

A true sale is therefore achieved when the assignment agreement reflects the parties' intention that the receivables are to be transferred by absolute assignment, rather than by way of security interest, and also the legal requirements set out above concerning assignment agreements are met.

(3) TRANSFER OF COLLATERAL

According to Ukrainian legislation, a collateral agreement is still valid and effective upon the assignment of the underlying receivables contract. However, in order to enforce the collateral agreement, particular details relating to the parties need to be specified and certain registration requirements complied with.

There are different registers in the Ukraine depending on the relevant security interests. For example, where the security type is a mortgage, the registration must be effected by a filing on the Mortgage Register. Mortgages are transferred after complying with a notarisation requirement. In the case of special pledge right, e.g. over movable assets, or in the case of securities, the registration is effected with a filing on the Movables Pledge/Encumbrances Register.

(4) CLAW-BACK AND "SUSPECT PERIODS"

The insolvency administrator may challenge certain transactions within a period of six months after the commencement of insolvency proceedings in respect of the assignor. Pursuant to such challenge, the Ukrainian court may declare the agreement invalid if, inter alia, the agreement grants the assignee rights and benefits that take priority over the other creditors of the assignor.

(5) DATA PROTECTION

Like most Eastern European jurisdictions, the Ukraine restricts the use and dissemination of personal data without explicit consent, e.g. of consumers. There is no risk of data protection restrictions where legal entities are involved.

The transfer of data protected by banking secrecy is only possible if express prior written consent of the bank's client is obtained.

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(6) REGULATORY

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

There are strict currency control regulations in the Ukraine. An individual license from the National Bank of Ukraine is required for an entity to be allowed to exchange currency and transfer money.

Pursuant to Ukrainian law, the assignment of loans to foreign entities must comply with certain registration requirements of the National Bank of Ukraine.

(7) TAXATION

Payments between parties who are residents of the Ukraine, as well as the repayment of principal, is not subject to withholding tax. Withholding tax at the rate of 15 % is applied to interest payments to a non-resident, unless a double tax treaty of the Ukraine provides otherwise.

Under Ukrainian tax law, there are no stamp duties levied on the sale/assignment of receivables.

The sale/assignment of receivables is not subject to VAT in the Ukraine.

A “permanent establishment” in the Ukraine incurs liability under other Ukrainian taxation laws, e.g. profits are taxed at the general rate of 25%.

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