Baker McKenzie.

A Global Guide to Legal Issues in Securitisation

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A Global Guide to Legal Issues in Securitisation

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Baker McKenzie, Amsterdam

Foreword

Dear Reader,

We are pleased to share with you our fully updated Global Guide to Legal Issues in Securitisation. This guide presents you with an overview of the general legal, tax, accounting and regulatory issues typically relevant to securitisation structures. The guide covers 33 jurisdictions across the globe.

Baker McKenzie's Global Securitisation Group's wide network of offices allows us to provide consistent, high quality legal advice in an efficient and coordinated manner. We have leading experts in all key and emerging markets, who advise all market participants.

Given economic, geopolitical and regulatory developments as well as the increasing cross-border nature of securitisation transactions and innovative structures, up-to-date knowledge of securitisation laws, practice and structures in various jurisdictions is vital to structure innovative and legally compliant transactions. We hope that this guide will serve as a useful reference tool for you.

I would like to thank all the chapter authors, my valued colleagues who are part of the Global Securitisation Group, for sharing their knowledge of the key legal issues relevant to securitisation transactions in the respective markets.

Please do not hesitate to contact any of the local Baker McKenzie chapter authors referenced in the guide if you have any questions, comments, or require assistance or advice. We welcome your feedback. Detailed experience statements are also available on request.

For more information, please visit our website.

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Introduction

The securitisation market has changed immensely over the years. In the early years, during which the technique was growing in popularity, securitisation transactions were complex finance arrangements confined to a small number of specialised lenders and borrowers in a limited number of jurisdictions. As securitisation techniques became more widespread and investor demand increased, new structures were developed. Increasingly diverse asset types have been successfully securitised — from residential mortgages to trade receivables, credit cards and esoteric assets — and a variety of entities seeking to raise finance by way of securitisation have entered the market, including consumer lenders, utility companies and private equity sponsors. Particular types of securitisation that have their own specific structures and terminology have also emerged and are beyond the scope of this chapter, such as collateralised loan obligations transactions (CLOs) and synthetic securitisation transactions.

Terminology and basic structures

Like many specialist markets, securitisation has its own jargon. Thus, the word "asset" is employed by securitisation practitioners in the sense of a financial asset or debt owed to a creditor. The main international accounting/financial reporting standards[1] refer to a "financial asset" as including:

> [...] any asset that is: (a) cash; (b) an equity instrument of another entity; (c) a contractual right: (i) to receive cash or another financial asset from another entity; or (ii) to exchange financial assets or financial liabilities with another entity under conditions that are potentially favourable to the entity.

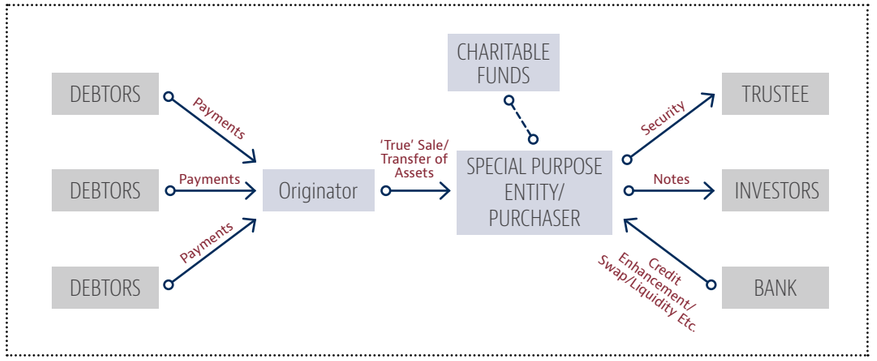
Typically, a securitisation transaction will concern contractual rights to receive cash or another financial asset, i.e., receivables.

The parties to a securitisation transaction will usually be referred to in accordance with their role in the transaction. The entity seeking to raise the finance provided by a securitisation structure is typically referred to as the Originator because that entity is normally the legal person who originates the financial assets to be securitised or acquires them for the purpose of securitising them ("**Originator**"). An administrator or servicer will also be appointed (who is often the Originator, but may also be a third party) to provide ongoing servicing of the securitised assets in accordance with specifically agreed credit, collection and arrears policies. Typically, although this is not always the case, the assets or the risks associated with the assets will be transferred to a special purpose entity (SPE) established for the purposes of the securitisation transaction. The SPE will acquire the risks associated with the securitised assets against which the financing is being raised. Establishing the SPE is an important part of the process, especially if the financing being raised is to be rated by one or more of the internationally recognised rating agencies, because the SPE will be required to satisfy numerous criteria in terms of restrictions on its operation and activities, level of independence (in terms of control/shareholding) from the Originator and/or its group and applicable taxation regime. The SPE usually pays the Originator a purchase price in respect of the securitised assets that it acquires. As part of the securitisation structure, funding will be provided to the SPE, usually via the issuance of debt securities of some

1 IAS 32:11

description (or sometimes by way of a loan). In this way, the assets are turned from illiquid non-tradeable assets belonging to the Originator into tradeable securities — hence the term "securitisation."

Figure 1 shows the aspects of a simplified typical securitisation structure in diagrammatic form.



Methods of transfer

The essence of traditional securitisation transactions (as opposed to synthetic transactions) is that the assets against which the finance is to be raised are effectively isolated from the ownership of (and thus the credit of) the Originator who sells/ transfers them to the SPE. Typically, this requires an analysis to be carried out in relation to the way in which it is proposed that the assets be transferred. It is important to note that this is not only a legal issue because the requirements for a recognisable legal transfer of the assets are also prerequisites for appropriate accounting treatment; regulatory capital treatment, including central bank and supra-national support schemes; and frequently relevant tax arrangements, all of which are considered below.

Traditional securitisations

As mentioned above, at the heart of a traditionally structured securitisation transaction will be the transfer or true sale of the assets being used by the Originator to raise the finance. The consequences of failing to comply with the relevant jurisdictional rules relating to what is required for a sale to be considered as a "true sale" vary from jurisdiction to jurisdiction, but in many cases the risk of a proposed sale that fails in form or substance to comply with what is required is that the transaction will be re-characterised as an unsecured loan that may not be enforceable against certain third parties for lack of registration. Accordingly, the legal analysis for sale treatment is of paramount importance. Again, most legal regimes' requirements typically relate to either the form taken by the transaction documents (e.g., whether they are expressed to be sale documents) or the substance (i.e., whether the transaction is consistent with a sale on closer analysis). In many jurisdictions, specified forms of wording are required in order to effect a sale/transfer, depending on the asset type and the terms of the underlying contract that has given rise to the rights relating to the asset. In addition, in some jurisdictions, mere compliance with the formalities is not sufficient to satisfy a

thorough legal analysis that a sale has been completed, and additional features of the transaction must also be considered in this context. Issues that may affect "true sale" analysis include the following:

- recourse arrangements under which the Originator is required to indemnify/buy back the assets if they default or fail to perform;
- the way in which the purchase price is paid, for example, whether there are discount/interest components;
- excess over-collateralisation; and
- payments in respect of purchased assets not being made into the correct accounts.

In some jurisdictions, there are different types of sales (e.g., legal or equitable sales and sales under particular statutory regimes), and it is important to consider exactly if, how and when debtors and other parties are notified of the sale and security arrangements. Each section included in this guide provides an overview of some of these issues as they relate to each jurisdiction.

Even if the terms of the contracts giving rise to the receivables that are the subject of the securitisation permit the sale/transfer of the rights (and often significant due diligence may be required to establish this), the legal work will not stop at the "true sale" analysis referred to above. Most jurisdictions will also have a number of clawback or unwind risks — normally tied to the insolvency of the Originator — under which a sale can be unwound or reversed if the transaction breached certain rules relating to the fair treatment of creditors to an Originator on the onset of insolvency. Thus, if the amount of the purchase price for the assets is too low or there is deemed to be an intention to prefer creditors, the transaction could be at risk of being unwound or reversed, leaving investors/lenders of the securitised debt as unsecured creditors in the insolvency of the Originator. For the above reasons, the provision of a "true sale" legal opinion by relevant legal counsel is typically expected in a securitisation transaction and requires a considerable amount of work to prepare, as the opinion will need to provide an analysis of both the sale/transfer arrangements, as well as a detailed analysis of applicable insolvency legislation.

Synthetic securitisations

In a synthetic securitisation, there is no initial sale or transfer of the underlying assets. Instead, there will be a contractual arrangement between the Originator and the SPE, which may take various forms, including a participation, a credit default swap or credit-linked note, pursuant to which only the economic risk associated with ownership of the assets is transferred contractually by the Originator to the SPE. It is important to recognise that the synthetic structure may not be suitable for all types of asset or Originator and may not allow for the relevant Originator to derecognise those assets from an accounting perspective. In particular, the contractual counterparty, such as the SPE, takes full contractual, and therefore credit, risk of the Originator. Since the risk of the assets has not been isolated from the Originator, the relevant counterparty will take both the credit risk associated with the assets' performance as well as that of the Originator. Therefore, synthetic securitisations have typically been used by more highly rated Originators (such as rated banks and investment firms) and involve carefully structured SPEs.

Servicing the assets/due diligence

In most jurisdictions, the ability of an Originator to identify receivables with payment flows in its accounting systems is an important factor influencing whether/how the receivables can legally be sold. Put simply, if the receivables cannot be identified so as to be properly specified in a contract of sale, most legal systems would regard the sale contract as insufficiently certain as to subject matter. The due diligence carried out by arrangers in structuring a securitisation transaction will normally determine whether this is likely to be a concern. Structures such as undivided interest arrangements (essentially "whole pool" sales) are designed to alleviate this problem, allowing for a securitisation of an Originator's assets, even if the systems do not allow "tagging" (that is, identification of receivables and associated payments) within the records maintained by the Originator.

Legal due diligence in relation to the contracts giving rise to the receivables will concentrate on the legal form of the various contracts. Thus, in a securitisation involving mortgages, all of the mortgage terms and conditions, the associated security and collateral arrangements will be examined. In some instances (such as consumer loan contracts), applicable legislation may provide a specific format for the contracts and prescribe penalties for a contract's failure to comply with the rules. In many jurisdictions, a breach of the relevant consumer credit laws and/or regulations may mean that the underlying contractual terms are rendered unenforceable, or enforceable only with leave of the court. Other legal issues that may have a significant bearing on how the transaction is structured include the governing law of the underlying receivables contracts (which may be different from the law of the jurisdiction of incorporation of the Originator), the ability/fairness of provisions penalising or prohibiting the assignment of the rights under the receivables contracts as well as setoff rights and data protection provisions.

As important as the legal due diligence exercise is the financial due diligence, which will concentrate on the credit, collection and arrears policies of the servicer who will be appointed to service the portfolio of assets sold to the SPE purchaser. In order to determine the level of credit (and therefore the amount of financing that can be provided), the performance of the receivables (in terms of time of collection, recovery rate, etc.) must be ascertained. Ideally, the Originator will have comprehensive records and systems available for this purpose. The procedures underpinning the way in which the underlying receivables are originated will be analysed. For example, in a mortgage-backed transaction, the way in which credit checks are carried out in relation to a customer seeking a mortgage will be verified, as well as the way such information is gathered, processed and stored. In addition, the collection process of the Originator/servicer — payment methods, account arrangements, etc. — will be reviewed and will form the basis of the documented agreed collection and servicing procedures to be carried out by the servicer for the SPE. In order to ensure ongoing compliance and to allow monitoring of the performance of the portfolio, the due diligence will also be used to design a reporting framework on key data pertinent to the receivables. This will also drive the calculation of any covenant ratios in the legal documentation drafted for the transaction.

Financing techniques

There are a number of different financial structuring techniques that may be used as part of a securitisation transaction structure. Although the market's most visible method is the issuance of listed, rated debt securities, there are a number of types of financing techniques used in both traditional and synthetic securitisation structures that each have features to recommend them according to particular circumstances. Some common financing techniques are examined below.

Bank loan funding

The funding of a securitisation transaction with a bank loan is sometimes referred to as warehousing, particularly when the finance is being provided to a structure that is being used to build up a portfolio of high-quality receivables prior to an issuance of debt securities backed by the pool of receivables once the pool has grown in size. The benefit of bank market/loan funding is primarily that the loan terms can be quite specific and flexible for all parties. Since the loan will normally be made either by a single bank or a small syndicate of banks (depending on the size of the portfolio of assets being securitised), the covenants, representations and events of default can all be tailored to the parties' requirements, and amendments to the terms of the financing documents can be made fairly easily and without reference to large numbers of external bodies/third parties. The Originator, in turn, can obtain all of the benefits of a securitisation (such as beneficial accounting treatment and limited recourse financing) without the complications of a debt issuance programme while the banks obtain an excellent rate of return linked to assets of proven credit quality. However, bank funding is normally not provided at the sort of competitive rates that are obtainable using other financing techniques, and so the use of this funding method tends to be confined to specialised deals or, as mentioned above, warehousing schemes tied to issuance programmes.

The disadvantages of bank funding are typically cost related. Since banks will expect to recover all of their own cost of funding, the terms of bank loan documentation will typically pass on to the borrower (the SPE) and ultimately, therefore, represent a cost to the transaction as a whole, together with capital adequacy and reserve costs where relevant. Accordingly, all increased costs and taxes will have to be met from the transaction payments. By contrast, because investors in asset-backed securities are investing in existing tradable securities, typical bond terms will not provide for the investor (even if it is a bank) to recoup any additional costs incurred as a result of increased capital or reserve costs.

Asset-backed commercial paper

Essentially another flexible funding arrangement, asset-backed commercial paper (ABCP) funding consists of short-term notes, typically issued at a discount to the face amount by an SPE set up either specifically or generally for the purposes of financing securitisation transactions. A number of ABCP issuers, often called ABCP "conduits," have been sponsored by many of the leading financial institutions in order to take advantage of the depth of the commercial paper market and the low effective funding

rates it offers. An ABCP issuer that is operated so as to provide financing to a number of Originators is typically referred to as a multiseller conduit (that is a commercial paper issuing company that provides funding to many sellers or Originators). The commercial paper notes issued by the conduit are purchased by dealers who, in turn, place the investments. Since the notes are usually highly rated, the investor group has traditionally been quite large and the effective funding rate (either the rate of return to the investors by way of discount to the face amount payable at maturity, or an interest payment or a combination of both) is competitively priced. The ABCP issuer will issue commercial paper notes and then purchase, on-lend or otherwise use the proceeds of the issuance to finance the assets of the Originator looking to raise securitised financing. In most cases, an Originator will be taking advantage of an ABCP programme that is already in existence, having been established by a sponsor well before the transaction specific to the Originator. What this means is that the private placement memorandum, relied on by investors interested in purchasing the commercial paper notes, the dealer agreements and conduit management arrangements will all already be in place, leaving only the terms of the specific financing arrangement to be determined. Although this method of financing has a great deal to recommend it in terms of speed of execution and flexibility, there are a number of additional features common to most ABCP conduit programmes that add some complications to the structure.

In the first place, because commercial paper is usually short term, the type of asset more naturally suited to this form of financing is also short term; thus, trade receivables (i.e., invoices issued to customers relating to the supply of goods or services with payment terms of a few months, creating non-interest bearing debts owed to the Originator) have a tenor that is ideal for a financing involving equally short-term flexible note issuances. Residential mortgages, which are typically far longer in term, are much less suited, although with revolving issuance structures it is possible to finance them using an ABCP-funded transaction structure.

Currency mismatches may also need to be addressed. Although the euro-based asset-backed commercial paper (Euro ECP) market is gradually increasing in size, the largest market is the US dollar denominated US Commercial Paper (USCP) market. Originators taking advantage of the USCP market will also normally need to pay for the associated foreign exchange costs if they are raising finance in a currency other than US dollars. Fortunately, most ABCP programmes already have existing foreign exchange lines available, but the incremental cost of foreign exchange will be incorporated into the overall costs of financing passed on to the Originator (but typically paid for out of the allocated collections from the payments made in respect of the receivables). A further additional cost to the transaction, which will again ultimately be borne by the Originator (but paid out of such collections), is the provision of a dedicated liquidity facility. This is important to ensure that commercial paper noteholders are repaid amounts due to them on a timely basis.

Debt securities

As mentioned elsewhere in this chapter, by far the most visible method of providing financing to a securitisation transaction is the issuance of debt securities. The debt securities, which are normally issued by the SPE purchaser and secured on the purchased assets, are typically listed on a recognised stock exchange and are often

assigned a rating, or more commonly a series of ratings attributable to a variety of tranched notes. The legal work involved in an issuance of asset-backed securities tends to be more extensive than for the transaction types thus far discussed, chiefly because of the amount of work involved in putting together the disclosure document that will be required in order for the debt securities to be admitted to trading on a recognised stock exchange. By contrast to the more flexible, less formal loan or ABCP funding, the terms and conditions of listed debt securities must be finalised and fixed so that all likely investors in the instruments know exactly what those terms are. The rules set by the relevant stock exchanges in accordance with the various listing rules and laws relating to disclosure specify the type and detailed level of the information that will be required in order to permit potential investors to make a fair and full assessment of the material features of the transaction so as to be able to make the decision on whether the investment should be made. Although there are a number of asset-backed debt issuance programmes and master trust structures in existence, the more common approach to date has been to document each issuance of asset-backed securities separately (i.e., on a standalone basis). Since the offering document or prospectus for the asset-backed securities will also be required to contain a substantial amount of information about all of the material documents relating to the securitisation transaction, as well as descriptions of all the parties involved and the assets that are providing the credit for the transaction, the offering document tends to become very large (often running to several hundred pages). The careful examination of all of the information contained in the offering materials is essential to ensure compliance with relevant rules on disclosure (such as under Regulation EU 2017/1129 as amended (the "**Prospectus Regulation**") in the EU, the Financial Services and Markets Act 2000 (FSMA) in the UK and the US Securities Act of 1933 in the US). There are significant penalties and liabilities associated with a responsible party's breach of the duty to prepare an offering document and/or to disclose material information to an issue.

The issuance of debt securities to fund securitisation transactions remains a frequently adopted method for a number of reasons. First, the debt securities are constituted so as to be in a tradable form with an acceptable rating (see below), with which many capital markets investors are familiar, and cleared and settled through recognised clearing systems. In addition, asset-backed securities tend to be attractively priced, in that their complexity tends to command a premium over the typical margin for ordinary debt securities of a comparable credit quality. The investors in capital markets instruments are well used to seeing debt securities with long-dated maturities, which means that assets (such as mortgages) with longer terms can properly be funded to term and there is likely to be less concern with respect to the refinancing risk that arises where short-term financing is put into place to cover long-dated assets. Finally, delinking the credit profile of the asset pool from the credit profile of the Originator coupled with robust due diligence on the asset pool, structural bankruptcy-remoteness and credit enhancement features embedded in these transactions (as described below) allows investors to gain exposure to debt securities with improved credit quality.

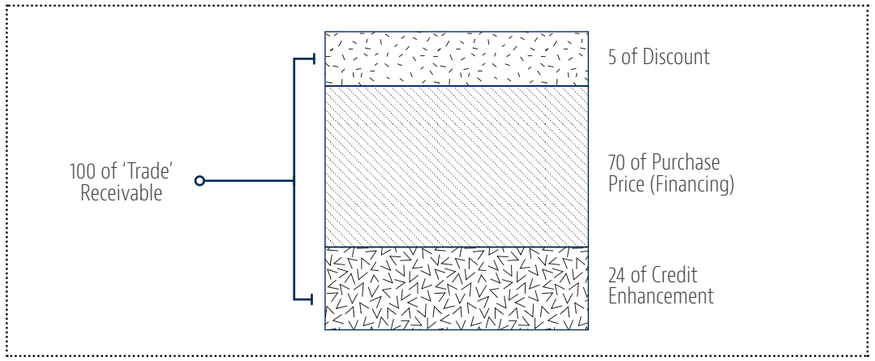
The securitisation market has increasingly developed to include many bespoke, private and unrated and/or unlisted deals. These often have a similar structure to securitisations funded by public issuance of debt securities and use similar technology and terminology but are often structured to meet transaction or party specific requirements.

Funding costs

Common to all securitisation transactions, since the object of the exercise for all is the raising of finance, is the fact that built in to the financing arrangement will be a financing cost, interest rate, commitment fee and overall cost of funding that will need to be repaid. Since the essence of a securitisation is that the assets provide the source of repayment for the funding raised, the relevant interest/financing charges will normally be paid/repaid out of collections relating to the securitised assets; typically, these costs will be the first costs/expenses to be met from the collections. The payments to be made during the life of the transaction will be organised into a priority of payments referred to as the waterfall, which will determine the order in which they are to be met on an ongoing basis.

The type of cost to be met will depend on the funding method being used for the transaction in question. Equally, the method of covering the cost or ensuring sufficient funds are available to pay the finance charge will vary depending on the type of asset being financed by way of the securitisation. Although asset types and their terms vary considerably, for present purposes it is useful to draw a distinction between two categories into which most will fall, namely interest-bearing and non-interest bearing assets. For example, trade receivables generally tend to be non-interest bearing, whereas most residential mortgages will require the borrower to pay interest based on the principal amount of the mortgage loan. Accordingly, in most trade receivables transactions, the interest/finance charges applicable (which, for example, may be the discounted amount of maturing commercial paper plus the applicable commitment fee for the liquidity facility being provided together with relevant foreign exchange amounts) will be provided for by incorporating a non-returnable discount in the purchase price paid for the receivables.

Figure 2 shows purchase price components in a trade receivables transaction.



Over-collateralisation, or credit enhancement, is often provided by way of a retention to the full value of the receivable as well (see "Credit enhancement" below).

In a mortgage-backed transaction, however, the interest/finance charge (such as the interest rate payable on the listed, rated notes issued to provide the funding) will normally be provided for by virtue of the interest payments being received by the

purchaser SPE in relation to the underlying mortgage loans. However, if the basis on which the interest is charged is different from the basis of interest applicable to the debt securities, a swap or other financial instrument or reserve may be required to ensure that the interest costs that investors are expecting will always be met.

Credit enhancement

Reference has been made throughout this chapter to the fact that securitisation transactions rely on the credit quality of the assets being securitised as opposed to the credit quality of the Originator itself. Despite the fact that the credit quality of a portfolio of diverse assets can be very high, it is highly unusual for the assets, without anything further, to be of sufficiently high credit quality to support a highly rated debt securities issue or investor requirements for unrated securities. Therefore, in most securitisation transactions, it is essential to design the legal and financial structure so as to accommodate additional financial support to the transaction to permit the desired rating to be achieved for the financing. This financial support is usually referred to as credit enhancement. Credit enhancement can be provided to a transaction in a multitude of different ways, always with the same goal. Support can be built into the assets or provided specifically to the funding side of the transaction. Thus, in a trade receivables transaction, a retention, assessed as the likely default rates of the portfolio, will typically be made from the financing amount or purchase price (see figure 2 above), often referred to as over-collateralisation, because the result is, in effect, that the finance raised will be secured over its principal amount — in a similar way to a traditional loan-to-value ratio calculation.

This result may also be achieved by paying the full face amount for the receivables being securitised (with no over-collateralisation) but additionally providing for a subordinated loan, or fund, or deposit of cash (sometimes referred to as a "reserve") to be made available to the SPE purchaser in the event that defaults on the underlying receivables would otherwise prevent principal payment being made when due in accordance with the funding instruments. Guarantees, standby letters of credit and even credit default swaps provided in each case by counterparties of sufficient credit quality have all been used to enhance the credit of securitisation transactions. Sometimes excess spread (or amounts of interest payable on the receivables in excess of amounts required to pay the finance charges) is used or "trapped" to build up a cash reserve, which in turn is used as credit enhancement. In each such case, the legal form of each of the agreements must be carefully documented and analysed — in some jurisdictions for example, over collateralisation is not permitted or is fatal to the "true sale" analysis (see above). Some legal regimes may not recognise the concept of subordination, and the ability of a counterparty to provide the sort of facility required will also need to be carefully checked.

Liquidity facilities

Many securitisation transactions will involve the provision of a liquidity facility to the SPE in the transaction. Liquidity facilities, distinct from credit enhancement facilities, are provided to cover the shortfalls arising from delays in payments under the assets, which if not covered, would mean that payments could not be made under the securitisation financing. A liquidity facility, provided by an appropriately rated bank, is thus often made available for drawdown by the SPE/issuer if such shortfalls have arisen.

Rating securitisation structures

Issues of asset-backed securities are frequently rated by one or more of the internationally recognised credit rating agencies. Effectively a rating (which can be either short term or long term), when issued, is an assessment by the relevant rating agency of the likelihood that the debt in respect of which the rating is sought will pay out in full and in a timely manner in accordance with the terms of the obligation. A short-term rating will be given to debt that is outstanding for less than one year, whereas a long-term rating applies to all debt sought to be rated in excess of one year.

The reason why a large number of arrangers of securitisation transactions seek a rating for an issue is that a rating typically significantly increases the potential pool of investors and impacts pricing, and, more recently, may well be a prerequisite to satisfying internal investment policy requirements or to including a transaction in a central bank support facility. A great deal of specific legal and other structural issues arise in the context of obtaining a rating, but these are beyond the scope of this chapter. However, most of the larger agencies have published papers or criteria explaining what is expected in relation to a transaction structure if a rating is sought. Failure to comply with rating agency criteria will mean that the issue will be rated lower than the level anticipated or not rated at all. Each of the agencies adopts a grading or notation system that ranges from an extremely high likelihood of full repayment of principal and interest, through to the lowest common level acceptable to an investor, which is commonly referred to as investment grade, and continues through the credit spectrum down to default. The grades (or notations) for long-term and short-term ratings can be correlated but are not exactly matched. The rating agency (or agencies) involved in rating a transaction will (or should) be drawn into the transaction process at an early stage, and frequent drafts of the documentation will be circulated to the rating agency analysts. As a robust legal structure is always a prerequisite to the provision of any rating, the rating agencies will expect to see the legal opinion provided by counsel addressing the structure, "true sale" and insolvency issues to a particular standard, hence the need for legal counsel appointed to assist on the transaction to be familiar with the detailed rating requirements for securitisation transactions.

Accounting for securitisation transactions

It is beyond the scope of this chapter to provide a full review of all of the current accounting standards relevant to securitisation transactions, and in any event, accountancy firms specialise in the provision of relevant accounting advice to parties to such transactions. Originators entering into a securitisation transaction are often seeking particular accounting treatment under applicable standards and, therefore, will need to structure the transaction accordingly.

Tax issues in securitisation

Tax issues feature prominently in all securitisation transactions. The transfer of the assets by the Originator may attract tax, there may be documentary levies (such as stamp taxes) imposed on the instrument transferring the assets and all of the payments associated with the securitisation transaction will need to be examined from (at the very least) the Originator's, the SPE's and the investors' perspective. Where

different jurisdictions are involved (for example, where the Originator and the SPE are incorporated in different jurisdictions), it will be necessary to consider the effect of cross-border payments, and the impact of tax treaties may also need to be considered.

A detailed analysis of specific tax issues for every type of securitisation transaction is beyond the scope of this chapter, so what is set out below is a list of some of the tax considerations commonly encountered in most securitisation transactions. The aim in most transactions is, of course, not to increase the amount of tax payable by the Originator above the level it already pays; this is often referred to as preserving "tax neutrality."

Transfer taxes

In some jurisdictions, a tax is levied on the instrument of transfer. Payment of the tax may afford better ownership protection, and non-payment may prevent the enforcement of the sale by the transferee. Depending on the level of cost and likely consequence of failure to pay the tax, it may be necessary to provide a reserve fund to be used for the payment of the tax at enforcement, which at the very least will impose an additional cost on the transaction.

Withholding taxes

Withholding taxes are essentially taxes imposed by a fiscal authority on the payer of an amount to a payee that represents the fiscal authority's assessment of the tax liability on the profit made by the payee, i.e., the recipient of the payment. Withholding taxes are particularly an issue in relation to cross-border payments. Since there will be a number of payments made in accordance with a securitisation transaction, each will need to be assessed to determine whether a withholding tax will be imposed. Thus, if an Originator sells interest-bearing assets to an SPE, it will be essential to ensure that the redirection of the interest referable to the assets from the Originator as recipient to the SPE as new owner of the assets will not result in any (or any additional) withholding taxes. In turn, all of the payments made by the SPE by way of interest (for example to bondholders/investors or banks providing liquidity or credit enhancement facilities) should also not result in withholding taxes. Many jurisdictions provide for specific exemptions for payments made under recognised debt securities that are listed on a recognised stock exchange and where payments are made to recognised banks already subject to tax in the relevant jurisdiction. Experienced legal and tax counsel are normally needed to assist in the initial structuring of the transaction to ensure that no unplanned withholding taxes are present in the proposed structure.

Taxes on profit

Where the transaction is structured as a sale of the assets, and depending on the asset type, some jurisdictions will assess the sale proceeds received by the Originator as pure profit and impose tax on the whole amount, unless the asset transfer arrangements are carefully structured. It will also be imperative to ensure that the SPE can match its income and expenditure, i.e., the relevant fiscal authority will permit the finance

costs to be deducted so as to ensure that the SPE itself makes little or no profit. If the payments to be made by the SPE are not allowed to be deductible from its receipts, then the SPE will be assumed to have made a larger profit and be liable to additional tax, which it will not have the financial resources to pay. At best, added tax will be a cost to the transaction. At worst, the SPE will be technically insolvent and the transaction's rating will be at risk. In many jurisdictions, the corporation tax treatment of certain SPEs has been addressed by specific tax legislation and/or regulations intended to apply to securitisation transactions so that if the relevant SPE falls within the strict parameters set by these regulations, the tax treatment can be assessed with a fair degree of certainty.

Supply taxes

Where an Originator is selling assets that are originated as a result of the supply of goods or services (as is the case with most trade receivables), many jurisdictions levy value added or supply taxes on the Originator. Some assets are specifically exempt from these taxes, but where they apply, an Originator may be entitled to reclaim all or part of the tax paid if the debtor defaults on payment. In the securitisation context, this can prove a major issue because, in respect of debtors who default in relation to assets that have been sold to the SPE, the Originator may no longer be able to reclaim the tax relief (often referred to as bad debt relief) as it is no longer the owner of the asset. Since a pre-existing agreement between the Originator and the SPE to resell defaulted debts may affect the "true sale" treatment, legal and tax counsel will need to structure the transaction carefully to mitigate against the impact of the lost tax relief.

Regulatory issues in securitisation

As set out in a separate section of this guide, there have been a number of recent developments in EU regulation of securitisation transactions, and different regulatory regimes will apply for market participants in the US or various other countries. For multijurisdictional transactions, multiple regulatory regimes will often apply for different purposes and transactions may be classified in different ways for different purposes. It is important to establish the relevant regulatory considerations early on in structuring a transaction so that the transaction can be structured appropriately and efficiently.

For further information, please contact your usual Baker McKenzie contact or any of the contacts set out at the end of this guide.

The EU Securitisation Regulation

The framework

Regulation (EU) 2017/2402, as amended by Regulation (EU) No 2021/557 ("**Regulation**"), sets out a harmonised securitisation regime that is applicable to all institutional investors (including UCITS and pension funds) across the European Union (EU), which includes provisions relating to risk retention, due diligence and transparency. It also contains a specific regulatory framework for "simple, transparent and standardised" (STS) securitisation, which currently encompasses on-balance sheet transactions (commonly referred to as synthetic transactions). In addition, the Regulation creates a system to ensure compliance with the framework and sets out the related sanctions for failing to do so. The Regulation applies to all securitisation positions created on or after 1 January 2019, with certain pre-existing securitisations benefiting from grandfathering.

The legislative framework comprises the Regulation and numerous Regulatory Technical Standards (RTS), Implementing Technical Standards (ITS) and guidance. Furthermore, the Regulation is complemented by the Capital Requirements Regulation framework (Regulation (EU) No 575/2013, as amended), which sets out the regulatory capital treatment for certain bank investors in securitisation transactions, including the additional criteria to be met by STS transactions in order to qualify for beneficial risk-weighting (10% as opposed to 15%) for those bank investors.

Application: What is a securitisation?

The Regulation applies to transactions that are deemed to be caught under the definition of "securitisation" set out in the Regulation. For the purposes of the Regulation, securitisation is defined as a transaction or scheme whereby (a) the credit risk associated with an exposure or a pool of exposures is tranched and (b) the transaction features each of the following characteristics:

- Payments in the transaction or scheme are **dependent on the performance of the exposure or the pool of exposures**. In other words, there should be a credit risk attributable to the pool of underlying exposures.
- The **subordination of tranches determines the distribution of losses** during the ongoing life of the transaction or scheme. The definition of tranche within the Regulation is not entirely clear. However, the commonly held view is that tranching must be contractual, it must be done at the transaction level (as opposed to the investor level) and it must come from an assumption of risk that is either more junior or senior than another tranche. As a consequence, the junior tranche(s) are more likely to suffer losses, while the senior tranche(s) continue to perform. Tranching may occur through the use of subordinated notes, subordinated loans or the payment of a deferred purchase price.
- The transaction or scheme **does not create lending exposures** as defined in Article 147(8) of Regulation (EU) 575/2013. This would exclude financings of physical assets, such as aircraft finance.

While all securitisations (as defined) are in scope, the Regulation is clear that re-securitisations are out of scope. In fact, they are banned entirely except in limited circumstances where there is a legitimate purpose for the resecuritisation.

Application: Who is caught?

If a transaction meets the definition of securitisation, certain key transaction parties will have obligations under the Regulation. These are the following:

- **Originator**: The Originator is the entity that is either directly or indirectly involved in the original creation of the asset, or an entity that acquired the asset for its own account and then securitised it.
- **Sponsor**: The sponsor is an entity that sets up and manages a securitisation but does not actually securitise its own assets. Typically, this will be the sponsor of an ABCP conduit or collateral managers of CLOs.
- **Issuer**: This is the issuing vehicle (typically a special purpose vehicle) through which the tranching of debt has been created. In the parlance of the Regulation, the issuer is referred to as the securitisation special purpose entity (SSPE). The SSPE must meet certain requirements regarding taxation, anti-money laundering and transparency if it is not established in the EU.
- **Institutional investors**: Entities that meet the definition of an institutional investor are subject to the due diligence rules under the Regulation and must carry out their own checks to ensure that the transaction complies with the provisions of the Regulation (see further below). The Regulation has also significantly expanded the scope of investors who are caught by these due diligence requirements; in addition to EU regulated banks (including investment firms), EU-regulated insurers (including reinsurers) and alternative investment fund managers (AIFMs) either established in the EU or with a full EU passport, the Regulation captures UCITS funds, EU pension funds and non-EU AIFMs.

Inevitably, given that the Regulation is EU-focused, questions arise as to the jurisdictional nexus of each of these key parties. There are important (and largely unresolved) issues as to how the rules apply to non-EU branches and subsidiaries of EU entities and, in a post-Brexit world, UK entities. Moreover, for STS transactions, the Regulation requires each of the originator, sponsor and SSPE to be located in the EU. In this respect, there have been recent attempts at clarifying some of these issues in the UK through legislation (please refer to the chapter on England) and in the EU, through a joint opinion of the European Supervisory Authorities on the jurisdictional scope of the obligations of the non-EU parties to securitisations under the Regulation, although there is ongoing market debate about some of these matters.

Rules for all securitisations

The general framework applies to all securitisations, not just those for which the designation of STS is sought. The following four key categories of obligations are set out in the Regulation:

- **Risk-retention**: The obligation on the Originator, sponsor or original lender (the parties must agree who will hold the retention, with the Originator being the fall-back retainer in the absence of agreement) to retain, on an ongoing basis, a material net economic interest in the securitisation, which is currently set at 5% (calculated by reference to the nominal amount of the securitised exposures or to the nominal value of each of the tranches sold or transferred to investors

and requiring any fees that may in practice be used to reduce the effective material net economic interest to be taken into account). This requirement is complemented by an indirect obligation on investors, through due diligence requirements,to ensure that the retention obligation is met prior to investing. A sole purpose test explicitly rules out entities with no real substance (with subjective tests to establish this) from holding the retention, and a change in the retaining entity is allowed under the Regulation in certain circumstances.

- **Transparency**: The Regulation imposes disclosure and ongoing reporting requirements applicable to private securitisations (such as ABCP conduits and transactions), in addition to public deals. It is commonly accepted that the factor determining whether a transaction is a public or private transaction is the existence of listing and the relevant listing venue: a transaction involving notes admitted to trading on a regulated market will be considered a public transaction, whereas a transaction involving loans or notes not admitted to trading or admitted to trading on an unregulated market (even one as commonly used as the Irish Stock Exchange's Global Exchange Market) will be considered private. The obligations set out in the Regulation and relevant RTS and ITS include ongoing disclosure of loan-level and transaction-level data to investors and to the relevant competent authorities, including, for public securitisations, the obligation to make such information available in a securitisation repository.
- **Due diligence**: Institutional investor due diligence requirements apply to institutional investors and include areas such as risk retention, availability of disclosure in line with the requirements set out in the Regulation and compliance with certain credit-granting criteria.
- **Credit granting**: The Regulation includes credit-granting criteria, requiring Originators, sponsors and original lenders to apply the same sound and well-defined criteria relating to securitised exposures as they apply to non-securitised exposures. These parties need to have clearly established processes and systems for the approval, amendment, renewal and refinancing of loans, thereby ensuring that the credit granted is based on a thorough assessment of the relevant obligor's creditworthiness.

(Optional) framework for STS securitisation

Term securitisation, on-balance sheet and ABCP transactions can achieve STS status if they meet high standards of simplicity, transparency and standardisation.

The STS framework comprises several individual criteria. It is important to note that certain elements of the STS criteria must have been met **at the date of issuance**, and others must be met as **at the date of notification** of the deal's STS status. Many of these criteria go beyond purely technical, legal amendments to transaction documentation and require practical compliance in terms of Originator policy, homogeneity of the underlying assets, etc.

In order to achieve STS status, the following requirements must be met:

- The transaction must meet the appropriate (and detailed) criteria relating to simplicity, transparency and standardisation.

- The Originator and sponsor must inform ESMA that the transaction meets the STS requirements.
- The transaction must have been added to the list of STS transactions maintained by ESMA on its website.

To assist market participants, ESMA has provided for an optional process whereby authorised third parties can attest to the satisfaction of the STS criteria. Certain entities have become authorised third-party verification agents, assisting Originators, sponsors and original lenders in determining whether the STS criteria has in fact been met. Importantly, the fact a transaction has been reviewed by a verification agent will not absolve the principal parties from liability if any STS assertions made turn out to be false. Nonetheless, it will be a helpful argument that those parties have endeavoured to check that the relevant transaction qualifies as STS.

Conclusion

The EU securitisation framework has recently been amended to accommodate the specificities of on-balance sheet transactions and the securitisation of non-performing exposures. This certainly reflects the anticipated increase in levels of activities in these product classes as well as the intention to make the EU securitisation framework more comprehensive and reflective of the needs of market participants in the post-COVID-19 economy.

While the Regulation has become "old news" for most market participants, events such as Brexit continue to test the interpretation of certain provisions and provide fertile ground for regulatory intervention and debate. Furthermore, a recent consultation on the functioning of the EU securitisation framework coupled with the ongoing development of a framework for sustainable securitisation may pave the way for further developments and regulatory change.

If you have any questions on the Regulation and how it may affect any of your transactions or proposed structures, please contact your usual Baker McKenzie contact or any of the contacts set out at the end of this guide.

Australia

Legal framework

There is no specific legislative framework for securitisation; however, securitisation transactions may be captured by various laws, regulations and authorities depending on the nature of the participants or underlying receivables contracts. There is a specific framework for covered bonds, which are regulated under Division 3A of Part II of the Banking Act 1959 (Cth) ("**Banking Act**").

