

AT A GLANCE

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SECURITISATION IN ROMANIA: SOME LEGAL ISSUES

OVERVIEW

It is likely that due to its large population and the outstanding growth of consumer lending during the last few years, Romania will experience its first securitisation transactions this year.

The following factors might support the Romanian banks entering into securitisation transactions: (i) Basel II (effective 1 January 2008), (ii) accession to the European Union and implementation of legislation related to securitisation, e.g. Prospectuses Directive, Financial Collateral Directive etc., (iii) relatively favourable legal and tax environment, and (iv) the banks' aim to refinance with foreign capital markets.

LEGAL CONSIDERATIONS

Romania is among the few European Union member states with an established special securitisation framework. A special securitisation law (Law No. 31/2006) (the "Securitisation Law") was adopted in Romania in 2006 to expressly (i) allow local law true sale securitisations and (ii) regulate the bankruptcy remoteness of the Special Purpose Vehicle (SPV) incorporated in accordance with the Securitisation Law.

However, due to a number of legal uncertainties and formalities with this new legal framework, including (a) high minimum capital requirements for the SPV, (b) licensing of the SPV's administrator, (c) uncertainty with respect to the incorporation of local SPVs established pursuant to the Securitisation Law into cross-border securitisation transactions, (d) the notification requirement of the originating bank's creditors, and (e) the lack of tax relief for the SPV found in other jurisdictions in the region, it can be argued that off-shore securitisation relying on general civil law rather than on-shore securitisation will drive the market in Romania.

Hence, this paper essentially outlines the legal issues arising when structuring off-shore securitisations.

(1) CHOICE OF LAW

As of 1 January 2007 the Rome Convention On The Law Applicable To Contractual Obligations came into force for Romania. As a result, it should be now possible for Romanian parties to choose foreign law to govern the contractual relationship between the parties even if no "foreign element" is present. Notwithstanding the choice of foreign law to govern the contractual relationship between the parties, the agreement would remain subject to certain limitations that are required pursuant to Romanian law.

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Hence, one can assume that provisions of the Romanian substantive law protecting obligors' rights, e.g. rights of set-off, perfection of the sale of receivables, must be considered when foreign law is selected to govern the assignment agreement.

(2) TRUE SALE

Pursuant to Romanian law, an assignment is valid upon the agreement of the assignor (in a securitisation context, the originator) and the assignee. It is preferable that the agreement is in writing. Where a contractual prohibition on assignment is contained within an underlying contract, a purported assignment will be ineffective against third parties unless the debtor has expressly given its consent.

If Romanian law governs the assignment agreement, prior consent of the debtor is not necessary for validation of the assignment. However, if the debtor is notified of the assignment this will cut off any rights the debtor may have to discharge or set-off against the assignor. Either the assignor or the assignee may notify the debtor.

Under Romanian law, there are special provisions regarding the notification of assignment of mortgage-backed receivables. Thus, pursuant to Law No. 190/1999 regarding real estate investments, the debtor must be notified by a registered letter either by the assignor or by the assignee. If it has not been agreed that the assignee will notify, the notification to the debtor should be given by the assignor within ten days from the conclusion of the assignment.

Romanian law permits the valid assignment of future receivables, provided that (i) the future receivables are sufficiently identified at the time of the assignment and the parties' intention is expressly given, or (ii) the future receivables are at least identifiable at the time of the assignment and may be individually identified when they arise.

In summary, a true sale is achieved when the assignment agreement is valid, the debtor is notified and the transaction is concluded "at arm's length" (see also below section (4)).

(3) TRANSFER OF COLLATERAL

Ancillary rights, e.g. mortgages and pledges, pass to the assignee automatically with the assignment, unless otherwise agreed by the parties.

Where the underlying receivables contract is backed by a mortgage, the transfer of the mortgage will need to be notarised and registered with the land registry. Where a pledge right is attached to the underlying receivables contract, registration with the Electronic Archive for Security Interests in Movable Property is required for giving notice to third parties.

(4) CLAW-BACK AND "SUSPECT PERIODS"

Under Romanian civil law, preferential or fraudulent transactions as well as transactions at an undervalue may be challenged by the assignor's creditors within three years from the date of registration with the Electronic Archive for Security Interests in Movable Property (art. 975 Civil Code).

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In addition, the insolvency administrator may challenge fraudulent transactions concluded within a general “suspect period” of three years prior to the commencement of insolvency proceedings in respect of the assignor. A special “suspect period” of 120 days is applicable with regard to certain dispositions with the assignor’s property, e.g. transferring property in order to discharge debt, granting security in real property etc.

Where transactions are concluded between affiliated companies a “suspect period” of only one year is applicable.

A recently enacted insolvency law (Act No.85/2006) follows the previous insolvency law (Act No. 64/1995) in terms of “suspect periods” and provides for the same general three-year “suspect period” for fraudulent transactions.

Further, those contracts which are not fully performed by the assignor (for example, executory type contracts) can be terminated at the insolvency administrator's discretion.

“Non-petition” clauses are not yet a proven mechanism for enhancing credit worthiness of securitisation transactions in Romania, but the clauses themselves are effective and valid if agreed upon between the parties.

(5) DATA PROTECTION

Pursuant to Romanian data protection legislation, an assignor is entitled to disclose information with respect to the underlying receivable to an assignee or to any other party related to the transaction, provided that (i) the debtor’s consent is obtained and (ii) the National Supervisory Authority for Personal Data Processing (N.S.A.P.D.P.) is notified. Further, the “export” of personal data to European Union and EEA member states and other states, for which the European Commission recognised an adequate level of protection, will be subject to only a preliminary notification to the N.S.A.P.D.P. In terms of banking secrecy under Romanian law, it may be assumed that banking secrecy rules are deemed to be complied with, to the extent that the disclosure of the debt (receivables contract) and related information does not infringe rules regarding disclosure of information concerning the debtor’s deposits and account movements. This is the case when the debtor has given its consent to the disclosure.

(6) REGULATORY

Under Romanian law, the business activity of purchasing receivables is free from licensing requirements. Servicing may only be performed by credit institutions or financial institutions authorised by the Romanian National Bank. However, in every case it is advisable when structuring a cross-border securitisation to coordinate with the Romanian National Bank on regulatory issues.

There are no restrictions on money transfer and currency exchange in Romania, however, there are some declaration obligations which need to be complied with, for example, stating the purpose of the money transfer.

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(7) TAXATION

Some of the double tax treaties in force for Romania allow minimisation of the withholding tax duty, provided that certain procedures are complied with, such as delivery of a certificate of residency by the foreign tax resident.

Under Romanian tax law, there is no stamp duty on the sale of receivables unless the parties decide to notarise the deed.

Under Romanian tax law, the transfer of receivables is a VAT exempted transaction.

The servicing of receivables triggers VAT under Romanian law to the extent it is performed within Romania.

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