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AT A GLANCE

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SECURITISATION IN SLOVENIA: SOME LEGAL ISSUES

OVERVIEW

Slovenia has not experienced any securitisation transaction of existing or future funds flows yet. However, there is significant originator interest and potential for doing securitisations with Slovenian assets, such as auto loans and leasings, consumer and mortgage credits SME-loans, as well as off-shore credit card remittances.

The country's accession to NATO and the EU in March and May 2004, respectively, indicates the financial and political stability of Slovenia. Strong economic growth during recent years supported by significant export/import expansion and consumer growth stimulated by wage increases have led to Slovenia's addition as part of the Euro zone at the start of 2007.

LEGAL CONSIDERATIONS

Effective January 2007, Slovenia enacted a securitisation legislation in the form of the Banking Act which regulates the securitisation of bank loans on a regulatory level. Essentially, the new law implements the Capital Adequacy Directive of the European Union, which specifies the capital adequacy requirements for Slovenian banks when dealing with traditional and synthetic securitisations.

(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. Where a foreign-based Special Purpose Vehicle (SPV) purchases receivables from a Slovenian originator, notwithstanding that the assignment agreement may be governed by foreign law, legal issues relating to the underlying receivable (e.g. assignability, set-off, enforcement against the debtor), will continue to be determined in accordance with Slovenian law.

Such choice of foreign law is subject to the usual statutory reservations relating to public policy and mandatory rules from which the parties cannot derogate.

(2) TRUE SALE

Pursuant to Slovenian law, an assignment is valid upon the agreement of the assignor (normally the originator in a securitisation) and assignee (the SPV in a securitisation context). There is no special form for the sale and assignment of receivables under Slovenian law; thus, the parties can agree both orally or in writing. In every case the assigned receivables must be sufficiently identified in the assignment agreement.

In general, where the receivables contract contains a prohibition on assignment, the assignment agreement will be ineffective. However, an assignment will be effective despite the prohibition if a document proving the existence of the receivable (but not containing the prohibition on assignment) was presented to the assignee at the time of assignment and the assignee did not otherwise know and was not obligated to know of the prohibition. An assignment agreement concluded in violation of a contractual prohibition on assignment will result in breach of contract followed by a claim for contractual compensation.

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However, a contractual prohibition agreed upon in a commercial contract will not prevent the validity and perfection of the receivables transfer. Nevertheless, the debtor would be entitled to discharge its debt through payment to the assignor.

According to Slovenian law, neither confirmation nor notification of the assignment to the debtor is a prerequisite for perfection of the assignment. The debtor is entitled to discharge its debt through payment to the assignor, until the time such debtor has been notified of the assignment. Generally, notification to the debtor can be given by the assignor as well as by the assignee.

In summary, a true sale can be achieved when (i) 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 (ii) the legal requirements concerning assignment agreements are met. Under Slovenian civil law it is possible to agree on a deferred purchase price for the receivables; however, a deferred element would require substantial review from a tax and accountancy standpoint.

As mentioned above, Slovenian law allows future receivables to be assigned. In order to validate and perfect such assignment, the future receivables need to be sufficiently identifiable; for example, the counterparties as well as the legal basis (e.g. type of contract) need to be sufficiently defined. Any true sale will fail if the future claims come into existence during the insolvency of the assignor. In such case, the assignment would be considered ineffective and the receivables would become subject to the insolvency estate.

(3) TRANSFER OF COLLATERAL

Ancillary rights, e.g. mortgages and pledges, pass automatically with the assignment of the underlying receivable, provided that they are connected to the assigned receivables. For perfection of the assignee's title over the collateral, re-registration with the relevant land or pledge registries needs to be undertaken.

(4) CLAW-BACK AND „SUSPECT PERIODS“

Under current* Slovenian insolvency law, at the beginning of insolvency proceedings the mutual rights and obligations of the assignor and the assignee will be automatically set-off. Any receivables transfer done within six months prior to the commencement of the insolvency proceedings, however, creates an exception if the purchaser knew or should have known that the company was un-able to pay its debts as they become due.

Under Slovenian law, the insolvency administrator is entitled to challenge fraudulent transactions performed within one year prior to the commencement of insolvency proceedings where the conditions of the claimed transaction are materially worse than those of similar transactions (e.g. the purchase price is significantly lower than the market price, or where the transaction grants the assignee greater benefits than the other creditors of the assignor) and if the assignee knew or should have known about the factors leading to the assignor's insolvency. The aforementioned knowledge of the purchaser is assumed, inter alia, in the case where the receivables transfer has been performed within three months prior to the commencement of bankruptcy proceedings.

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The insolvency administrator can invoke his claw-back right (the right to file suit) until the date of the oral court proceedings dealing with the division of the estate. There is no deadline to invoke such claw-back rights as a defensive measure in proceedings initiated against the assignor or another creditor of the assignor.

It is notable that „non-petition" clauses are not yet a proven mechanism for enhancing credit-worthiness of securitisation transactions under Slovenian law.

(5) DATA PROTECTION

Special consumer data protection legislation in Slovenia prohibits the use of personal data of private consumers and business secrets of legal entities. The written consent of the individual is required for any disclosure of personal data. Legal entities or natural persons performing commercial activity are permitted to process personal data on persons with whom they have entered a contractual relationship if such data is required in order to fulfill contractual obligations or to exercise rights arising from that contractual relationship. There are no special restrictions on the export of personal data from Slovenia to the European Union. For the export of data to other countries, the approval of the Slovenian Information Commissioner generally needs to be obtained.

According to Art. 214 of the Slovenian Banking Act-1, the bank must maintain the confidentiality of data, facts and circumstances about an individual client, regardless how the bank has obtained such data. The persons who are obliged to keep the data confidential include the employees of the bank itself as well as other persons who have any kind of access to such data when performing services for the bank (Art. 215 Banking Act-1). A waiver of the banking secrecy provision is possible with the borrower's consent.

(6) REGULATORY

Under Slovenian law, neither the purchasing nor the servicing of receivables requires a license. There are no currency control regulations regarding the transfer of money outside Slovenia. „Passporting" of banking services is possible under Slovenian law.

The new securitisation framework provides strict rules with respect to the calculation of the capital requirements for securitisation-related risk.

(7) TAXATION

The interest portion of the receivable is subject to Slovenian withholding tax unless the persons liable to such tax are able to take advantage of a double taxation treaty; Slovenia has double tax treaties with Germany, Luxemburg, Ireland, The Netherlands and United Kingdom, for example. According to these double tax treaties the withholding tax on interest varies between five percent (Germany, Luxemburg, Ireland and The Netherlands) and ten percent (United Kingdom).

Under Slovenian tax law, there are no stamp duties or other taxes or fees when assigning receivables, although fees may be payable in respect of the re-registration of related collateral.

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There is no VAT levied on the sale and purchase of receivables according to Slovenian law. The servicing of receivables is subject to VAT when it is performed in Slovenia.

A business that is permanently established in Slovenia is subject to corporate income tax. The sole purchasing and servicing of Slovenian receivables by a non-resident would not subject such non-resident to liability for corporate income tax in Slovenia.

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** A new insolveny law has been recently enacted. However, this overview focuses on issues which will not be effected by the new law before October 2008.*

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