The main regulator of relevance to securitisation activities is the Australian Securities and Investments Commission (ASIC), which governs:

- issuances of securities
- Australian financial services licences (AFSL), which are required to deal in financial products or provide financial services and therefore necessary for certain roles or activities in securitisation transactions (e.g., trustees and managers)
- conduct of corporations and compliance with the Corporations Act 2001 (Cth) ("**Corporations Act**"), which is relevant because parties to securitisation transactions are predominantly corporations
- foreign companies, which may be required to register with ASIC in circumstances where their activities, including securitisation, amount to "carrying on business in Australia"

The Australian Prudential Regulation Authority (APRA) is responsible for regulating prudential standards and Australian Prudential Standard 120 — Securitisation ("**APS 120**") applies to securitisations that involve authorised deposit taking institutions (ADIs) in Australia. APS 120 aims to ensure that ADIs appropriately manage securitisation risks, and ensure sufficient capital is held against the associated credit risk. It requires that ADIs involved in securitisation activities:

- give a risk management framework covering its involvement in a securitisation
- ensure there is clear and prominent disclosure of the nature and limitations of its obligations arising from its involvement in a securitisation
- do not provide implicit support to a securitisation
- calculate regulatory capital for credit risk against its securitisation exposures

Many entities involved in securitisation escape regulation by APRA because they do not take deposits and are, therefore, excluded from the definition of "banking business."

General laws may impact securitisation transactions in a number of ways, including:

- There are ongoing disclosure and reporting requirements under the Corporations Act where securities are not issued to professional investors in minimum subscription amounts of AUD 500,000 (although this is infrequent, with most Australian securitisations being to institutional investors and through wholesale transactions).
- Security interests in personal property are governed by the Personal Property Securities Act 2009 (Cth) (PPSA), which requires registration of security interests on the Personal Property Securities Register.

- Various tax legislation (and potentially multiple regimes) will apply depending on the chosen structure and nature of the underlying assets (e.g., stamp duty).
- Relevant state or territory trust legislation will apply where a trust structure is used (as is generally the case).
- Certain consumer lender providers will be subject to the National Consumer Credit Protection Act 2009 (Cth). An Originator may be required to obtain an Australian credit licence (ACL) where underlying receivables contracts involve credit activities (although exemptions do apply for specific securitisation entities).
- A servicer will require an ACL where exercising the rights and obligations of a credit provider and an AFSL where the underlying receivables contracts involve regulated financial services (e.g., insurance or margin loans).
- Priority of payment in a waterfall context may be affected by Australian laws that cannot be contracted out of (e.g., liquidators' rights to remuneration ahead of secured creditors and employee entitlements).
- Consumer protections, including false and misleading representations and misleading and deceptive conduct set out in the Australian Competition and Consumer Act 2010 (Cth), may apply depending on the nature of the parties involved in the transaction.
- There are registration requirements for exchange listing (e.g., Australian Securities Exchange (ASX) listing rules) or trading through a clearing system.
- Consumer due diligence and reporting of suspicious matters is required under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth).
- The collection, use and disclosure of personal information must comply with the Privacy Act 1988 (Cth), which sets out data breach notification requirements and specific restrictions for credit information (a concurrent equitable duty of confidentiality may also apply).

Common securitisation transaction structures

There are no specific laws relating to the establishment of securitisation special purpose vehicles (SPVs).

A special purpose trust is the most commonly used securitisation structure in Australia. The trust is usually established in Australia but may be established offshore for regulatory purposes or investor preferences.

With a trust structure, profits can be distributed to beneficiaries under units of a trust, paid as a return on notes that have been subscribed for, or extracted for fees (e.g., servicer or manager fees).

Trusts have a number of advantages, including:

- on insolvency of the underlying corporate entity
- familiarity of the Australian market with trust structures
- efficient to establish and govern, by way of a trust deed, with special duties and rights allocated to managers and servicers

- no requirement to register as a trust (except in very limited circumstances, e.g., managed investment trusts)
- few ongoing filing requirements associated with registering an Australian Business Number (ABN)

A general security interest is usually granted over all assets in favour of the security trustee for the benefit of the secured creditors. The security trustee will have the sole right to enforce the security, and investors usually retain powers to direct the security trustee to take actions.

Alternatively, special purpose companies or a two-tier combination of an issuing company and an asset-holding trust may be used.

In addition to general law, a special purpose entity will be governed by:

- its constitution or articles of association and, unless expressly excluded, the replaceable rules in the Corporations Act if it is a special purpose company
- its trust deed if it is a special purpose trust

Method of transfer

A transfer of receivables is usually by way of equitable assignment. It is critical that the receivables are identified with sufficient certainty by listing, eligibility criteria or the exclusion of particular receivables. Receivables under contracts restricting or prohibiting assignment without consent are generally considered unable to be securitised.

For a purchaser of receivables to obtain legal title in the event of insolvency, they must perfect their interest in accordance with the relevant state or territory statutory regime.

Tax

A number of tax issues may arise regarding securitisations in Australia, including:

- Transfer duties (stamp duty) may be imposed by the relevant state or territory (e.g., declaration of trust or asset transfer to the SPV).
- Withholding taxes, including a 10% interest withholding tax and up to 30% royalty withholding tax, may be imposed on payments to foreign resident recipients and deducted by the issuer (unless an exception applies).
- Income tax will be payable by:
  - in the case of a special purpose company, that company
  - in the case of a special purpose trust, the beneficiary where presently entitled to income
- A 10% goods and services tax (GST) will apply for services supplied under transaction documents (e.g., serving and management agreements).
- Australian securitisation entities will generally need to comply with the FACTA Intergovernmental Agreement, as "Investment Entities."
- Careful consideration of the application of Australia's thin capitalisation rules is needed to ensure deductibility of debt issued by the securitisation vehicle.

Accounting treatment

There are no specific accounting standards applicable to securitisation under Australian taxation laws.

Regulatory concerns

Insolvency laws have been significantly affected by the introduction of broad ipso facto reforms. An ipso facto contractual clause allows one party to terminate or modify the operation of the contract upon the occurrence of a specified insolvency related event (such as the appointment of an administrator, receiver or liquidator) in respect of another party. A stay on enforcement of ipso facto contractual clauses triggered by the counterparty becoming subject to certain specified formal corporate insolvency events came into effect and applies to all contracts, agreements or arrangements entered into from 1 July 2018. The Corporations Regulations 2001 (Cth) set out types of contracts and rights that have been excluded from the stay and include:

- a contract, agreement or arrangement that is, or governs, securities, financial products, bonds or promissory notes
- a contract, agreement or arrangement under which a party is or may be liable to subscribe for, or to procure subscribers for, securities, financial products, bonds or promissory notes
- a contract, agreement or arrangement that involves a special purpose vehicle and that provides for securitisation

In recent years, non-ADIs have effectively competed in the residential mortgage lending market (which accounts for a significant portion of securitisation transactions in Australia) against APRA-regulated ADIs, who have been subject to an increase in lending rates for investor and interest-only loans. However, APRA's powers have recently been expanded to non-ADIs in the following ways:

- There has been a reduction in the available exemptions from registration and reporting under the Financial Sector (Collection of Data) Act 2001 (Cth), previously relied upon by non-ADIs. A registrable corporation (having at least AUD 50 million in outstanding debts due to it resulting from the provision of finance, and/or providing AUD 50 million in loans or other financing arrangements in the previous financial year) must, among other things, register with and provide documentation regarding its financial position to APRA on a regular basis.
- There have been amendments to Part IIB of the Banking Act, giving APRA the power to make rules regarding the lending activities of non-ADIs in circumstances where it considers such lending activities "materially contribute to risks of instability in the Australian financial system."

Most recently, the release of the Final Report of Australia's Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 1 February 2019 is expected to influence changes to lending processes with likely impacts on underlying securitised assets and indirect consequences for securitisation transactions.

AUSTRALIA

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Austria

Legal framework

Much like other jurisdictions, Austrian law does not provide for a dedicated securitisation regime. Accordingly, the general rules of Austrian law, in particular, the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), the Commercial Code (*Unternehmensgesetzbuch*), the Insolvency Code (*Insolvenzordnung*) and the Banking Act (*Bankwesengesetz*), as well as tax laws, apply to securitisation transactions in Austria. In addition, EU regulations, such as the Securitisation Regulation and the Capital Requirements Regulation (CRR) — being directly applicable in Austria — have to be considered.

From a civil law perspective, the crucial issue is the recognition of the true sale. While not recognised formally under Austrian law, the concept of a true sale has been accepted in Austrian legal writing. However, it should be noted that, to date, the approach taken in Austrian securitisation transactions has not yet been tested before the Austrian Supreme Court. However, we are confident that — provided that the transaction is structured accordingly — a true sale can be achieved as a matter of Austrian law.

Austrian special purpose vehicles (SPVs)

It is generally possible to establish an Austrian special purpose entity. Such entity would need to have a limited scope of business only, restricting its activities to those necessary for securitisation transactions. In that case, the SPV would not need to obtain a banking licence as such operations would be exempt from the scope of banking business. However, the SPV would still be bound by Austrian statutory banking secrecy. Further, it should be noted that there is no Austrian law equivalent to a trust. Accordingly, in Austrian securitisation transactions, SPVs are typically established in other jurisdictions that provide a more favourable legal framework for securitisation transactions.

Method of transfer

In order to effect a true sale under Austrian civil law, an agreement over the sale and purchase of receivables has to be put in place between the seller and the purchaser. This agreement constitutes the legal title (*Verpflichtungsgeschäft*) and thus establishes the contractual obligations between the parties. In addition, the actual transfer of the assets to be sold has to take place, thus completing the in rem aspect of the true sale. This is referred to as the modus (*Verfügungsgeschäft*). Only upon both title and modus being completed, ownership in the receivables will pass from the seller to the purchaser. By contrast, it is not mandatory to notify the underlying debtors of the receivables of the assignment. However, as long as the debtors have not been made aware of the assignment, they can still validly discharge their obligations vis-à-vis the seller.

Over-collateralisation/yield

As part of credit enhancement practices, it is common for discounts (which are used to cover funding costs) and deferral elements (to cover over-collateralisation levels) to be factored into the purchase price calculation. It is generally accepted that, as long as such adjustments to the purchase price are calculated based on previous/historical default rates (potentially including a margin) or are fixed at the time when the relevant receivable is assigned and hence can be considered reasonable, they should not prevent a true sale.

Withholding tax

There are generally no withholding or other taxes imposed on payments made by Austrian debtors with regard to claims that are assigned in the course of a securitisation transaction. For other countries, the applicable (double tax) state treaties need to be considered.

Stamp duty

Under Austrian law, assignments (such as the sale of receivables in the context of a securitisation transaction) are subject to stamp duty in the amount of 0.8% of the agreed consideration (i.e., the purchase price and not the value of the receivable) if they are signed in Austria or are signed abroad and subsequently brought into Austria. The assignment of receivables to an SPV is generally exempt from Austrian stamp duty. However, there is some uncertainty as to the scope of such exemption. In addition, a potential reassignment of receivables, e.g., upon a clean-up, would not be exempt from the duty to pay stamp duty thereon. Therefore, it is common practice for Austrian securitisation transactions to be executed abroad.

Tax on Austrian source income

As mentioned above, in an Austrian securitisation transaction, the purchaser of the receivables will typically be incorporated outside Austria. Should the purchasing company be in Austria, it would be subject to Austrian corporate taxation. When the SPV is located outside Austria, it would normally not be subject to corporate income and trade tax provided that, in particular, it is incorporated, managed and administered outside Austria, it does not have a permanent establishment in Austria, the significant part of its assets is located outside Austria and there is no agent acting on its behalf in Austria.

Accounting treatment

The Austrian legal framework does not provide specific rules on the accounting treatment of an Austrian securitisation transaction. Accordingly, where an Austrian seller is controlled by a parent company in Austria, the seller will be consolidated by way of the rules set out in the Austrian Commercial Code. Under Austrian general accounting principles, the seller of receivables can only remove the receivables sold to the purchaser from its balance sheet upon a true sale having taken place. One of the crucial points for assessing whether a true sale has taken place is that the credit risk (i.e., the risk that the debt fails to pay) has to pass from the seller to the purchaser and the sale has to be final in the sense that no general repurchase obligation of the seller is agreed at the outset. Additional factors such as potential default guarantees, the relationship between the seller and the purchaser, discounts or limited repurchase obligations would also have to be considered carefully.

Regulatory concerns

If an Austrian SPV is used, special care needs to be taken to ensure that it does not inadvertently pass the threshold of activity subject to a licence under the Austrian Banking Act. As mentioned above, the regulatory framework in Austria is mainly driven by legislation enacted at the level of the EU, in particular the Securitisation Regulation and the CRR.

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Belgium

Legal framework

SECURITISATION VEHICLE

Belgium has a special legal framework for securitisation transactions consisting of dedicated securitisation vehicles and provisions facilitating the mobilisation of certain types of receivables to securitisation vehicles. The dedicated Belgian securitisation vehicle is the so-called company for the investment in receivables (*vennootschap voor belegging in schuldvorderingen/société d'investissement en créances* (SIC/VBS)) ("**Belgian SIC**"). Strictly speaking, parties could also set up an investment fund, but in practice parties usually opt to incorporate a company in the form of a Belgian SIC. Belgian SICs are subject to a specific (generally light) regulatory framework introducing a series of rights, rules and obligations. For example, Belgian SICs:

- can only be funded by institutional or professionals investors
- should be registered on a list held by the Belgian Federal Public Service Finance
- can only invest in receivables held by third parties, which are transferred to the Belgian SIC by means of a transfer agreement
- are required to manage the special purpose vehicle (SPV) in accordance with the principle of risk spreading in the sole interest of the investors, which entails that Belgian SICs should diversify their investments as to the type of investment instruments and the number of counterparties in accordance with certain quantitative and qualitative requirements
- benefit from a beneficial tax regime (as set out in more detail below)
- benefit from various other Belgian law provisions facilitating transfers of receivables and addressing, for example, transferability, transfer formalities and set-off
- are subject to certain requirements as to the organisational form of the SPV
- are subject to certain specific rules on accounting, the issuance of units in the SPV and conflicts of interest

It could be argued that a party may also incorporate any other type of (unregulated) Belgian company deemed useful for the envisaged securitisation, but this would lead to a less favourable tax regime being applicable. Foreign securitisation SPVs can also be used. These would be subject to the relevant foreign regulatory framework and would not benefit from the special tax regime applicable to Belgian SICs.

INCORPORATING A BELGIAN SIC

As mentioned above, a Belgian securitisation vehicle generally takes the form of a Belgian SIC. Before starting its activities, the Belgian SIC must apply for registration with the Belgian Federal Public Service Finance on the list of institutional undertakings for investment in receivables. The registration requirement also applies to each of the compartments established by the Belgian SIC. The registration is mandatory in order to be able to benefit from the specific beneficial tax regime that applies to Belgian SICs.

The minimum capital requirement of a Belgian SIC amounts to EUR 61,500 and must be fully paid-up.

Although there is no formal timeframe within which the Belgian Federal Public Service Finance must decide on a registration request, setting up a Belgian SIC and obtaining registration with the Belgian Federal Public Service Finance generally takes around 2-3 months.

Under this regime, the Belgian SIC may not hold any assets, make any legal commitments or engage in any other business outside the framework of its securitisation operations or outside the investments authorised by law.

LICENCE REQUIREMENTS IN RELATION TO THE PURCHASE OF CERTAIN RECEIVABLES

Residential mortgage credit receivables and consumer credit receivables can only be transferred to certain purchasers, including licensed mortgage and consumer credit providers respectively and entities qualifying as securitisation vehicles (including, among others, a Belgian SIC) under the Belgian Act of 3 August 2012 on various measures to facilitate the mobilisation of receivables in the financial sector ("**Mobilisation Act**").

Securitisation vehicles purchasing consumer credit receivables do not need to obtain a specific licence as a consumer credit provider. However, a securitisation vehicle purchasing residential mortgage credit receivables should also be licensed as a mortgage credit provider, although the licence requirements are less restrictive for securitisation vehicles.

PROSPECTUS REGULATIONS

Any public offer of investment instruments or admission to trading on a regulated market in Belgium may be subject to prospectus requirements, unless an exemption applies.

A Belgian SIC may issue securities to be listed on a regulated market if it includes selling restrictions in the placement documentation clarifying that only institutional and professional investors can buy these securities. In this case, the Belgian SIC will, in principle, also have to issue a prospectus accompanied by an external credit rating.

Method of transfer

Under Belgian civil law, receivables are transferred by way of assignment (*cessie/cession*). Such transfers are enforceable against third parties (with the exception of the debtor of the relevant receivable and any third party having previously acquired a concurrent right with respect to the same receivable) from the date of the relevant transfer agreement.

For the transfer to be enforceable against the debtor of the relevant receivable, the transfer must be notified to, or acknowledged by, the debtor of that receivable. For the transfer to be enforceable against any third party having previously acquired a concurrent right with respect to the same receivable, the transfer must be notified to, or acknowledged by, the debtor of that receivable prior to that third party having notified its concurrent right to that debtor, or prior to that debtor having

acknowledged that third party's concurrent right. In practice, debtors are generally only notified of the transfer upon the occurrence of certain trigger events.

As long as any transfer has not been notified to, or acknowledged by, the debtor of the transferred receivable, then, notwithstanding such transfer, (i) the debtor may still validly pay and discharge its debt to the transferor, (ii) if a bona fide third party acquires the same receivable as a result of a subsequent transfer, sale or pledge of that receivable, that bona fide third party will be entitled to that receivable if it has notified the debtor or obtained the debtor's acknowledgement first, and (iii) set-off may still take place between the transferor and the debtor if the receivable and a debt owing from the transferor to the debtor both become due and payable (although it should be noted that, even after notification or acknowledgement, set-off may still take place in certain circumstances).

Ancillary rights that are considered accessory to the receivable (e.g., security rights, statutory privileges and retention of title) will, in principle, transfer automatically together with the receivable.

Additional formalities may apply to the transfer of the receivable or the ancillary rights depending on the type of transferred assets, such as specific rules applicable to the transfer of consumer credit receivables or mortgage credit receivables. However, some of those specific transfer rules are not applicable in the case of a transfer by or to an entity that qualifies as a financial institution, a credit institution or a securitisation vehicle under the Mobilisation Act.

Belgian law does not have a statutory definition of "true sale" and Belgian courts have not yet provided firm guidelines on this subject. Based on legal doctrine, the economic effects of a transaction will have to be taken into account and, for example, a transfer of receivables may not be a true sale of these receivables if (among other things) the default risk is not effectively transferred to the transferee. On that basis, Belgian courts are likely to consider (i) whether or not the transferee has (full or partial) recourse against the transferor for defaulted receivables and (ii) whether or not the purchase price actually paid by the transferee for the purchased receivables is a market price for the receivables.

Tax

Issues feature prominently in all securitisation transactions and are to be considered from the perspective of the Originator, the SPV, the investors in the SPV and the debtors. The transfer of assets by the Originator to the SPV may give rise to income tax in the hands of the Originator and could also give rise to VAT, withholding taxes or transfer taxes/stamp duties becoming due (depending on, among others things, the jurisdiction of the Originator, the transfer price and the application of a discount, the nature of the assets transferred, etc.). The cash flows generated by the assets transferred to the SPV will typically need to be analysed from a (withholding) tax perspective. The broader question of the corporate tax treatment in the hands of the SPV typically needs to be addressed as well. A detailed analysis of specific Belgian tax issues for every type of securitisation transaction is beyond the scope of this chapter. What is set out below is a list of some of the tax considerations commonly encountered in securitisation transactions involving a Belgian SPV taking the form of a Belgian SIC.

TAX TREATMENT OF A BELGIAN SIC

A Belgian SIC is virtually exempt from income tax on its profits. In reality, it is subject to corporate income tax at the ordinary rate of 25%, but its taxable basis is limited to the following items:

- the sum of its disallowed expenses (with certain exceptions, such as the write-downs and capital losses on shares and, importantly, the non-deductible portion of the net borrowing costs exceeding the 30% ceiling under the 30% EBITDA rule introduced into Belgian law following the EU Anti-Tax Avoidance Directive)
- the sum of any abnormal or gratuitous advantages (deemed) received by the Belgian SIC (as a result of any non-arm's length transaction to the benefit of the Belgian SIC)

Belgian SICs are, however, also subject to the special (100% or 50%) secret commission tax if they do not properly justify their expenses by issuing appropriate tax slips. The tax is applied on the amount of expenses that are not properly mentioned on the appropriate tax slips.

Disallowed expenses include, in particular, interest expenses on debt owed to nonresident investors that are not subject to tax (or benefit with respect to such interest income from a tax regime that is notably more favourable than in Belgium (low-taxed entity)) when and to the extent such loans exceed a 5:1 debt/equity ratio.

Since abnormal or gratuitous advantages received are included in the taxable basis of Belgian SICs, it is of particular importance that any transaction between the SIC and other (related) parties be made at arm's length (market) conditions.

VAT ASPECTS

The transfer of receivables to a Belgian SIC will generally be exempt from Belgian VAT.

A general VAT exemption is also available for services regarding the management of a Belgian SIC (covering management services rendered to the Belgian SIC and services rendered with respect to the management of its assets). This exemption does not apply with respect to services of a mere material or technical nature.

Financial services are typically exempt from VAT, with the exception of services related to the collection of debt.

Withholding tax

There is no Belgian withholding tax due on income (particularly interest income) received by the Belgian SIC on financial assets (with the exception of Belgian-sourced dividends). This exemption is subject to the Belgian SIC issuing an affidavit to the debtor of the income that confirms that the Belgian SIC is the legal owner of the assets generating the income. Other withholding tax exemptions that do not require the issuance of an affidavit to the debtor might be available in certain cases and under certain conditions (e.g. for interest on mortgage loans).

Payments of interest or dividends made by a Belgian SIC to its investors are generally subject to Belgian withholding tax at a rate of 30%, subject to available exemptions or reductions under domestic law or tax treaties, as the case may be.

BELGIUM

Stamp duties

Generally, no stamp duty or similar charge is due in Belgium upon the transfer of receivables, irrespective of the transfer method chosen.

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Brazil

Legal framework

Strictly speaking, securitisation has always been allowed in Brazil, as each step of its structure, individually considered, is supported by an existing statute. Furthermore, it is fully grounded in civil law principles (e.g., assignment of credit, deferred payments, etc.). However, there is no specific law in Brazil that regulates securitisation transactions in general and as a whole, which means that many of the laws and regulations are related to the workings of securitisation vehicles and the rules for the assignment of credits, among others.

The regulatory bodies for securitisations in Brazil are the Brazilian Exchange Commission (CVM) and the Central Bank of Brazil ("BCB").

One of the most used, important and common special purpose vehicles ("SPVs") that can undertake the securitisation of receivables in Brazil is the so-called Investment Funds in Credit Rights (*Fundos de Investimentos em Direitos Creditórios* — FIDC), regulated by Resolution CMN No. 2,907 dated 29 November 2001, as amended; as well as the Resolution CMN No. 4,694 dated 29 October 2018, as amended, from the National Monetary Council ("CMN"); Instruction CVM No. 356 dated 17 December 2001, as amended ("Instruction CVM 356"); and Instruction CVM No. 444 dated 8 December 2006, as amended.

For the securitisation of real estate receivables, three specific SPVs are used: (i) the Real Estate Credit Securitisation Company (*Companhia Securitizadora de Créditos Imobiliários*) under Federal Law No. 9,514 dated 20 November 1997 ("Law No. 9,514"), as amended by Provisional Measure No. 1,103 dated 15 March 2022 ("MP 1,103"); and Resolution CVM No. 60 dated as December 23, 2021 ("Resolution CVM 60"); (ii) the Real Estate Investment Fund (*Fundo de Investimento Imobiliário* — FII), regulated by Federal Law No. 8,668 dated 25 June 1993, as amended by Law 14,130, dated 29 March 2021, and CVM Instruction No. 472 dated 31 October 2008, as amended "Instruction CVM 472"); and (iii) Investment Fund in Agro industrial Chains (*Fundo de Investimento em Cadeias Agroindustriais - Fiagro*), regulated respectively by Instruction CVM 356, Instruction CVM 472 and CVM Instruction No. 578 dated 30 august 2016, as amended from time to time.

The securitisation of financial receivables can be undertaken through SPVs, via the issuance of: (i) real estate receivables certificates (*Certificados de Recebíveis Imobiliários* — CRI), as amended by the MP 1,103 and CVM Resolution 60; (ii) covered bonds (*Letra Imobiliária Garantida* — LIG), under Federal Law No. 13,097 dated 19 January 2015, as amended, as well as CVM Resolution No. 5,001 dated 24 March 2022, and BCB Resolution No. 225 dated 13 April 2022.

The securitisation of agribusiness receivables can also be made through the issuance of agribusiness receivables certificates (*Certificados de Recebíveis do Agronegócio* — CRA), under Federal Law No. 11,076 dated 30 December 2004, as amended by Law No. 13.986, of 7 April 2020, and CVM Resolution 60.

Incorporating a special purpose vehicle (SPV)

An SPV in Brazil is usually an investment fund or a securitisation company.

The FIDC and the FII are investment funds owned by investors, via interest (*cotas*) issued by the fund, in the legal form of joint ownership (*condominium*), without legal personality.

Investment funds must abide by the rules and they are under the regulation of the CVM, with which they must be registered.

Securitisation companies must be public companies (*sociedade anônima de capital aberto*). Investors and creditors acquiring the securities or the credit instruments issued by the securitisation companies (e.g., CRA and CRI) are not usually shareholders of the securitisation companies.

Method of transfer

Receivables in Brazilian securitisation transactions are typically transferred through an assignment of credit rights agreement. In these agreements, it is common and advisable for the assignor to notify its client of the assignment of the receivable (although it is important to note that such notification is not a requisite for the perfection of the assignment) and to have the agreement registered with the registry of titles and deeds of the domicile of both parties (assignor and assignee, if resident in Brazil) to make the assignment agreement valid and effective against third parties.

The assignment of certain financial credits by financial institutions must also be registered in a registration and clearing system accredited by the BCB (currently, this is the C3 — *Câmara de Cessões de Crédito*).

In Brazil, the assignment of receivables should be made on a non-recourse basis to characterise it as a true sale, with no risk of recharacterisation as a secured loan. An assignment of receivables with recourse against the assignor may be recharacterised as a loan for tax or other legal purposes.

Lastly, the assignment of a receivable includes its related security and guarantees, unless there is provision otherwise in the relevant assignment agreement (Article 287 of the Brazilian Civil Code).

Tax

Brazilian tax legislation is sparse with respect to securitisation transactions. The effective tax levy depends heavily on the design of the transaction, the nature of the SPV, the credits acquired and the funding mechanism. Therefore, we provide below the general aspects of the taxation of SPVs organised as securitisation companies or investment funds. Furthermore, we also provide general aspects of the taxation of CRIs and CRAs, and the levy of the Tax on Financial Transactions (IOF).

SECURITISATION COMPANIES

In a local securitisation, the financial institution usually assigns its financial credits with a discount to the securitisation company. The Originator is entitled to the deduction of the discount, and the securitisation company should recognise the corresponding gain.

According to Brazilian tax legislation, securitisation companies of real estate, financial and agribusiness receivables are subject to the actual profit regime for the determination of the corporate income taxes (*Imposto de Renda sobre Pessoa Jurídica — IRPJ/Contribuição Social sobre o Lucro Líquido* — CSLL). There is a lack of clarity as to whether securitisation companies of commercial receivables would also be mandatorily subject to the actual profit regime. There is no express provision in Brazilian legislation in this sense.

Nevertheless, and although controversial, the Brazilian tax authorities have issued rulings stating that the actual profit method would be, in principle, mandatory for all securitisation companies. In addition, current income tax reform proposal, approved at the House of the Representatives in 2021, but still pending appreciation at the Senate, specifically provides that all securitisation companies shall be subject to the actual profit regime, which shall settle such controversy. Therefore, it is important to monitor the progress of his proposal at the Senate in the coming months.

The actual profit method is determined by the sum of revenues less costs and expenses that result in the net profit. The actual profit is the net profit adjusted by additions and exclusions provided in the corporate income taxes. Therefore, the taxable income is calculated based on the securitisation company's gross revenue minus allowed deductions. The combined IRPJ/CSLL rate is 34%.

The timing of deductions of expenses and the recognition of gains by the securitisation company may vary depending on the specifics of its capital structure.

For the purpose of social contributions over revenues (*Programas de Integração Social* — PIS/*Contribuição para Financiamento da Seguridade Social* — COFINS), a securitisation company of real estate, financial and agribusiness receivables is subject to the cumulative regime. Therefore, the revenues deriving from the discount of the receivable are subject to a combined rate of 4.65% on its gross revenues. It is possible to deduct the funding expenses in the determination of the PIS/COFINS tax basis.

At first glance, there is no mandatory regime of PIS/COFINS applicable to securitisation companies of commercial receivables. However, considering the understanding of the Brazilian tax authorities that all securitisation companies would be subject to the actual profit method for corporate income tax purposes, the non-cumulative regime would be the mandatory regime of PIS/COFINS for securitisation companies of commercial receivables. Therefore, the gross revenues of a securitisation company of commercial receivables would be subject to PIS/COFINS at a combined rate of 9.25%. According to the provisions of the legislation, it is possible to deduct credits in the determination of the PIS/COFINS tax basis in the non-cumulative regime.

INVESTMENT FUNDS

As mentioned above, two of the most used investment funds for the securitisation of receivables are the FIDC and the FII.

As a rule, investment funds are not subject to taxation on earnings or gains derived from their portfolios, and the taxation is focused on the level of the quotaholders. In other words, earnings and gains derived from investments in investment funds are subject to income tax only at the redemption, amortisation or sale of their quotas.

The FIDC is subject to the general rules for the taxation of investment funds in Brazil.

Brazilian resident quotaholders of the FIDC are subject to withholding income tax ("WHT") at regressive tax rates on the amortisation, redemption and disposal of the FIDC quotas. If the FIDC is considered a long-term investment fund, the applicable tax rates would vary from 22.5% to 15%, depending on the investment maturity date, which can vary from less than 180 days (subject to 22.5% WHT) to more than 720 days (subject to 15% WHT). If the FIDC is considered a short-term investment fund, the applicable tax rates are 22.5% (if the investment maturity date is less than 180 days) or 20% (if more than 180 days).

The income tax reform proposal pending appreciation at the Senate also aims to simplify the WHT taxation over the FIDC earnings and gains, by setting a 15% WHT flat rate, regardless of the term of the investment. Thus, again, it is important to monitor the progress of this proposal at the Senate in the coming months.

The FII is subject to specific tax regulations. Brazilian resident quotaholders of the FII are subject to WHT at a flat 20% tax rate in the amortisation, redemption and disposal of the FII quotas. Brazilian tax legislation provides that the FII shall distribute 95% of its earnings to its quotaholders every six months based on financial statements determined on 30 June and 31 December of each year. The distribution of profits is also subject to WHT at a 20% tax rate.

Non-resident quotaholders that do not invest in the fund, according to the terms of Resolution 4,373, including investors domiciled in low-tax jurisdictions, are subject to the same taxation as Brazilian residents, as explained above.

Regarding nonresident quotaholders not domiciled in low-tax jurisdictions that invest in an FIDC or an FII, pursuant to the terms of Resolution 4,373, the redemption and/or amortisation of the fund quotas will be subject to a flat 15% WHT, regardless of whether the fund is considered a short- or long-term investment fund.

With respect to a future sale of the FIDC or FII quotas by a foreign investor under Resolution 4,373, the gain will be taxable at 15%. If the FIDC or FII quotas are sold on the Brazilian stock exchange, in view of a specific legal provision, there are reasonable arguments to support that the gain could benefit from 0% WHT.

CRI AND CRA

The earnings deriving from the receivables certificates CRI and CRA are subject to WHT. In the case of Brazilian individuals, the earnings of investment in CRIs and CRAs are exempt from WHT. This exemption also applies to nonresident individuals investing in Brazil under the terms of Resolution 4,373, even if they are domiciled in low-tax jurisdictions.

Brazilian legal entities are subject to WHT at regressive rates that may vary from 22.5% to 15%, depending on the maturity date of the investment. In this case, the WHT is only a payment in advance of the corporate income taxes ("IRPJ/CSLL"). Therefore, the revenue deriving from the CRI or CRA will be included in the determination of the legal entity's corporate income taxes' tax basis as a financial revenue and the WHT can be used to offset the due amount of IRPJ/CSLL.

Nonresident legal entities investing under the terms of Resolution 4,373 are subject to a 15% WHT. Nonresident quotaholders that do not invest in CRIs and CRAs under the terms of Resolution 4,373, including investors domiciled in low-tax jurisdictions, will be subject to the same WHT taxation as a Brazilian legal entity, according to regressive rates from 22.5% to 15%.

TAX ON FINANCIAL TRANSACTIONS ("IOF/EXCHANGE" AND "IOF/BONDS")

Pursuant to the Brazilian tax legislation, the conversion of Brazilian currency into foreign currency and vice versa (e.g., for the purposes of investing in the Brazilian financial and capital markets by means of the acquisition of investment fund quotas, CRIs and CRAs) is subject to the IOF/Exchange. The current applicable rate for most types of foreign exchange transactions is 0.38%. However, foreign exchange transactions related to the

inflow and outflow of funds in connection with investments carried out by a foreign investor in the Brazilian capital markets, including the repatriation of funds invested in the Brazilian capital and financial markets, are currently subject to the IOF/Exchange at a 0% rate.

As of March 19, 2022, a new decree amended the IOF regulations to reduce the rates of the IOF/Exchange.

The decree establishes an immediate reduction for some transactions, such as the reduction to zero of the rate applicable to short-term foreign loan operations. In other cases, however, the rate reduction is gradual over the next few years, as in the case of credit or debit card transactions. It is also foreseen that the IOF/Exchange rate will be zero for all transactions as of 2029.

In any event, the Brazilian government may increase the rate of the IOF/Exchange at any time up to 25% of the amount of the foreign exchange transaction. However, any increase in rates may only apply to transactions carried out after this increase and not retroactively.

Brazilian tax legislation also imposes the IOF/Bonds on transactions involving bonds and securities, including those carried out on a Brazilian stock exchange. The IOF/Bonds rate applicable to transactions involving CRIs and CRAs is currently zero, although the Brazilian government may increase such rate at any time up to 1.5% of the transaction amount per day, but only in respect of future transactions.

Accounting treatment

Brazilian companies that issue publicly traded securities (the Originator of the receivables or the securitisation vehicle) must prepare their consolidated financial statements according to International Accounting Standards Board (IASB) standards (Article 177(5) of Federal Law No. 6,404 dated 15 December 1976, and Instruction CVM No. 457 dated 13 July 2007).

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Chile

Legal framework

The main regulatory framework for securitisation in Chile is contained in Title XVIII of Law No. 18.045 ("**Securities Market Act**"), which establishes the rules applicable to the incorporation, registration and surveillance of the so-called *Sociedades Securitizadoras* ("**Securitisation Companies**"), which are special purpose corporations that must be registered with the Chilean Financial Markets Commission (FMC). The sole and exclusive business purpose of Securitisation Companies is the issuance and placement of asset-backed securities referred to in the law as "**Securitisation Bonds**."

The Securities Market Act also governs the securitisation process, including provisions concerning the issuance and registration of Securitisation Bonds; the creation of special purpose vehicles (SPVs) based on said issuances; and special rules governing the transfer of assets when these are made in connection with a securitisation.

It is important to note that Securitisation Companies are the only companies entitled to issue and conduct a public or private placement of Securitisation Bonds. These can be defined as debt securities where payment is backed up with a pool of assets that the Securities Market Act recognises as being held by a Securitisation Company in a *patrimonio separado* (which is patrimony (pool of assets and liabilities) or an SPV that is segregated from all other assets and liabilities held by the Securitisation Company that is acting as issuer).

Incorporating an SPV

The Securities Market Act provides that each issuance of Securitisation Bonds made by a Securitisation Company creates a *patrimonio separado*. The *patrimonio separado* is an SPV, but it is not a legal entity; it is just a segregated patrimony or fund that is managed by the Securitisation Company in accordance with the rules established under the Securities Market Act and under the indenture pursuant to which the Securitisation Bonds are issued. Based on these rules, the only third parties having recourse against the *patrimonio separado* are the bondholders and the service providers (which can only be those recognised as such in the Securities Market Act and in the corresponding indenture).

As established under the Securities Market Act, each issuance of Securitisation Bonds automatically creates a *patrimonio separado*, which is integrated with the assets and liabilities identified in the indenture.

Method of transfer

The Securities Market Act provides special rules in order to expedite the transfer of those assets that are being contributed to a *patrimonio separado* pursuant to an indenture governing the issuance of Securitisation Bonds.

Specifically, the Act provides the following:

a. A Securitisation Company can acquire, among others, "credits and rights that are evidenced in writing and that are of a transferrable nature."

b. For securitisation purposes, it is understood that the contracts, credits, rights or their corresponding titles (documents evidencing them) are of a transferrable nature even if they qualify generally as "nominative credits," in which case their acquisition or transfer can be made simply by endorsing the document on which the nominative credits are evidenced.

c. For securitisation purposes, the transfer or assignment of contracts, credits and rights will be enforceable against the corresponding debtors from the date on which the indenture is executed (provided the contracts, credits and rights have been identified in the indenture). As of that date, the obligors will not be able to invoke defences but for their personal defences against the assignee (this is the *patrimonio separado*).

We note that the above implies an important change to the general rule applicable under Chilean law for purposes of assigning nominative credits, which requires either a notice to the debtor, or its acceptance, in order for the transfer or assignment of the nominative credit to be valid and enforceable against it.

Over-collateralisation/yield

Internal credit enhancements have played an essential role in achieving high credit ratings on the securities issued. While over-collateralisation has been used most in the past, a senior/subordinated structure with several tranches of bonds has been the primary tool in obtaining such ratings, while spread accounts and mandatory prepayment obligations have also played an important role.

External credit enhancement has been common in future flow securitisations, which have been guaranteed with mortgages over real estate or by insurance providers. Forward and swap arrangements have been used to support issuances backed with Yankee bonds.

Tax exemptions

The Securities Market Act provides the following tax exemptions in connection with the securitisation industry:

a. The issuance of Securitisation Bonds is exempted from stamp tax, in a proportion equivalent to the proportion that those assets contributed to the *patrimonio separado*, which paid stamp tax when issued or were expressly exempted from paying stamp tax when issued, and represents the total assets contributed to the *patrimonio separado*.

b. The difference between the purchase price and the face value of a credit being acquired for securitisation purposes will not be considered as taxable income. Only the difference (existing at the time) between the purchase price of the credits (duly adjusted) and the amount received upon their collection or sale (if applicable) is considered as taxable income.

c. All fees and other compensation paid by a Securitisation Company to a third party in connection with the management and custody of the underlying assets of a securitisation are exempted from VAT.

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China

Legal framework

The Chinese securitisation market began to emerge and develop during the 1990s. After the first residential mortgage-backed securitisation (RMBS) in 1992, securitisation transactions were mainly conducted through offshore structures.

This was mainly to evade legal barriers such as currency control and the lack of a specific legislative framework. It was only between 2005 and 2008 that the Chinese securitisation market began to develop significantly.

In 2003, the China Securities Regulatory Commission (CSRC) first launched the initiative of special asset management (SAM) with the legal basis being Interim Measures on the Administration of Customer Asset Management Business by Securities Companies ("**Interim Measures**"). In 2005, a ministerial-level working group led by the People's Bank of China (PBOC) and the China Banking Regulatory Commission (CBRC) — which has now merged with the China Insurance Regulatory Commission and formed the China Banking Insurance Regulatory Commission (CBIRC) — issued a set of rules that formed a pilot legal framework for securitisation in China, with the most important rule being the Administration of Pilot Projects for Securitisation of Credit Assets (jointly issued by the PBOC and the CBRC), with other rules addressing tax, accounting issues, etc. (together referred to as "**Pilot Regulations**"). The Interim Measures and the Pilot Regulations initiated the so-called pilot securitisation programme. The Interim Measures allowed Chinese securities companies to securitise corporate assets, whereas the Pilot Regulations allowed Chinese banks and other financial institutions to securitise their loan receivables.

At the end of 2008, due to concerns that securitisation transactions would threaten their financial stability (as a result of the amount of assets taken off-balance sheet), the PBOC, the CBRC and the CSRC suspended the approval for the transactions under the pilot securitisation programme. Following this, Chinese financial institutions and securities companies were not permitted to securitise credit and corporate assets. The Chinese domestic securitisation market was relaunched in 2012 after a four-year suspension, with the issuance of the Notice on Relevant Matters Concerning Further Expanding the Pilot Securitisation of Credit Assets ("**Credit Assets Regulation**"), jointly issued by the PBOC, the CBRC and the Ministry of Finance of the People's Republic of China. The Credit Assets Regulation expanded the scope of assets eligible for securitisation and permitted investors, and sets out further requirements in relation to risk self-retention and credit rating, etc.

