

AT A GLANCE

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SECURITISATION IN THE CZECH REPUBLIC: SOME LEGAL ISSUES

OVERVIEW

It is likely that due to the outstanding growth of residential mortgage and unsecured consumer lending during the last few years, the Czech Republic will experience its next securitisation transactions soon.

The following factors might support the Czech banks entering into securitisation transactions: (i) implementation the Capital Requirement Directive, (ii) relatively favourable legal and tax environment, and (iii) the banks' aim to refinance with capital markets.

LEGAL CONSIDERATIONS

Czech law fails to specifically address and provide a clear answer as to whether and under what circumstances an assignment of future receivables can be legally effected. This overview will show that this particular uncertainty of the Czech legal system may be overcome by other means in a way which provides full comfort to the market, and that cross-border securitisations in the Czech Republic are possible.

(1) CHOICE OF LAW

As of July 2006, the Czech Republic ratified and acceded to the Rome Convention on the law applicable to contractual obligations. As a result, it should be possible for Czech parties to choose foreign law to govern their contractual relationship even if no "foreign element" is present, subject

to the limitations specified in the Rome Convention. 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 Czech law.

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

(2) TRUE SALE

Under Czech law an assignment agreement is valid upon the agreement between an assignor (the originator in a securitisation transaction) and an assignee. The agreement must be in writing.

If there is a contractual provision prohibiting the assignment of the receivables contract, the assignment will be void (and thus ineffective). If Czech law governs the assignment agreement, no consent of a debtor is necessary for a valid assignment, save for when the agreement between the debtor and the assignor expressly specifies otherwise. In addition, notification to the debtor is not needed for the effectiveness of the assignment as the assignment is valid upon the execution of the written assignment agreement. It should be noted, however, that unless the debtor is notified of the assignment, it remains entitled to discharge its obligations by paying the assignor, despite the fact that the legal owner of the receivable will be the assignee. The assignment of a receivable has effect against the debtor

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(i.e. is perfected in respect of the debtor) upon (i) the notification to the debtor of the assignment by the assignor or (ii) the serving of proof of the assignment on the debtor by the assignee.

As an assignment of future receivables is not expressly addressed under Czech law, and as such, a great deal of uncertainty exists as to its binding nature, an assignment of future receivables has to be structured in a way which enables sufficient identification of the receivables, for example where the future receivables are based on a particular contract which specifies the debtor and the receivable with certainty. In order to overcome this issue in the Home Credit securitisation, the daily assignment of existing receivables arising since the previous day was successfully implemented. Such daily assignment may be based on a framework assignment agreement combined with daily assignment confirmations. As it is possible under Czech law to take advantage of electronic signatures, daily confirmations of assignment may be in electronic form enabling daily assignments to be time and cost efficient.

In summary, a true sale is achieved when the assignment agreement is valid, perfected and is concluded “at arm’s length” (see also section (4)).

(3) TRANSFER OF COLLATERAL

Ancillary rights, e.g. mortgages and pledges, are transferred to the assignee automatically with the assignment of the underlying receivables provided that they are related to the assigned receivables. It is advisable, however, that the assignee as new mortgagee registers his title to the receivables and the collateral for evidence and enforcement purposes.

Under Czech law, a notarised agreement which incorporates the debtor’s consent to enforcement has the legal power of an execution title allowing expeditious enforcement.

(4) CLAW-BACK AND “SUSPECT PERIODS”

Under the new Czech insolvency law (effective 1 January 2008), the insolvency administrator may (and has to, if the creditors so request) claw-back any transfer concluded (i) without reasonable consideration, (ii) which favours certain creditors at the expense of others or (iii) which intentionally defrauds the creditors, provided such transfer occurred within one, three or five year(s) prior to the commencement of the insolvency proceedings (three years in case of transfers sub. (i) and (ii) between related persons, one year in case of transfers sub. (i) and (ii) between not-related parties and five years in case of transfers sub. (iii)).

(5) DATA PROTECTION

Under the provisions of Czech data protection legislation, personal data may be used and processed provided the following conditions are met: (i) the individual has consented to such use and processing; and (ii) the approval of the Czech Data Protection Authority has been obtained. The “export” of personal data to countries outside the European Union is restricted and only permitted with a grant of approval by the National Data Protection Office.

In terms of bank secrecy, Czech law does not provide a clear regulatory framework. However, pursuant to a regulation issued by the Czech National Bank, when Czech banks outsource their activities, bank secrecy is deemed to be kept confidential provided that the disclosure of the borrower-related information has been contractually agreed and the purpose of the disclosure is clearly pre-defined in the credit documentation.

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(6) REGULATORY

Under Czech law purchasing and servicing of receivables are business activities free of licensing requirements.

“Passporting” of banking activities is generally possible under Czech law.

There are also no restrictions on money transfer and currency exchange in the Czech Republic.

(7) TAXATION

The Double Tax Treaty with The Netherlands eliminates withholding tax, provided that certain procedural requirements are complied with.

Under Czech tax law there is no stamp duty on the sale of receivables.

Pursuant to Czech tax law, no VAT should be levied on the transfer of receivables.

Servicing of receivables under Czech law appears to trigger a charge to VAT at a rate of 19 % if such activity is performed within the territory of the Czech Republic.

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