In 2015, the PBOC issued a public announcement on the implementation of a recordal regime for credit asset securitisation, pursuant to which the issuer and the Originator may apply for a "shelf" registration with the PBOC, and obtain a quota for the issuance of asset-backed securities within a prescribed validity period. The issuer and the Originator may issue asset-backed securities in instalments within the quota during the validity period. Prior to each issuance, the relevant transaction and offering documents should be filed with the PBOC for recordal.

Thereafter, with authorisation from the PBOC, the National Association of Financial Market Institutional Investors (NAFMII), a self-disciplinary organisation of institutional financial institutions in China, published a series of information disclosure guidelines in respect of the securitisation of different types of underlying assets, including auto loans, mortgage loans, consumption loans, non-performing loans, micro and small enterprises loans and shantytowns transformation project loans respectively. In late 2016, NAFMII reformed the rules for the asset-backed notes (ABN), previously an asset-backed debt financing instrument for non-financial institutions introduced by NAFMII in 2012, and transformed ABN into a new type of securitisation instrument in the Interbank Bond Market. [1]

The CSRC followed suit and promoted the securitisation market for corporate assets by issuing the Provisions on the Administration of Securities Companies' Asset Securitisation Business ("**Securities Companies' Assets Regulation**") in 2013. The Securities Companies' Assets Regulation sets guidance for asset-backed securities backed by corporate assets. In 2014, the CSRC issued the Provisions on the Administration of Securitisation Business of Securities Company and Subsidiary of Fund Management Company ("**Securitisation Business Administration Provisions**") and a set of rules on information disclosure and due diligence. These rules replaced the Securities Companies' Assets Regulation and further streamlined the securitisation process under the SAM structure (see below). Since then, SAM securitisation no longer requires approval from the CSRC, but transactions will be recorded with the Asset Management Association of China (AMAC), a self-disciplinary organisation for the investment fund industry in China, after the issuance.

The asset-backed securities under the SAM structure are traded on the Shanghai Stock Exchange or the Shenzhen Stock Exchange, subject to a non-objection letter from the relevant exchange. The Shanghai Stock Exchange and the Shenzhen Stock Exchange issued their general guidelines on the asset-backed securitisation business in 2014, followed by a series of specific rules on the listing of asset-backed securities and information disclosure in respect of different kinds of underlying assets, such as receivables, financial leasing assets, infrastructure assets and public-private-partnership (PPP) assets. These rules provide for a comprehensive risk-management system for the asset-backed securitisation business.

Tax

STAMP TAX

Currently, parties to an assets transfer agreement will be subject to stamp tax, and no stamp tax will be levied on the other various transaction documents entered into by the parties to a securitisation transaction, including the trust agreement, servicing agreement, account agreement, agency agreement, etc. The sale of notes from the issuer or the sale of notes between investors is also not subject to any stamp tax.

1 In addition to the recordal with the PBOC, for each transaction the Originator and the trustee would also need to effect a credit asset securitisation information registration with China Credit Assets Registration & Exchange Co., Ltd. (also known as the Yindeng Centre).

VALUE ADDED TAX (VAT)

Although it remains unclear under the VAT Regulation, tax advisers tend to take the view that the transfer of assets from the Originator to the trust company should not be subject to VAT.

From 1 January 2018, the trustee or SAM Manager (as defined below) will pay VAT at the rate of 3% on its taxable activities during the operation of the SPT (as defined below) or the SAM (as defined below).

All of the interest derived from the underlying credit assets, any service fee received by the servicer, and any remuneration received by the issuer, the account bank, the paying agent, the custodian or other intermediaries that provide services to the securitisation transaction will be subject to VAT at the rate of 6%, which is slightly higher than the rate of business tax (5%) before the VAT reform.

For investors, the trading of asset-backed securities will be subject to VAT at the rate of 6%, which is levied on the gap between the original purchase price and the selling price.

ENTERPRISE INCOME TAX

The originator's profits arising from the transfer of the assets to the trust company are subject to enterprise income tax. If losses are incurred, the amount may be deducted in accordance with enterprise income tax policies and regulations. In the event the originator repurchases the transferred assets, tax authorities will adjust the enterprise income tax if such repurchase is not conducted on an arm's length basis.

So long as the trust company has distributed all profits generated from the securitised assets to the investors during the current financial year, no enterprise income tax is currently levied at the trust level. However, such non-taxed earnings received by institutional investors are taxable income at the investor level. If the profits have not been distributed by the trust company to the investors during the current financial year, such profits are subject to enterprise income tax. When such taxed profits are distributed to the institutional investors later, the institutional investors are not subject to enterprise income tax.

Any service fee received by the servicer and any remuneration received by the trustee, the account bank, the custodian or other intermediaries that provide services to the securitisation transaction will be subject to enterprise income tax.

Enterprise income tax will be levied on the investors who have earned profits from the trading of the securitisation products based on the relevant enterprise income tax rate. If trading losses are incurred, the relevant amount may be deducted in accordance with enterprise income tax policies and regulations.

Any income of the investors arising from the liquidation of the trust company is subject to enterprise income tax and any liquidation losses may be deducted in accordance with enterprise income tax policies and regulations.

Other Information

PARALLEL SECURITISATION MARKETS

Depending on the type of institution and regulatory authority, there are generally two main types of securitisation structures:

- A securitisation with a special purpose trust (SPT) structure. The securitised products are issued and traded on the Interbank Bond Market. This type of structure employs a trust company, which is approved by the CBIRC with a finance licence granted by the CBIRC pursuant to the Administrative Measures for Trust Companies, as the vehicle that will act as trustee under a trust agreement for the credit assets originated by a financial institution. In accordance with the Pilot Regulations, the SPT issues bonds backed by credit assets entrusted by banks and other eligible financial institutions. Most ABNs by non-financial institutions also adopt the SPT structure; however, they are subject to a different set of rules issued by the PBOC and NAFMII. Investors are qualified institutional investors for the Interbank Bond Market, a market organised and regulated by the PBOC.
- A securitisation with a SAM structure under which the securitised products are traded on the regulated stock exchanges. This type of structure engages a securities company or a subsidiary of a securities investment fund management company ("**SAM Manager**"), which will be approved by the CSRC to conduct customer asset management business, as the SAM Manager that will act as asset manager under a specific asset management plan for receivables originated by corporations as the underlying assets. The SAM Manager issues beneficiary certificates backed by the relevant underlying assets, and those beneficiary certificates may be traded on the Shanghai Stock Exchange and the Shenzhen Stock Exchange. Investors are qualified institutional investors for these two stock exchanges. Pursuant to the Chinese Securities Investment Fund Law and Securitisation Business Administration Provisions, the SAM structure is supervised and approved by the CSRC.

True sale issues

TRUE SALE IN SPT STRUCTURE

Under the Pilot Regulations, credit assets transferred to the trustee are trust property, which are independent of property of the originator, trustee, loan servicer, fund depository institution, securities register and fund custodian institution or any other transaction party. Further to this rule, the property and benefits generated by a trustee, loan servicer, fund depository institution and other institutions providing services for securitisation transactions, from managing or operating the special purpose trust or under other circumstances, will fall under the trust property. If originators, trustees, loan service providers, fund depository institutions, securities registration, custodian agencies and other institutions providing services for securitised transactions become insolvent or bankrupt, trust property will be excluded from the insolvency estate of these parties.

TRUE SALE IN SAM STRUCTURE

Transactions using the SAM structure may be structured as either off-balance sheet or on-balance sheet transactions. Assets related to a specific asset management plan are segregated from the assets associated with other specific asset management plans. Investors in a specific asset management plan only have recourse to the underlying assets relating to that particular asset management plan, and not to all of the assets of the Originator or the SAM Manager, such as other underlying assets or receivables. A number of debates have arisen in respect of whether assets transferred to a specific asset management plan should be regarded as a sale from the perspective of Chinese contract law under this structure.

Latest developments

SUCCESSFUL LAUNCH OF FIRST BATCH OF PUBLICLY TRADED REAL ESTATE INVESTMENT TRUSTS (REITS) IN INFRASTRUCTURE SECTOR

In April 2020, China initiated the pilot scheme on publicly traded infrastructure REITs following the joint issuance by the CSRC and the National Development and Reform Commission (NDRC) of the Notice of the Work Related to Promoting the Pilot Scheme of Real Estate Investment Trusts (REITs) in the Infrastructure Sector. After two year's groundwork, the first batch of twelve publicly traded infrastructure REITs were established and listed between June 2021 and April 2022. The first batch of pilot infrastructure projects includes traffic facilities (such as warehouses, toll ways and ports), municipal facilities (such as water supply and waste disposal) and industrial parks. The total amount raised under these REITs is approximately RMB 45.802 billion, aided by the strong backing of institutional investors and individual investors.

Following the successful listing of the first batch of pilot projects, the pilot scheme will soon be expanded in terms of geographic and industry scope, according to the Further Notice of the Work Related to the Pilot Scheme of Real Estate Investment Trusts (REITs) in the Infrastructure Sector issued by the NDRC in July 2021. In terms of geographic scope, all qualified projects nationwide would be eligible for the pilot REITs scheme. Further, in terms of industry scope, the pilot scheme has now been extended to energy infrastructure, new types of infrastructure and government-subsidised rental housing and other infrastructure sectors (such as natural and cultural heritage and 5A scenic areas). However, hotels, shopping malls, office buildings and other commercial real estate projects are still not covered under the pilot scheme.

So far, no preferential tax policy for publicly traded REITs has been issued.

REVERSE SUPPLY CHAIN ASSET SECURITISATION HELPS TO RESOLVE LIQUIDITY ISSUE OF SMALL AND MEDIUM-SIZED ENTERPRISES

A traditional enterprise asset securitisation transaction for supply chain account receivables is typically led by a core creditor. The core creditor would select certain claims of supply chain account receivables it has against certain debtors to form the asset pool, and issue the securitisation project based on its financing demand. In recent years, asset securitisation projects based on claims of account receivables led by core debtors have been emerging in the market. Such transactions are usually referred to as "reverse supply chain asset securitisation" projects.

In a reverse supply chain asset securitisation project, the core debtor, based on its demand to pay for goods or services to suppliers, provides the option of "payment by asset securitisation" as one of the fund settlement methods to its suppliers. If the supplier chooses "payment by asset securitisation," a factoring service provider cooperating with the core debtor will pay cash to the supplier and acquire the relevant claim of account receivables against the core debtor. The factoring service provider would then establish an asset pool based on the claims of account receivables it has obtained against the same core debtor and issue the asset securitisation product.

Under this model, "payment by asset securitisation" becomes a payment method for the core debtor to discharge payment obligations toward its suppliers. Once the supplier selects this payment method, it may immediately obtain the consideration for assignment of claims of account receivables from the factoring service provider. This model would effectively address the demands of small and medium-sized enterprises for efficient collection and liquidity.

TIGHTENED REGULATION OVER THE SECURITISATION OF MICROCREDIT ASSETS

Microcredit assets have long been a major type of underlying asset in China's securitisation market. Recently, in response to certain national policies on reducing the financing costs of small and micro-sized enterprises, curbing excessive spending and indebtedness of individuals and protecting personal privacy, regulatory authorities including the PBOC and CBIRC have issued several regulations concerning microcredit business, including regulations on online loans by commercial banks, internet consumer loans for university students, etc. These regulations broadly cover financing cost control, customer type restrictions, disclosure of credit information, credit business operation specification and certain other aspects. Stock exchanges would also be focusing on such issues when reviewing the applications for securitisation transactions of the relevant types in accordance with the above-mentioned policies and regulations.

Table: Comparison of Legal Framework

	Credit asset Securitisation	Asset-backed notes	SAM securitisation
Regulator(s)	**PBOC & CBIRC**	**NAFMII**	**CSRC**
Main regulations	PRC Civil Code (*民法典*) PRC Trust Law (*信托法*) Administrative Rules for Pilot Securitisations of Credit Assets (effective as of 20 April 2005) (*信贷资产证券化试点管理办法*) Measures for the Supervision and Administration of Pilot Projects of Credit Asset Securitisation of Financial Institutions (effective as of 1 December 2005) (*金融机构信贷资产证券化监督管理办法*) Notice on Relevant Tax Policies Related to Credit Asset Securitisation (effective as of 20 February 2006) (*财政部、国家税务总局关于信贷资产证券化有关税收政策问题的通知*) Notice on Issues concerning the Alteration of Registration of Mortgage Involved in Securitisation of Personal Housing Mortgage Loans (for Trial Implementation) (effective as of 16 May 2005) (*建设部关于个人住房抵押贷款证券化涉及的抵押权 变更登记有关问题的试行通知*) Rules on Disclosure of Information Regarding Asset-backed Securities (effective as of 13 June 2005) (*资产支持证券信息披露规则*) Notice on Relevant Matters Concerning Further Expanding the Pilot Securitisation of Credit Assets (effective as of 17 May 2012) (*关于进一步扩大信贷资产证券化试点有关事项的通知*)	PRC Civil Code (*民法典*) PRC Trust Law (*信托法*) Administrative Measures for Debt Financing Instruments of Non-financial Enterprises in Interbank Bond Market (effective as of 15 April 2008) (*银行间债券市场非金融企业债务融资工具管理办法*) Guidelines on Asset Backed Notes of Non-financial Enterprises (effective as of 9 October 2017) (*非金融企业资产支持票据指引*) System of Registration Documents and Forms of Public Offerings of Asset Backed Notes of Non-financial Enterprises (effective as of 9 October 2017) (*非金融企业资产支持票据公开发行注册文件表格体系*) Rules on the Information Disclosure for Debt Financing Instruments of Non-financial Enterprises in Interbank Bond Market (effective as of 1 May 2021) (*银行间债券市场非金融企业债务融资工具信息披露规则*) Rules for the Noteholders' Meetings of Debt Financing Instruments of Non-financial Enterprises in the Interbank Bond Market (effective as of 27 December 2019) (*银行间债券市场非金融企业债务融资工具持有人会议规程*)	PRC Civil Code (*民法典*) PRC Securities Law (*证券法*) PRC Securities Investment Fund Law (证券投资基金法) Provisional Measures on Supervision and Administration of Privately-offered Investment Funds (effective as of 21 August 2014) (*私募投资基金监督管理暂行办法*) Provisions on the Administration of Securitisation Business of Securities Company and Subsidiary of Fund Management Company (effective as of 19 November 2014) (*证券公司及基金管理公司子公司资产证券化业务管理规定*) Guidelines on the Information Disclosure for Securitisation Business of Securities Company and Subsidiary of Fund Management Company (effective as of 19 November 2014) (*证券公司及基金管理公司子公司资产证券化业务信息披露指引*) Guidelines on the Due Diligence for Securitisation Business of Securities Company and Subsidiary of Fund Management Company (effective as of 19 November 2014) (*证券公司及基金管理公司子公司资产证券化业务尽职调查工作指引*) Guidelines on the Asset Back Securitisation Business in Shanghai Stock Exchange (effective as of 26 November 2014) (*上海证券交易所资产证券化业务指引*)

	Credit asset Securitisation	Asset-backed notes	SAM securitisation
Regulator(s)	**PBOC & CBIRC**	**NAFMII**	**CSRC**
	Public Announcement of PBOC [2015] No. 7 (effective as of 26 March 2015) (*中国人民银行公告[2015]第7号*) Circular on the Information Registration for Credit Asset Securitisation of Banking Financial Institutions (*关于银行业金融机构信贷资产证券化信息登记有关事项的通知*) Rules on the Information Registration for Credit Asset Securitisation (Trial) (*信贷资产证券化信息登记业务规则（试行）*) Guidelines on the Information Disclosure for Asset Backed Securities Backed by Personal Auto Loans, Personal House Mortgage Loans, Non-Performing Loans, Personal Consumption Loans, Micro and Small Enterprises Loans, Shantytowns Transformation Project Loans		Guidelines on the Asset Back Securitisation Business in Shenzhen Stock Exchange (effective as of 25 November 2014) (*深圳证券交易所资产证券化业务指引*) Guidance on the Listing Rules and Information Disclosure for Asset Backed Securities backed by different kinds of assets issued by Shanghai Stock Exchange and Shenzhen Stock Exchange (relating to receivables, financial leasing assets, infrastructure assets and PPP assets) Detailed Working Rules on the Due Diligence Investigation into the Asset Securitisation Business of Public-Private-Partnership (PPP) Projects, Accounts Receivables of Enterprises and Creditor's Rights of Financing Lease by AMAC
Legal structure	SPT (trust relationship) Asset-backed securities	SPT (trust relationship) or other structure recognised by NAFMII	SAM (entrustment relationship) SAM beneficial certificates
Eligible Originators	Financial institutions	Non-financial institutions	Not specified
Issuer/asset manager	Trust companies approved by CBIRC	Trust companies approved by CBIRC, the Originator or other entity recognised by NAFMII	Securities companies and subsidiaries of securities investment fund management companies regulated by CSRC, Trust companies approved by CSRC
Eligible assets	Credit assets of financial institutions	Not specified	Not specified
Trading platform	Interbank Bond Market	Interbank Bond Market	Shanghai Stock Exchange and Shenzhen Stock Exchange
Registrar	China Central Depository & Clearing Co. Ltd	Shanghai Clearing House	China Securities Depository and Clearing Corporation Limited

CHINA

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Colombia

Legal framework

Colombia has a specific regulatory regime concerning the securitisation process. The legal framework is mainly found in the financial sector compilation regulation, Decree 2555/2010. This regulation addresses different securitisation methods, specialised securitisation entities and underlying assets. Securitisation of residential mortgages is regulated by Law 546/1999, which contains specific provisions on entities that may originate from these assets, as well as rules regarding securitisation companies in relation to mortgage assets.

Transaction documents relating to securitisation are governed by the Commercial Code, which contains the rules for the trust structures often used for special purpose vehicles (SPVs), as well as other ancillary contracts entered into with the securities depositary and the stock exchange.

In addition, civil law rules govern the transfer of underlying assets to the SPV, as well as true sale issues, which are discussed below.

The types of securities issued may adopt one of the following forms:

a. Equity-type securities: these grant the investor a specific share of the underlying pool of assets. The investor will not receive a fixed cash flow, but will partake in the gain or loss produced by the securitised assets.
b. Debt-type securities: these grant investors the right to receive principal and interest under the predefined terms. The assets transferred to the SPV serve as collateral for the indebtedness transaction.
c. Mixed securities: these contain the rights conferred by equity-type securities and may be subject to a specific amortisation schedule or may grant a minimum rate of return.

The securities market is divided between the main market and the institutional investors market (*segundo mercado*, which is comparable to a type of alternative investments market or AIM). The main differences between these two are: under the AIM, the issuer will negotiate the terms of the offering directly with qualified investors during the offering preparation; only qualified investors may purchase securities; there is no mandatory credit rating; and the AIM issuance process is simpler and faster. Finally, an AIM issuance requires less information to be revealed to the market, resulting in a considerably shorter prospectus.

Incorporating an SPV

Colombian regulation allows for different mechanisms, which serve as SPVs. Firstly, an irrevocable commercial trust may be set up. Commercial trusts do not give rise to a legal entity, but are a contractual structure whereby certain assets are transferred to a segregated estate in order to serve a specific purpose determined by the contracting parties. Under this structure, a regulated entity administers the trust. The trust itself acts as the issuer SPV. Whenever the Originator is a public entity, the trust being set up as an SPV will be subject to public procurement rules.

Secondly, an investment fund may be set up to act as the issuing SPV. Investment funds have a similar structure to those of commercial trusts. They do not give rise to legal personality, and they are also managed by regulated entities. These are mainly pooled funds that are administered by an appointed manager with the purpose of generating income for the investors.

Thirdly, securitisation may be carried out by specialised securitisation corporations that are set up for such purpose. The only such corporation currently set up is the Titularizadora Colombiana, which is mainly owned by local banks. This corporation mainly purchases assets originating from local banks (e.g., housing mortgages) and securitises these assets.

Method of transfer

The transfer method will vary depending on the underlying asset. The most common securitised asset consists of a set of pooled credit rights. The transfer of such assets to the SPV is achieved via assignment of such rights under the rules of the Civil Code, which is considered by some to be somewhat dated and formalistic on this matter. The procedure mandates that the assignor, who is the owner of record of such credit rights (the Originator) and assignee (the issuing SPV) enter into a contract whereby title to the assigned assets must actually be delivered by the assignor to assignee.

Although a valid assignment may be made without notice to the debtors or payers of such credit rights, such notification is required for the assignment to be enforceable against the debtors and third parties generally. Notification is usually explicit or formal, or may be implied by the acts of acceptance displayed by the debtor. In an explicit scenario, notification is achieved by an exhibit of the assignment title to the debtor or payer. This is usually the preferred mechanism in securitisations. However, acceptance may also be evidenced by conclusive means, such as the actual payment of the debt to the SPV. Once the underlying debtors have been notified of the assignment, they may only discharge their obligations by paying these to the issuing SPV.

Whenever the credit rights to be securitised are contained in promissory notes or other negotiable instruments, the method of transfer will be indorsement, as governed by the Commercial Code. Other underlying assets may result from the actual transfer of real estate properties to the SPV, in which case different formalities will apply. For example, whenever the securitised assets are to be backed by real estate, formalities on the transfer of such properties to the SPV will apply.

Over-collateralisation/yield

Over-collateralisation and credit enhancement may include both internal and external mechanisms. So called internal credit enhancement mechanisms are most common in underlying assets that generate cash flows. Such internal credit enhancement mechanisms may include, among others, structural subordination of the issuance, excess cash flows generated, replacement of defaulted assets and liquidity credit lines. External credit enhancement mechanisms include guarantee by regulated entities and insurance companies, cash collateral and collateral trust arrangements.

There are a few particularities depending on the type of underlying asset involved. These include:

a. **Loan portfolios or other similar cash-flow-generating assets:** over-collateralisation must reach 1.5 times the portfolio's default index. Such default index must be calculated following the method contained in the regulation. When the securitisation is directed at the AIM, no over-collateralisation is required.
b. **Real estate securitisation:** the value of the securitisation shall not exceed 110% of the value of the real estate property.
c. **Construction projects securitisation:** the participation rights of the project's Originators will be subordinated to those securities offered to market investors. Alternatively, any of the external credit enhancement mechanisms explained for the loan portfolios may be implemented.
d. **Infrastructure and public utilities securitisation:** The expected cash flow returns may be backed by any of the methods discussed in other types of securitisation.

Tax

For tax purposes, trusts are deemed flow-through entities. This means that trusts are transparent vehicles and consequently, they are not considered to be income tax taxpayers.

The transparency principle, defined in Article 102 of the Colombian Tax Code (CTC), states that the beneficiary of the trust should include in their correspondent income tax return the income, costs and expenses incurred/accrued at the trust level in the same taxable period of the accrual with the same tax conditions, such as source, nature, deductibility and concept, as if the taxable activity had been directly carried out by them.

Article 102-1 of the CTC provides specific rules applicable to securitisation processes, as follows:

a. The Originator is subject to income tax on all the amounts realised or recognised in their favour during the corresponding fiscal period provided these exceed the cost of the assets, titles or rights of their property assigned in the securitisation process.
b. In that sense, the income that will be taxable for the Originator is the difference between (i) the value paid by investors to acquire the financial instruments resulting from the securitisation and (ii) the cost of the underlying assets.
c. The holders of the securities are subject to income tax on the income generated by the titles and on the profits obtained from the titles' sale.
d. Income derived from titles including credit rights are treated as interest for tax purposes; those derived from participation titles will have the tax treatment applicable according to their nature. In mixed titles, the tax treatment will depend on the revenues obtained for each concept.
e. When assets or rights are acquired through a securitisation process, their cost will be the sum of the costs of the respective titles.

On the other hand, Article 271-1 of the CTC states that the beneficiary of the trust should report the assets and liabilities of the trust as if these had been held directly by the beneficiary. This means that for tax purposes, the underlying assets are still considered as part of the taxpayer's net worth despite the fact that, from a legal perspective, they were transferred to the trust.

Hence, the trust's rights and the trust's underlying assets share the same tax characteristics. Article 102 of the CTC establishes that the trust rights received by the beneficiary of the trust have the same tax basis and tax conditions that the contributed assets had before being contributed to the trust.

Accounting treatment

Under Colombian law, there are no specific rules setting out the accounting treatment of securitisation transactions. Accordingly, rules set forth in the International Financial Reporting Standards (IFRS) must be observed in order to determine the assets and liabilities recognition and to consider whether the SPV financial information requires consolidation by the parties involved in the securitisation transaction.

Regulatory concerns

Securitisation in Colombia is considered to be somewhat limited in terms of structures and underlying assets. Currently, the market is heavily concentrated in residential mortgage assets, which are in turn purchased mainly by the same originating banks. The central government set up an expert consulting group to provide recommendations to deepen the local securities market. In December 2019, the group published its final report, noting that there should be incentives to broaden the scope of securitised

COLOMBIA

assets. Furthermore, the study notes that several public entities currently have material assets sitting on their balance sheets, which could well be securitised in order to provide liquidity for such entities and to deepen the securities market while providing attractive alternatives for investors.

During the first quarter of 2021, the central government presented a Bill to Congress on the overhaul of certain aspects of the financial and securities markets. Such proposal does not contain any reference to securitisation methods or structures. However, it is anticipated in the market that there will be some degree of regulatory intervention to broaden the scope of types of securitised assets.

Other recommendations contained in the study include the need for the state to set up an entity to provide a guarantee to such public securitised assets. Such guarantee would be particularly useful in relation to securitisation of alternative assets, such as those derived from education, the health system, agriculture business and infrastructure.

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Czech Republic

Background

Raising funds by means of asset securitisation transactions still remains to be a relatively new concept in the Czech Republic. The first successful Czech-based transaction in the form of a securitisation was finalised in 2003 when Home Credit Finance A.S. (a non-banking provider of consumer credits) securitised its portfolio of credit card receivables. A further securitisation transaction was completed in 2006 when Raiffeisenbank A.S. together with Raiffeisen Bank Polska S.A. securitised their portfolio of bank loans. However, it is worth noting that certain industries present numerous opportunities for this method of off-balance sheet financing, and potential investors have also shown interest in financing them. After the slowdown following the Global Financial Crisis (GFC), the conditions for household lending became much more favourable for debtors, since the financial and real estate sector was substantially affected by the GFC. However, the Czech economy has fully recovered from the GFC and there still appears to be great potential for further growth. Accordingly, securitisation appears to have become attractive in the Czech Republic, particularly in the areas of consumer credit, credit cards and business loans. With regard to mortgage loans, it should be noted that in the Czech Republic there is an established practice of issuing mortgage-backed bonds, which is effectively a method by which banks can fund their mortgage loans portfolios in a relatively inexpensive and tested manner. Mortgage bonds are attractive but are clearly limited to specified classes of loans.

Legal framework

Currently, there is no specific securitisation legislation in the Czech Republic. General provisions of Czech law will therefore apply to the respective legal relationships within a securitisation and legal uncertainty can be eliminated through sophisticated structuring.

Incorporating a special purpose vehicle (SPV)

The SPV is an entity established for the purposes of a securitisation transaction. Its activity is limited to acts essential for the completion of the securitisation. The SPV should be "bankruptcy remote."

In order to create an independent ownership structure for the SPV, the form of a trust fund (*svěřenský fond*) can be used. This allows for SPV structuring similar to trusts recognised in common law systems. If the form of a trust fund is not used, the SPV should be created and controlled by independent third parties to ensure it is bankruptcy remote.

A Czech-based SPV does not need to be licenced or otherwise qualified in order to perform its role in the securitisation transaction. In particular, it need not be a bank or a financial institution under Czech banking regulations.

Method of transfer

The most common method of transferring receivables governed by Czech law is by way of an assignment. This is achieved by an agreement between the assignor (**Originator**) and the special purpose vehicle (SPV) as the assignee. Generally, an effective assignment involves a true transfer of the underlying receivables from the Originator to the SPV along with the necessary documentation relating to the receivable, which is necessary to enforce the receivable against the debtor.

The debtor's consent is not required in order to assign receivables under Czech law; however, this rule can be overridden by contract and it is therefore necessary to review the underlying documentation. If the debtors are not notified by the Originator that an assignment has taken place, or the assignment is not proved to the debtors by the SPV, the debtors may validly discharge their obligations by paying, or entering a settlement with the Originator rather than paying the SPV. The assignment would be binding only on the parties to the assignment agreement.

As mentioned above, in order to make an assignment effective against the debtor, the assignment must either be notified to the debtor by the Originator (or a person acting on behalf of the Originator) or by the SPV if the SPV can provide evidence of the assignment to the debtor. In the latter case, the debtors can request a copy of the assignment agreement. In both cases, notice should, but does not have to, be given in the form of a written statement delivered to the individual debtors in relation to each receivable. There are, however, no mandatory rules governing the notification of assignment to the debtors. Notice is effective when it is received by the debtor. When the receivable is assigned to multiple subjects, the first assignment that was notified to the debtor is effective.

It should be noted that, even after the effective assignment occurs, the debtors are entitled to set off against the receivables transferred to the SPV the sums owed to them by the Originator as well as the sums that were not due at the time of the assignment. However, the debtors must notify the SPV of such set-off rights against the Originator without undue delay after being notified of the assignment. After the debtors receive the notice of assignment, the SPV will be entitled to receive payments (payment to the Originator will not release the debtor from its obligation in relation to the receivable) and ultimately enforce outstanding receivables on its own account. Furthermore, the SPV may, under specified conditions, instruct the Originator to enforce the receivables in the Originator's name and on the account of the SPV. If the receivables are enforced by the Originator, the debtor is entitled to set off their own rights against the obligations to the Originator but not against obligations to the SPV, even after the debtors are notified of the assignment.

In practice, one can limit the above risk by prohibiting set-off in the underlying documentation. In this regard, it should be noted that enforceability of such a clause is an issue that is not provided for by a specific provision of Czech law, but by general legal practice. In addition, a decision of the Czech Supreme Court confirmed that a clause prohibiting set-off is valid. Despite the fact that, unlike in common law systems, Czech court decisions do not set a precedent that is binding in other cases, Czech courts will usually follow decisions made by the Supreme Court.

It should also be noted that without the consent of the debtor, only the Originator's rights (not obligations) may be assigned. Therefore, any obligations of the Originator arising from the underlying documentation will remain with the Originator. This inevitably raises commercial issues, which can be solved (for example) by using a back-to-back contractual arrangement between the Originator and the SPV. However, after the enactment of the Czech Civil Code in 2014, the concept of assignment of the whole contract was introduced. This allows the assignment of both rights and obligations under the contract. Such assignment becomes effective only after the consent of the other party to the contract (the non-assigning party) has been given. The non-assigning party may express its consent in advance. In such case, the assignment becomes effective upon its communication to the non-assigning party by the assignor or upon the assignment being proved to it by the assignee (i.e., the same system of notification as in the case of receivables assignment). However, it

should be noted that the non-assigning party may disagree with the fact that the assignor is freed from its obligations toward the non-assigning party upon such assignment. Therefore, if the non-assigning party expresses such disagreement, the assignor will still be obliged to perform its obligations under the contract if the assignee does not fulfil them.

Over-collateralization/yield

Over-collateralisation and credit enhancement may include both internal and external mechanisms. So-called internal credit enhancement mechanisms are most common in underlying assets that generate cash flows. Such internal credit enhancement mechanisms may include, among others,structural subordination of the issuance, excess cash flows generated, replacement of defaulted assets and liquidity credit lines. External credit enhancement mechanisms include guarantee by regulated entities and insurance companies, cash collateral and collateral trust arrangements.

There are a few particularities depending on the type of underlying asset involved. These include:

a. **Loan portfolios or other similar cash-flow-generating assets:** over-collateralisation must reach 1.5 times the portfolio's default index. Such default index must be calculated following the method contained in the regulation. When the securitisation is directed at the AIM, no overcollateralisation is required.
b. **Real estate securitisation:** the value of the securitisation shall not exceed 110% of the value of the real estate property.
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d. **Infrastructure and public utilities securitisation.** The expected cash flow returns may be backed by any of the methods discussed in other types of securitisation.

Tax

CORPORATE INCOME TAX

Generally, the remuneration received by the seller of receivables (who is a Czech tax resident or who has a permanents establishment in the Czech Republic) within securitisation arrangements is treated as taxable income which can be reduced by tax deductible costs (subject to certain limitations). Currently, 19% corporate income tax is applicable in the Czech Republic.

The 19% corporate income tax rate also applies to gains realized by the Czech SPV (unless the SPV qualifies for an investment fund). When the SPV is located outside the Czech Republic, it would normally not be subject to the Czech corporate income tax provided that, in particular, it is incorporated, managed and administered outside the Czech Republic, it does not have a permanent establishment in the Czech Republic, the significant part of its assets is located outside the Czech Republic and there is no agent acting on its behalf in the Czech Republic.

WITHHOLDING TAX

There are generally no withholding or other taxes imposed on payments made by Czech debtors with regard to claims that are assigned in the course of a securitisation transaction. For other countries, the applicable double tax treaties need to be considered.

Withholding tax of 15% is applicable on interests received by investors under the general rules of the Czech Income Taxes Act. The 15% withholding tax rate may be modified by the particular double tax treaty; withholding tax exemption is also available if certain criteria are met. If the interest payments were paid to a recipient from a country with which there is no double tax treaty or treaty for exchange of tax information concluded, the withholding tax of 35% would apply.

STAMP DUTY

There is no stamp duty applicable on the assignments (such as the sale of receivables in the context of a securitisation transaction).

Regulatory concerns

DATA PROTECTION

Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR)) and the ensuing Czech-delegated Data Processing Act deal only with individuals; therefore, if the debtors are companies, such data protection legislation will not apply. Information related to companies (e.g., their name, reputation, trade secrets, etc.) is protected by general provisions of the Czech Civil Code.

In the case of individuals, the assignment of receivables to the SPV represents a legitimate interest of the Originator as required by the GDPR and, as a result, the consent of the debtor to the transfer and processing of their personal data is not required. If an entity other than the assignee (the SPV) will service the receivables (typically the Originator), a data processing agreement pursuant to Article 28(3) of the GDPR needs to be concluded.

It should also be noted that the export of personal data outside the EU is limited by equivalent EU data protection legislation. Only those non-EU member states that received an equivalency decision of the European Commission pursuant to Article 45(1) of the GDPR are considered to have an equal level of data protection as an EU member state. Therefore, no specific requirements need to be fulfilled with regard to the transfer of personal data to those jurisdictions.

BANKING SECRECY

Banking secrecy laws apply to debtors whether they are individuals or companies. The regulation of banking secrecy under Czech law is quite strict, causing potential obstacles not only to structured securitisation transactions but also to other common bank business activities. Banks are not allowed to provide any information about their customers during the course of their business without the customers' consent. Outsourcing arrangements provide another example of potential problems with banking secrecy in terms of protecting the information by the outsourcing party in the same way as the bank.

However, the Czech National Bank has approved the sale of non-performing loans as compatible with banking secrecy. Moreover, the Czech Supreme Court has ruled several times that an agreement on the assignment of receivables that are due is not invalid just because the assignor is a bank and the assigned receivables are subject to banking secrecy. It is therefore advisable that banking secrecy issues in respect of the assignment of loans that are not due or not classified by the Czech National Bank as non-performing loans should be discussed with the Czech National Bank.

CONSUMER PROTECTION

The regulation of consumer rights in the Czech Republic is compliant with corresponding EU rules. As far as consumer receivables are concerned, a mere assignment of receivables is not subject to any specific consumer protection law requirements. However, legislation governing the fairness of contract terms may apply. The rate of interest (as well as default interest) that may be charged to debtors (consumers) can either be determined on a contractual basis or by way of reference to the relevant legislation; however, certain principles of good moral conduct (i.e., the restriction on usurious interest rates) must also be considered.

Securitisation of consumer receivables may trigger further consumer protection issues. In particular, consumer credits may be prepaid at any time without the imposition of charges, fair settlement among contracting parties (goods provider, credit provider and consumer) must be reached if the consumer returns the purchased goods, and damages claims made by a consumer may result in the set-off of its claim for damages against a receivable.

If the underlying contracts are held incompatible with the consumer protection regime, the relevant clauses will be unenforceable provided that those relevant clauses are separable from the main body of the contract. If they are not separable, then the whole contract may be rendered unenforceable. This issue should be covered during the due diligence process as it is assumed that consumer credit contracts will be in standardised form.

FOREIGN EXCHANGE CONTROLS

Since the Foreign Exchange Act was repealed, there have been no foreign exchange controls in place during ordinary periods. Only the notification duties in respect of the Czech National Bank remain and these should be considered in respect of each particular transaction. In the case of an emergency, however, the Czech government may impose foreign exchange controls pursuant to the Emergency Act.

FOREIGN EXCHANGE RATES AND INTEREST RATES RELATED RISK

One of the issues that should be taken into account during the structuring of any cross-currency securitisation transaction is the risk associated with the changes in foreign exchange (FX) rates and the risk associated with fluctuations in interest rates. FX risk is prominent in cases where the securities issued by the SPV are denominated in a different currency than the securitised assets. Interest rate risk is particularly prominent in all cases where the securitised receivables have floating interest rates (or a fixed rate where the securities issued by the SPV have a floating interest rate). Each of the above risks can be eliminated by using appropriate derivative instruments.

ANTI-MONEY LAUNDERING REGULATION

Any entity purchasing debts and receivables for business purposes falls within the scope of the "regulated person" definition under the Czech Anti-Money Laundering and Terrorist Financing Act. Therefore, depending on the deal structure, the SPV would likely have to comply with such regulation.

Other Information

APPURTENANCES AND THE SECURITY PACKAGE

One issue that needs to be given proper consideration is the quality of the security package related to the assigned receivables. In many cases the security interest is perfected by the process of registration in the relevant registry (real estate registry, commercial registry, notarial register of movable pledges, etc.). The review of the quality of the security package is a task to be undertaken during the due diligence process to ensure proper perfection has occurred. If perfection has not occurred, enforcement of the security package may be problematic.

It is important to recognise that appurtenances (e.g., interest) and any forms of security are transferred automatically with the assigned receivables. However, with regard to the security, in order to properly transfer a receivable encumbered with any form of security, the person providing such security must be properly notified of the assignment by the assignor (or the assignment must be proved to such person by the assignee). Until such notification has been made, the assignment is not effective toward the security provider.

Unlike in other jurisdictions, the transfer of the security package does not depend on the registration in the relevant registries (i.e., the transfer takes place at the date of assignment provided that the assignment is properly notified). Although in most cases it is practical, in some cases even necessary to amend the records in such registries prior to the enforcement of the rights under the security package. Such amendment of the records in the relevant registries does not affect the ranking of the transferred security interest. The time necessary for making the required changes in the relevant registries can vary depending on the type of security interest created and on the relevant authority involved in the registration. For example, notarial registries of movable pledges can be amended in a matter of hours or days, while amending the records of the real estate registries can take several weeks or months depending on the particular authority involved.

TRUE SALE/INSOLVENCY ISSUES

It is also important to pay attention to the structuring of the assignment because there is a risk that, if not structured properly, the transaction could be construed as a security assignment rather than a "true sale" transaction. The principle of security assignment is that the assignment contains an undertaking of the assignee to assign the transferred receivable back to the assignor when the underlying (secured) obligation is properly fulfilled by the debtor.

The terms of the assignment should be bona fide and on arm's length commercial terms. If these principles are not followed, and if the Originator experiences financial instability (including insolvency), the assignment could be challenged by the creditors of the Originator and/or its bankruptcy administrator. Nevertheless, the price paid for the receivables can

reflect genuine discounts provided on a commercial basis without disturbing the true sale character of the transaction. If it is reasonable (i.e., reflecting the commercial basis), payment can be deferred as well.

LIABILITY OF THE ORIGINATOR TO THE SPV

In respect of the assignment agreement, the Originator will be liable to the SPV if:

a. the assigned receivable does not meet the eligibility criteria set or agreed upon;
b. the Originator does not notify the SPV of certain defects that the receivable has and/or does not have;
c. the Originator assures the SPV, contrary to the reality, that the receivable does not have any defect or that it is fit for a particular use; or
d. the Originator is not the legal owner of the receivable assigned.

It should also be noted that if consideration is provided for the assignment of the receivable, the Originator will be liable to the SPV if the receivable does not in fact exist at the time of its assignment. Such liability is limited by the total amount of the consideration plus interest. In addition, the Originator is also liable for the recoverability of the receivable by the SPV.

GLOBAL ASSIGNMENT OF EXISTING AND/OR FUTURE RECEIVABLES

In addition to assigning specifically identified receivables each time they arise, Czech law enables a global assignment of both existing and future receivables by way of one (framework) assignment agreement. Such receivables must be clearly identified. Global assignment of future receivables is easier in terms of deal structuring, as there is no need for a periodical assignment of the respective receivables. Such future receivables would be assigned at the moment of their creation with no follow-up actions needed on the part of the assignor or the assignee, which are typical where individual receivables are assigned.

CONFLICT OF LAW

Under the Rome I Regulation on the law applicable to contractual obligations — which has been adopted at EU level and is binding in the Czech Republic — it is possible to choose the governing law for individual contractual arrangements of the securitisation transaction without limitation. Parties to the assignment of receivables can choose the law that will govern their relationship, while the law governing the right to which the assignment relates will determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question as to whether the debtor's obligations have been discharged. However, in contracts where all elements relevant to the transaction at the time of choice of law are concerned with one country only, the choice of law does not prejudice the application of the rules of that country that cannot be derogated from by that contract (so-called "mandatory rules").

Conclusion

Following the economy's recovery from a period of crisis, the economic potential of financing through asset securitisation seems to be great again. It appears to be only a question of time before securitisation will begin to play a more substantial role in the Czech Republic. Initial securitisation deals have been completed and further transactions are likely to be contemplated in the future. From a legal perspective, the environment of uncertainty resulting from the piecemeal and incomplete legal regime applicable to securitisation may be successfully eliminated by the use of well-thought-out legal structures.

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England

Legal framework

The securitisation framework currently applicable to UK securitisation transactions has resulted from the "onshoring" of the EU Securitisation Regulation following the transition period set out in the Withdrawal Agreement concluded between the EU and the United Kingdom establishing the terms of the United Kingdom's orderly withdrawal from the EU, in accordance with Article 50 of the Treaty of the EU. The "onshored" EU Securitisation Regulation (featuring the amendments introduced by the Securitisation (Amendment) (EU Exit) Regulations 2019) has become domestic UK law and is commonly referred to as the UK Securitisation Regulation. Additionally, a specific taxation regime applies to English-incorporated companies which are used for securitisation structures (as described below).

Transaction documents relating to securitisations in England are typically governed by the law of England and Wales. There is a common misconception that English law is the appropriate law for any transaction involving assets or obligors located in the UK. This is the case as it relates to England and Wales. However, if any of the underlying assets or any of the underlying obligors are governed by or located in Scotland or Northern Ireland, separate Scottish law or Northern Irish advice will be required.

Incorporating a special purpose vehicle (SPV)

An English **SPV** is typically incorporated as a public or private company limited by shares, depending on whether the transaction involves an offer of securities to the public. Unless there are compelling reasons to do otherwise, it is standard market practice in England to establish an SPV as an orphan entity that does not form part of the same corporate group as any other party to the transaction (including the Originator or the seller). Typically, a third-party entity (a corporate services provider) would have membership interests in the orphan entity, and would hold these on trust for discretionary charitable purposes. This results in the SPV being "bankruptcy remote," which means that the assets sold to the SPV are not at risk if the company that originated or sold the assets being securitised becomes insolvent. Additionally, certain provisions are usually built into the transaction documentation to ensure that secured creditors have limited recourse to the SPV's assets and that none of the secured creditors are able to bring claims against the SPV or petition its insolvency, resulting in the SPV being protected against insolvency.

Method of transfer

In order to effect a legal assignment of receivables, the following requirements must be met:

- The assignment must be absolute rather than by way of charge.
- The rights being assigned must relate to the whole (and not part only) of the debt.
- The assignment must be in writing under the hand of the assignor.
- Express notice of the assignment must be given to the obligor.

Where the underlying asset portfolio comprises a number of receivables, it is typical for the assignment of receivables to take effect in equity only. This is a practical approach, but it has the added benefit (usually for originators and sellers) that the underlying obligors are not notified of the assignment while the transaction is performing and/or prior to the occurrence of certain trigger events.

An assignment that takes effect in equity only will have the following consequences:

- An obligor is entitled (by virtue of its lack of knowledge of the transfer of receivables pursuant to a securitisation transaction) to continue to make payments under the relevant financing contract to the legal title holder (usually the Originator or the seller), who is entitled to receive the same).
- The legal title holder can give an obligor a good discharge for payment upon receiving the relevant monies from the obligor.
- An obligor may set off against the SPV claims against legal title holder arising prior to the obligor's receipt of a notice of transfer. However, the giving of such notice to the obligor will not preclude a subsequent claim of the obligor against legal title holder being available for set-off against the debt assigned to the SPV if it is closely or inseparably connected with the relevant financing contract.
- A later assignee of (or taker of a fixed charge over) a financing contract without notice of the transfer by legal title holder of the relevant receivables pursuant to a securitisation transaction who first gives notice to the obligor of its interest would take priority over the SPV.
- The SPV would be required to join legal title holder in any action to enforce the relevant debt against an obligor prior to notice being given.

Given the above consequences, it is typical for transaction documents to include specified default triggers that would entitle the SPV or (in certain circumstances) the trustee to serve notice of the assignment on the underlying debtors, thereby perfecting the assignment.

An insolvency office holder would ordinarily be bound by a valid assignment (whether an equitable assignment or a legal assignment) effected prior to the onset of insolvency, subject to any clawback rights. However, if the assignor is required to take further steps to realise the recoverables (for example, where the securitised receivables relate to vehicle-related financing contracts, in the event that a vehicle is returned and is required to be monetised via an auction sale), there is scope for the proceeds of realisation to accrue to the insolvency estate of the assignor and not the assignee.

Over-collateralisation/yield

Both a discount (to cover funding costs) and a deferred element (to ensure over-collateralisation levels and allow for profit extraction) can be incorporated into the purchase price paid for the relevant English receivables, usually without affecting the "true sale" nature of the transaction.

Tax

CORPORATE INCOME TAX

There is a special corporation tax regime for "securitisation companies" in the UK. The Taxation of Securitisation Companies Regulations 2006 (S I 2006/3296) ("**2006 Regulations**") were introduced to tax securitisation companies on their actual

cash profit, rather than on the accounting profit (to address potential distortions in accounting and tax reporting arising from accounting changes in 2005). This ensures that there is minimal tax leakage from a structure that uses an English SPV. The 2006 Regulations have been amended by The Taxation of Securitisation Companies (Amendment) Regulations 2018 ("**2018 Regulations**") and The Taxation of Securitisation Companies (Amendment) Regulations 2022 (the "**2022 Regulations**", and together with the 2018 Regulations and the 2006 Regulations — "**UK Taxation Regulations**")).

Certain conditions need to be met for an SPV to be a "securitisation company" for the purposes of the 2006 Regulations (as amended by the 2018 Regulationsand by the 2022 Regulations).

Among other things:

- The assets securitised have to be financial assets for accounting purposes.
- Broadly, the SPV has to distribute all the cash that it receives within an 18-month period (except where reserves of cash are required to be retained, for example, for credit enhancement purposes).
- Generally, the SPV has to satisfy certain requirements in relation to the issuance of securities and their status under UK insolvency law.

The 2018 Regulations amend and update the existing 2006 Regulations, addressing the uncertainty regarding the application of certain tax rules on securitisation companies.

The 2018 Regulations:

- remove the obligation to withhold income tax in respect of residual payments;
- make revisions to the definition of "financial assets" (for arrangements made after 6 February 2018), including:
  - to clarify that derivatives whose underlying subject matters include land or shares and loan relationships with embedded derivatives relating to shares or land are included (to address doubt that had been cast on this point); and
  - to disregard small and insignificant non-financial assets where they have been inadvertently included in a portfolio of otherwise qualifying financial assets.
- exclude securitisation companies from the recovery of unpaid corporation tax provisions; and
- make revisions to the definition of a "warehouse company" to allow a warehouse securitisation company to transfer assets indirectly to a note-issuing company or an asset-holding company on a securitisation.

A reform of the UK Taxation Regulations has been completed with the 2022 Regulations, which features provisions to facilitate "retained securitisation transactions" (i.e., those in which the securities issued are not placed with third-party investors but acquired by the originator instead), amend the requirements that securitisation SPVs only hold financial assets and to reviewlower the thresholds required for an SPV to qualify as a "securitisation company" for the purposes of the UK Taxation Regulations. The 2022 Regulations entered into force from 17 May 2022 but do not apply to a company in

relation to a capital market arrangement entered into by it before that date, any capital market investment that is part of such an arrangement or any securities which represent such a capital market investment.

INTEREST WITHHOLDING TAX

England (and the UK generally, given that tax rules apply across the UK) is a jurisdiction where withholding tax (as at the date of this guide, at the rate of 20%) generally applies to payments of interest. Therefore, it is important to ensure that appropriate withholding exemptions apply to all payments within the securitisation structure to avoid tax leakage.

Generally, payments of interest with a UK source may be paid without withholding UK tax where the recipient is either:

- a UK resident company; or
- a nonresident carrying on business in the UK through a branch or agency to which the payment of interest is attributable.

Therefore, if the SPV is located in England, there is generally no UK withholding on underlying assets. Where payments of interest that arise in the UK are made to a non-UK resident company (including a securitisation SPV), these payments are usually subject to withholding and the SPV will generally have to apply for relief under an applicable double tax treaty. Non-UK resident SPVs that purchase English assets are generally located in Ireland, Luxembourg or the Netherlands, as each has a double tax treaty with the UK.

Payments of interest made by an English SPV can generally (and subject to certain exceptions) only be paid without withholding of UK tax where the SPV's securities are listed on a "recognised" stock exchange and are therefore entitled to the UK "quoted Eurobond" exemption.

STAMP DUTY

Generally, UK transfer taxes (stamp duty, stamp duty reserve tax and stamp duty land tax) are levied only on transfers of shares, real estate and non-standard loans carrying characteristics that UK legislation has deemed equivalent to equity. There are currently no other stamp duties or transfer taxes applicable to the issuance of notes or transfers of receivables in the UK.

Accounting treatment

Currently, the two sets of accounting standards of primary relevance to corporate entities acting as Originators in a securitisation transaction are the International Financial Reporting Standards (IFRS) and the Generally Accepted Accounting Principles (GAAP). Under both regimes, if the securitisation transaction or structure under review includes one or more SPV, the first accounting issue to consider will be whether the SPV is required to be consolidated by one or more of the relevant parties involved. The second question is whether the receivables will be treated as off-balance sheet items. These are accounting, as opposed to legal, questions and it is important to recognise that it is possible for a sale to be considered a "true sale" from a legal perspective in circumstances where off-balance accounting treatment is not achieved (and the converse also applies).

Regulatory concerns

In recent years, regulatory change has been increasingly driven by new European legislation. In particular, the Securitisation Regulation (please see the separate chapter in this guide on the Securitisation Regulation) and the revised European capital requirements framework have had a significant impact on securitisations in England.

Following the transition period set out in the Brexit Withdrawal Agreement, the EU Securitisation Regulation, as amended by the Securitisation (Amendment) (EU Exit) Regulations 2019, has become law in England (and is commonly referred to as the UK Securitisation Regulation). Although closely aligned with the EU Securitisation Regulation, for the time being, the Securitisation (Amendment) (EU Exit) Regulations 2019 introduced certain deviations, which has been the first indication that there is a diverging path for English securitisation. This has become more evident following the most recent amendments to the EU Securitisation Regulation (introduced by Regulation (EU) 2021/557 of the European Parliament and of the Council creating, among other things, a "simple, transparent and standardised" (STS) regime for synthetic securitisations). To date, these have not yet been reflected in the UK securitisation framework.

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France

Regulatory concerns

France has banking monopoly rules which, in principle, forbid the performance of credit operations made on the French territory (such as the purchase of non-matured receivables) by anyone other than a French-licenced or EU-passported financial institution or a French investment fund specifically authorised to do so.

Legal framework

The legal framework of securitisation in France is largely shaped by reference to the entities developing securitisation activities, regulated by the *Code monétaire et financier* (CMF). Additionally, the core principles of contract law set out in the *Code civil* (FCC) apply. French domestic legislation is complemented by the European Union rules applicable, particularly EU Regulation 2017/2402 ("**Securitisation Regulation**").

Until 2017, securitisation activities were restricted to *organismes de titrisation* (OT) and then extended by the Ordonnance No. 2017-1432 of 4 October 2017 to *organismes de financement spécialisé* (OFS), both belonging to the generic category of *organismes de financement* (OF) constituted under the CMF.

In order to facilitate access to the French financial, the *Ordonnance of 2017* has introduced an exception to the banking monopoly rule allowing non-licenced entities to purchase unmatured receivables arising from credit operations provided that the debtor is not an individual acting for non-professional purposes.

Incorporating a special purpose vehicle (SPV)

Until 2017, securitisation transactions were usually structured through two alternative forms of OT: the *fonds commun de titrisation* (FCT) or the *société de titrisation* (SDT). The FCT is set up as a fund without legal personality, while the SDT is incorporated as a limited liability company and is usually employed in transactions with an international tax element to allow an efficient tax treatment.

The 2017 legislative reform has introduced a new type of entity, the *organisme de financement spécialisé* (OFS). OFS can take two forms: *fonds de financement spécialisé* (FFS) or *société de financement spécialisé* (SFS). The FFS can be set up as a fund with no legal personality and the SFS can be set up as a limited liability company.

All the above structures are typically managed by a management company licenced by the *Autorité des Marchés Financiers* (AMF) as a portfolio management company (*société de gestion de portefeuille*) and authorised to manage alternative investment funds (*Fonds d'investissement alternatifs*). A custodian is appointed to act as depositary of the receivables held by the OT or OFS and of any other liquid assets. The custodian must be a credit institution established in a country belonging to the European Economic Area or a credit institution specifically authorised by the French Ministry of Economy and Finance.

French OT and OFS (including their compartments) are bankruptcy remote, pursuant to Section 214-175 (III) of the CMF.

Method of transfer

French law allows securitisation of existing and future receivables to be either governed by French or foreign law and also allows different Originators to sell into a single securitisation entity.

Under French law, securitisation receivables are usually transferred using the method provided in the CMF, using a *bordereau* delivered by the seller/Originator to the OT/OFS management company. The *bordereau* effectively assigns the receivable as well as any security attached thereto without need for further formalities and is enforceable towards third parties on the date thereof, irrespective of the date of creation or maturity of the receivables.

Transfer of existing and/or future assets to a bankruptcy-remote OT or an OFS is not typically open to challenge upon the seller/Originator's insolvency given that, pursuant to the provisions of the CMF, the assets are effectively insulated from risk of consolidation in the Originator/seller's balance sheet and from clawback risk.

Over-collateralisation/yield

Although there are no specific requirements in relation to over-collateralisation or credit enhancement under French law, transactions are usually structured to include a certain degree of over-collateralisation and certain credit enhancement features.

Tax

The transfer of assets to OTs and OFCs is generally tax neutral. The tax regime applicable to FCTs is designed to make these entities not subject to corporate income tax. This is not the case with SDTs, which are often constituted on the basis of bespoke agreements with the relevant tax authorities.

No withholding tax applies on interest payments made by debtors established in France. Securities issued by OTs and OFCs are be subject to 75% withholding tax in relation to payments made to entities located outside France in a non-cooperative state or territory, with a few limited exceptions (the list of which is updated every year) (Section 125 A of the *Code Général des Impôts*).

Accounting treatment

Section 214-175 (I) of the CMF establishes the accounting obligations of French OTS and OFS and their management companies, which include a balance sheet, profit and loss account and other annexes prescribed by the relevant competent authority.

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Germany

Legal framework

Germany does not have a dedicated securitisation regime. Thus, the German legal framework mainly applicable to securitisation transactions includes the Civil Code (*Bürgerliches Gesetzbuch*), the Insolvency Code (*Insolvenzordnung*), German tax laws and the German Banking Act (*Kreditwesengesetz*). In addition, several European regulations, which are directly applicable, play an increasing role, in particular, the Securitisation Regulation, as well as the Capital Requirements Regulation (CRR) and the Alternative Investment Fund Managers Regulation (AIFMR).

German special purpose vehicles (SPVs)

German special purpose entities are predominantly established for the securitisation of bank loans for which an exemption in relation to trade tax applies. In such case, the SPV usually takes the form of a German limited liability company (*Gesellschaft mit beschränkter Haftung* — GmbH). Within the corporate form of GmbH, a small form of GmbH is commonly used (*Unternehmergesellschaft* (*haftungsbeschränkt*) — UG) which can be quickly established with a minimal share capital of EUR 1 only.

Offshore SPV jurisdictions are customarily used for other asset classes.

Method of transfer

While the sale agreement between seller and purchaser establishes the contractual obligation of the seller to sell the receivables, the common method of title transfer of claims governed by German law (i.e., claims arising from any agreement governed by German law, either expressly or impliedly) is effected by way of assignment. This is achieved by an agreement between the assignor (i.e., the seller of the receivables) and the assignee (i.e., the purchaser of the receivables), which is typically created by way of: (i) a written offer by the assignor to the assignee; and (ii) payment of the relevant purchase price by the assignee to the assignor by way of acceptance (offer and acceptance method). In contrast, it is not necessary to inform the underlying debtor/obligor of the assignment for it to be valid. From a practical perspective, obligor notification is required if the purchaser wishes to enforce the collection of due receivables directly.

Over-collateralisation/yield

Both a discount (to cover funding costs) and a deferred element (to cover over-collateralisation levels) can be incorporated into the purchase price paid for the relevant German receivables without disturbing the true sale nature of the transaction. However, this is subject to the proviso that the discount and/or deferred element is either reasonable (i.e., based on historical default rates plus a certain margin) or is fixed at the time of sale so as not to endanger any removal (if intended) of the receivables from the transferor's balance sheet (see under "Accounting treatment" below).

Withholding tax

Generally, there are no withholding or other taxes imposed on payments made by German debtors with regard to claims that are sold and assigned in the course of a securitisation transaction. As a rule, this position is no different if these payments bear interest.

Stamp duty

Currently, there is no stamp duty or other similar documentary charge in Germany levied on the assignment of claims, irrespective of the method of transfer chosen.

Tax on German source income

For a typical securitisation transaction, the purchaser will typically be incorporated and based outside of Germany, mainly for tax reasons (corporate income tax, trade tax and VAT). However, where the assets are securitised by a bank, a German SPV can be operated on a tax-neutral basis. An SPV incorporated outside of Germany will be subject to limited corporate income and trade tax only if the Originator, in its capacity as a seller and/or servicer, is regarded as either the purchaser's "permanent establishment" or "permanent representative" in Germany. However, this can be avoided by structuring the transaction carefully.

Accounting treatment

Under German law, there are no specific rules setting out the accounting treatment of a German securitisation transaction. Accordingly, Germany's Generally Accepted Accounting Principles must be applied. Under these rules, the transfer of claims shown in the seller's balance sheet results in a removal from the balance sheet if the transfer can be qualified as a true sale. This is the case if the so-called "economic ownership" (*wirtschaftliches Eigentum*) passes from the seller to the purchaser. In contrast, the transfer of legal title alone is not sufficient. Generally, the conditions for a true sale include the following:

- From an economic perspective, the credit risk (i.e., the risk that the debtor of the receivables does not meet its payment obligations) is assumed by the purchaser.
- The sale of the receivables is final (which would not be the case, for example, if the reassignment/resale of the receivables had already been agreed at the time of the sale).
- There are no default guarantees from the seller and neither a total return swap nor an agreement pursuant to which the purchase price will be adjusted in accordance with the losses of the sold receivables are entered into between the seller and the purchaser.
- The seller of the receivables does not hold equity in the purchaser and does not acquire debt securities issued by the purchaser (either in full or in a significant amount).

- Any purchase price discount agreed between the parties is either non-adjustable or, if adjustable, qualifies as appropriate and customary in the market (e.g., because it is determined based on the quota of actual past losses plus a reasonable risk surcharge).

Any remaining risk retained by the seller could jeopardise the off-balance sheet treatment and should therefore be considered very carefully. An obligation of the Originator to repurchase merely those receivables that are subject to misrepresentation, however, will not jeopardise a true sale. Where the dividing line between these two extremes falls, and how best a transaction can be structured to achieve off-balance sheet treatment, would need to be addressed in detail. Nevertheless, off-balance sheet treatment can often be achieved.

Regulatory concerns

In recent years, regulatory change has mainly been enacted by European legislation. The Securitisation Regulation and the revised European capital requirements framework continue to have the greatest impact on securitisations in Germany.

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Hong Kong

Legal framework

There is no specific securitisation legislation in Hong Kong. Instead, the framework applicable to securitisation transactions in Hong Kong is primarily based on common law principles, as well as a number of Hong Kong statutes that may be relevant to certain aspects of securitisation transactions, such as: (a) the Companies Ordinance in relation to the establishment of special purpose vehicles (SPVs) and registration of security; (b) the Companies (Winding Up and Miscellaneous Provisions) Ordinance in relation to insolvency; (c) the Law Amendment and Reform (Consolidation) Ordinance in relation to transfer of loans and receivables; (d) the Money Lenders Ordinance in relation to lending; (e) the Securities and Futures Ordinance in relation to issuance of securities; (f) the Conveyancing and Property Ordinance in relation to dispositions with an intent to defraud creditors; and (g) the Personal Data (Privacy) Ordinance in relation to the use and transfer of personal data.

Incorporating a special purpose vehicle (SPV)

SPVs are typically used in securitisation transactions in Hong Kong. Normally, the SPV will beneficially own the assets (e.g., debts and other receivables) purchased from the originator and issue notes to investors. The SPV will usually be established as bankruptcy-remote from the originator in order to prevent creditors of the originator from having any claims against the SPV on the insolvency of the originator. In addition, SPVs are generally orphan entities that fall outside of the corporate group of the other parties to the securitisation transaction (such as the originator).

The Companies Ordinance provides a legal framework for the establishment of companies in Hong Kong, which includes SPVs, but there are no specific laws relating to the establishment of SPVs for securitisation transactions. Although the SPVs can be incorporated in Hong Kong, it is more common to establish SPVs in offshore jurisdictions such as the Cayman Islands, which may provide more favourable tax treatment and enhanced provisions regarding SPV status.

It is common for the constitutional documents of the SPV to impose restrictions on the activities that SPVs can undertake (namely, those that relate to the securitisation transaction, such as the ownership of the assets purchased from the originator and the issuance of notes) so as to minimise the risk of the SPVs conducting other business and incurring liabilities to third-party creditors.

Method of transfer

The method of transfer for receivables that are governed by Hong Kong law (such as where the receivables arise under a Hong Kong law contract) is by way of assignment of such receivables to the SPV. An assignment may be effected as either a legal or an equitable assignment. In order for an assignment of receivables to take effect as a legal assignment under Hong Kong law, the following requirements set out in the Law Amendment and Reform (Consolidation) Ordinance must be met:

- The assignment must be an absolute assignment.
- The whole amount of the receivable must be assigned, rather than a partial assignment of the receivable.
- The assignment must be in writing and signed by the assignor (i.e., the originator).
- Express written notice of the assignment must be given to the debtor.

Any assignment that does not satisfy the above criteria (such as where the assignment is not disclosed by notice to the debtor) will take effect as an equitable assignment, whereby the originator retains the legal interest in the assigned receivables. An equitable assignment will also have the following key consequences:

i. A debtor may obtain a good discharge of the debt owed by it in respect of the assigned receivable by paying the originator (and not the SPV).
ii. A debtor may have rights of set-off or counterclaim against the originator, which would be binding against the SPV.
iii. The originator may agree with the debtor to amend the underlying contract under which the assigned receivables arise without the SPV's consent.
iv. A subsequent security or assignment of the receivables to a third party may rank in priority to the SPV's interest in the assigned receivables if the third party does not have notice of the SPV's rights and if the debtor receives notice of the subsequent security or assignment prior to receiving notice of the SPV's interest.
v. The SPV would ordinarily be required to join the originator in any action to enforce the relevant debt against the debtor prior to notice being given.

As such, if the assignment is on an undisclosed basis and takes effect as an equitable assignment only, it is common for the transaction documents to include specific triggers entitling the SPV (or requiring the originator) to serve a notice of assignment to the relevant debtor in order to perfect the assignment as a legal assignment.

Over-collateralisation/yield

Both a discount (for covering funding costs) and a deferred element (to cover over-collateralization levels) can be incorporated into the purchase price paid for the relevant Hong Kong receivables without disturbing the true sale nature of the transaction.

Tax

Gains on the transfer of capital assets are not taxed in Hong Kong.

The SPV could be subject to profits tax in Hong Kong if it is considered to be carrying on trade or business in Hong Kong. Depending on the structure, the chargeable income could be minimal to the extent that the SPV can claim a tax deduction for its interest expenses.

Stamp duty is chargeable on the transfer of interests in land and the transfer of Hong Kong stock. "Stock" includes debentures, loan stocks, funds, bonds or notes denominated in Hong Kong dollars or redeemable in Hong Kong dollars. Mortgage transfers are generally not subject to stamp duty.

There is no withholding tax on interest payments in Hong Kong.

There are no value-added taxes in Hong Kong.

Accounting treatment

Whether or not a securitisation transaction can receive off-balance sheet treatment from the originator's group would need to be analysed and confirmed by auditors. One of the key factors that auditors typically consider is whether the assignment of the receivables takes effect as a true sale, that is, whether the assignment of the receivables by the originator to the SPV would constitute a sale of the receivables, rather than a loan secured by the relevant assigned receivables. A true sale of the receivables would result in the originator ceasing to be the beneficial owner of the receivables, such that the receivables would not constitute assets of the originator (or its estate) or become subject to any insolvency proceedings relating to the originator.

There are certain general factors that Hong Kong courts would consider relevant to determining whether or not a particular transaction is a true sale or whether it involves the grant of security and, therefore, should be recharacterised as a secured loan. These factors include the following:

a. Under a true sale, a seller would not be entitled to recover the assets sold by paying the purchase price back to the purchaser. Conversely, under a secured loan arrangement, security providers have an equity of redemption entitling them to demand the release of any assets from any security granted by it upon the repayment of any money owed to the secured party. For example, if the purchaser has a general right to demand that the seller repurchase all the receivables originally sold by it and repay the purchase price, this may undermine the true sale analysis.

b. Under a true sale, a purchaser would be free to deal with the assets purchased by it without having to account for any profit to the seller. However, under a secured loan arrangement, the security provider would be entitled to the surplus funds remaining after the sale of any secured assets once the relevant amounts owed have been discharged. By the same token, under a true sale, if a purchaser sells any purchased assets at a loss, such loss would be on the purchaser's own account and it cannot look to the seller to recover any such loss. Under a secured loan arrangement, the security provider would still be liable for any amounts owed that are not discharged in full by the proceeds of sale of the secured assets.

c. Similarly, under a true sale, a purchaser would have no right of recourse against a seller for deficiencies in the receivables or for any failure to receive payment on them for any reason (i.e., the general non-payment risk and insolvency risk would be assumed by the purchaser), or for deficiencies under the contracts under which the receivables arose, other than a very limited degree of recourse.

d. If an assignment is intended to be a true sale, then, generally speaking, no security should be granted in support of the obligations of the originator to avoid the risk that a Hong Kong court would recharacterise the transaction as a secured loan.

It is also important to note that it is possible for there to be a true sale from a legal perspective in circumstances where off-balance sheet accounting treatment is not achieved (and the converse also applies).

For completeness, in certain cases, a liquidator of the originator appointed under Hong Kong law may seek to set aside or disclaim a sale and assignment of receivables under Hong Kong insolvency laws, such as in cases of transactions at an undervalue, unfair preference, disclaimer of onerous property, disposition with intent to defraud creditors and so on.

Regulatory concerns

Where the originator is a licensed bank in Hong Kong (or another form of authorized institution in Hong Kong), it may need to approach the Hong Kong Monetary Authority (HKMA) or otherwise observe guidance issued by it prior to undertaking a securitisation. The HKMA supervises authorized institutions' compliance with general requirements for credit risk transfer activities (including securitisations) under the Banking Ordinance, its subsidiary legislation and HKMA-issued regulatory guidelines. These requirements include, among other things, certain securitisation-related capital adequacy, liquidity, large exposure and financial disclosure requirements.

There are a number of other regulatory ordinances that need to be considered, in particular the Companies (Winding Up and Miscellaneous Provisions) Ordinance (which deals with disclosure requirements for companies issuing a prospectus) and the Securities and Futures Ordinance (setting out the licensing requirements for the regulated activities of dealing in securities and providing investment advice).

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Indonesia

Background

Although the concept of securitisation of assets has long been recognised in Indonesia, the use of the structure as a fundraising alternative or form of investment began to appear on the Indonesian market in the early 2000s. To date, not many companies or investors have set up this structure to fundraise or invest onshore.

The securitisation of assets in Indonesia is governed under various regulations issued by the Indonesian Financial Services Authority (*Otoritas Jasa Keuangan* — OJK), depending on the type of assets designated to be used as underlying assets for the creation of securities.

Under the current regulations, the securitisation of assets is done either through collective investment contracts (CIC) or through the issuance of participation letters. CICs are entered into between a licenced Indonesian investment manager and a licenced Indonesian custodian bank, where the investment manager is authorised to manage the portfolio investment, and the custodian bank is authorised to carry out the collective custody of the investment funds and the securities through participation units. The CICs have to be established by a notarised deed signed by notaries who are registered with the OJK.

The CIC will form a fund, but it is not a legal entity as with securitisations in other jurisdictions. A CIC mainly governs the relationship between the investment manager, the custodian bank and the participation unit holders, as well as how the underlying assets are managed.

In Indonesia, what is commonly understood as "asset securitisation" is limited to financial assets structured under asset-backed securities CICs (*kontrak investasi kolektif-efek beragun asset* — KIK-EBA) or asset-backed securities in the form of a participation letter (*Efek Beragun Aset berbentuk Surat Partisipasi* — EBA-SP).

There are additional structures similar to the aforementioned asset securitisation, including (i) real estate investment funds (which are more similar to REIT in other jurisdictions) (*dana investasi real estat* — DIRE) and (ii) infrastructure investment funds (*dana investasi infrastruktur* — DINFRA). While DIRE and DINFRA are not asset securitisations (like KIK-EBA and EBA-SP), a brief description of these structures is provided below.

KIK-EBA

In a KIK-EBA structure, the CIC fund that is established for this purpose will issue securities in the form of participation units to raise funds from investors, the proceeds of which will be used to purchase certain financial assets (underlying assets) from the company that intends to monetise its financial assets and raise funds using this structure (the Originator/original lender).

The financial assets that are used in the KIK-EBA's portfolio must fulfil the following criteria: (i) they have or will produce cash flow; (ii) they are legally owned by or under the possession of the Originator; and (iii) they can be freely transferred to the KIK-EBA.

These include:

- commercial paper receivables
- credit card receivables
- any future receivables
- credit facility receivables
- government-backed debt securities
- credit enhancements
- future cash flows or commercial paper conferring rights to future cash flows
- future income or commercial paper conferring rights over future income
- other equivalent financial assets and other financial assets that are related to the above assets

EBA-SP

Another asset securitisation model is asset-backed securities in the form of a participation letter. The participation letter (*Efek Beragun Aset berbentuk Surat Partisipasi* — EBA-SP) is a form of security that can only be issued by Indonesian limited liability companies ("**Sponsor Company**") whose business activity is sponsoring financing for housing loans. To be a Sponsor Company, a company, primarily banks and finance companies, must obtain the relevant licence from the OJK.

The Sponsor Company raises funds from investors or the public by issuing the EBA-SP (whether through a public offering or a private offering), the proceeds of which are used to purchase the receivables of home ownership loans (*kredit pemilikan rumah*) from the Originators (either banks or financing companies). The home ownership loan receivables are the only portfolio assets that can be used as the underlying asset for the issuance of an EBA-SP.

From the outset, the structure of an EBA-SP is similar to a KIK-EBA structure. However, the EBA-SP structure is not established under the CIC framework. In the EBA-SP structure, the Sponsor Company (as the issuer) will enter into an issuance agreement with a trustee (*wali amanat*) and a custodian bank, where the agreement will govern: (i) the representation of the unit holders by the trustee; (ii) the custody and the administration of the investment; and (iii) the issuance.

DIRE AND DINFRA

DIRE and DINFRA do not involve financial assets, but are backed with specific underlying assets:

- for DIRE, real estate assets, constituting at least 80% of the net asset value (NAV) of the fund
- for DINFRA, public infrastructure assets, constituting at least 51% of the **NAV** of the fund

DIRE and DINFRA structures also use the CIC framework, similar to the KIK-EBA structure.

Unlike KIK-EBA, which also uses the CIC framework, there is no specific "true sale" test (as further explained below) for transferring assets to DIRE and DINFRA. However, these schemes require a CIC (or the special purpose vehicle (SPV) established for the purpose of the funds) to own and be able to control or protect their investment in the underlying assets.

CREATION AND OFFERING OF SECURITIES

Securities created using the above framework in the form of participation units or participation letters can be offered through a public offering or a private offering.

Securities offered in a manner that constitutes a "public offering" under Law of the Republic of Indonesia No. 8 of 1995 on Capital Market ("**Capital Market Law**") must go through a process akin to an IPO, which includes filing a registration statement to the OJK and preparing a prospectus. A private offering of the participation units or participation letters would only be subject to a certain post-reporting obligation to the OJK.

The OJK has indicated that a "public offering" within the meaning of the Capital Market Law will be deemed to have been made if an issuer makes an offering of securities (including participation units and participation letters) in Indonesia, where any of the conditions below are fulfilled:

- The offer is made using the mass media.
- The offer is made to more than 100 parties in Indonesia.
- The offer is made to fewer than 100 parties in Indonesia but results in sales to more than 50 parties in Indonesia.

Generally, the term "parties in Indonesia" will refer to any Indonesian citizens, Indonesian entities and foreign nationals residing in Indonesia. The term "issuer" generally refers to the party making an offer of the securities.

Incorporating a special purpose vehicle (SPV)

KIK-EBA AND EBA-SP

KIK-EBA and EBA-SP structures do not involve an SPV. In the KIK-EBA structure, the fund will purchase the financial assets directly from the Originator. In the EBA-SP structure, the Sponsor Company (as the issuer of the securities) will purchase the underlying asset (i.e., the receivables of home ownership loans) directly from the Originator (banks/ financial institutions).

DIRE AND DINFRA

A structure involving the incorporation of an SPV can be used in both DIRE and DINFRA. Having an SPV in the structure limits the exposure of risks from the ownership of the underlying assets to the sponsors or the funds. The CIC, represented by the investment manager, will be the owner of the SPV (to create an investment layer), and the SPV can purchase the asset for the benefit of the funds. With this SPV structure, the CIC will not invest directly in the required underlying assets, for example real estate assets or public infrastructure assets.

The SPV must be in the form of Indonesian limited liability companies (*perseroan terbatas*), which are at least 99.9% owned by the CIC but registered under the name of the investment manager or the custodian bank, for the benefit of the unit holders. In practice, the investment manager is recorded as the shareholder in the shareholders' register of the special purpose company. If an SPV is established, the actions of the SPV must be regulated under the CIC because the CIC is the only instrument that is binding on, and can be relied on by, the unit holders.

Method of transfer

TRUE SALE OF FINANCIAL ASSETS

KIK-EBA and EBA-SP structures require a true sale of financial assets from the Originator to the CIC/fund or the issuer, respectively. A true sale in Indonesia can be made through a transfer of rights over the receivables, known as "cessie".

A cessie is implemented based on the provisions of Article 613 of the Indonesian Civil Code (ICC). According to Article 613 paragraph (1), the valid transfer of ownership rights of receivables can be effected through a notarial or private deed, in which all the rights to the receivables are assigned to the transferee. The deed is construed to constitute the actual delivery and acceptance of the ownership rights by the transferor — in this case the Originator — and the transferee — in this case the CIC or the issuer of EBA-SP. The valid transfer of the ownership rights does not require any approval from the obligors (e.g., the borrowers, if the financial assets transferred are receivables from credit facilities). If a cessie is done, the obligors will need to be notified.

Based on the above, the ICC does not require a formal notice or written acceptance by the obligor to constitute a legal and valid transfer of the receivables under a transfer agreement. The transfer agreement may be in a simple form of a private deed between the parties with a schedule containing a list of all receivables to be transferred. Article 613 paragraph (2) of the ICC specifies that until the obligor has been duly served notice, preferably through a court bailiff, or has accepted and acknowledged the transfer of the relevant receivables in writing, the obligor can discharge its obligations to pay the transferee and continue paying the transferor/original creditor in respect of the amounts of the receivables due by payment of these amounts. Therefore, in practice, although it would not affect the validity of the assignment, the parties and especially the transferee would usually require written acceptance and acknowledgment of such an assignment from the obligor to perfect the assignment. Considering that a cessie will, in theory, only transfer the rights to the receivables, and not the obligations, an assumption of liability will also need to be arranged in order for the KIK-EBA to assume all liabilities of the financial asset.

Specifically under the OJK regulation governing the KIK-EBA, the true sale must fulfil the following requirements:

- The financial assets must be separated from the Originator's assets, and there must be an effort from the investment manager to ensure that the financial assets are not part of the bankruptcy estate of the originator.

- The originator must transfer all rights and obligations in relation to the financial asset to the fund, and the originator is prohibited from retaining any benefit from that financial asset.
- The originator no longer acts as the holder of the rights to the financial assets.
- The originator cannot be the controller of the fund in the relevant securitisation of assets.
- The transfer of financial assets must be without recourse.
- If the originator also acts as the servicer, the service being provided by the servicer must be provided on an arm's length basis.
- If the originator also acts as the paying agent, there must be no obligation imposed on the Originator to provide the funds to the KIK-EBA unless the funds have been received from the debtors.

The underlying assets transfer agreement between the Originator and the fund must also consist of one of the following features:

- If there is a depreciation of the value of the financial asset held by the fund to a non-economic scale, the Originator has the right of first offer or right of first refusal with regard to the buyback of the asset with a fair value.
- The Originator can buy back the assets if there is a pre-agreed provision in the transaction documents that obliges the Originator to buy back the assets from the fund if there has been a breach of the terms and conditions or warranties.

The fulfilment of the true sale requirements must be supported by a legal opinion issued by a legal consultant registered with the OJK. An auditor's opinion (with respect to the true sale) may also be obtained in order to support the satisfaction of the true sale itself.

As mentioned, in the context of DIRE and DINFRA, there is no specific "true sale" test imposed by applicable rules. However, these schemes would require the CIC (or the SPV established for the purpose of the funds) to own and be able to control or protect its investment in the underlying assets.

SERVICER

A servicer is the party responsible for processing and supervising the payment conducted by the debtors, conducting preliminary actions in the form of warning, or other acts if the debtor is late or fails to fulfil its obligation. The servicer will negotiate and settle things with the debtors, as well as provide any other services as may be stipulated in the CIC.

Given the nature of the underlying assets, this concept is only relevant to KIK-EBA and EBA-SP structures. Usually, the Originator will be appointed as the servicer as it may be easier for them to deal with their clients/debtors. The servicer may be compensated in accordance with the terms of the CIC.

This servicer concept is not relevant in DIRE and DINFRA structures.

Tax

DISTRIBUTION TO PARTICIPATION UNIT HOLDERS

Generally, based on Article 4(3)(i) of Law No. 7/1983 as last amended by Law No. 7/2021 on Income Tax ("**Income Tax Law**"), the distribution of profit from a CIC to the participation unit holders is not a taxable object. However, under the Director General of Tax Decision No. KEP-147/PJ/2003, if the participation unit holders would receive a fixed cash flow/profit from their participation in a certain CIC arrangement (e.g., KIK-EBA Fixed Cash Flow), the participation unit holders will be treated as loan/bonds creditors for tax treatment purposes and the income received will be considered as interest compensation that is subject to withholding tax on interest from bonds. In general, the withholding tax rate is 15% for resident taxpayers and 20% for nonresident taxpayers.

Based on Article 2(1) of Government Regulation No. 91/2021 ("GR 91/2021"), starting from 30 August 2021, income in the form of interest from bonds received by resident taxpayers and permanent establishments is subject to a final income tax rate of 10%.

TRANSFER OF ASSETS

The assets transfer for the purpose of securitisation triggers tax implications. The applicable tax rate would depend on the underlying assets that will be contributed in the asset securitisation.

For instance, under the DIRE framework, in a transfer of real estate, the transferor is obliged to pay the 0.5% income tax on the transfer of right of land and/or building, subject to the fulfilment of certain requirements. This tax is final in nature. This is set out in Government Regulation No. 40/2016. This tax is payable by the party that transfers the land and/or the building prior to the transfer of the legal ownership of the right to the land and/or the building. In addition, the party who purchases the land or building (in this structure, the SPV) will also be subject to 5% Land and/or Building Transfer Duty (*Bea Perolehan Hak atas Tanah dan Bangunan* — BPHTB).

Specifically on the transfer of receivables, the prevailing tax rules are silent, and the tax implications would likely be subject to the tax authorities' interpretation and discretion.

VAT

Services provided by the Originator (as a service provider) to collect payments on behalf of the fund from the debtors would be subject to 11% VAT per 1 April 2022 or 12% per 1 January 2025 if the service provider is a registered taxable entrepreneur for VAT purposes.

SPV STRUCTURE

In a structure involving an SPV (i.e., in a DIRE or DINFRA structure), the dividend payment from the Indonesian operating company that holds the assets to the SPV that is an Indonesian corporate resident taxpayer will be exempted from tax.

The distribution from the SPV that is an Indonesian corporate resident taxpayer to its shareholder that is an Indonesian corporate resident taxpayer will be exempted from withholding tax.

STAMP DUTY

Securities transactions in Indonesia are subject to stamp duty. The nominal amount of the Indonesian stamp duty is IDR 10,000 for transactions having a value greater than IDR 5 million. Generally, the stamp duty is due on execution. Stamp duty is payable by the party that receives the executed document. For documents that are made by two parties or more, the stamp duty is payable by each party on the document received.

Other information

CREDIT ENHANCEMENT

A credit enhancement may be provided to increase the quality of the KIK-EBA's investment portfolio in relation to the repayment to the securities holders. The instruments below are allowed to be used as a credit enhancement for a KIK-EBA:

- subordination of a class of asset-backed securities to another class of asset-backed securities, in relation to the same CIC
- letters of credit
- guarantee funds
- allowance for bad debts
- guarantee for liquidity upon maturity
- guarantee on tax payments
- options
- interest rate or foreign exchange rate swap

A practical example of this credit enhancement is the issuance of two classes of securities under the KIK-EBA framework, where the priority class securities, comprising the majority of the participation units, are offered to the public. On the other hand, the other class of the securities, comprising the minority of the participation units, is held by other parties who are willing to have the repayment subordinated (e.g., the sponsor). The cash obtained by the KIK-EBA based on the performance of its underlying assets is distributed to the participation unit holders based on the cash waterfall scheme applicable to each class of the securities, where payments for the priority class securities holder will be prioritised.

LISTING ON THE INDONESIA STOCK EXCHANGE

The KIK-EBA, EBA-SP, DIRE and DINFRA can be listed on the Indonesia Stock Exchange (IDX). Listings of participation units are usually publicly offered, so when processing the registration statement with the OJK, a parallel listing process with the IDX will need to be undertaken. One of the key elements that need to be considered is obtaining the listing approval from the IDX, which can be done by satisfying the specific requirements set out in the relevant IDX regulations.

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Italy

Legal framework

Securitisation transactions in Italy have evolved over the past 20 years on the back of substantial legislative activity. Most significantly, the Italian parliament passed Law No. 130 of 30 April 1999, as amended and implemented from time to time (the "**Securitisation Law**"), following which the volume of transactions implemented by Italian Originators significantly increased in each subsequent year.

SECURITISATION LAW

The Securitisation Law was enacted on 30 April 1999 to simplify the securitisation process and to facilitate the increased use of securitisation as a financing or deleveraging technique in the Republic of Italy.

It applies to securitisation transactions involving the true sale (by way of non-gratuitous assignment) of receivables, where the sale is to a company created in accordance with Article 3 of the Securitisation Law, and all amounts paid by the assigned debtors are to be used by the relevant company exclusively to meet its obligations under notes issued to fund the purchase of such receivables and all costs and expenses associated with the securitisation transaction. The Securitisation Law addresses some specific issues with respect to the transfer of assets:

- Object of the transfer: Article 1 of the Securitisation Law clarifies that the Securitisation Law applies to transactions involving the sale of existing or future monetary receivables, which — in the event of a transfer of a pool of receivables — must be identifiable as a block (*in blocco*) in accordance with Article 58 of Legislative Decree No. 385/1993 (as amended, the "**Italian Banking Law**") and the relevant instructions issued by the Bank of Italy. This means that any such receivables, in order to be identifiable as *in blocco*, should be:

  Credits, debts and contracts that have a common element of identification; such element could consist of the technical form, the economic sector of destination, the type of counterparty, the geographical area or any other element which allows identification of the relationship transferred in blocco.

  It is worth noting that the requirement for a pool has been eliminated in relation to trade receivables transactions and disposals of non-performing loans and leases (NPLs) (see further below).

- The nature of the transferee and the servicer: The Securitisation Law does not provide for any restrictions on the nature of the transferor, but it is worth noting that the originators of the receivables (the "**Originators**") are predominantly banks or other financial intermediaries. However, following recent amendments to the Securitisation Law that render the assignment of trade receivables under the Securitisation Law less burdensome, corporates could play a more active role in the market in the future. On the other hand, as stated above, the law requires that the transferee of the receivables is a special purpose company (the "**SPV**") enrolled on a special register held by the Bank of Italy. In addition, it is expressly provided that servicing activities (which include the collection and recovery of the receivables as well as monitoring compliance of the transaction with applicable law and the prospectus under which the securities are issued) be carried out by a bank or another financial intermediary enrolled with a register held by the Bank of Italy in accordance with Article 106 of the Italian Banking Law. It is worth noting that such role is often played by the Originator and, in the context of NPL transactions, the role is played by a third party independent specialised servicer, to the extent in both cases it is a bank or eligible financial intermediary. In this respect, it is now also envisaged that, pursuant to Ministerial Decree No. 53/2015, entities licensed under Article 115 of Royal Decree No. 773/1931 (which would include entities that have receivables recovery activities among their corporate objects) are entitled, under certain conditions, to purchase receivables without being a bank or an intermediary enrolled pursuant to Article 106 of the Italian Banking Law.

- Sale perfection requirements: The Securitisation Law introduces a significant departure from the common ordinary rules set out in the Italian Civil Code, according to which any transfer of receivables becomes enforceable against the assigned debtors by serving a notification of the transfer upon them or by obtaining the assigned debtors' acceptance of the transfer that occurred (both bearing a date certain at law, which implies the involvement in the notification process of a court bailiff or in the establishment of a PEC (certified electronic email) account or of a notary in the certification of the acceptance). Pursuant to Article 4 of the Securitisation Law (by way of reference to Article 58 of the Italian Banking Law, which sets forth the rules for the transfer of rights, assets and businesses to banks and financial intermediaries), a transfer of receivables complying with the criteria set out under the Securitisation Law can become enforceable against the underlying debtors and the Originator's third-party creditors through the publication of the relevant transfer notification in the Italian Official Gazette and the registration of such transfer in the SPV's Companies' Register. Following the date on which such formalities have been perfected: (i) the transfer cannot be challenged or disregarded by any subsequent assignee of the transferor, the creditors of the transferor, the liquidator of the transferor and the assigned debtors; and (ii) any collections from the transferred receivables will be reserved to exclusively meet the payment obligations due by the SPV under the notes and the payment of the costs associated with the transaction. Furthermore, under the Securitisation Law, no formalities are required in order to perfect the transfer to the SPV of collateral security (including mortgages) pertaining to the transferred receivables, to the extent that any such guarantees are reserved for bank or financial intermediaries and, hence, could not be formally exercised by the SPV (i.e., so-called *Patto Marciano*).

Important changes to the Securitisation Law and the Factoring Law have been introduced in the last few years, which have reshaped and expanded the two instruments. The changes have been brought about by the following statutes:

- Law decree No. 145 of 23 December 2013, converted into law by Law No. 9 of 21 February 2014 (published in Official Gazette No. 43 on 21 February 2014) (the "**Law Decree 145/2013**")
- Law decree No. 91 of 24 June 2014, converted into law by Law No. 116 of 11 August 2014 (published in Official Gazette No. 192 on 20 August 2014) (the "**Law Decree 91/2014**")

- Law decree No. 50 of 24 April 2017 (published in Official Gazette No. 95 of 24 April 2017) (the "**Decree 50/2017**")
- Law No. 145 of 30 December 2018 (published in Official Gazette No. 302 on 31 December 2018) (the "**2019 Budget Law**")
- Law decree No. 34 of 30 April 2019 (published in Official Gazette No. 100 on 30 April 2019) (the "**Crescita Decree**")
- Law No. 160 of 2 December 2019 (published in Official Gazette No. 304 on 30 December 2019) (the "**2020 Budget Law**")
- Law decree No. 162 of 30 December 2019, converted into law by Law No. 8/2020 (published in Official Gazette No. 51 of 29 February 2020) (the "**Milleproroghe Decree**")
- Law No. 178 of 30 December 2020 (the "**2021 Budget Law**")

LAW DECREE 145/2013

With reference to the underlying assets backing the notes, in order to promote a wider use of the so-called mini bonds (i.e., bonds issued by non-listed Italian SMEs under Legislative Decree No. 83 of 22 June 2012), Law Decree 145/2013 has amended the Securitisation Law in order to expressly make clear that, to the extent such instruments are not equity-linked, hybrid and/or convertible, they may be purchased or subscribed by the SPV and used as underlying assets backing the notes issued by the SPV under the Securitisation Law reintroducing this asset class (CDOs) in the Italian securitisation market under the category of "basket bonds." This reform has recently been supplemented by the amendments to Article 1-*bis* of the Securitisation Law, introduced by the 2019 Budget Law (see below for further details).

With reference to investors, Law Decree 145/2013 clarified that the notes may be subscribed by a single underwriter provided that it qualifies as a qualified investor (*investitore qualificato*) under Legislative Decree No. 58 of 24 February 1998 (as amended, the "**Financial Act**"). Although this is merely a clarification, it clearly indicates the general trend toward liberalising the Italian finance industry by allowing the structuring of simpler securitisations.

The two above changes clearly aim to open the securitisation market to SMEs, as a source of cheaper and more diversified financing.

From the perspective of commingling risk, a significant innovation was introduced by Law Decree 145/2013 and later perfected by Law Decree 91/2014. The result of the changes was to substantially eliminate the factual commingling risk of collections (and relevant investments) deposited into bank accounts. Whilst the Securitisation Law always contemplated the statutory segregation of the securitised assets (receivables relating to each transaction form a separate estate from other transactions carried out by the SPV and the SPV's own assets and no actions are permitted on such estate by any creditors other than the holders of the notes issued to finance the purchase of the relevant securitised receivables) a certain risk was always identified where collections on such receivables and investments made with such monies were deposited in bank accounts. This, coupled with legal uncertainties concerning the validity of floating charges over bank accounts in Italy, often led to the use of bank and investment accounts located in other jurisdictions, typically England. The new provisions now clarify that:

- Any sums paid into the segregated accounts can be freely and immediately disposed of by the SPV to pay exclusively the noteholders and the hedging counterparties covering the risks on the securitised receivables/notes and other transaction costs; no actions are permitted on the segregated accounts by other creditors.
- Should any insolvency procedure be opened against the servicer or other depositories, no suspension of payments will affect the monies standing to the credit of the segregated accounts or any sums that will be credited during the insolvency procedure. Hence, any sums transferred or credited in the segregated accounts will be immediately available to effect the payments due under the securitisation.
- Similarly, no actions are permitted by the creditors of the servicers or sub-servicers on the accounts opened with any other depositories to collect any amounts on behalf of the SPV, other than for amounts exceeding the monies due to the SPV under the securitisation.
- Should any insolvency procedure be opened against a depository, any sums existing or that will be credited on such accounts during the insolvency procedure will be immediately returned to the SPV without the need for procedural requests, filing or submission of claims/petitions, and without waiting for any composition and/or restitution among the creditors.

The above changes seem to have led to the abandonment of the use of offshore cash accounts (at least as a rating agencies' requirement) and accounts created for the deposit of eligible investments.

Moreover, it is also envisaged that the assignment of any existing and future receivables arising from credit agreements (*aperture di credito*), even where settled in a current account (*conto corrente*), will be enforceable provided that the credit agreements are entered into on or prior to the payment of the purchase price with date certain at law (*data certa*).

Law Decree 145/2013 also amended the Securitisation Law to the effect that (i) trade receivables no longer need to be transferred to the SPV as a pool (*in blocco*); and (ii) the parties to a securitisation of trade receivables may elect to perfect the assignment of any receivables through the formalities provided for by the Factoring Law (i.e., full or partial payment of the purchase price, bearing a date certain at law[1] or those contemplated in the Italian Civil Code, i.e., notice of the transfers to the assigned debtors or acceptance of the transfers by the assigned debtors, each bearing a date certain at law), in lieu of the perfection formalities provided for by the Securitisation Law (i.e., publication in the Official Gazette and registration in the competent Companies' Register). In light of the above, the Securitisation Law now provides that: starting from (i) the date of payment with a date certain at law (*data certa*), with respect to trade receivables, or (ii) the date of publication in the Official Gazette for other types of receivables (each a "**Ring-fencing Date**"):

(i) no actions will be permitted on the assigned receivables or cash-flows collected from the debtors, other than to satisfy the noteholders' rights and transaction costs

1 To this end, it will be sufficient to record the transfer into the bank account of the assignor in accordance with Article 2 paragraph 1(b) of Legislative Decree No. 170 of 21 May 2004, which implemented in Italy the Financial Collateral Directive 2002/47/EC.

(ii) no set-off will be permitted to the assigned debtors, between any amounts relating to the assigned receivables against credits owed to the SPV or assignee that arise after the Ring-fencing Date; and

(iii) the assignment to the SPV will be enforceable against the assignors: (a) permitted assigns who have not perfected the assignment prior to the Ring-fencing Date; and (b) creditors who have not started enforcement proceedings on the assigned receivables before the Ring-fencing Date.

The transfer of claims owed by public entities has also been made easier. Law Decree 145/2013 now clarifies that transfers are effective against third parties where the perfection formalities provided for by the Securitisation Law have been met and so no other formalities are required for the purpose of the validity of the assignment; however, pursuant to the underlying contracts or by law, for obtaining payment from Italian local entities directly to the SPV — such as the case of healthcare receivables — it could be required that a notice is served to each debtor (even by way of PEC).

As regards the risk of insolvency of the assigned debtors, Law Decree 145/2013 has extended the protection from clawback actions to prepayments (which are not governed by Article 67, which generally governs payments from debtors and had already been neutralised by the Securitisation Law, but by Article 65 of Royal Decree No. 267 of 16 March 1942 (the "**Italian Bankruptcy Law**"), which captures prepayments of debts that fall due on or after adjudication in bankruptcy, effected in the two years preceding such adjudication.) Thus, payments from debtors are now clawback free. Other payments and the assignments themselves are still subject to clawback in accordance with Article 67 of the Italian Bankruptcy Law, but the suspect periods are shortened to three and six months, respectively. 2

Law Decree 145/2013 also introduced the possibility of structuring transactions through the assignment of assets to collective investment schemes (the "**Investment Funds**"), providing that:

- For such securitisations, the collection and payment services can be carried out by the asset manager (*società di gestione del risparmio* (SGR)) (the "**Asset Manager**") already managing the Investment Fund (as opposed to appointing third-party servicers). This amendment allows the transaction to remain subject to the Bank of Italy's supervision, without increasing the transaction costs, as would be the case if a third-party servicer had to be appointed. Therefore, if the Asset Manager is appointed to act as collection agent, it will be responsible for the collection and payment services and will have the express obligation, as servicers have under the Securitisation Law, to verify that the transactions comply with the applicable laws and the terms of the prospectus.

2 Under general rules pursuant to Article 67 of the Italian Bankruptcy Law, a transfer is subject to clawback: (i) if the transfer was not at an undervalue, if bankruptcy follows within six months (reduced to three months in the case of a Securitisation Law transfer), where the transferor was insolvent at the time of the transfer and the receiver can prove that the SPV was, or ought to have been, aware of the insolvency; and (ii) if the transfer was at an undervalue (the consideration received is at least 25% lower than the real value), if bankruptcy follows within 12 months (reduced to six months in the case of a Securitisation Law transfer), if the transferor was insolvent at the time of the transfer and the SPV cannot prove that it was not, and ought not to have been, aware of the insolvency. It is worth noting that proving ignorance of insolvency is very difficult; a party can generally try to show reliance on the transferor's rating, solvency certificates, good standing certificates, execution searches, protests bulletins, etc., but it will ultimately be a matter of fact.

- The assignment of receivables to the Investment Funds is subject to Articles 4 and 6 of the Securitisation Law (and the other provisions of Securitisation Law to the extent compatible). This means that Article 58 of the Italian Banking Law will apply, by effect of which: (i) the assignee must give notice of assignment by registration in the Companies' Register and publication in the Official Gazette; and (ii) there will be an automatic transfer to the assignee of the security interests securing the receivables (without the need for further registrations or annotations).

LAW DECREE 91/2014

Law Decree 91/2014 amended the Securitisation Law by, among other things (i) confirming and extending the segregation effect as set out above; and (ii) allowing SPVs to grant financings subject to the relevant requirements summarised below. In this respect, Law Decree 91/2014 provides that the Securitisation Law applies also to securitisation transactions carried out through the granting of one or more loans by the SPV, and the following applies:

- from the (certified) date the loan is drawn, in whole or in part, no action is permitted on the receivables and on any sums paid by the assigned debtors other than in satisfaction of the rights of the noteholders and to cover the other costs of the securitisation; and
- the servicer of the securitisation is to be responsible for verifying the correctness of the financing transactions and the relevant compliance with the applicable legislation.

The possibility for an SPV to perform lending activity is consistent with the general trend toward the opening of the Italian lending environment to new players, including foreign qualified institutions acting as investors of securitisations and bonds, to grant private companies (including SMEs) easier access to different sources of funding, ensuring at the same time adequate regulatory control through the involvement of regulated entities acting as servicers of the securitisation.

The SPV may only grant loans:

- to borrowers other than individuals and "micro-enterprises" identified by a bank or a financial institution registered under Article 106 of the Consolidated Banking Act;
- provided such bank or financial institution retains a significant interest in the securitisation, which is aligned with the rules for risk retention requirements set out by the applicable EU legislation; and
- subject to the purchasers of the securitisation notes being qualified investors.

DECREE 50/2017

Article 60-*sexies* of Decree 50/2017, included at the time the decree was converted into law by Law No. 96 of 21 June 2017, introduced new provisions into the Securitisation Law, the purpose of which is to improve recoveries in respect of non-performing loan receivables acquired by the SPV.

In accordance with these new provisions of the Securitisation Law, the SPV will be able to, among other things:

i. disburse loans (always in accordance with the general rules on loans by securitisation SPVs set out in Article 1 1-*ter*) to such distressed debtors in order to improve recovery of the debt or the debtor;

ii. where there is (i) an economic and financial restructuring agreement or plan in place with the debtor, or (ii) an agreement made under Articles 124, 160, 182-*bis* and 186-*bis* of the Italian Bankruptcy Law or (iii) a similar corporate recovery or restructuring procedure or agreement in place, acquire and/or subscribe for equity in such debtors and at the same time grant loans; the decree expressly exempts the SPV from the equitable subordination rules contained in Articles 2467 and 2497-*quinquies* of the Italian Civil Code; and

iii. establish corporate vehicles to directly acquire the real estate and other (registered) assets securing the relevant receivables. This includes property financed by financial leasing contracts, regardless of whether such contracts have been terminated, together with the related contractual rights. As is the case with amounts deriving from instruments purchased or subscribed for by securitisation companies, amounts deriving from these assets and the proceeds of sale will be deemed to be ring-fenced assets of the SPV that must be used exclusively to satisfy the noteholders and to meet transaction costs.

2019 BUDGET LAW

In late 2018, the Italian Parliament approved the 2019 Budget Law; paragraphs 1088 to 1090 of Article 1 of such law introduced some welcome clarifications and additions to the Securitisation Law.

i. As set out above, the Securitisation Law had already been amended in 2014 in order to provide the possibility for securitisation SPVs to advance loans in certain circumstances. However, Securitisation SPVs were prevented from advancing loans to physical persons and to microenterprises (as defined by Article 2, paragraph 1 of the exhibit of Commission Recommendation 2003/361/EC, of 6 May 2003). The microenterprises lending ban has recently been lifted by the amendments to Article 1-*ter* of the Securitisation Law introduced by Article 1, paragraph 1090 of the 2019 Budget Law, having been replaced by a ban on lending to enterprises that have a balance sheet less than EUR 2 million in total. In addition, Article 1, paragraph 1090 of the 2019 Budget Law has clarified that lending by a securitisation SPV may also occur (subject to the rules and limitations set out by the Securitisation Law and outlined above) in the framework of, among other things, a traditional securitisation (i.e., one contemplating the true sale of existing receivables to securitisation SPV).

The above amendments are of specific interest for the purpose of certain NPL securitisations, particularly those involving unlikely-to-pay claims ("**UTPs**"), which often require active management of the securitised portfolio of claims, possibly including new finance. The latter legislative change confirms an interpretation of the Securitisation Law already adopted by practitioners in recent UTP transactions. The former change eliminates the unintended result of limiting financing sources for real estate undertakings (often undercapitalised) in the context of UTP securitisations.

ii. Article 1, paragraph 1088 of the 2019 Budget Law amended Article 7 of the Securitisation Law in respect of non-true sale or "subrogation" securitisations. In addition to clarifying that such securitisation transactions must involve the transfer of the risk in respect of the underlying claims, the amended provisions allow the borrower/owner of the claims to ring-fence, segregate and encumber such claims (and underlying assets) for the benefit of the SPV lender as well as transfer all collections to it, as would be the case in a true sale securitisation. This provision, however, will still need to be implemented by the Ministry of the Economy and Finance (MEF), which will need to identify assets and rights that can be ring-fenced and the formalities needed to achieve the ring-fencing and security, with particular regard to third parties' rights and insolvency situations. In mandating the MEF to issue implementing regulations (which are now expected by the end of 2020), the 2019 Budget Law also states that the beneficiaries of the ring-fencing and segregation could be not only the noteholders but also the hedging counterparties of the lending SPV.

iii. By another amendment made to Article 7 of the Securitisation Law, the legislator extended the operation of the Securitisation Law to include "revenues" arising from the ownership of real estate assets (as well as registered movables, such as vehicles) and rights in rem or personal rights over such assets. The aim of such amendment would appear to facilitate RMBS/CMBS securitisations; given the high level of the change and the lack of further provisions coordinating this principle with the rest of the law, it is uncertain what application is to be expected in the future. The following Crescita Decree (see below) has tried to bring some more clarity.

iv. Finally, the 2019 Budget Law made changes to Article 1-*bis* of the Securitisation Law, which deals with the securitisation of securities. In essence, the change makes it possible for a Securitisation SPV to purchase or subscribe for bonds even if these do not meet some of the statutory requirements: essentially, (i) in relation to SPAs, the limitation that the size of the issuance does not exceed twice the size of the corporate capital unless the bonds are listed, is waived to the extent that the securitisation notes are listed and the Securitisation SPV has purchased the entire issue; and (ii) in relation to SRLs, the requirement that the bond be issued only to professional investors subject to regulatory supervision is waived, so that a Securitisation SPV will be able to subscribe for bonds issued by an SRL despite not being such a professional investor.

CRESCITA DECREE

In line with the 2019 Budget Law, further changes were introduced into the Securitisation Law by the Crescita Decree, in order to facilitate the transfer of non-performing loans and/or registered movable assets and real estate assets.

i. The Crescita Decree modified Article 7.1 of the Securitisation Law providing that, among other things, one or more backup SPVs (*società veicolo d'appoggio*) may also be established as stock companies (*società di capitali*) (so-called "**REOCOs**") with the exclusive purpose of acquiring, managing and developing — in the interest of the securitisation transaction — directly or through one or more further backup SPVs authorised to assume the original debt in whole or in part, real estate and registered movable assets, as well as other granted or newly established assets and rights, and including assets financed by financial leasing

agreements (even if terminated) and the relationships deriving therefrom (in such cases, the backup SPV is typically referred to as "**LEASCOs**"). Therefore, it has been clarified that more than one backup SPV can be incorporated for the same securitisation transaction. The related assets and rights may be transferred pursuant to Article 58 of the Consolidated Banking Act, even if they cannot be identified *en bloc*, without any formalities or additional notes other than those provided for therein. The Crescita Decree has also extended the statutory segregation regime to these assets and rights, as well as the proceeds arising from them; they are segregated by law, in favour of the noteholders and constitute segregated assets (*patrimonio separato*), from the assets of the backup SPVs. With reference to leasing, LEASCOs are assimilated, from a tax point of view, to companies engaged in financial leasing. Furthermore, in the event that — together with assets — financial lease contracts or the legal relationships resulting from their termination are transferred to the backup SPV, it is sufficient that the LEASCO is fully consolidated in the balance sheet of a financial intermediary under Article 106 of the Consolidated Banking Act. Article 7.1 also confirmed that assignment of non-performing receivables may be effected even if the receivables cannot be identified *en bloc* and publishing in the Official Gazette only provides details on transferor, transferee, transfer date, information on the type of underlying agreements, the period under which the underlying relationships arise and the website on which information on the receivables will be uploaded. As regards the transferability of the assets to REOCOs and subsequent transfer to third parties, the Crescita Decree introduced and confirmed certain new tax provisions in respect of which we would refer you to the "Tax aspects" section set out below.

ii. The Crescita Decree has also introduced a new article in relation to transactions involving real estate assets, registered movable assets and rights in rem or in person. Article 7.2 specifies that an SPV operating in this context can carry out only real estate securitisation transactions. Assets and rights designated to satisfy rights of noteholders and hedging counterparties must be identified in respect of each transaction. Additionally, in this type of securitisation transaction, assets, rights and revenues constitute segregated assets, which must be administrated by a qualified Asset Manager.

iii. Changes have been made also to Article 4 of the Securitisation Law, with the purpose of facilitating the securitisation of bank UTPs deriving from overdraft facilities; the selling bank may now transfer and assign to another bank or financial intermediary, registered under Article 106 of the Consolidated Banking Act, the right/obligation to provide further funding as per the relevant overdraft facility or credit agreement, separate from the relevant current account associated with such overdraft facility. Collections received in the current account (including those relating to new advances) shall no longer belong to the assigning bank but to the securitisation transaction.

iv. Finally, the Crescita Decree has allowed the SPV to grant loans not only to debtors, but also to entities assuming the assigned debtors' liabilities and affiliates of the assigned debtors, pursuant to Article 2359 of the Italian Civil Code.

2020 BUDGET LAW

The 2020 Budget Law has extended the rules set out in Article 7.1 (i.e., securitisation transactions of non-performing loans executed by banks and financial intermediaries) to assignments of receivables carried out as part of transactions of social value (*valore sociale*), where the SPV leases to the debtor the real estate asset granted as security for the assigned receivables. In addition, paragraph 8-*bis* of Article 7.1 has extended to transactions of social value the time requirement for the application of the tax regime provided for deeds of transfer or security on real estate assets purchased by the SPV.

MILLEPROROGHE DECREE

Recently the Milleproroghe Decree has introduced significant changes and specifications in relation to the Securitisation Law.

Without amending the text of the Securitisation Law, the Milleproroghe Decree introduced general principles. In particular, the exemption from declaration of ineffectiveness and clawback pursuant to Articles 65 and 67 of the Italian Bankruptcy Law is extended also to securitisations carried out by way of granting of financings. Furthermore, in relation to the loans granted pursuant to Article 7, paragraph 1, letter a) of the Securitisation Law (securitisation made through financing from the SPV to the seller), the financed party can establish segregated assets (*patrimonio destinato*) to the exclusive satisfaction of the claims of the noteholders, by a specific corporate resolution that contains: (i) the segregated assets and rights identifiable as a pool, (ii) the beneficiaries of the segregation, (iii) the rights granted to the beneficiaries, (iv) the terms related to the disposal and replacement of the assets, and (v) limits and circumstances in which the financed party may use the receivables generated by the segregated assets. In the event of insolvency proceedings regarding the financed party, the agreements relating to the segregated assets remain in force and the relevant receivables, assets, rights and legal relationships continue to be considered for the benefit of the noteholders.

In addition to the above, the Milleproroghe Decree has provided the following amendments to the Securitisation Law: (i) loans granted by SPV pursuant to Article 1, paragraph 1-*ter* of the Securitisation Law can also be disbursed through banks or financial intermediaries, and the receivables arising out of such loans can be segregated in favour of the noteholders; and (ii) loans pursuant to Article 7, paragraph 1, letter (a) of the Securitisation Law can be granted simultaneously and in addition to transactions carried out in accordance with Article 1, paragraphs 1, 1-*bis* and 1-*ter* of the Securitisation Law. Finally, the Milleproroghe Decree has specifically extended the regime of assignment of receivables arising out of overdraft facilities to other forms of revolving facilities.

2021 BUDGET LAW

The 2021 Budget Law introduced the possibility of a new securitisation structure: by amending Article 1, paragraph 1, letter (b) of the Securitisation Law, this law provides that sums collected by the SPV in any way (i.e., not only from the debtors but also guarantors and third parties) on assigned receivables can be utilised not only to satisfy the noteholders and the costs of the securitisation but also to service and reimburse loans granted to the SPV by licensed lenders. Thus, the recent amendment allows

Securitisation SPVs to be funded through loans as an alternative to issuing notes, thereby creating new structuring possibilities for the securitisation of bad loans and opening the market to different categories of investors. The 2021 Budget Law also introduces the possibility for a REOCO, the backup SPV (*società veicolo d'appoggio*), as currently regulated by Article 7.1 of the Italian Securitisation Law, to acquire real estate assets securing purchased receivables by way of de-merger or other corporate aggregation structures.

FACTORING LAW

As an alternative to the transfer of assets under the Securitisation Law, receivables can be transferred on a factoring basis, pursuant to the Factoring Law, which is typically applied in the context of corporate principal finance but is often also considered for the establishment of trade receivables securitisation programmes.

The Factoring Law also allows the transfer of future receivables even if they are not identified, provided they will come into existence within a 24-month period. However, a trustee in bankruptcy of the transferor can withdraw from the transfer of future receivables by paying back the transfer price. Partial receivables and conditioned receivables, as long as they are identifiable, are also permitted.

The Factoring Law introduces a special regulation (in derogation from the general rules contained in the Italian Civil Code) concerning the transfer of receivables, such as simplified perfection formalities. In particular, as already stated above as having been introduced into the Securitisation Law with reference to the alternative method for perfecting the assignment, a transfer of receivables under the Factoring Law is perfected vis-à-vis third parties (other than assigned debtors) upon partial or full payment of the relative purchase price, such payment being made on a date certain at law (*data certa*). Moreover, also in respect of a Factoring Law transfer, Article 67 of the Italian Bankruptcy Law is stated to be not applicable to the payment by the assigned debtors to the transferee. However, the payments can still be clawed back from the transferor if they were aware of the insolvency at the time the payment was made, and, if the transfer is without recourse, the transferor then has recourse against the transferee.

In order to fall within the Factoring Law, the transferor in a securitisation transaction must be a business entity (an entrepreneur), and the receivables must arise out of a contract entered into in the course of the transferor's business. The factor, on the other hand, must be a bank or financial intermediary enrolled with a register held by the Bank of Italy and have the activity to purchase receivables as a corporate object. In this respect, it is worth noting that the Factoring Law has recently been amended in order to expand the transfer of trade receivables to corporates (*incorporated as società di capitali*) belonging to the transferor's group and carrying out the activity of purchasing receivables owed by third parties' debtors to the same group's companies, which are not banks or financial intermediaries. However, this provision has been very recently introduced and so remains untested in commercial and legal practice.

The Factoring Law may be also used in a cross-border transaction by structuring a first sale (the "**First Sale**") to an EU bank. The EU bank in turn sells the Italian receivables on

to the foreign SPV that issues the notes. The First Sale would qualify for the application of the Factoring Law.

The Factoring Law is usually relied upon by sellers of non-interest-bearing trade receivables that do not have collateral attached to them. On the contrary, where an Italian securitisation involves interest-bearing receivables and/or collateralised receivables, the securitisation will usually be structured under the Securitisation Law (for the reasons set out under "Tax aspects" below).

Method of transfer

Italy has specific legislation on securitisation and factoring: the Securitisation Law and Law No. 52 of 21 February 1991 (the "**Factoring Law**"), respectively.

Over-collateralisation/yield

Both a discount and a deferred element — to cover funding costs and over-collateralisation levels respectively — can be incorporated into the purchase price paid for the relevant Italian receivables without necessarily affecting the true sale nature of the transaction. However, should a deferred purchase price element be envisaged, the assignor will normally be required to report in its financial statements the percentage of the assigned receivables corresponding to the deferred purchase price.

Tax

TRANSFER

Withholding tax applies in principle to cross-border interest payments. Cross-border interest payments are subject to a 26% withholding tax, unless exemptions provided for by specific domestic law provisions or by tax treaties against double taxation apply. Assuming the receivables are non-interest bearing and are assigned without recourse, then, as between the transferee and the transferor, there is no withholding tax imposed on the payments in respect of Italian receivables, except where receivables are purchased at a discount and such discount includes an interest component, i.e., a component destined to the payment of interest to the transferee's financiers, in which case withholding tax could apply to such interest component.

Under a certain interpretation of Italian law, the financial component embedded in the difference between the nominal value of the receivables and the purchase price (the "**Discount**") representing the consideration for the financing, granted to the Italian Originator by a non-Italian resident purchaser through the purchase of the receivables, may be characterised for Italian income tax purposes as capital income (*reddito di capitale*) pursuant to Article 44 of the Italian Income Tax Code. Consequently, Italian withholding tax at 26% would be applicable to the financial element embedded in the Discount. Exemptions may be available under specific domestic law provisions or under tax treaties against double taxation.

The gains and other proceeds realised "...through the transfer for a consideration or the reimbursement of pecuniary credits" other than that representing the financial element noted above and taxed as capital income, qualify in the hands of the non-

Italian purchaser as miscellaneous income (*reddito diverso*) pursuant to Article 67(1) (c-*quinquies*) of Presidential Decree No. 917/1986. According to Article 5(5) of Legislative Decree No. 461 of 21 November 1997, capital gains from the sale or redemption of debt claims are exempted from Italian income taxes when realised by a non-Italian resident person that is resident for tax purposes in a country allowing an adequate exchange of information with Italy (and which complies with all the documentary requirements).

Law Decree 91/2014 has exempted payments on medium-long term financings from withholding tax interest (i.e., financing having a duration longer than 18 months) granted by banks established in the EU. It is still unsettled whether this exemption can apply to committed programmes for the purchase of receivables entered into by banks established in EU with Italian Originators (under the Factoring Law).

Registration tax is applicable on contractual documents executed in Italy, unless structured as exchange of correspondence.

Further, if registered collateral (i.e., collateral that needs to be registered in public registries for perfection purposes as pledges over quotas, mortgages, special lien, pledges over IP rights) is transferred as part of the transfer of the receivables (whether automatically as a matter of law or otherwise), registration tax may be payable at a rate of 0.5% and mortgage and cadastral tax may be payable on the mortgages at a rate of 2% of the amount secured by such collateral. If the transaction is effected under the Securitisation Law, no formalities (other than publication in the Official Gazette) are required to perfect the transfer of such collateral, and therefore no registration tax or mortgage and cadastral tax will become payable.

Other information

NOTES

Notes issued by a SPV, pursuant to Article 6, paragraph (1), of the Securitisation Law will be subject to the tax regime provided for by Legislative Decree 1 April 1996, No. 239, as subsequently amended and supplemented (the "**Decree 239/1996**").

Pursuant to Decree 239/1996, withholding tax applies at the rate of 26% on any interest, premiums and other proceeds (the "**Interest**") payable in respect of the notes. However, it is worth noting that, subject to compliance with certain requirements and procedures, Decree 239/1996 provides an exemption from the 26% substitutive tax for any payment of Interest in respect of the notes pursuant to the Securitisation Law made to: (a) non-Italian resident beneficial owners, without a permanent establishment in Italy to which the notes are effectively connected, who are resident, for tax purposes, in a white list country; (b) international bodies and organisations established in accordance with international agreement ratified in Italy; (c) foreign institutional investors, even if they are not taxable persons, set in a white list state; and (d) central banks and entities also managing official state reserves.

NEW PROVISIONS ON TAX TREATMENT OF BACKUP AND RE SECURITISATION SPVS

The Crescita Decree introduced some amendments to the Italian Securitisation Law for tax purposes.

In particular, with respect to backup SPVs (*società veicolo d'appoggio*), Article 7.1, paragraph 4 states that their assets, rights and proceeds originating from such assets and rights establishes a segregation of assets (*patrimonio separato*) in favour of the SPV in the interest of the noteholders, so clarifying that the accounting treatment, i.e., off-balance sheet treatment, and the related tax-neutral regime applicable to SPVs also apply to the backup SPV's set-up in the context of the securitisations of non-performing loans. Therefore, as a general principle, any income derived by the backup SPV is not subject to any income taxation, with the only exception of amounts, if any, available to the backup SPV at the end of the securitisation process.

Moreover, the above-mentioned decree provides for the application of registration, mortgage and cadastral taxes at a fixed amount of EUR 200 each on the transfer to a backup SPV of the assets and rights granted or set up to guarantee the receivables that are object of the securitisation.

The same tax treatment applies on the transfer of the real property or other rights on the real property from the backup SPV to:

- entities performing business activity if they declare in the transfer deed their intention to resell the same assets or rights within five years; and
- individuals not performing a business activity if the conditions for the application of the beneficial regime, so-called *prima casa*, are met and the purchaser does not resell such assets in the following five years from the date of purchase.

As to the VAT aspect, the Italian Tax Authority, with guidelines No. 18/2019, provides some clarifications on the proceeds paid by the SPV to the backup SPV. In particular, the ITA has clarified that:

- the amount paid by the SPV to the backup SPV for the managing of the assets falls within the application of the VAT (management fees);
- the transfer of money from the SPV to the backup SPV to refund the purchase, management, insurance, development and sale costs of the real property does not fall within the application of the VAT; and
- the transfer of assets from the backup SPV are exempt from the VAT application, according to Article 10, paragraph 1, No. 8-*bis*) and 8-*ter*) of Presidential Decree No. 633 of 1972.

As mentioned above, the Crescita Decree introduced the possibility of securitising proceeds deriving from real estate assets and registered movable assets in the context of the restructuring of debts of borrowers in a distressed scenario. In such respect, Article 7.2 was introduced to the Italian Securitisation Law in order to allow ad-hoc securitisation SPVs ("**RE Securitisation SPVs**") to purchase real estate and registered movables, as well as in-rem and contractual rights on such assets, and to securitise the proceeds deriving from such assets.

As clarified by the Italian tax authorities with ruling No. 132/2021, RE Securitisation SPVs enjoy the same tax treatment applicable to the backup SPVs as described above, both for direct and indirect taxation purposes. In particular, the Italian tax authorities

have confirmed that, as a consequence of their off-balance sheet treatment from an accounting standpoint, RE Securitisation SPVs are tax-neutral from a direct taxation perspective. Moreover, notes issued by the RE Securitisation SPVs abovementioned will be subject to the tax regime provided for by Decree 239/1996, just like ordinary securitisation SPVs.

Moreover, the above-mentioned decree provides for the application of registration, mortgage and cadastral taxes at a fixed amount of EUR 200 each on the transfer to and from a RE Securitisation SPVs of the real estate connected to the receivables deriving from the lease agreements lease object of the securitisation.

DATA PROTECTION

Broadly speaking, under Italian law, no data on natural persons can be transferred without their prior written consent. Nevertheless, in the context of a transfer, no consent is needed, but simple notification. Facilitations are contemplated in the case of transfers under the Securitisation Law, in respect of which notification to the assigned debtors may be performed through publication in the Italian Official Gazette for privacy purposes (subject to a later, more detailed notice).

NPL SECURITISATIONS

There has been a primary market for non-performing loans and leases in Italy for several years following a boom in the early 2000s (due largely to the introduction of the Securitisation Law).

To assist larger banks in disposing of high volumes of NPLs, in addition to the specific provisions of the Securitisation Law as discussed above, new measures have been introduced in recent years, including:

- a state-backed guarantee on senior tranches of securitised NPLs (GACS);
- the establishment of two private funds (the ***"Atlante"***) for the purpose of subscribing for new equity in Italian banks and purchasing mezzanine and equity tranches of securitised NPLs; and
- reforms of bankruptcy and foreclosure proceedings in order to accelerate and make more efficient the recovery procedures and the reduction of NPLs on banks' balance sheets.

In particular, Italian Law No. 49 of 8 April 2016 (the "**Law 49/2016**") was enacted in order to introduce a scheme for the GACS (structured in order to meet the European Commission demands to avoid state aid and to be renewed from time to time, as renewed in 2019 for two further years until 27 May 2021) that envisages the use of true sale securitisation to facilitate the disposal of NPLs by banks in the Italian market. Law 49/2016 as amended by Law Decree 25 March 2019 No. 22 published in Official Gazette No. 71 of 25 March 2019 in the context of the emergency measures adopted by the government for the COVID-19 pandemic, contemplates the issue by the Italian State (through the Italian Ministry of Economy and Finance (MEF)) of a first demand NPL securitisation guarantee (*Garanzia Cartolarizzazione Sofferenze* – GACS) assisting the most senior tranches of notes issued under an NPL securitisation. Under the envisaged

scheme, any subordinated tranches are not to be repaid until such senior tranches have been fully repaid. A fee calculated as a yearly percentage of the amount guaranteed will be paid by the SPV to the MEF, which increases over time to incentivise an accelerated recovery.

The guarantee will need to be previously approved by the MEF upon request of the relevant originator and will only be issued after the senior tranche is rated investment grade or higher by a rating agency included in a list accepted by the Eurosystem and subject to at least 50% of the mezzanine/junior tranches issued under the securitisation being sold to the market. The servicing of the securitised portfolio of NPLs will be carried out by a third entity independent from the relevant originator and its group.

It is worth noting that certain requirements of the GACS mechanism are currently under review by the Italian legislator in the context of the package of law provisions that the Italian government is going to enact in order to support the national economy in light of COVID-19.

The GACS mechanism, initially planned to remain in force until 6 March 2019 and renewed in 2019 for two years until 27 May 2021, has been further postponed to 14 June 2022, by Article 1 of Decree 15 July 2021 of the Ministry of Economy and Finance.

In the same context, other amendments have also been introduced by Italian Law No. 119 of 30 June 2016 (the "**Law 119/2016**") with the aim of accelerating enforcement proceedings both in existing and future lending transactions and increasing the volume of new financing for the Italian lending market, and also supporting the development of Italian NPL securitisations.

In particular, under Law 119/2016 a new floating charge over movable assets (*pegno mobiliare non possessorio*) has been introduced in order to improve access to financing and the growth of the lending sector. Pursuant to the *pegno mobiliare non possessorio*, any entrepreneur (*imprenditore*) registered in the Companies' Register (*Registro delle Imprese*) is now allowed to grant a floating charge over its assets to a broad range of creditors while retaining the right to use and dispose of the relevant property. The *pegno mobiliare non possessorio* can be created to secure the obligations (arising in the course of business) of the security provider itself and/or any third parties. The new *pegno mobiliare non possessorio* can be granted to any creditor and is available as a security for any obligations (including those arising from short-term credit lines and future obligations, as long as a maximum amount is indicated). This new security interest must be registered with a new online register held by the Italian tax authority (*Agenzia delle Entrate*) and is enforceable vis-à-vis third parties as from the date of registration. In the context of insolvency, the *pegno mobiliare non possessorio* may be enforced by the creditor provided that the secured obligations have been admitted as priority claims (*crediti privilegiati*) in the bankruptcy.

Under Law 119/2016, it is now possible for banks and other Licensed Financial Intermediaries to include in their banking financing arrangements an agreement (the "***Patto Marciano***") to obtain, in case of default, title to a designated real estate asset(s) (real estate assets where the owner, their spouse and/or immediate relatives live are not eligible). Repossession upon default can be exercised directly by the creditor or by designating a real estate affiliate. In order to repossess, a payment default needs to be outstanding and continuing for more than nine months (from the date on which

the third instalment is due, in case of monthly instalments, or from the date on which any payment is due for longer instalments or bullet financings). If at the time of the payment default, at least 85% of the principal of the relevant financing has already been repaid, the period of the outstanding payment default necessary to trigger the repossession is extended from nine months to 12 months. Upon the occurrence of a default, the creditor is entitled to notify the debtor (or the third-party security giver) and other secured creditors of its intention to proceed with the repossession of the asset(s). After 60 days of such notification, the creditor may ask the competent court to appoint an appraiser. In the event that the appraisal value exceeds the outstanding debt and the transfer costs, the creditor will pay the difference to the debtor. The transfer is perfected on the date on which the appointed appraiser communicates the value of the real estate asset(s) or, should the value exceed the outstanding debt, on the date on which the creditor pays to the debtor the difference. Even if the borrower (or the third-party security provider) challenges the appraisal value, repossession is not suspended. If the opposition is successful, the borrower will be entitled to receive the difference between the outstanding debt and costs and the updated value.

LEGISLATIVE DECREE 14/2019 (THE "COMPANY CRISIS AND INSOLVENCY CODE")

On 11 October 2017, the Italian Parliament approved Law No. 155 of 19 October 2017 (*Legge Delega*) conferring to the Government the powers to enact certain amendments to the Bankruptcy Law including, inter alia, to the claw-back discipline. On 14 February 2019, Legislative Decree No. 14 of 12 January 2019, enacting Law No. 155 of 19 October 2017 and introducing the "Company Crisis and Insolvency Code" (*Codice della Crisi di Impresa e dell'Insolvenza*) containing the reform of bankruptcy law, has been published on the Official Gazette of the Republic of Italy. It will enter into force as of 1 September 2020 except for certain amendments related, among others, to corporate governance and directors' liability which have entered into force as of 16 March 2019. It should be noted that, with the exception of certain amendments related to, inter alia, corporate governance and directors' liability which have entered into force as of 16 March 2019, the entry into force of the Company Crisis and Insolvency Code, which should have originally entered into force on 15 August 2020 was, due to a pandemic emergency caused by a new form of coronavirus initially delayed to 1 September 2021 by Law Decree No. 20/2020, subsequently postponed to 16 May 2022, by way of the Law Decree No. 118 of 24 August 2021 (the "**Decree 118/2021"**), and then to 15 July 2022, under Article 42 of the Law Decree. No. 36 of 30 April 2022, modifying the Article 389 of Legislative Decree No. 14 of 12 January 2019. Furthermore, the Decree 118/2021 has also postponed to 31 December 2023 the entry into fore of Title II of Part I of the Company Crisis and Insolvency Code (relating to alert procedures and the assisted crisis resolution procedure before the OCRI).

Summary

The above is, by necessity, only a very brief discussion of some of the issues raised by securitisation and the advantages and benefits of this particular method of financing in Italy. However, it is hoped that this brief discussion has shown that securitisation is an innovative and flexible method of financing that ought to attract the interest of all corporate treasurers and other professionals seeking new and more economic methods of arranging finance and to facilitate the structuring of investments in non-performing exposures.

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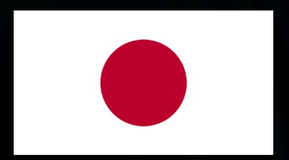

Background

SECURITISATION — LEGAL ISSUES IN JAPAN

This section deals with specific legal considerations in relation to the securitisation of receivables in Japan and the securitisation of receivables governed by Japanese law, and should be read in conjunction with the "Introduction to Securitisation" section.

The Japanese securitisation market developed significantly during the 1990s, with the support of active investments from various funds, lenders and other investors, as well as relatively steady economic conditions. Securitisation refers to a certain finance/investment approach based on cash flow derived from particular assets or business performance, rather than finance or investment based on a company's creditworthiness. Typically, underlying assets include various receivables (lease receivables, housing loan receivables, auto loan receivables, etc.), infrastructure projects, whole businesses, various real estate (commercial, residential, industrial, hospitality, etc.) and credit-linked products and derivatives.

The field of real estate securitisation developed significantly during this period to include many of the types of securities available in other major markets, including asset-backed securities, commercial mortgage backed securities, residential mortgage-backed securities and real estate investment trusts (known as "**J-REITs**"). Laws and regulations were introduced and developed to facilitate the expansion and regulation of the securitisation market in Japan. Those laws and regulations were introduced to regulate the Japanese securitisation market and include certain licensing requirements, risk disclosures, rules concerning bankruptcy remoteness, tax restrictions and rules concerning conflicts of interest. Together with other codes of conduct, the legal and regulatory framework has ensured that the Japanese securitisation market is safe, reliable and attractive to Originators and investors alike.

Despite this considerable growth, the decline in share prices worldwide and the financial downturn caused by the subprime crisis caused a dramatic slowdown in Japan's economy, and in particular, the Japanese real estate market after the collapse of Lehman Brothers in September 2008.

Nevertheless, the securitisation market in Japan has become attractive to investors. The Nikkei index continues to follow a general upward trend as companies experience increased profits and look to identify new opportunities for investment. Meanwhile, the real estate market continues to recover as investors seek to capitalise on depressed property prices in the residential and commercial real estate sectors. There are indications that the Japanese securitisation market is recovering and that this recovery will continue over time. In particular, the J-REIT market recovered, and the REIT Index of the Tokyo Stock Exchange has increasingly been attracting public investors and led the recovery of the real estate market in 2013. However, in 2020 and thereafter, the J-REIT market has been adversely affected by the COVID-19 pandemic, as is discussed further below.

TMK STRUCTURE AND GK-TK STRUCTURE

Japanese law allows an investor to take advantage of various tax-friendly securitisation schemes. Although a joint-stock corporation (*kabushiki kaisha*) can be used to own and invest in securitised assets, including receivables or real estate, the prevailing investment trend is to make use of a securitisation structure or private fund using a special purpose company (SPC). With respect to investments in real estate in particular, two types of structures are frequently used by securitisation or private real estate funds — a TMK or GK-TK structure.

TMK structure

One of the primary laws governing securitisation in Japan is the Asset Securitisation Law (formerly the Special Purpose Company Law). The Asset Securitisation Law confers a certain tax benefit intended to support the securitisation market, and in particular, real estate securitisations. This tax benefit is generally available to securitisation schemes making use of bankruptcy remote SPCs to hold the underlying assets (or trust beneficial interests thereto).

This type of structure uses an SPC called a *tokutei mokuteki kaisha* (TMK), incorporated under the Asset Securitisation Law, as the vehicle that will own the real estate or trust beneficial interest (known as a "TMK structure"). In a typical financing structure, the TMK issues preferred shares to investors and bonds to the lender or institutional investor. Both the preferred shares and bonds are backed by the real estate or trust beneficial interest owned by the TMK.

TMKs enjoy favourable tax treatment, provided they meet certain requirements under Japanese law. A qualified TMK that meets certain tax law requirements can deduct dividends and interest from its taxable income, minimising the TMK's effective corporate tax rate. A TMK also enjoys lower real estate acquisition tax and registration tax rates, which can be quite substantial if the value of an asset portfolio is significant.

A TMK is strictly regulated under the Asset Securitisation Law. Among other things, it must file a notification of a certain asset liquidation plan with the local financial bureau before it commences business. The plan sets forth the type of business in which the SPC may be involved. It must also file a notification of any amendments to the plan. In 2011, the Asset Securitisation Law was amended to loosen such strict filing requirement and give TMK flexibility on additional investment into real estate in the form of trust beneficiary interest.

GK-TK structure

Another common structure is the GK-TK structure, which makes use of a *godo kaisha* (GK), or Japanese limited liability company. Under this structure, the GK, as the TK operator, owns and operates the real estate or trust beneficial interest under a *Tokumei Kumia*i (Silent Partnership) Agreement ("**TK Agreement**") with the TK investors. As silent "partners," the investors may not take part in any of the business or management of the GK. Although the parties enter into a so-called Silent Partnership Agreement, no actual partnership is formed between the TK operator and the TK investors. Instead, the relationship between them is purely contractual.

The GK-TK structure has been commonly used as the preferred structure for private real estate funds, due, in part, to its simplicity. The GK-TK structure has been generally used to acquire real estate indirectly in the form of trust beneficiary interests of trusts owning real estate due to the license requirements of the Real Estate Syndication Law (RESL) (as discussed further below). Previously, the law applicable to the GK-TK structure did not impose particularly strenuous licensing requirements on the GK holding a trust beneficiary interest in real estate. However, with the implementation of the Financial Instruments Exchange Law (FIEL) in 2007, trust beneficial interests held by a GK became subject to licensing requirements, which apply, among other things, to TK Agreements.

In addition to licensing requirements, the FIEL provides a regulatory regime for "self-investment business," which applies to TK Agreements under which investments are made "primarily" in securities (including trust beneficial interests in real estate). Any TK operator who engages in the management or investment of such a collective investment scheme fund must be licensed to conduct "discretionary investment business" ("**DIB License**") under the FIEL.

An exemption to the DIB License requirement is available if at least one of the Japanese investors is a qualified institutional investor (QII). If this is the case, under the QII special business exemption, the TK operator is exempt from obtaining a DIB License, but it must file prior notification with the local financial bureau of the Financial Supervisory Agency. To qualify for the QII special business exemption, at least one of the TK investors must be a QII and there must be fewer than 50 total non-QII TK investors.

Another exemption to the DIB License requirement under the FIEL is available if the TK operator delegates under a discretionary asset management agreement all of its investment business (i.e., fund management services) to a third-party asset manager that is properly licenced to conduct discretionary investment business in Japan.

The asset manager in a GK-TK structure who engages in asset advisory business for the GK must have a DIB License or at least an investment advisory business licence ("**IAB License**"), depending on the structure. An asset manager with only an IAB License cannot engage in discretionary investment business and, as a result, cannot make any investment decisions on behalf of the GK.

Until recently, a GK would have itself needed to be licensed under the RESL in order to acquire real estate in fee simple and to enter into TK Agreements with TK investors subject to certain exceptions. However, effective in December 2013, the RESL was amended to eliminate those licence requirements and has permitted the GK itself to acquire real estate in fee simple and to enter into TK Agreements with TK investors if the GK retains a licensed real estate syndication operator. This license was newly introduced by the Ministry of Land, Infrastructure, Transportation and Tourism.

Although there are certain requirements as to who can participate in this new type of GK-TK, the amended RESL has stimulated additional real estate investments in Japan by institutional investors such as pension funds, and helped increase investments in — including renovations of — hospitals, nursing homes, elderly care facilities and other types of smaller or medium-sized properties without involving a trustee in Japan.

J-REITS

In Japan, most J-REITs use the investment corporation structure, and a number of such J-REITs are listed on the Tokyo Stock Exchange. The J-REIT is an investment corporation that is a vehicle incorporated pursuant to the Investment Trust and Investment Corporation Law. The investment corporation must delegate its asset management to a licensed asset management company. The investment corporation owns real properties and distributes the profits generated by such real properties to its shareholders (unit-holders). The shares (units) of a number of investment corporations are listed on Japanese stock exchanges where their shares are publicly traded. The target assets of the J-REIT are a broad range of real properties, including residential buildings, offices, commercial or retail buildings, hotels or resorts, warehouses and logistic buildings. In June 2013, the Law Concerning Investment Trust and Investment Corporation Law (which

governs J-REITs) ("**Investment Trust Law**") was reformed. The amended Investment Trust Law reforms the J-REIT system to include the implementation of rights plans for J-REITs, regulation of insider trading and measures to allow investment in foreign assets by J-REITs.

Similar to the TMK, J-REITs enjoy special tax treatment with respect to dividends to investors, which, subject to certain qualifying requirements, are treated as a deductible expense for the purposes of corporate tax. Since investment corporations are prohibited from carrying profit forward to the next fiscal year for the principal purpose of enjoying special tax treatment, they tend to rely on debt finance.

Listed J-REITs are subject to disclosure requirements under the FIEL, which include: (i) securities registration statements in the case of public offerings of new shares or bonds and (ii) continuing disclosure of annual (or bi-annual) securities reports. In addition, the listing rules of the stock exchange require the listed J-REITs to disclose information where certain events (especially related to assets and financial conditions) occur, on a timely basis. Most listed J-REITs have disclosed detailed information on real property (such as net operating income generated from the property and appraisal value) and detailed and timely financial information after the end of their fiscal periods (such as estimated distribution of profits).

During the financial distress after the collapse of Lehman Brothers in 2008, many listed investment corporations fell into difficulties with obtaining finance or refinancing. In response, after 2009, a series of J REITs announced mergers between listed J-REITs to expand their scale of assets. However, in 2013, a series of new J-REITs went public on the Tokyo Stock Exchange, and a series of listed J-REITs restarted the public offering of shares. As a result, the REIT Index of the Tokyo Stock Exchange was increasing after 2013, leading the recovery of the real estate market in Japan. However, from spring 2020, the COVID-19 pandemic adversely affected the performance of a wide range of various real estate portfolios. More specifically, Japan's government "requested" the suspension of various businesses pertaining to real estate, such as entertainment events, hotels, restaurants, etc., which has caused a delay of returns to real estate owners and developers. The Tokyo Stock Exchange REIT Index dropped from February to March 2020. However, it recovered in 2021. J-REITs are now facing a restructuring of their investments, while some J-REITs have allowed moratoriums to tenants and hotel operators to rescue such tenants and hospitality players in the long term.

A new trend of the J-REIT is "infrastructure REIT" which mainly holds renewable energy plants or other infrastructure assets. In response to the growth of the renewable energy market in Japan, seven (7) infrastructure REIT have been listed in the Tokyo Stock Exchange to date.

NEW TREND OF REAL ESTATE INVESTMENT - SECURITY TOKEN

The amendment of the FIEL in 2019 enhances the regulations on STOs (Security Token Offerings) by applying the securities regulations under the FIEL when an STO offers an investment program. The tokens or the rights represented on such tokens issued in an STO are called "Security Tokens", which are newly classified as the securities under the amended FIEL. STOs will be subject to disclosure requirements, and the issuers or brokers who deal with STOs will be subject to certain registration requirements under the amended FIEL.

In 2021, Mitsubishi UFJ Trust Bank, one of Japan's largest banks, has completed its first public offering of the asset-backed security token issuance in Japan. The bank announced it created beneficiary certificates representing the asset-backed securities and tokenized them on

the securitize platform. Investors are issued a digital token that represents a physical investment of the real estate to be stored on a blockchain.

TRUST STRUCTURE

As a recent trend, trustees are assuming the role of repackaging products. For example, a trustor will entrust its holding shares, JGBs, corporate bonds, convertible bonds, loans, etc. in a certain trust bank, and the trust bank will borrow non-recourse loans from banks or issue "trust bonds" to various investors as well as through public offerings. These loans or trust bonds are backed by trust assets, which can include derivative transactions to which the trust bank is a party. The structure can be either a "cash trust" where the trustee will purchase relevant shares, JGBs and bonds, etc. at the instruction of the trust beneficiary interest holder, or "securities trust or loan receivable trust" where the trustor has already acquired such shares, JGBs and bonds before entering into the trust agreement. In general, trust banks in Japan are not necessarily proactive when it comes to new products and tend to take a conservative approach.

PERFECTION OF TRANSFERRED RECEIVABLES

The perfection of transferred real estate in Japan is a relatively simple issue thanks to the unified real estate registration system, which usually accurately reflects the ownership of real estate. However, in the case of a securitisation of receivables or loans, the question of how to effectively perfect the transfer of such assets is critical.

There are two main laws relating to this issue:

- the Civil Code
- the Law Concerning the Transfer of Movables and Receivables

Under the Civil Code, notification from the creditor to the debtor is required for a creditor to perfect the transfer of a receivable. A debtor, meanwhile, may only perfect the transfer of its obligations under a receivable with the consent of the creditor and the transferee. Such notification date or consent date must also be certified by the postal service or a notary public. The Civil Code has changed, effective as from 1 April 2020. As a result, detailed rules regarding the perfection and/or transfer of a receivable have changed, although the overall practice has not been much affected.

The traditional method of perfection under the Civil Code can give rise to significant costs, especially when a large number of receivables or loans are being transferred, such as in the context of a securitisation. To resolve this issue, the Law Concerning the Transfer of Movables and Receivables allows large numbers of receivables or loan portfolios to be transferred at one time and such transfers to be perfected by way of a certain registration system. This convenient system has greatly assisted the securitisation of receivables and loan portfolios in Japan, including auto loan receivables, lease receivables, consumer loans, commercial loans, trade receivables and receivables of other asset classes.

In addition, the new wave of digitalisation will affect the traditional practice of registry offices and notary public offices that have relied on original paper or manual signature, and it is expected that the new system will allow e-applications and introduce a new practice of perfection. This trend has accelerated due to the COVID-19 situation.

TRUE SALE

An important requirement for ensuring the bankruptcy remoteness of a securitisation vehicle is that a "true sale" of the assets has taken place, regardless of whether the underlying assets are real estate or a portfolio of receivables. This issue is closely related to the "off-balance sheet" accounting treatment of the Originator. If an Originator becomes insolvent and the bankruptcy trustee challenges the effectiveness of the sale of assets from the Originator to the securitisation vehicle, or the legal/accounting separation of such securitisation vehicle from the Originator, the question of whether a true sale issue has in fact taken place will require analysis.

Although there is no clear guidance as to what constitutes a true sale under Japanese law, the Japanese securitisation market recognises certain key factors, which include the following:

- consideration of fair market value
- the completion of perfection
- no significant buy-back option (i.e., the level of risk transfer)
- the reasonable intention of the related parties

Tax

TAX IMPLICATIONS FOR SECURITISATION

In Japan, as mentioned above, there are certain special tax treatments benefiting securitisation vehicles that have allowed the securitisation market to develop significantly to date. To avoid or reduce taxes in connection with a securitisation, transaction participants should: (i) choose a securitisation vehicle that is not taxed at the entity level (a pass-through entity, such as the TK Agreement in a GK-TK structure); or (ii) structure a securitisation so that profits of a taxable securitisation vehicle that are distributed to investors may be treated as a deductible expense (a pay-through entity, such as the TMK). For transactions in which the value of the asset portfolio is significant, transaction participants should consider using the TMK, which offers lower real estate acquisition tax and registration tax rates.

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Kazakhstan

Background

Prior to the global financial crisis of 2008, there were several major cross-border securitisation transactions in Kazakhstan, including securitisation of residential mortgages and diversified payment rights. Kazakhstan's economy was severely affected by the global economic downturn, which curtailed all attempts of securitisation transactions following 2008. In 2014 and 2015, Kazakhstan experienced another slowdown in economic growth sparked by falling oil prices, the Ukrainian crisis and uncertainty surrounding the Russian economy.

In 2019, the central bank, the National Bank of Kazakhstan (NBK), published an operational plan for the development of the financial sector on its website. For the first time in many years, the NBK stated in its plan that it would focus on the development of the securitisation market. Accordingly, while the effect of the COVID-19 pandemic and the Russian invasion of Ukraine in 2022 remains to be seen, we expect that the securitisation market (particularly domestic securitisation) will reemerge and begin to play a more substantial role in Kazakhstan.

Legal framework

Kazakhstan has a comprehensive legal framework for the implementation of securitisation transactions, although this is as yet untested in this context. The key law that regulates securitisation in Kazakhstan is the Securitisation Law.[1] A number of other laws and regulations contain provisions regulating various aspects of securitisation, such as bankruptcy remoteness, the issuance of bonds by a local SPV, "true sale" provisions and capital treatment of securitisation exposures.

While Kazakhstani securitisation regulations are untested, they are sufficiently developed to allow parties to implement securitisation transactions successfully. While there may be certain gaps in legal regulation, these uncertainties can be navigated via well thought-through legal structures.

Set forth below is a brief summary of the relevant provisions of the Securitisation Law.

Incorporating a special purpose vehicle (SPV)

Under the Securitisation Law, securitisation financing is conducted through a bond issuance by an SPV, which is secured by the purchased receivables.

An SPV is subject to the following requirements:

a. It may be established by the Originator or another party in the form of a Kazakhstani joint-stock company or a limited liability partnership.
b. Its capital must be paid up only by cash.
c. Entities registered in certain offshore jurisdictions, or that have affiliates in such jurisdictions, are prohibited from directly or indirectly holding shares in an SPV (such jurisdictions include Cyprus, Hong Kong and the Cayman Islands).

1 Law "On Project Financing and Securitisation" dated 20 February 2006, as amended ("Securitisation Law").

The law does not provide any specific requirements with respect to officers and employees of an SPV. However, the Securities Market Law[2] provides that, at the request of the SPV's creditors, representatives of the creditors must be included on the corporate bodies of the SPV.

The law does not prohibit the SPV from engaging an independent management company and outside accountants.

The Securitisation Law attempts to achieve a legal basis for the bankruptcy remoteness of the SPV. It does so by providing a special legal capacity for the SPV, requiring the SPV to segregate the assets assigned by the Originator from its own and any other assets, and placing limits on the SPV's voluntary reorganisation and liquidation.

In addition, the Securitisation Law provides that enforcement, with respect to the assigned assets securing the specific bond issue, may be made only for the purpose of fulfilment of the SPV's obligations and payment of services connected with the specific securitisation transaction.

Further, under the Bankruptcy Law,[3] the assigned assets are not included in the bankruptcy estate of an insolvent SPV. Such assets will be transferred by the bankruptcy administrator to the representative of the bondholders for the satisfaction of the bondholders' claims.

Importantly, the law prohibits a bankruptcy administrator from challenging securitisation transactions as a preference/undervalue in bankruptcy proceedings.

Tax

TAX IMPLICATIONS

Generally, tax implications of a securitisation transaction will arise in relation to the following key elements of the transaction: (i) sale of receivables; and (ii) payments made by debtors to the SPV. A generic description of the tax implications applicable to each of those elements is set forth below. Depending on the circumstances of a particular transaction, the analysis may be different, e.g., depending on the nature of receivables, the identity of the debtors, and whether the transaction is cross-border or purely domestic.

Sale of receivables

Kazakhstan does not impose a stamp duty or other documentary taxes on the sale of receivables.

In securitisation, receivables will be sold to the SPV, in most cases, at a discount or at par so that the sale will not generate taxable profit for the Originator. Otherwise, there is a 20% profits tax and 12% VAT rate, which are payable by the Originator on any positive difference between the purchase of the securitised receivables and their par value.

2 Law "On Securities Market" dated 2 July 2003 ("**Securities Market Law**").
3 Law "On Rehabilitation and Bankruptcy" dated 7 March 2014 ("**Bankruptcy Law**").

The SPV will be subject to a 20% profits tax, which is payable on any positive difference between the value of the securitised receivables and the purchase price paid upon their assignment to the SPV. In the case of an offshore SPV, such differences will be subject to withholding tax at a rate of 20% but may be avoided under most double tax treaties (subject to compliance with certain procedural requirements).

The sale of receivables is not subject to VAT in Kazakhstan if the underlying receivables are credit (loan) receivables.

Payments made by debtor (domestic securitisation)

Generally, interest paid by debtors to the SPV will be subject to Kazakhstani corporate income tax at the rate of 20%. If interest is paid by corporate debtors, 15% of the tax will need to be withheld by the debtors, while the remaining 5% will need to be paid by the SPV on its own. Where debtors are individuals (natural persons), the SPV will need to pay the entire tax on its own. Interest on certain types of instruments (e.g., bonds listed on a stock exchange operating in Kazakhstan or abroad and interest in financial leasing transactions) is exempt from corporate income tax.

Payments made by debtor (cross-border securitisation)

Interest payable by Kazakhstani debtors to an offshore SPV will be subject to withholding tax at the rate of 15% (provided that the SPV has no permanent establishment in Kazakhstan). The rate of the withholding tax may be reduced under most double tax treaties to which Kazakhstan is a party (the usual reduced rate is 10%), subject to compliance with certain formalities and the SPV being the beneficial owner of interest payments. In practice, it may be difficult to prove that the SPV is the beneficial owner of interest payments, and therefore, to apply the reduced rate. The repayment of the principal portion of indebtedness by the debtors will not be subject to tax. Interest on certain types of instruments (e.g., bonds listed on a stock exchange operating in Kazakhstan or abroad) is exempt from withholding tax.

Other information

ORIGINATOR

Generally, an Originator may establish an SPV as its wholly owned subsidiary. However, certain regulated Kazakhstani financial organisations are prohibited from owning shares in other legal entities, other than certain permitted entities. For example, Kazakhstani mortgage companies are prohibited from acquiring shares in companies other than: (a) finance organisations (locally licenced banks, insurance companies, securities market participants, etc.); and (b) entities whose shares are listed in the higher listing tier on the Kazakhstani Stock Exchange (KASE). Accordingly, a mortgage company may be restricted from setting up an SPV as its subsidiary, given that the SPV is not a "finance organisation" for the purposes of Kazakhstani law, and its shares will not be listed on the KASE. In this case, the SPV may need to be incorporated by a third party.

As noted under "Bond Issuance" below, if the Originator acts as the sole shareholder of an SPV, it will need to comply with the general requirements applicable to bond issuers,

i.e., it must have a rating of at least B2 from Moody's or its debt-to-equity ratio must not exceed seven (prior to the issuance of bonds by the SPV).

SECURITISED ASSETS

The Securitisation Law does not restrict the types of assets, both existing and future, that may be securitised. However, they must be homogeneous for any particular securitisation transaction.

The Securitisation Law expressly permits the assignment of future receivables. The receivables that are being assigned must be determined in the agreement between the Originator and the SPV. This is so that the existing receivable is identifiable at the moment of entering into the agreement, and any future receivable should be identifiable no later than the moment it arises.

The securitised assets must be separated from the assets of the SPV and must not be used for any purposes other than in the interests of the SPV's creditors. The assets must be entrusted to and accounted by a Kazakhstani custodian bank in accordance with a custodian agreement between the SPV and the custodian bank.

The SPV must use proceeds from securitised assets exclusively for the payment of interest on the bonds issued in the securitisation transaction, and for payments of related services. It may also invest such proceeds in financial instruments where doing so is allowed by the Securitisation Law. If the SPV intends to carry out such investments, it must engage a licenced investment portfolio manager.

Securitised assets of an SPV cannot be subject to attachment, except for the purposes of enforcing the obligations of the SPV in a securitisation transaction. In case of an attachment, the proceeds must be repaid in the following order:

- first, to repay the obligations of the SPV secured by the purchased receivables
- second, to pay for the services of third parties obtained in connection with the securitisation transaction

In case of liquidation of an SPV, the secured assets are assigned to all creditors pro rata to their claims.

TRUE SALE

In general, a true sale can be achieved under Kazakhstani law, provided that: (i) the intention of the parties and the wording of the transaction documentation make it clear that the receivables are transferred by way of sale, rather than by way of security or otherwise; and (ii) the results of the transaction (including the discretion and the level of control afforded to the purchaser and the amount of recourse to the Originator) are consistent with a sale.

Banking regulations provide additional true sale requirements for banks. For example, an originating bank may exclude the securitised assets from the calculation of credit risk weighted exposures only if certain conditions are satisfied, e.g., the Originator must not control the SPV and must not own any shares in it, and the risk of non-performance on the securitised assets must always be borne by the SPV, even when the Originator is insolvent.

ASSIGNMENT OF RECEIVABLES: NOTICE REQUIREMENT

The assignment of receivables in a securitisation transaction is effected by execution of an assignment agreement between the Originator and the SPV, and registration of the bond issuance. Accordingly, the assignment agreement by itself will not result in the assignment of receivables; the assignment will become effective only after the SPV procures registration of its bond issuance by the regulator, the Agency for Regulation and Development of Financial Markets.

As a result of assignment of loans to the SPV, the SPV will be entitled to all receivables related to those loans. The Originator will not be liable to the SPV if the proceeds received by the SPV from the assigned loans are less than the purchase price paid by the SPV to the Originator.

A transfer by way of assignment is valid without regard to whether the relevant debtor has been given notice of the transfer.[4] However, the purchaser bears the risk of any unfavourable consequences resulting from failure to give such notice. Until notice is given, the debtor can discharge its debt to the assignor rather than to the assignee. In order for the assignee to assert a direct claim against the debtor, a written notice of assignment is required. The notice may be given by the assignor or the assignee (in the assignee's case, proof of assignment may be required).

GOVERNING LAW

In a domestic securitisation transaction, the transfer of receivables will be governed by Kazakhstani law.

Regarding a cross-border securitisation, the Originator and offshore SPV may choose a foreign law to govern the transfer of receivables. However, the Civil Code [5] provides that certain agreements must be governed exclusively by Kazakhstani law and be subject to the exclusive jurisdiction of Kazakhstani courts (e.g., mortgages, leases and other agreements relating to immovable property situated within Kazakhstan). While there is no legislative guidance or court precedent on this point, it would be reasonable to expect that a Kazakhstani court may, in theory, require that the assignment of payments under a lease agreement in respect of immovable property situated in Kazakhstan be governed by Kazakhstani law.

SERVICING

Pursuant to the Securitisation Law, the Originator may continue to collect (service) payments under the assigned receivables, unless agreed otherwise

BOND ISSUANCE

The Securities Market Law imposes certain requirements on issuers of bonds. Among other things, an entity can only issue bonds if (a) it has a rating not lower than B2 from Moody's (or an analogous rating from other approved rating agencies), or (b) in the quarter preceding the filing of an application for the registration of the bond issuance, its debt-to-equity ratio did not exceed seven. However, these requirements do not apply to an SPV in a securitisation if the Originator, which acts as the sole shareholder of the SPV, meets the above criteria.

The Securities Market Law does not envisage subordination of tranches. Thus, it is uncertain whether it will be possible to divide the bonds into different classes with differing priorities as to payment of principal and interest (e.g., senior and junior tranches). However, the junior tranche may be structured as a subordinated loan (rather than a bond).

The SPV's bond issuance prospectus must contain certain additional information applicable to the SPV, e.g., it must include, as an attachment, the receivables sale agreement.

4 Where the Originator is a Kazakhstani bank, the prior written consent of the relevant debtor may be required as a matter of banking legislation.

5 Civil Code (Special Part) dated 1 July 1999 ("**Civil Code**").

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Luxembourg

Legal framework

The law of 22 March 2004 on undertakings for securitisation, as amended, (the "**Securitisation Law**") was developed to provide an optional and favourable regulatory framework to Luxembourg-based securitisation projects. This adaptable legal and tax framework provides ample flexibility with regard to the form of issuing vehicles and the various structures that can be used. It ensures an environment that protects investors' interests while, at the same time, offering considerable flexibility in structuring such transactions.

The preparatory works to the Securitisation Law emphasise that one of the crucial elements of securitisation transactions is the isolation of securitised assets within a specific estate, which must be exposed only to liabilities directly related to the holding or enforcement of the securitised claims. In this context, the initial purpose of the Securitisation Law was to create a legally secure and flexible environment for the securitisation of a wide range of assets.

The application of the Securitisation Law by a Luxembourg issuer remains optional. This means that the issuer can choose whether to be governed or not, by the Securitisation Law, in addition to the other legal and tax provisions applicable in Luxembourg. Given its multiple legal and tax advantages, incorporating a new securitisation vehicle under the Securitisation Law is strongly recommended.

The Securitisation Law will only apply to securitisation vehicles located and with a registered office established in Luxembourg.

After over 15 years of existence, the Securitisation Law still provides one of the most favourable and stable environments in Europe in which to structure and run securitisation transactions. It is estimated that since 2004, more than 1,500 securitisation vehicles have been incorporated in Luxembourg and over 5,000 compartments created.

On 9 February 2022, the Luxembourg Parliament adopted the draft bill No. 7825 which was proposed by the government on 21 May 2021 (the "2022 Amendment Law"), in order to amend the Securitisation Law. The 2022 Amendment Law provides even greater flexibility and further increases the attractiveness of Luxembourg as a jurisdiction for securitisation transactions.

Incorporating a special purpose vehicle (SPV)

INCORPORATING AN SPV

The Securitisation Law allows securitisation vehicles to be set up either as a (i) securitisation company, or (ii) a securitisation fund managed by a management company. In practice, however, securitisation funds are rarely used.

The main difference between securitisation companies and securitisation funds is that companies are opaque while securitisation funds are transparent entities. This being said, the 2022 Amendment Law broadened the scope of corporate forms available for SPV as it expanded from public limited liability companies (société anonyme) and the private limited liability companies (société à responsabilité limitée), to general

corporate partnerships (*société en nom collectif*), simple limited partnerships (société en commandite simple), special limited partnerships (*société en commandite spéciale*) and simplified joint stock companies (*société par actions simplfiée*).

In practice, and depending on the transaction's characteristics, the favoured corporate forms for securitisation vehicles in Luxembourg are: (i) public limited liability company (*société anonyme*); followed by (ii) private limited liability company (*société à responsabilité limitée*). Furthermore, the securitisation company is usually set up as a so-called "orphan structure" by having its shareholder(s) legally separated from the Originator of the transaction. This legal separation ensures the "bankruptcy remoteness" of the structure and allows a cheaper source of financing for the assets securitised.

Tax

The tax advantages offered by the securitisation framework in Luxembourg are another major driving factor behind the selection of jurisdiction when structuring a new transaction.

Incorporation or amendment of the constitutional documents of a Luxembourg registered securitisation vehicle is limited to a fixed EUR 75 registration fee.

Securitisation companies are fully liable for corporate income tax and municipal business tax, as are all companies registered under the same corporate form in Luxembourg. However, interest (which concerns dividends for a securitisation vehicle considering their qualification, tax-wise, as taxdeductible commitments toward investors/creditors) expenses incurred by the securitisation vehicle are fully tax deductible. Attention should, however, be paid to the interest deduction limitation rule provided for under the new Article 168-bis of the Luxembourg Income Tax law.

The principle, is that exceeding borrowing costs will be deductible in the tax period in which they are incurred only up to 30% of the taxpayer's earnings before interest, tax, depreciation and amortisation (EBITDA).

Exceeding borrowing costs means the portion of interest expenses exceeding interest income.

Note that securitisation companies governed by Article 2 point 2 of the Regulation (EU) 2017/2402 of 12 December 2017, referred to as simple, transparent and standardised securitisation,[1] are not subject to the above-mentioned interest deduction limitation rule. The same applies to stand-alone entities defined as a taxpayer that is not part of a consolidated group for financial accounting purposes and with no associated enterprise (including trusts, foundations, and *stichting* holding directly or indirectly more than 25% of the taxpayer) or non-Luxembourg permanent establishment.

Excessive borrowing costs up to EUR 3 million (where the EBITDA limit is exceeded) remain deductible.

Securitisation companies are exempt from net wealth tax. However, a minimum net wealth tax would remain applicable. In this respect, a flat annual minimum net wealth tax of EUR 4,815 (as at 1 January 2020) would be due, assuming that the securitisation

1 For the securitisation vehicles not falling under the scope of Regulation (EU) 2017/2402 of 12 December 2017, further guidance should be released in 2020.

vehicle's financial fixed assets, amounts owed by affiliated undertakings and by undertakings with which the company is linked by virtue of participating interests, transferable securities and cash deposits represent (i) at least 90% of its total balance sheet and (ii) a minimum amount of EUR 350,000 ("Asset Test"). Alternatively, should the Asset Test not be met, a progressive annual minimum net wealth tax ranging from EUR 535 to EUR 32,100 (as at 1 January 2020), depending on the securitisation vehicle's total gross assets, would be due.

Information on progressive annual minimum net wealth tax:

- EUR 535 for companies having a total balance sheet of less than EUR 350,000
- EUR 1,605 for companies having a total balance sheet higher than EUR 350,000 and lower or equal to EUR 2 million
- EUR 5,350 for companies having a total balance sheet higher than EUR 2 million and lower or equal to EUR 10 million
- EUR 10,700 for companies having a total balance sheet higher than EUR 10 million and lower or equal to EUR 15 million
- EUR 16,050 for companies having a total balance sheet higher than EUR 15 million and lower or equal to EUR 20 million
- EUR 21,400 for companies having a total balance sheet higher than EUR 20 million and lower or equal to EUR 30 million
- EUR 32,100 for companies having a total balance sheet higher than EUR 30 million

The "total balance" sheet is defined as the closing balance of the balance sheet gross assets of the previous financial year.

As a result, the tax impact for securitisation companies should allow the tax neutrality of the transaction.

Securitisation funds are exempt from corporate income tax, municipal business tax and subscription tax.

Dividend distributions made by a securitisation vehicle are exempt from withholding tax. Interest payments are also exempt from withholding tax, with the exception of withholding tax that may be levied on interest payments made to beneficial owners who are Luxembourg resident individuals. Securitisation companies (as opposed to securitisation funds) are, as a matter of principle, fully entitled to benefit from the double tax treaties that Luxembourg has entered into.

Finally, securitisation vehicles are exempt from net wealth tax.

Regarding VAT, management services received by a securitisation vehicle incorporated in Luxembourg are largely exempt. Securitisation undertakings are generally not required to register for VAT with the relevant Luxembourg VAT office, except where they are liable to pay Luxembourg VAT under the reverse charge mechanism on services rendered by suppliers established outside Luxembourg, or they perform intra-Community acquisitions of goods exceeding EUR 10,000 per year (VAT excluded), such as legal or accounting services.

Accounting treatment

Securitisation companies registered in Luxembourg are subject to all the accounting rules applicable to commercial companies. Furthermore, where multiple compartments have been established, a specific individual presentation for each compartment should be prepared within the financial reports.

Securitisation funds will be subject to the specific accounting regime applicable to fonds *commun de placement* (i.e., collective investment schemes existing under a contractual form).

The Securitisation Law also requires the appointment of an external auditor for both forms of securitisation vehicle.

Regulatory concerns

SUPERVISORY AND REGULATORY CONCERNS

Securitisation vehicles that offer securities to the public on a continuous basis are subject to the approval of the Luxembourg Financial Sector Supervisory Commission (the "**CSSF**", *Commission de Surveillance du Secteur Financier*). The last criteria was initially defined by the CSSF in order to determine the public offers on a continuous basis. Therefore, the 2022 Amendment has set forth the conditions to be fulfilled for the determination of a public offer of financial instruments by settling the cumulative conditions of "(a) continuously issuing securities (more than three issues per year) to (b) the public" i.e.: (i) the investors do not qualify as "professional investors", (ii) the denomination of the issues are less than 100,000 euros, and (iii) the issues are not distributed in the form of private placement.

Securitisation vehicles regulated by the CSSF should submit for prior approval to the CSSF: (i) their constitutional documents; (ii) information about their administrative, management and supervisory bodies; and (iii) details of direct or indirect shareholders that have the ability to exercise significant control. Furthermore, financial information should be disclosed to the CSSF on a periodic basis.

Securitisation vehicles incorporated in Luxembourg and subject to the Securitisation Law are out of the scope of the EU Directive on Alternative Investment Fund Managers if (i) they do not securitise loans that originated by themselves or (ii) synthetic transactions only concern the securitisation of creditrelated risks. Irrespective of the assets securitised, Luxembourg securitisation vehicles remain out of scope if: (a) they have been financed only through the issuance of debt instruments; (b) they are not managed following a defined investment policy within the Luxembourg Law of 12 July 2013 on alternative investment fund managers ("**AIFM Law**"); or (c) they meet the definition of "securitisation special purpose entity" within the meaning of the AIFM Law.

Because securitisation undertakings commonly enter into different types of derivatives contracts, rules derived from the European Market Infrastructure Regulation (EMIR) may be applicable to them. However, due to the ability to create independent compartments, Luxembourg-based vehicles are able to mitigate some of the constraints resulting from EMIR (for example, the threshold that must be reached in order to

trigger the legislation's clearing and risk mitigation obligations should be calculated at the level of each compartment, rather than at the level of the whole vehicle).

Other information

FEATURES OF THE SECURITISATION LAW

A broad scope of risks that may be securitised

One of the most significant advantages of the Securitisation Law lies in the fact that any predictable stream of income or risk may be securitised. Furthermore, assets arising in the future may also be part of a securitisation transaction.

A securitisation undertaking is authorised to securitise risks relating to claims, other assets or obligations assumed by third parties or inherent to all or part of the activities of third parties. Despite Article 53 (2) of the Securitisation Law referring to the possibility to "assume those risks by acquiring the assets, guaranteeing the obligations or by committing itself in any other way." However, according to the CSSF, direct lending by a regulated securitisation undertaking can only be performed in specific circumstances and, in particular, where:

- the issuer does not allocate the funds raised from the public to a credit activity on its own account and the documentation relating to the issue clearly defines the assets on which the service and the repayment of the loans granted by the securitisation undertaking will depend
- the issuer clearly describes (i) the borrower(s) and/or (ii) the criteria according to which the borrowers will be selected, so that the investors are adequately informed of the risks, including the credit risks and the profitability of their investment at the time securities are issued

In both cases, information on the characteristics of the loans granted must be included in the issue documents. In general, in view of the nature of a securitisation activity, the securitisation undertakings' action must be limited to a "prudent man" passive management of the securitised debt portfolio, irrespective of whether or not this management is delegated to a professional acting on behalf of the securitisation undertaking.

MANAGEMENT OF THE SPV

Even though the SPV is still prohibited from undertaking commercial activity, the 2022 Amendment Law allows securitisation vehicles or third parties to actively manage a basket of risks linked to loans, bonds or debt instruments as long as the financing instruments are not issued to the public. In practice, the management of the collateralized loan obligation managers (CLOs) or the collateralized debt obligation (CDOs) would be delegated.

Furthermore the 2022 Amendment Law confirms the ability of an SPV to undertake risks by acquiring, directly or indirectly, the securitized assets since it provides that the SPV may acquire the assets to be securitized either by itself being a party to the acquisition agreement or through a partially or fully owned entity.

FINANCING OF THE SPV

Prior to February 2022, the SPV could not be granted a loan except for temporary and accessory purposes, and mainly for liquidity. The 2022 Amendment Law answered favourably to the long-awaited permission request from professionals. It broadens the possibility to finance the securitisation vehicles through loans (instead or in addition to financial instruments).

CONSTITUTION OF SECURITIES BY THE SPV

As provided by the 2022 Amendment Law, a securitisation vehicle is from now on allowed to grant securities or pledge its assets in favour of any third party as long as the security (or the guarantee) relates to a securitisation transaction. Previously, only the investors of the securitisation vehicle couldbenefit from it.

SECURITISATION VEHICLES WITH MULTIPLE COMPARTMENTS

The Securitisation Law also provides for the establishment of securitisation vehicles with multiple compartments, allowing the segregation or ring-fencing of assets and liabilities within each of the vehicle's independent compartments. Using this structure, which involves the creation of a new compartment each time the securitisation vehicle enters into a new transaction, the investors and creditors, whose claims arise with respect to a particular transaction, will only have recourse to the assets of the specific compartment associated with that transaction, without any rights to claim over the assets of another compartment (except if otherwise provided in the constitutional documents). Each compartment can be liquidated separately, i.e., without triggering the liquidation of the vehicle or other compartments. This ability to create independent compartments within one securitisation undertaking is almost unique in continental Europe, and allows a significant reduction in the costs as well as the formalities for multiple or recurrent transactions initiated by the same Originator and/or arranger.

The 2022 Amendment Law confirms the importance of the compartments by allowing every securitisation vehicle to create segregated compartments and requiring that each of them be subject to their own treatment regarding the distribution of profits and losses.

RESTRICTION ON TRANSFER OF ASSETS

In order to provide additional protection to investors, the Securitisation Law provides that a securitisation vehicle can only sell its assets in accordance with the specific provisions of its constitutional documents or its management regulations.

"LIMITED RECOURSE", "SUBORDINATION" AND "NON-PETITION" PROVISIONS

The Securitisation Law specifically upholds these key provisions, commonly found in agreements documenting a securitisation transaction, which contribute to the bankruptcy remoteness of the securitisation vehicle. The 2022 Amendment Law also provides a statutory subordination and hierarchy of the different classes of funding following which, for instance, fixed income debt is ranked above participating debt and debt is takes priority over shares and units.

Securitisation structures

WAREHOUSING TRANSACTIONS

The assets to be securitised may be pre-financed by third-party loans or intragroup financing subject to the following conditions:

i. The "warehousing phase" of the transaction should last for a limited period of time; and

ii. Following this initial phase, the financing of the transaction should include the issuing of securities for a substantial amount.

"ONE-TIER" OR "TWO-TIER" TRANSACTIONS

The Securitisation Law expressly authorises the use of two-tier structures, whereby a first vehicle (the issuing vehicle) is used to issue securities and assign the proceeds of the issue to a second vehicle (the acquiring vehicle) that will acquire the assets being securitised.

"TRUE SALE" OR "SYNTHETIC" SECURITISATIONS

Both true sale and synthetic securitisation transactions (i.e., transactions where only the default risk of the portfolio of assets is transferred to the securitisation vehicle using derivative instruments, with the actual ownership of the portfolio remaining on the balance sheet of the Originator) are allowed under the Securitisation Law.

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Malaysia

Background

SECURITISATION IN MALAYSIA

Securitisation in Malaysia began in 2001, following the introduction of the Guidelines on the Offering of Asset-backed Securities (**ABS Guidelines**) by the Securities Commission of Malaysia (**SC**) in response to global trends and in line with the Capital Market Masterplan initiatives to strengthen and improve the Malaysian capital markets. Similar to other jurisdictions, asset-backed securities (ABS) are securities that are issued pursuant to a securitisation transaction.

Securitisation transactions are recognised as having many advantages over traditional forms of financing. From the Originators' perspective, it potentially offers lower cost of funding, off-balance sheet treatment of debt resulting in improved gearing and liquidity, and diversification of funding sources. From the investors' perspective, securitisation provides a broad selection of fixed income investments.

Under the ABS Guidelines, any person who wishes to issue, offer for subscription or purchase, or make an invitation to subscribe for or purchase ABS must seek the approval of the SC, unless the ABS are structured to fall within the ambit of the Lodge and Launch framework (**LOLA**) implemented by the SC. The ABS Guidelines and the *Guidelines on Unlisted Capital Market Products* (**LOLA Guidelines**) (in the case of unlisted ABS to sophisticated investors in Malaysia and persons outside Malaysia) introduced by the SC set out the specific requirements and criteria that must be compliedwith for issuance of ABS in Malaysia.

ASSETS THAT MAY BE SECURITISED

The ABS Guidelines and the LOLA Guidelines provide that the assets that are the subject matter of a securitisation transaction must fulfil all of the following criteria:

a. The assets generate cash flow.
b. The originator has a valid and enforceable interest in the assets and in the cash flows of the assets prior to any securitisation transaction.
c. There are no impediments (contractual or otherwise) that prevent the effective transfer of the assets or the rights in relation to such assets from an Originator to a special purpose vehicle (SPV). For example:
    i. The necessary regulatory or contractual consents have been obtained in order to effect the transfer of such assets from an Originator to an SPV.
    ii. The Originator has not done or omitted to do any act which enables a debtor of the Originator to exercise the right of set-off in relation to such assets.
d. The assets are transferred at a fair value.
e. No trust or third party interest appear to exist in competition with an Originator's interest over the assets.
f. Where the interest of an Originator in the assets is as a chargee, the charge must have been created for a period of more than six months before the transfer.

Where the ABS is structured as a Sukuk (i.e. Islamic debt securities), the assets that are the subject matter of the securitisation transaction must be Sharia compliant. It is important to note that non-Sharia compliant business assets and interest-bearing debt instruments, such as credit card receivables and mortgages are not permitted under Sharia law.

Credit enhancement

Depending upon the nature of the transaction and the assets involved, the asset pool is usually supported by one or more types of internal and/or external credit and/or liquidity support in order to improve the credit risk profile of the ABS.

INTERNAL CREDIT ENHANCEMENT

A popular type of internal credit support is the senior/subordinated structure. The senior ABS are typically assigned with a higher rating, while the lower-quality (but presumably higher-yielding) subordinated classes receive a lower rating or are typically unrated.

Sometimes "excess spread" (i.e., the net amount of interest payable on the underlying assets in excess of amounts required to pay the finance charges) is used or "trapped" to build up a cash reserve that in turn is used as credit enhancement.

EXTERNAL CREDIT ENHANCEMENT

External credit enhancement such as third-party guarantees or security, letters of credit provided in each case by counterparties of sufficient credit quality or provision of cash collaterals have all been used to enhance the credit of securitisation transactions.

In the event an information memorandum or disclosure documents are issued in relation to the ABS transaction, such information memorandum or disclosure documents must contain information on any credit enhancement and liquidity facilities put in place to support the securitisation transaction including an indication of where material shortfalls may arise.

Foreign exchange control

Foreign exchange control in Malaysia is governed by the Financial Services Act 2013 (**FSA**) and/or the Islamic Financial Services Act 2013 (**IFSA**), with the controller or regulator of foreign exchange being BNM. In 2013, BNM issued Notices on Foreign Exchange Administration Rules (**FEA Rules**), which set out transactions that are allowed by BNM that are otherwise prohibited under the FSA and/or the IFSA. A party undertaking or engaging in any transactions that are not provided or allowed under the FEA Rules would have to obtain approval of BNM prior to undertaking the said transaction.

LABUAN INCORPORATED SPVS

Under the FEA Rules, a Labuan incorporated SPV would be deemed nonresident.

i. Foreign currency issuance by nonresidents

Paragraph 2 of Notice 5 of the FEA Rules provides that a nonresident SPV is allowed to issue a security or an Islamic security denominated in foreign currency in Malaysia to any person. Thus, where a Labuan incorporated SPV is used to issue foreign currency-denominated ABS, approval from BNM would not be required pursuant to the FEA Rules.

Resident investors are allowed to subscribe to the foreign currency-denominated ABS issued by a Labuan incorporated SPV subject to the limitations set out in Notice 3 of the FEA Rules.

ii. Ringgit issuance by nonresidents

Pursuant to the Joint Information Note on the Issuance and Subscription of ringgit and foreign currency-denominated Sukuk and bonds in Malaysia issued jointly by the BNM and the SC (**Joint Information Note**), approval from BNM would be required for a non resident SPV to issue ringgit-denominated ABS in Malaysia.

RESIDENT SPVs

Pursuant to the FEA Rules, a resident issuer is allowed to issue ABS:

a. Denominated in ringgit, in any amount, in Malaysia to nonresident investors provided that such ringgit-denominated ABS does not involve any non-tradable ABS. Pursuant to the Joint Information Note, approval from the BNM would be required if the resident issuer intends to issue non-tradable ringgit-denominated ABS to nonresident investors.

b. Denominated in foreign currency to any person provided that the issuance of such foreign currency denominated ABS to nonresident investors is subject to a limit of MYR 100 million equivalent in aggregate. This limit is calculated based on the aggregate borrowing of the resident issuer and other resident entities within its group of entities with a parent-subsidiary relationship. Approval from BNM would be required if the ABS issued to nonresident investors exceeds the prudential limit of MYR 100 million equivalent in aggregate.

GUARANTOR OR SECURITY PARTY

iii. Non-resident guarantor

Paragraph 22(1) of Notice 2 of the FEA Rules provides that a resident issuer is allowed to obtain financial guarantee in any amount in foreign currency or ringgit from a non-resident.

iv. Resident guarantor

Paragraph 21 of Notice 2 of the FEA Rules provides that a resident is allowed to give a financial guarantee in any amount in foreign currency or ringgit in favour of a nonresident (Labuan) issuer, unless the nonresident issuer is (i) a special purpose vehicle, i.e., an entity set up solely for a specific purpose and is not an operating business unit (in which case, the resident guarantor is required to comply with the borrowing provisions of Notice 2 of the FEA Rules); or (ii) the resident guarantor has entered into a formal or informal arrangement to redeem such ABS in foreign currency other than in an event of default (in which case, the repayment will be deemed as an investment in Foreign Currency Asset (as defined in the FEA Rules) and the resident guarantor is required to comply with the relevant provisions of Notice 3 of the FEA Rules).

No approval from BNM would be required for financial guarantees given by licenced onshore bank.

Legal framework

The Malaysian capital market consists of markets in several assets classes, primarily the equity market, the debt securities/bond market and the market for financial derivatives.

The Malaysian bond market is viewed mainly in terms of its issuer base, which broadly consists of public debt securities and private debt securities (PDS), and in terms of market structure, which is comprised of listed and unlisted bonds. Unlisted bonds are largely traded over the counter (OTC), while listed bonds are traded through the Malaysian stock exchange, Bursa Malaysia.

A wide variety of debt securities products are available in the Malaysian bond market, including straight or fixed-rate bonds, floating-rate bonds, asset-backed securities, exchangeable bonds, convertible bonds, etc. Malaysia, as a key Islamic financial centre, also offers a wide variety of Islamic capital market securities called *Sukuk* that are Sharia compliant.

The SC is the lead statutory authority entrusted with the responsibility of regulating, promoting and developing the Malaysian securitisation markets. The SC is responsible for supervising capital market activities and market institutions including the exchanges, clearing houses and registered market operators, and enforcing and administering laws and regulations pertaining to the capital market in Malaysia. The SC is also the main approval authority for bond issuance in Malaysia, both listed and unlisted. The primary legislation that governs the issuance of capital market products in Malaysia is the Capital Markets and Services Act 2007 (as amended and/or substituted from time to time) (CMSA).

Pursuant to the CMSA, the SC has issued various guidelines to provide legal and regulatory framework to the Malaysian capital markets, including guidelines in relation to the offering of wholesale funds, structured products, corporate bonds, asset-backed securities and Islamic securities. These guidelines are intended to be a catalyst for corporate sector capital market transactions and put forward the SC's criteria for the issuance of the relevant capital market products.

Previously, any issuance of capital market products would require the prior approval or acknowledgment of the SC. In 2015, the SC implemented a major reform in its funds and product approval regime by introducing the LOLA and the LOLA Guidelines, which put in place an online submission system that no longer requires the issuing party to seek the SC's approval or acknowledgment in respect of the offering of unlisted capital market products to sophisticated investors in Malaysia or persons outside Malaysia. Under the LOLA regime, the time-to-market for unlisted capital market products is significantly reduced by enabling the unlisted capital market products to be launched as soon as the required information and documents are lodged with the SC via its online submission system. The LOLA regime requires the first issuance of each lodged product be done within 60 business days from date of lodgement.

Incorporating a special purpose vehicle (SPV)

The SPV must be resident in Malaysia for tax purposes and have independent and professional directors or trustees.

The following requirements have to be considered to determine whether an SPV is "bankruptcy remote":

a. The SPV cannot include in its objectives the power to enter into any other activities that are not incidental to its function as an SPV in relation to the securitisation transaction; it should merely hold the assets, issue the asset-backed securities and manage the cash flows arising from the assets to ensure timely payments of the securities.
b. The SPV must subcontract to third parties all services that may be required by it to maintain the SPV and its assets.
c. The SPV is not allowed to have employees or incur any fiduciary responsibilities to third parties other than to parties involved in the securitisation transaction.
d. All the present or future liabilities of the SPV (including tax) must be quantifiable and capable of being met out of resources available to it.

An additional requirement imposed on the SPV includes that the SPV must maintain proper accounts and records to enable a complete and accurate view to be formed of its assets, liabilities, income and expenditure to comply with regulatory reporting requirements in respect of an issuance.

In relation to incorporation of an SPV, the requirements set out in the following Malaysian legislation will need to be considered:

a. in the case of a Malaysian SPV, the Malaysian Companies Act 2016; and
b. in the case of a Labuan SPV, the Labuan Financial Services Authority Act 1996 and the Labuan Companies Act 1990.

Method of transfer

The transfer of assets from the Originator to the SPV generally needs to be conducted in a manner that results in a "true sale," and not, in substance, merely a secured financing or transfer by way of security. The transfer of assets normally occurs in the form of an assignment (being equitable or legal) or novation.

The commonly used method to effect a "true sale" of an underlying asset in an ABS transaction in Malaysia is by way of an equitable assignment. The risk that arises from an equitable assignment is that a wrong dealing by the Originator may expose the transferee (the SPV in a securitisation transaction) to problems in terms of priority of its claim if it only has an equitable assignment. A problem may arise if the transferor retransfers the underlying assets to a second transferee that then serves notice on the obligors/debtors in respect of the underlying assets (where a legal assignment is deemed created over the underlying assets in favour of the second transferee under

Malaysian law); the second transferee will have priority over the first transferee. Additionally, equitable claims are decided by courts on a case-by-case basis so decisions may vary.

That being said, the perfection of legal assignments in securitisation transactions may cause difficulties. From a Malaysian law perspective, in order to create a legal assignment, the obligors/debtors to the underlying assets would need to be served with a notice of the assignment. This legal formality may prove difficult to comply with when there is a large pool of obligors/debtors to the underlying assets in a securitisation transaction.

As such, the transfer of assets from an originator to the SPV in Malaysia is still widely done by way of an equitable assignment. The risks to an equitable assignment can be mitigated by restrictive covenants imposed on the Originator, prohibiting it from creating subsequent security interests over the underlying assets to be transferred to the SPV under the securitisation transaction. It is important to pay attention to the structuring of the assignment, because if not structured properly, the transaction could be construed as a security assignment rather than a "true sale" transaction. On the other hand, transfer by way of novation is also a preferred method as it effectively transfers all the Originator's rights title interests and obligations in the underlying assets to the SPV.

In order to mitigate the risk of recharacterisation of the transfer of the assets from the originator to the SPV as a secured financing rather than a "true sale", the following "true sale," criteria as set out in the ABS Guidelines and the LOLA Guidelines must be considered and observed:

a. The underlying asset must have been isolated from the Originator.
b. The Originator must effectively transfer all rights and obligations in the underlying asset to the SPV.
c. The Originator must not hold any equity stake, directly or indirectly, in the SPV. In addition, the Originator must not be in a position to exercise effective control over the decisions of the SPV in relation to the securitisation transaction.
d. The SPV must have no recourse to the Originator for losses arising from those assets save for any credit enhancement provided by the Originator at the outset of the securitisation transaction.
e. Where the Originator is also the servicer, the services must be provided on an arm's length basis, on market terms and conditions. In addition, there must be no obligation imposed on the Originator to remit funds to the SPV unless and until they are received from the debtor of the Originator in respect of the underlying asset.

If the above principles are not followed, in the event the Originator experiences financial instability (including insolvency), the method of transfer could be challenged by the creditors of the Originator and/or its liquidator. To the extent that legal isolation is accomplished, investors need to look only to the assets, and not to the Originator, for repayment on the ABS.

Tax

INCOME TAX

Malaysia adopts a territorial principle of taxation in that only income accruing in or derived from or received in Malaysia from outside Malaysia is subject to income tax in Malaysia. Previously, foreignsourced income ("**FSI**") was exempted from Malaysian income tax. With effect from 1 January 2022, the tax exemption on FSI has been removed, and FSI received in Malaysia is now subject to income tax. Nonetheless, on 30 December 2021, the Malaysian Ministry of Finance ("**MOF**") announced that the tax exemption on FSI will be given, by concession, for a period of five (5) years from 1 January 2022 to 31 December 2026 on (i) all types of FSI for individuals (except those in a partnership business in Malaysia), and (ii) foreign-sourced dividends received by companies or limited liability partnerships in Malaysia.

For the year of assessment ("YA") 2022, there is also a new prosperity tax known as "Cukai Makmur" which is a one-off tax imposed at the rate of 33% on the chargeable income of companies that exceeds RM 100 million. The MOF has clarified that taxable FSI received by companies in YA 2022 will not be included in the calculation of chargeable income of a company for the purposes of "Cukai Makmur".

The Income Tax (Asset-Backed Securitisation) Regulations 2014 ("**ABS Income Tax Regulations**") issued under the Malaysian Income Tax Act 1967 (ITA) prescribes the income tax treatment for asset-backed securitisation transactions. In summary, the ABS Income Tax Regulations provides that:

a. With respect to an originator:
   i. The proceeds, gains or losses from the disposal of trade receivables or stock in trade of the originator pursuant to a securitisation transaction is deemed to have been accrued or incurred throughout the period of the securitisation transaction. Such proceeds and gains will constitute the gross income of the originator in the basis period for a year of assessment (YA) that relates to the period of the securitisation transaction, while losses will be allowed as a deduction in that basis period;
   ii. Notwithstanding the above, in the case of a property development business, where any stock in trade in respect of that business is disposed of by the originator pursuant to a securitisation transaction and the originator has a call option to buy back such stock in trade, the proceeds, gains or losses from the disposal of such stock in trade will be treated as gross income or will be allowed as deduction in arriving at the originator's adjusted income, in any basis period for a YA in which the call option expires; and
   iii. Any balancing charge or allowance arising from the disposal of fixed assets by the originator is deemed to be made in the basis period for a YA that relates to the period of the securitisation transaction, in accordance with a prescribed formula.

b. With respect to an SPV:
   i. Income of the SPV (from all sources) should be considered as the SPV's gross income from a single source consisting of a business in the basis period for a YA;

   ii. Any expenses incurred by the SPV for the acquisition of trade receivables or stock in trade pursuant to a securitisation transaction that is deductible under the ITA will be deemed to have been incurred throughout the period of the securitisation transaction and will be allowed as a deduction in arriving at the SPV's adjusted income in the basis period for a YA that relates to the period of securitisation transaction; and
   iii. Deductions for investment holding companies do not apply to the SPV.

c. Section 44A of the ITA on group relief does not apply to the transfer of loss between the Originator and the SPV.

STAMP DUTY

Any instrument or document to which an SPV is a party (including instruments for the transfer or assignment of rights in any asset to or from an SPV), as well as any instrument for credit enhancement, are exempted from stamp duty if they are executed for the purpose of an asset-backed securitisation transaction approved by the SC.

REAL PROPERTY GAINS TAX

Chargeable gains accruing on the disposal of any chargeable assets (e.g., interest in Malaysian real property or shares in real property companies) for the purpose of an asset-backed securitisation transaction approved by the SC are exempted from real property gains tax if they are either:

a. to or in favour of an SPV; or
b. in connection with the repurchase of the chargeable assets, to or in favour of the person from whom those assets were acquired.

WITHHOLDING TAX

Generally, payment of interest derived from Malaysia to any nonresident person is subject to withholding tax at the rate of 15% gross, unless reduced under an applicable tax treaty, with specific exemptions such as interest paid to a nonresident company in respect of Sukuk or debenture issued in ringgit, other than convertible loan stock, approved or authorised by, or lodged with, the SC. With effect since 1 January 2022, this exemption does not apply to interest paid or credited by a SPV to a company pursuant to the issuance of asset-backed securities lodged with the SC where the company and the person who established the SPV solely for the issuance of the asset-backed securities are in the same group.

SERVICE TAX

Services performed by a servicer to administer the assets or perform such other services on behalf of the SPV as may be required in an asset-backed securitisation transaction may fall within the scope of taxable services. However, management services provided by any person who is licensed or registered with the SC for carrying out the regulated activity of fund management under the CMSA are not considered taxable service.

Further, with effect since 1 January 2022, the provision of brokerage services relating to the trading of shares listed on Bursa Malaysia will be exempt from service tax.

Regulatory concerns

Apart from obtaining approval from the SC (in relation to ABS which do not fall within the ambit of the LOLA), an issuer may also need to obtain approvals and rating from various other bodies (regulators and non-regulators), in particular the Bank Negara Malaysia (BNM) if the originator is a financial institution or pursuant to the foreign exchange control requirements (see above), the Economic Planning Unit and relevant State authorities for transfer of real property assets, the Malaysian Registrar of Companies in order for the originator to set up the SPV in Malaysia, Bursa Malaysia if the originator is subject to the listing requirements or, if applicable, listing of ABS, and the relevant rating agencies.

For the issuance of Islamic ABS, the issuer must appoint an independent Sharia adviser, and must comply with the principles approved by the SC's Sharia Advisory Council (SAC) and additional conditions imposed by the SAC.

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Mexico

Legal framework

The Mexican Securities Market Law enacted in 2005 was a key element to reinforce the legal framework of securitisation transactions in Mexico. Moreover, the amendment to certain federal laws also provided certainty to the implementation of these transactions. These laws include regulations for the issuance by Mexican vehicles or trusts of securities or *certificados bursátiles.*

Securitisation legal framework in Mexico includes the following laws and regulations:

- Securities Market Law (*Ley del Mercado de Valores*)
- General Rules Applicable to the Issuers of Traded Securities and Other Participants in the Securities Market (*Disposiciones de carácter general aplicables a las emisoras de valores y a otros participantes del mercado de valores*), issued by the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores* — CNBV)
- The National Banking and Securities Commission Law (*Ley de la Comisión Nacional Bancaria y de Valores*)
- General Rules Applicable to Credit Institutions (*Disposiciones de carácter general aplicables a instituciones de crédito*) issued by the CNBV
- The General Law of Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*)
- Internal rules of the Mexican Stock Exchange (*Reglamento interior de la Bolsa Mexicana de Valores*) and the Institutional Stock Exchange (*Bolsa Institucional de Valores*)
- The General Law of Commercial Companies (*Ley General de Sociedades Mercantiles*)
- The Federal Civil Code (*Código Civil Federal*)
- The Federal Tax Code (*Código Fiscal de la Federación*)
- The Commerce Code (*Código de Comercio*)

Incorporating an SPV

Mexican law allows for the incorporation of special purpose vehicles (SPV) for securitisation transactions:

- The General Law of Negotiable Instruments and Credit Transactions governs Mexican trusts (*fideicomisos*) and the issuance of trust certificates (*certificados de participación*).
- The Securities Market Law governs the issuance of trust certificates (*certificados bursátiles fiduciarios)*, as a Mexican traded certificate.

a. **Mexican trust (*fideicomiso*)**. A Mexican trust is incorporated by a settlor (*fideicomitente*), a financial institution as trustee (*fiduciario*) and a beneficiary (*fideicomisario*). The settlor transfers ownership over assets or rights to the trustee for the benefit of the beneficiaries. This is the most common SPV structure used in Mexican securitisation transactions.

b. **Notes (*certificados de participación*)**. These *certificados de participación* are securities that represent: (i) the right to a pro rata portion of yields on the assets that form part of the trust estate; (ii) the right to a pro rata portion of the property right or of the ownership over the assets that form part of the trust estate; or (iii) the right to a pro rata portion of the net proceeds resulting from the sale of the trust estate assets.

c. **Structured Notes (*certificado bursátil*).** A *certificado bursátil* is a security that represents: (i) the individual participation of its holders in a collective credit; (ii) the right to a portion of the property or ownership right over assets or rights in trust; (iii) the right to a part of the yields and, where appropriate, the residual value of the trust estate; (iv) the right to a part of the product that results from the sale of the trust estate; and (v) the right to receive the payment of principal, interest or any other amount.

Method of transfer

Under Mexican law, a true sale is performed through the assignment of receivables or assets in favour of the trust. The transfer must comply with certain requirements and formalities depending on the assets to be transferred, which should be made in writing and should be notified to the corresponding debtors. Depending on the SPV, the transfer can be included in the trust agreement or at a later stage.

Over-collateralisation/yield

Valuation reports of assets (tangible and intangible) given as collateral, cash reserves, letters of credit and concentration accounts are forms of credit enhancement for securitisations used in Mexico.

Tax

A suitable tax and accounting treatment is essential in order to avoid withholding and other unfavourable tax consequences for securitisation transactions. In general terms, any assignment or sale of assets is considered a transfer for tax purposes and is subject to income tax. This applies if the transfer is made to another company or a business trust. The SPV would not be able to conduct business activities in order to avoid being subject to this provision.

Generally, in Mexico funds are formed as pass through vehicles for tax purposes. Pursuant to article 14 of the Mexican Federal Tax Code, a transfer of assets to a trust made by the settlor would not be treated as a sale for Mexican tax purposes to the extent that the trustors retain residual rights over the trust estate; however, it is deemed as a true sale.

It is important to consider that the specific accounting treatment for a securitisation transaction will depend on the activities carried out by the SPV.

Regulatory concerns

The Securities Market Law and the General Rules Applicable to the Issuers of Traded Securities and Other Participants in the Securities Market provide for rules to be followed in order to carry out a public offer of securities. The CNBV is the regulatory institution in charge of reviewing, regulating and approving issuances and transactions carried out by individuals and corporations as well as credit institutions.

On the other hand, the Securities Deposit Institute (*Instituto para el Depósito de Valores*) is the only authorised agency to act as depository of public securities in Mexico.

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The Netherlands

Background

During the mid-1990s, the Dutch securitisation market began to develop with the issuance of Residential Mortgage-Backed Securities (RMBS). As the securitisation market grew and became more sophisticated, the types of financial assets being securitised broadened. Securitisation transactions have become increasingly important for Dutch banks and corporates as part of their funding strategies.

A number of Dutch banks continued to successfully place RMBS in 2022. In addition, trade receivables transactions, whole loan deals, auto lease securitisations and covered bonds are the primary focus of attention in the Netherlands.

Dutch banks are now playing a central role in the recovering market for RMBS. A significant proportion of RMBS and other asset-backed securities (ABS) transactions in Europe are originated in the Netherlands. This is mainly due to the strong reputation of the Dutch mortgage market and the fact that the Dutch residential market has performed well against other European jurisdictions. In addition to securitisation transactions involving Dutch assets, over the past decade, the Netherlands has proven to be an attractive jurisdiction for establishing special purpose vehicles (SPVs) due to certain major tax and legal advantages for both Dutch and international securitisations and other types of structured finance transactions.

New types of lenders have entered the Dutch mortgage market in the past few years. Instead of investing in Dutch mortgages by way of securitisation or by way of purchasing an existing mortgage portfolio, these new players establish a mortgage platform and originate Dutch residential mortgages themselves by using appropriately licensed intermediaries or newly incorporated SPVs with such a licence. In addition, such platforms have been issuing RMBS since 2017. These non-bank lending platforms have also entered the Dutch buy-to-let market, and several buy-to-let securitisations have taken place.

The legal considerations set out below regarding securitisation generally also apply to the other kind of transactions described above.

Legal framework

LEGAL FRAMEWORK — SECURITISATION

The Netherlands has not adopted any specific securitisation law. As a result, there are no specific legal limitations under Dutch law on how a securitisation should be structured, unlike in some other jurisdictions (e.g., Luxembourg). Accordingly, Dutch securitisation transactions are effected under the general laws of the Netherlands and, in particular, under the Dutch Civil Code (*Burgerlijk Wetboek*). Furthermore, the parties to a securitisation transaction should ensure compliance with the Dutch Financial Supervision Act (*Wet op het financieel toezicht* — FSA).

LEGAL FRAMEWORK — COVERED BONDS

In addition to traditional securitisations, structured covered bonds have been issued by banks in the Netherlands since August 2005, using structuring techniques similar to those used for securitisation transactions. As a result of the absence of a statutory framework for covered bonds in the Netherlands, structured covered bond issues were not compliant with the Directive on Undertakings for Collective Investment in Transferable Securities ("**UCITS Directive**"). Therefore, specific covered bond legislation was introduced in the Netherlands, which came into force on 1 July 2008 and was replaced by new legislation in 2015. The aim of the legislation introduced in 2015 is to strengthen regulatory supervision on registered covered bonds by the Dutch Central Bank (*De Nederlandsche Bank N.V.*), to increase investor confidence and to lower the financing costs of Dutch banks. The most important changes include the introduction of a minimum level of over-collateralisation of 5% and the liquidity buffer, while the minimum rating requirement for registered covered bonds has been removed.

The Dutch regulations set out the conditions and minimum requirements that an issuing bank, which has its registered office in the Netherlands, must meet for the bonds to be issued by that bank in order to qualify as covered bonds. The Dutch Central Bank registers all covered bonds that meet such criteria, which is open to the public for inspection. The issuing bank must demonstrate to the Dutch Central Bank at least quarterly that the registered covered bonds continue to comply with the requirements for registration.

Article 52.4 of the UCITS Directive sets out requirements for Dutch covered bond issuers in order to allow UCITS to invest in Dutch covered bonds as eligible assets up to significantly higher investment limits. A Dutch regulated covered bond that complies with Article 129 of the Capital Requirements Regulation (CRR) is eligible to receive favourable treatment under the monetary policy operations of the European Central Bank.

Eligible assets to be held by a Dutch covered bond company typically include Dutch mortgages, but sometimes also include mortgages from other jurisdictions (e.g., Germany) as well as certain other assets prescribed by the CRR.

In addition, on 27 November 2019, the Directive (EU) 2019/2162 of the European Parliament and of the Council on the issue of covered bonds and covered bond public supervision ("**Covered Bond Directive**") and Regulation (EU) 2019/2160 of the European Parliament and of the Council amending Regulation 575/213 as regards exposures in the form of covered bonds ("**Covered Bond Regulation**") were adopted. The Covered Bond Directive and the Covered Bond Regulation aim to foster the development of covered bonds across the European Union. The Covered Bond Directive (i) provides a common definition of covered bonds, which will represent a consistent reference for prudential regulation purposes, (ii) defines the structural features of covered bonds and identifies high-quality assets that can be considered eligible in the pool backing the debt obligations, (iii) defines the tasks and responsibilities for the supervision of covered bonds and (iv) sets out the rules allowing the use of the "European Covered Bonds" label. The Covered Bond Directive builds on the analysis and the advice of the European Banking Authority and should be implemented in each member state (including the Netherlands). On 15 November 2021, the Covered Bond Directive has been implemented in the FSA and in the Bankruptcy Act (*Faillissementswet*).

Incorporating a special purpose vehicle (SPV)

INCORPORATING AN SPV

A Dutch SPV is typically set up in the form of a private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid* — B.V.). With respect to securitisation transactions, it is common practice to use an "orphan structure" where a foundation (*stichting*) is the holder of all shares in the B.V. A foundation can be set up in one day and a B.V. can generally be incorporated in a matter of days with a minimum capital of EUR 0.01.

Method of transfer

TRANSFERRING THE RECEIVABLES

Under Dutch law, assignment of the legal title to receivables can be effectuated by means of a notarial deed of assignment or a private deed of assignment and a notification to the debtor (*openbare cessie*). Assignment of the legal title can also be effectuated by means of a notarial deed of assignment or a private deed of assignment that is registered with the Dutch tax authorities, in each case without notification of the assignment to the debtors being required (*stille cessie*).

A separate requirement applies to the transfer of consumer credit receivables. Pursuant to Dutch law, an assignment by a lender of its rights under a consumer credit agreement has to be notified to the consumer, except where the original lender remains the servicer of the receivable. This notification requirement, however, does not apply to loan receivables secured by a mortgage. In most securitisation transactions, the legal title is assigned through a deed of assignment that is registered with the Dutch tax authorities, thereby avoiding the need for notification.

Furthermore, the transaction documents typically provide that the assignment of the receivables is not notified to the debtors except where certain events occur. Until notification of the assignment to the debtor, the debtor can only validly discharge its obligations (*bevrijdend betalen*) by making payments to the assignor (i.e., the Originator). However, upon notification, the debtor can only validly discharge its obligations by paying the assignee (i.e., the SPV). The notification may be given verbally, in writing or in any other form and can even take place after the bankruptcy of the assignor.

Tax

TAX IMPLICATIONS

The tax issues set out below refer to a typical "orphan" structure comprising an SPV in the form of a Dutch B.V. that is wholly owned by a Dutch foundation.

CORPORATE INCOME TAX

A foundation is only subject to Dutch corporate income tax if and to the extent it carries on a business enterprise. A foundation that only performs activities as a shareholder will generally not be considered to be carrying on a business enterprise.

Therefore, a foundation established and operating with the sole purpose of holding shares in an SPV will generally not be subject to Dutch corporate income tax.

A B.V. is subject to Dutch corporate income tax by virtue of its legal form. This means that all of the income of the B.V. is, in principle, taxable at the statutory Dutch corporate income tax rates. Under the current corporate tax rates, the first EUR 395,000 of profits are subject to tax at the rate of 15% and profits that exceed EUR 395,000 are subject to tax at the rate of 25.8% in 2022. Typically, the difference between the income from the receivables it holds and the expenses on the notes issued by the SPV should be such that only a minimal taxable margin is left in the SPV itself. For the tax deductibility of the SPV's expenses, it is important that the SPV's income should qualify as interest (or equivalent) derived from a loan (or equivalent). Besides ordinary interest income on a loan, this can for example also include financial lease income.

WITHHOLDING TAX ON RECEIVED INTEREST

Subject to the possible application of beneficial ownership or (other) anti-abuse rules in the jurisdiction of the obligor of the receivable, interest paid to the SPV will often be exempt from withholding tax in the country where the obligor of the receivable is resident or is subject to a significantly reduced withholding tax rate by virtue of a double tax treaty concluded between the Netherlands and the obligor country. It is these exemptions and reductions that render the Netherlands particularly attractive as a jurisdiction for securitisation SPVs. Tax treaties are in place between the Netherlands and over 90 jurisdictions. The Dutch treaty network is regularly expanded by ongoing negotiations with jurisdictions around the world. If the interest received by the SPV has been subject to withholding tax, the withholding tax should be creditable against the Dutch corporate income tax, provided that the interest is included in the SPV's taxable base.

INTEREST EXPENSES

Generally, interest paid by the SPV to its creditors, which are normally third parties, should not be subject to Dutch withholding tax on interest. However, for completeness, the following should be considered.

On 1 January 2021, the Dutch government introduced the Dutch Withholding Tax Act 2021 (*Wet bronbelasting* 2021 — DWT). The DWT introduces a withholding tax at a tax rate of 25.8% (2022) on interest and royalty payments by a Dutch resident entity to a recipient that is not an individual that is (deemed to be) **affiliated** and where the situation is (deemed to be) abusive. For the purposes of the DWT, the SPV and the recipient (i.e., the SPV's creditors) are considered affiliated (*gelieerd*) if, in short, either the SPV or the recipient (or a group of investors acting in concert of which the SPV or the recipient is part) owns a direct or indirect controlling interest in the other. Further, the situation is (deemed to be) **abusive** if the recipient is considered to be resident in a jurisdiction that is listed in the annually updated Dutch regulation on low-taxing states (generally a statutory tax rate on business profits of less than 9%) and non-cooperative jurisdictions for tax purposes.[1] In general, no Dutch withholding tax should apply on the interest paid by the SPV since it is likely to be paid to unaffiliated creditors (and even if they are deemed affiliated, Dutch withholding tax should still not apply

1 The countries currently (as per 1 January 2022) on the list are: Anguilla, Bahamas, Bahrein, Barbados, Bermuda, British Virgin Islands, Guernsey, Isle of Man, Jersey, Cayman Islands, Turkmenistan, Turks & Caicos Islands, Vanuatu, United Arab Emirates, US Virgin Islands, American Samoa, Fiji, Guam, Palau, Panama, Samoa and Trinidad & Tobago.

unless the situation is deemed to be abuse). For listed notes, it can be difficult to establish with certainty whether a noteholder may be deemed affiliated (or whether the situation may be abusive), which could create risks if an SPV fails to withhold tax on interest payments and it is later determined (in accordance with the foregoing) that withholding tax should have applied. The SPV may not be able to reclaim such amounts from the noteholder that was deemed affiliated.

In normal situations where the SPV is owned by a foundation and none of the SPV's creditors exercise control over the SPV or (indirectly) participate in the profits of the SPV, the above should not apply.

Furthermore, while not relevant in most cases for securitisations, interest payable on a debt instrument issued by the SPV may become subject to a 15% dividend withholding tax if the debt instrument is to be treated as equity for Dutch tax purposes. This is typically not the case where the debt instrument has a maturity date of less than 50 years and the note documentation provides for an "at arm's length" interest that is not profit dependent. For completeness, the Dutch government has proposed draft legislation that would (if adopted) introduce an additional 25.8% dividend withholding tax. This new dividend withholding tax also only applies in the unlikely event that the receivable owned by a creditor of the SPV is treated as equity for Dutch tax purposes (see above criteria). Furthermore, it would only apply under the same criteria as the abovementioned interest withholding tax (i.e., where the creditor is deemed **affiliated** and the situation is deemed **abusive**). Therefore, this new proposal is unlikely to be relevant for a typical securitisation SPV.

OTHER TAXES

The transfer of Dutch commercial real estate or real estate-related rights may be subject to Dutch transfer tax. This is particularly relevant for mortgage-backed securities transactions. The rate is generally 2% for residential real estate that is acquired by a person who will occupy the real estate and 8% for other real estate. The 8% rate is expected to be increased to 9% effective January 1, 2023.

Regulatory considerations

REGULATORY CONSIDERATIONS

Pursuant to the FSA, an SPV in a securitisation transaction might be considered a "credit institution" (*kredietinstelling*) (as it may obtain repayable funds from the public and grant credits for their own account) and would therefore be required to hold a banking licence. However, the FSA provides that if an SPV meets certain requirements, it will not be regarded as a credit institution and, therefore, will not be required to hold a Dutch banking licence. The definition of "credit institution" in the FSA must be interpreted in light of the definition of "credit institution" under the CRR.

In order for an SPV not to qualify as requiring a banking licence under the FSA and CRR, it must take adequate measures to ensure that it attracts repayable funds solely from parties that do not qualify as "the public." As of yet, there is no European guidance as to what constitutes the "public." According to the Dutch legislator's explanatory notes for the act implementing the CRR in the Netherlands (and amending the FSA),

until such guidance becomes available, the "old" (pre-CRR) regime still applies. In practice, this means that no funds are "attracted from the public" when the funds are taken solely from "professional market parties" and/or persons or entities within a "restricted circle." The term "professional market party" is defined in the FSA and further regulations pursuant to the FSA. The definition includes credit institutions, investment firms, financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, and commodity futures dealers. However, there are also less common categories of professional market parties, such as entities that have a credit rating (either on the entity itself or on any series of its issued securities). Persons or entities purchasing debt instruments of at least EUR 100,000 qualify as professional market parties irrespective of their status and location. In most securitisation transactions, notes issued by an SPV or loans obtained by an SPV can only be acquired and transferred in minimum denominations or participations of EUR 100,000 (or its foreign currency equivalent), thus ensuring that the noteholder qualifies as a "professional market party." In addition, the SPV can take measures against non-professional market parties purchasing their notes, for example by imposing extensive selling/transfer restrictions in respect of the notes/loans and (in respect of notes only) by including legends on the notes that are denominated in amounts of less than EUR 100,000, stating that investors must qualify as professional market parties under the FSA. These precautions allow an SPV to issue notes (in denominations of at least EUR 100,000) in the Netherlands, without being at risk of becoming subject to any Dutch banking licence requirements.

A prospectus approved by the Dutch Authority for the Financial Markets (AFM) or a financial regulator of another member state and passported into the Netherlands (if applicable) is generally required for the offering of notes to Dutch investors in the Netherlands. An approved prospectus is not needed in the event that notes are offered to Dutch "qualified investors."

By acquiring Dutch consumer credit receivables, the SPV is deemed to provide consumer credit. Pursuant to Article 2:60 of the FSA, a licence is required for granting consumer credit. An exemption is available for the SPV if the SPV outsources the servicing of the consumer credit receivables and the administration thereof to an entity that is adequately licensed under the FSA. Typically, a servicing contract is entered into by the SPV and the original lender. However, a third party can also be appointed to act as a licensed servicer.

Other information

NETHERLANDS-SPECIFIC CONSIDERATIONS

There are certain specific Dutch law considerations that investors should take into account.

Set-off

Under Dutch law, a debtor has a right of set-off if it has a claim that corresponds to its debt to the same counterparty and it is entitled to pay its debt as well as to enforce payment of this claim. Such claim of a debtor could, among other things, result from current account balances or deposits made with the Originator or a breach of the duty of care (*zorgplicht*) of the Originator.

After the assignment of the receivables to the SPV and notification thereof to a debtor, the debtor will also have set-off rights vis-à-vis the SPV, provided that the legal requirements for set-off are met (see above) and further provided that: (i) the counterclaim of the debtor results from the same legal relationship as the relevant receivable; or (ii) the counterclaim of the debtor has originated (*opgekomen*) and become due and payable (*opeisbaar*) prior to the assignment of the receivable and notification thereof to the relevant debtor.

Banks sometimes prohibit set-off under their general terms. However, it is questionable whether a court would uphold such a prohibition in the general terms with respect to consumers.

Bank mortgages

Under Dutch law, mortgage rights are accessory rights (*afhankelijke rechten)*, which, by operation of law, follow the receivable to which they are connected. Furthermore, a mortgage right is also an ancillary right (*nevenrecht*) and the assignee of a receivable secured by an ancillary right will have the benefit of such a right, unless the ancillary right by its nature is, or has been construed as, a purely personal right of the assignor or if such transfer is prohibited by law.

Dutch mortgage deeds typically provide that the mortgage rights created pursuant to such mortgage deeds do not only secure the loan granted to the debtor for the purpose of acquiring the relevant property, but also other liabilities and moneys that the debtor, now or in the future, may owe to the relevant bank ("**Bank Mortgages**" or sometimes called "**all moneys mortgages**").

The prevailing view is that where a receivable secured by a Bank Mortgage is assigned, the mortgage right will in principle (partially) pass to the assignee (the SPV) as an accessory right, provided that the mortgage deed: (i) specifically states that it will pass; or (ii) does not include an indication to the contrary. Any further claims of the assignor will also continue to be secured and, consequently, the Bank Mortgage will be a jointly held security right by both the assignor (Originator) and the assignee (SPV) following the assignment.

Whether the Bank Mortgage will remain with the original holder of the security right in the particular circumstances involved will be a matter of interpretation of the relevant mortgage deed.

Future receivables

Certain receivables, such as operational leases and rentals, are to be considered "future receivables" under Dutch law. Future receivables are receivables that are "earned" over a period of time in the future. If receivables are regarded as future receivables, an assignment and/or pledge thereof will not be effective to the extent the receivables come into existence on or after the date on which the assignor or pledgor has been declared bankrupt or granted a suspension of payments. This means that, upon an enforcement by the SPV or the security trustee, the assignee will not be entitled to the monthly instalments under leases and other receivables that qualify as future receivables that arise after such bankruptcy and suspension of payment of the assignor.

Dutch auto-lease transactions have been structured so as to avoid this issue by using a hire-purchase structure.

Code of conduct for residential mortgage loans

The Dutch Banking Association (*Nederlandse Vereniging van Banken*) and the Dutch Association of Insurers (*Verbond van Verzekeraars*) are subject to a code of conduct for residential mortgage loans (*gedragscode hypothecaire financieringen*, "**Code of Conduct**"), which is ratified by all banks and insurance companies. The Code of Conduct establishes the maximum ratio of loan to market value of the collateral.

Since the penultimate revision of the Code of Conduct in 2011, the criteria for granting mortgage loans to consumers are stricter than before. For instance, the Code of Conduct limits the interest-only element of a mortgage loan to 50%. Notwithstanding certain exemption and derogation possibilities provided in the Code of Conduct, all Dutch mortgage lenders must comply with the Code of Conduct.

In addition to the Code of Conduct, the ministerial regulation for residential mortgage loans (*Tijdelijke regeling hypothecair krediet*), as amended on 1 January 2022, sets out the income criteria and limits the maximum of a mortgage loan to 100% of the market value of the related residence in 2022. There are a few exemptions pursuant to which the loan-to-value ratio can be higher than 100%. Since 2013, the loan-to-value ratio has been reduced by 1% each year and, since 2018, the ratio has been fixed at 100%. Where there is any conflict between the ministerial regulation and the Code of Conduct, the ministerial regulation should take priority.

National mortgage guarantee

Since 2004, a considerable number of RMBS transactions consist of mortgage loans that benefit from a National Mortgage Guarantee (*Nationale Hypotheek Garantie* — NHG). This is an insurance scheme in the Netherlands for mortgage loans that protects both borrowers and lenders.

The Home Ownership Guarantee Fund (*Stichting Waarborgfonds Eigen Woningen* — WEW), a central private entity, is responsible for administering and granting the NHG. The WEW is financed by one-off charges to the borrowers of 0.60% of the principal amount of the mortgage loan (as of 2022). The NHG is available to all mortgage lenders in the Netherlands. The NHG guarantee is only granted when certain eligibility criteria regarding the loan, the property and the borrower, among other things, are met.

In 2022, an NHG can be issued up to a maximum amount of EUR 355,000 (or EUR 376,300 in the case of energy-saving features) with the current loan-to-value ratio of 100% (or 106% in the case of energy-saving features). Notary costs, advisory costs and real estate transfer tax (*overdrachtsbelasting*) are included in this amount. The loan amount is also limited by the amount of income and the market value of the property. Since 1 January 2022, the NHG also allows for a new way of valuation of properties, called "desktop taxatie". Instead of a physical valuation of a property, the valuation will be executed online by using available information online, for example information on energy-saving features included in the property. However, this way of valuation

of properties in order to get a mortgage, limits the loan-to-value ratio to 90%. The benefits, on the other hand, are that it is time- and money saving compared to physical valuations.

The NHG covers 90% (10% is at the own risk of the lender) of the outstanding principal, accrued unpaid interest and disposal costs in the event of any residual debt after a foreclosure following a default on the mortgage loan. The lender is responsible for meeting the requirements of the NHG. In the event that the requirements are not met, there is no obligation for the WEW to pay the losses to a lender. Because the NHG reduces the loss upon a borrower's default, securitisations with NHG mortgage loans as collateral will, in general, be awarded higher ratings from the rating agencies than "normal" mortgage-backed securities.

The Mortgage Credit Directive

The directive on credit agreements for consumers relating to residential immovable property ("**Mortgage Credit Directive**") has aimed to introduce a European single market for mortgage credit with a high level of consumer protection. The Mortgage Credit Directive's main purpose is to reduce the substantial differences between the laws of the member states with regard to the conduct of business in the granting of credit agreements relating to residential immovable property and in the regulation and supervision of credit intermediaries and non-credit institutions providing credit agreements relating to residential immovable property. In the Netherlands, the current Code of Conduct and the ministerial regulation for residential mortgage loans (as described above) already include many of the behavioural rules as envisaged by the Mortgage Credit Directive.

Code of conduct for granting consumer credit

The code of conduct for granting consumer credit establishes the borrowing capacity that is determined in cooperation with the National Institute for Family Finance Information (NIBUD). The borrowing capacity is based on the basic standard, which is the minimum amount that is required by a household for the cost of living. To determine the basic standard, the composition of the household and the net housing costs will be taken into consideration. When the net income of the consumer is lower than the basic standard, the bank will not be allowed to grant credit pursuant to the code of conduct for granting consumer credit.

Uniform interest rate policy

According to a decree regarding a uniform interest rate policy (*eensporig rentebeleid*) in respect of residential mortgage loans, a residential mortgage lender should offer the same interest rate to a new borrower as to an existing borrower with the same risk profile being offered a new interest rate during the following interest rate period.

SECURITY

Under Dutch law, a security interest over receivables is granted by means of a right of pledge in favour of the pledgee / the security trustee, to secure the SPV's obligations. In Dutch securitisation transactions, the security trustee is usually a newly incorporated Dutch foundation (*stichting*). The security trustee must be independent from the SPV, since it acts for the benefit of the noteholders and the other secured creditors of the SPV under the transaction. Therefore, it would be prudent to ensure that the directors of the security trustee and SPV are different. Under Dutch law, the security rights and the claims for which the security rights are vested cannot be separated. Consequently, the security trustee itself must also be a creditor of the SPV. In most transactions, a parallel debt structure is used to achieve this.

REPORTING REQUIREMENTS

In certain circumstances, the SPV must comply with reporting requirements in connection with payments made to and by the SPV under the transaction documents, pursuant to the Financial Regulations Act 1994 (*Wet financiële betrekkingen buitenland*) and the rules promulgated thereunder. Pursuant to the implementation of Regulation (EU) No. 1075/2013 of the European Central Bank (ECB/2013/40), Dutch SPVs engaged in securitisation transactions are obliged to notify the Dutch Central Bank of their existence and must provide the Dutch Central Bank with data on end-of-quarter outstanding amounts, financial transactions and write-offs/write downs on the assets and liabilities of the SPV on a quarterly basis. Furthermore, the SPV will have to be compliant with the reporting requirements as set out in the European Market Infrastructure Regulation (EMIR) if it intends to enter into a derivatives contract, such as an interest rate swap.

THE AFM'S APPROACH TO TRANSPARENCY REQUIREMENTS FOR PRIVATE SECURITISATION TRANSACTIONS

The transparency requirements under Article 7 of the Securitisation Regulation[2] require the Originator, the sponsor and the SPV to make certain information available to, among others, national competent authorities in both public securitisations and private securitisations. The Securitisation Regulation does not specify, however, how the information should be made available to national competent authorities in private securitisations, and it leaves room for national competent authorities to provide guidance in this respect.

The AFM and the Dutch Central Bank are the competent authorities under the Securitisation Regulation in the Netherlands. The Dutch Central Bank is the competent authority for securitisations that involve an Originator, sponsor or original lender with a licence from the Dutch Central Bank. All other securitisations with an Originator, sponsor, original lender and/or SPV established in the Netherlands are supervised by the AFM. Furthermore, the Dutch Central Bank is the competent authority that supervises simple, transparant and standardised ("STS") securitisations. To qualify as an STS securitisation, the Securitisation Regulation sets out certain requirements. In the case that a securitisation qualifies as STS securitisation, the originator or sponsor has to send an STS-notification to the European Securities and Markets Authority ("ESMA"), which will be published on their website, unless it is a private securitisation.

1 Definition of Securitisation Regulation should be changed into Regulation to align with the definition used in the chapter "The EU Securitisation Regulation".

THE NETHERLANDS

After the notification to ESMA, the AFM or the Dutch Central Bank will have to be informed as well.

The AFM has published guidance on its website on how private securitisations in the Netherlands should comply with the transparency requirements at pricing: a completed digital form "private securitisations notification template" should be sent by email to the AFM by the designated reporting entity prior to pricing. It is not mandatory to submit transaction documents of private securitisations to the AFM together with the digital form, but "upon request" additional information, such as quarterly reports and transaction documents, should be made available to the AFM. In addition, a notification must be sent to the AFM in case of any inside information or if a significant event occurs in accordance with the Securitisation Regulation.

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Peru

Legal framework

Securitisation was introduced in Peru in 1996 via Legislative Decree No. 861, *Ley del Mercado de Valores*, whose original text and amendments were later compiled in a new official text under Supreme Decree No. 093-2002-EF, *Texto Único Ordenado de la Ley del Mercado de Valores* (the "**Securities Market Law**"). Title XI of the Securities Market Law contains the main provisions regarding securitisation. Later, the *Superintendencia del Mercado de Valores* (the Peruvian capital markets supervisory authority — (SMV)) further developed these provisions by approving additional regulations through CONASEV Resolution No. 001-97-EF, *Reglamento de los Procesos de Titulización de Activos (*together with the Securities Market Law — the "**Securitisation Regulations**").

Pursuant to the Securitisation Regulations, securitisations may be arranged by means of (i) a securitisation trust (*fideicomiso de titulización*) administered by a special securitisation trustee (*sociedad titulizadora*) or (ii) a special purpose company (*sociedad de propósito especial*). The first structure (securitisation trust) is the most commonly used type of securitisation in Peru; there has been very little experience of using a special purpose company in a securitisation transaction.

Any kind of present or future assets can be transferred to a securitisation trust or special purpose company, except for assets subject to precautionary measures or those that are subject to any kind of litigation. Special purpose corporations can only receive credit assets that will generate a cash flow (such as a credit portfolio), although other types of assets may be used where they are able to generate such cash flows.

There is another limitation for securities that are to be publicly offered: such assets may not be subject to litigation for any reason and they cannot be used if they have been seized by means of a judicial resolution. However, under the securitisation procedure, these assets may still be used where it is the creditor that has initiated such legal actions.

Method of transfer

The transfer of assets to a securitisation trust will occur under a "transfer in trust," where consideration does not need to be paid, nor do securities need to be issued as a result. On the other hand, the transfer of assets to a special purpose corporation can be structured either as a capital contribution to such company (thus, shares are issued in favour of the Originator) or as a sale of assets.

The specific formalities to perfect the transfer of assets to the securitisation vehicle depend on the general rules applicable to each type of asset. Receivables are transferred by assignment of rights. Generally, for the assignment to be effective against the debtors, it is necessary to notify them of such assignment so that they may be aware of who their new creditor is and can pay accordingly. However, the Securitisation Regulations introduced a rule where, instead of notifying all debtors, the Originator may fulfil such legal requirements by publishing the assignment of rights for three consecutive days in a newspaper of national circulation. Additionally, the Securitisation Regulations established a special rule where no notification is necessary if the Originator remains in charge of the receivables' collection.

The transfer of assets to a securitisation vehicle for a securitisation operation has special legal protections as long as securities are placed or transferred to investors in exchange of consideration. According to the Securities Market Law, the transfer cannot be voided on grounds of simulation, annulled or declared without effect for fraud if it would cause damage to the investors that acquired securities from the securitisation vehicle under a public offering, or even if the securities were privately placed, if investors acted in good faith and could suffer damages. Damage is deemed to be caused to investors if the payment of the obligations owed to them may become impossible or more difficult to fulfil if the transfer is voided, or if this would cause the issuer to decrease its credit risk.

Furthermore, assets transferred to a securitisation vehicle are protected against the Originator's insolvency. The Bankruptcy Law allows creditors to request that any transfers made within a suspicion period (which extends one year backward from the beginning of insolvency proceedings) are ineffective and therefore such assets return to the debtor's estate. Nonetheless, if assets were transferred for the purposes of a securitisation operation, the Originator's creditors cannot exercise this right. However, there are recent judicial precedents that are recognizing that labor creditors have a right to persecute such assets, even if they are transferred to a trust.

Tax

Securitisation trusts are not considered taxpayers for tax purposes; in other words, they are transparent (pass through entities) from an income tax perspective. Furthermore, the Peruvian Income Tax Law establishes that the taxable income shall be attributed to the Originator, beneficiary or third party as agreed in the trust agreement. In any case, the withholding agent will be the trustee (*sociedad titulizadora*).

Generally, securitisation trusts attribute passive income to the beneficiary (investors), in which case either (i) a withholding income tax rate of 5% for domiciled individuals or (ii) another applicable rate, depending on the type of income for individuals that are non-tax residents, will apply. In addition, (i) if the investor is a domiciled taxpayer entity, its income will be considered as a corporate business income and, thus, subject to a tax rate of 29.5%, and (ii) if such entity is a non-domiciled taxpayer, the tax rate applicable to its income will depend on the type of income attributed or paid.

The income tax applicable to the beneficiaries that are tax residents is calculated on their net income. In this regard, the trustee could deduct the expenses incurred in managing the investments. However, if the beneficiary is a non-tax resident, no deduction of expenses is allowed (they are subject to income tax on a gross basis).

In the case of capital gains obtained from the transfer of Peruvian securities issued by the securitisation trust, the applicable Peruvian income tax rate will vary depending on different factors (e.g., if the transferor is domiciled or not domiciled in Peru, if it is an individual or a company, or whether or not the securities are transferred through the Lima Stock Exchange). The tax rate could be 5%, 29.5% or 30%, respectively.

Capital gains resulting from the transfer of securities issued by securitisation trusts are exempted from income tax, as long as they comply with certain requirements noted below:

- They must be transferred through the Lima Stock Exchange.
- The securities must have a stock market presence (i.e., traded on a regular basis considering certain amounts provided by the regulations).

This exemption will be in force until 31 December 2022, according to Law No. 30341.

Regulatory concerns

PUBLIC OFFERING REGULATIONS

Securities issued as a result of a securitisation transaction can be placed on the market by either a public or a private offering. Where the offering qualifies as a public offering, the documents of the transaction will need to be previously approved and registered by the SMV in the *Registro Público del Mercado de Valores* (the "**Securities Market Public Registry**"), and the *sociedad titulizadora* will comply with all applicable ongoing disclosure obligations in connection with the securitisation trust managed by it.

Pursuant to the Securities Market Law, a public offering is an invitation to the general public or to certain segments thereof, in connection with the placement, acquisition or sale of securities (which would include securitised products). With respect to the previous definition, the following shall be taken into consideration:

- "Adequately diffused" is defined by public offerings regulations as an offering directed to individuals, on an individual basis or otherwise, in simultaneous or successive transactions, by way of newspapers, magazines, radio, television, meetings, data processing systems or other technology that is suitable to communicate with the public.
- "Segment of the market" is defined as a group of people (individuals) that require a higher protection from the regulator because public interest is involved, given that such individuals may have difficulties in making investment decisions. It is presumed that a group equal to or greater than 100 individuals is of public interest and these individuals require protection from the SMV. However, this presumption does not discard the possibility that an offering targeted to a group composed of less than 100 individuals could be considered a public offering, which is why this aspect has to be analysed on a case-by-case basis.

Any offering that takes place in Peru that falls outside of such definition would be considered a private offering and not subject to registration. Notwithstanding the above, the Securities Market Law provides the following private offering safe harbours, provided that no general advertising is used:

i. An offering directed only to institutional investors. Here, the securities purchased shall not be resold to third parties unless the sale is made to another institutional investor or the security is previously registered in the Securities Market Public Registry.

ii. An offering of securities where the face value or placement value of each security offered is greater than or equal to PEN 575,963 (approximately USD 152,371). In this case, the securities shall not be sold in the secondary market at a value lower than such face value or placement value, including a sale back to the issuer.

Please note, however, that only the safe harbour described in (i) above is applicable to securitisations.

The SMV is authorized by law to access information on every securitisation trust administered by securitisation agents regardless of whether securities were placed by means of a public or private offering.

SECURITIES INTERMEDIATION REGULATIONS

According to the Securities Market Law, it is mandatory that the placement of publicly offered securities be performed by duly licenced intermediation agents, unless the issuer itself directly places the securities. Hence, the participation of an intermediation agent must be taken into account when arranging a securitisation transaction as a public offering. Note that securitisation agents are not allowed to perform this activity.

In the case of a private offering, it is possible for a securitisation agent to also serve as a placement agent; however, such agent must avoid performing this activity on a regular basis to prevent being considered as performing intermediation activities without a licence. The reason for such a recommendation is that the definition of intermediation activities in the Securities Market Law makes no distinction between a private offering and a public offering of securities.

Other information

SECURITISATION TRUST

Under Peruvian law, a trust is an estate with no legal personality of its own, composed of a series of rights and obligations transferred in trust (*dominio fiduciario*) to it by a trustor. Any assets or liabilities transferred to the trust are considered to be part of an estate separate from that of the trustor for all legal purposes. The trust shall be administered by an entity authorised by law to act as its fiduciary. The transference in trust confers full authority on the trustee over all of the assets transferred in the trust. The trustee shall exercise its duties taking into account the objective for which the parties agreed to establish a trust and subject to the limitations established in the trust agreement.

A securitisation trust is a special kind of trust; its purpose is the issuance of securities backed by the trust's assets, which are transferred to the trust estate by the trustor, denominated by the Securitisation Regulations as an Originator (*originador*). Such assets are meant to generate cash flows that will be used to pay back investors. Proceeds from the issuance of securities will be used in accordance with the use of proceeds provisions set forth in the securitisation trust indenture.

The creation of a securitisation trust requires the mandatory intervention of a special securitisation trustee (*sociedad titulizadora*). The *sociedades titulizadoras* are corporations licenced by the SMV to perform securitisation activities and are subject to certain minimum requirements as to their infrastructure and stock capital. The *sociedades titulizadoras* serve as the securitisation trust's trustee and will issue the securities (either equity or debt securities) backed by the trust's assets.

The securitisation trust is created by an agreement between the Originator and the *sociedad titulizadora*, or unilaterally by the latter. Investors adhere to the agreement when they purchase securities issued by the trustee on behalf of the trust, and obtain the condition of beneficiaries of the trust. From the placement of securities onward, the agreement cannot be modified without the consent of the investors. It is not mandatory to register this agreement in the National Public Record for it to be valid; however, in order to perfect the transfer of assets to the trust, the transfers must be duly registered in the National Public Records' section applicable to each asset. The agreement must also be notarised in order to be registered.

The legal framework contains an open list of operations that can be arranged through a securitisation trust, which include the following:

i. securitisation of credit portfolios and other assets that generate cash flows;
ii. transfers of real estate assets generating cash flows through commercial exploitation or liquidation that will back the payment of the securities to be issued;
iii. those arranged for the development of specific projects, where the trust is integrated by design, technical studies and other assets for the project, whose cash flows shall back the payment of the securities to be issued; and
iv. those whose purpose is to finance infrastructure projects and public services, where the securities are backed with the future cash flows to be generated.

The securitisation trust is the preferred structure because, among other reasons, the administration of the assets falls on a third party, the *sociedad titulizadora*, instead of the Originator itself, as would be the case in a special purpose corporation.

Furthermore, the securitisation trust is not limited to backing only the securities issued by it. Peruvian regulations also allow the trust to back (i) securities issued by third parties as long as those securities amount to less than 50% of all securities backed by the securitisation trust and the term of maturity of those securities do not exceed that of the securities issued by the trust, (ii) liabilities directly incurred by the securitisation trust with financial institutions or multilateral entities so long as the term of maturity of those liabilities do not exceed that of the securities issued by the trust, and (iii) liabilities incurred by the originator with financial institutions or multilateral entities so long as the same conditions set forth in (i) above are met.

SPECIAL PURPOSE CORPORATION

Special purpose corporations are regulated, as any ordinary corporation, by Law No. 26887 (the "**General Corporations Law**") as well as by the legal framework, which establishes some special rules.

These types of corporations are exempt from the rule of shareholder plurality. Hence, they can be incorporated with only one shareholder, which could be the Originator. However, its corporate purpose is strictly limited to the acquisition of credit assets and the issuance of securities. Special purpose corporations are not permitted to perform any other activities. Furthermore, its bylaws must allow the holders of its issued securities to elect at least one member of its administrative organ (such as the board of directors).

When the Originator is the only shareholder of the special purpose corporation, or it otherwise exercises the control of the corporation, there are additional limitations:

i. At least one member of each collective administrative organ must be an independent person not related to the Originator.
ii. The corporation cannot file for insolvency without the vote of such independent person.
iii. The registers and financial statements must be prepared by independent accountants. There are no minimum capital requirements.

As mentioned above, in Peru the securitisation trust is the most common structure used for securitisation, the main reasons being the following:

i. A securitisation trust is an autonomous estate different from the estate of the trustee, the trustor and the trust beneficiaries, and such trust estate is not liable for any obligations or liabilities of any of the parties to the securitisation trust.
ii. Insolvency regulations set forth in the *Ley General del Sistema Concursal* (the "**Bankruptcy Law**") will not apply to the securitisation trust but do apply to the special purpose corporation.

FIBRA: A SPECIAL TYPE OF SECURITISATION TRUST

A *Fideicomiso de Titulización para Inversión en Renta de Bienes Raíces* (FIBRA) is a special type of securitisation trust whose purpose is to invest in real estate assets and generate cash flows from its lease to third parties. A key condition to establishing a FIBRA is that the securities issued must be equity based, publicly offered and registered in the Securities Market Public Registry. Additional conditions include the following:

a. At least 70% of the trust's assets must be invested in real estate assets.
b. Real estate properties built or purchased by the securitisation trust can only be transferred after four years.
c. The securitisation agent must distribute and pay 95% of the profits among holders of its equity securities at least once a year.

Investors that participate in FIBRAs are subject to certain tax benefits. There are two main benefits:

i. Investors that contribute real estate assets to a FIBRA can defer the payment of the applicable income tax until one of the following occurs: (i) the investor transfers the equity certificates issued as a result of the contribution made to the FIBRA, in which case the income tax to be paid is proportional to the value of the certificates transferred; or (ii) the FIBRA transfers the real estate asset to a third party, in which case the whole deferred income tax becomes payable.
ii. Income from a property lease or another form of assignment to use the real estate is subject to (i) a 5% withholding tax on the gross basis, in the case of nonresident individuals and (ii) a 24% withholding tax on the gross income of nonresident entities.

These tax benefits are lost if the securitisation trust loses its status as a FIBRA due to a lack of compliance with any of the applicable legal requirements.

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The Philippines

Background

On 25 May 2005, the Philippine Congressional Oversight Committee approved the implementing rules and regulations ("**Rules**") of the Securitisation Act of 2004 ("**Securitisation Law**"). The Rules took effect on 19 July 2005. The Securitisation Law provides the legal and regulatory framework for asset securitisation, and grants tax exemptions and other incentives in favour of securitisation transactions in the Philippines. It is designed to create a favourable capital market environment for asset-backed securities (ABS) and to facilitate the development of a secondary market for residential mortgage-backed securities.

Method of transfer

In the securitisation process under the Securitisation Law, loans, receivables or similar financial assets with an expected cash payment stream ("**Assets**") are sold on a without recourse basis by a seller ("**Seller**") to a special purpose entity (SPE). The SPE then issues to investors ABS that depend, for their payment, on the cash flow from the Assets. The issuance of the ABS must be in accordance with the plan for securitisation ("**Plan**") approved by the Philippine Securities and Exchange Commission (SEC). The Seller may be the original obligee of the Assets sold ("**Originator"**).

Receivables that are to arise in the future cannot be considered as Assets unless approved by the relevant regulator of the Originator (i.e., the SEC or the Philippine Central Bank (*Bangko Sentral ng Pilipinas* — BSP)). Receivables from future expectations of revenues by the government, national or local, arising from royalties, fees or taxes cannot be included in the pool of Assets underlying the ABS ("**Asset Pool**").

Tax

WITHHOLDING TAX

All ABS issued by an SPE pursuant to a Plan approved by the SEC are not considered as deposit substitutes under the relevant Philippine banking and tax laws. However, the yield from the ABS is subject to a 20% final withholding tax, except those held by tax-exempt investors.

To promote the securitisation of the mortgage and housing-related receivables of government housing agencies as may be determined by the Housing and Urban Development Coordinating Council (HUDCC) and the Department of Finance (DOF), the yield or income of the investor from any low-cost or social housing-related ABS is exempt from income tax.

TAX AND FISCAL INCENTIVES

The Securitisation Law and the Rules provide for the following tax and fiscal incentives:

- exemption from value-added tax (VAT) and documentary stamp tax (DST) on: (i) a true sale or transfer of Assets to the SPE and transfer of security interest thereto; (ii) a retransfer of Assets from the SPE to the Originator/Seller, including security interest thereto, if required under the Plan; and (iii) all secondary trades and subsequent transfers of ABS, including all forms of credit enhancement in such instruments;
- reduction to 50% of registration and annotation fees payable to the register of deeds on the true sale or transfer of Assets to the SPE and the transfer of the security interest thereto, or on a retransfer of Assets to the Originator/Seller, if required under the Plan;
- exemption from VAT on the original issuance of the ABS and related forms of credit enhancement by way of original issuance of securities related solely to the securitisation transaction;
- exemption from capital gains tax on the transfer of assets by dation in payment by the obligor to the SPE; and
- exemption from income tax on the yield or income of the investor from any low-cost or social housing-related ABS.

Accounting treatment

The accounting treatment of Philippine securitisation is governed by Philippine Financial Reporting Standards (PFRSs), which adopt International Financial Reporting Standards (IFRS), and likewise by Philippine Accounting Standards (PASs), which follow International Accounting Standards (IASs). Of particular relevance to an Originator in a securitisation transaction in the Philippines is PAS 39, adopting IAS 39 (Financial Instruments: Recognition and Measurement). IAS 39 provides additional guidelines on derecognition, fair value measurement of financial assets and financial liabilities, impairment assessment, fair value determination and hedge accounting. Furthermore, PFRS 7, which follows IFRS 7 (Financial Instruments: Disclosures), is relevant in providing risk information to users of financial statements.

BSP Circular No. 781 (dated 15 January 2013) provides the implementing guidelines issued by the BSP in relation to the revised risk-based capital adequacy framework for the Philippine banking system in accordance with the Basel III standards. Basel III reforms have introduced new standards in capital adequacy and liquidity, which aim in particular to mandate better transparency of secondary market movements involving securitisation and resecuritisation risk. Universal banks and commercial banks, as well as their subsidiary banks and quasi-banks, are required to maintain certain risk-based capital adequacy ratios, expressed as a percentage of the relevant capital to risk-weighted assets.

Under BSP Circular No. 781, any gain on sale resulting from a securitisation transaction must be deducted from Common Equity Tier 1 (which, together with Additional Tier 1 capital, composes Tier 1 or going concern capital).

Regulatory concerns

SPES

The SPE may be a special purpose corporation (SPC) or a special purpose trust (SPT) created solely for the purpose of securitisation.

An SPC is a stock corporation with a minimum paid-up capital of PHP 5 million (approximately USD 100,000), or such higher amount as the SEC may prescribe. The SPC generally cannot engage in any activity other than: (i) owning and holding the Asset Pool; (ii) issuing ABS; and (iii) performing incidental activities disclosed in the registration statement filed with the SEC.

An SPT is a trust constituted for the sole purpose of purchasing assets, as well as owning and holding the Asset Pool for a definite period until all of the ABS issued for the particular Asset Pool are paid. The SPT does not need to be registered with the SEC. An entity that is duly licenced to perform trust functions by the BSP administers the SPT. The BSP determines the capitalisation requirement for the trustee that administers an SPT. The term of the SPT expires upon full payment of all of the ABS it has issued.

The SPE cannot undertake any activity other than that contained in the approved Plan, except upon the written approval of the SEC and the written consent of the holders of the ABS representing at least two-thirds of the outstanding amount of the ABS.

The SPE may invest the proceeds of collections from the Asset Pool that are not yet due for distribution to holders of the ABS only in: (i) obligations issued or fully guaranteed by the Government of the Republic of the Philippines or issued by the BSP; (ii) registered securities; or (iii) other readily marketable investments that the SEC may approve from time to time.

APPROVAL OF THE PLAN AND REGISTRATION OF ABS

The SPE, whether an SPC or SPT, must submit the Plan to the SEC for its approval. The SPE must obtain BSP endorsement of the Plan: (i) if the Originator of the Assets is a bank or any other entity subject to the supervision of the BSP, or is controlled by such bank or entity; or (ii) if the SPE is constituted as an SPT.

All of the ABS proposed to be sold or distributed by an SPE within the Philippines, except those exempt securities and exempt transactions under the Securities Regulation Code (SRC), must be registered as securities with the SEC. For this purpose, the SPE must file a prospectus and a registration statement with the SEC. The SEC may only provide an SPE with an order and permit to sell ABS after compliance with the registration requirements and approval of the Plan by the SEC. Any person claiming exemption from the registration requirements under the SRC must file a notice of exemption and a duly populated disclosure statement with the SEC no later than five days prior to the offering of the ABS,.

No ABS may be issued unless the ABS has been rated by a duly accredited credit-rating agency. No credit-rating agency can commence rate-making operations pursuant to the Securitisation Law until it has obtained accreditation from the SEC.

Other information

TRUE SALE OF ASSETS

The conveyance of the Assets to the SPE must be absolute, without recourse, and a "true sale." There is a "true sale" when the following conditions have been met:

- The transferred Assets are legally isolated and placed beyond the reach of the Originator or Seller and its creditors.
- The SPE has the right to pledge, mortgage or exchange the transferred Assets.
- The transferor relinquishes effective control over the transferred Assets.
- The transfer is effected by a sale, assignment or exchange, or in any event on a without recourse basis.
- The SPE has the right to the profits and disposition with respect to the Assets.
- The transferor does not have the right to recover the Assets, and the transferee does not have the right to reimbursement of the price or other consideration paid for the Assets.
- The SPE undertakes the risks associated with the Assets.

It is presumed that if an insurance company transfers its Non-Performing Assets to a Financial Institutions Strategic Transfer Corporation (FISTC) or individual, the transfer shall be considered not a True Sale if the selling insurance company acts as trustee (insurance company's trust department, if applicable) or if the trust department of any of the insurance company's subsidiaries/affiliates, parent bank or parent bank's subsidiaries/affiliates acting as trustee, under any circumstances, in the securitization of NPAs that it has transferred to the FISTC.

In the exercise of a "**clean-up call**" option, a retransfer may be made by the SPE with respect to the remaining Assets in the Asset Pool as a consequence of a breach of warranty or if the outstanding principal balance of the Asset Pool falls to 10% or less of the original principal balance of the Asset Pool (including foreclosed and other assets). The consideration for the retransfer shall be at current market value. Such "clean-up call" is not considered recourse or in violation of the requirements of a "true sale."

THE SERVICER

The servicer collects and records payments received on the assets, remits such collections to the SPE and performs other duties as may be required by the SPE. Its authority generally encompasses the general powers of administration other than asset management or administration.

The servicer must have a minimum authorised capital of PHP 10 million (approximately USD 200,000), or such higher amount as the SEC may prescribe. The servicer must be independent of the SPC or the trustee of the SPT. It cannot share common ownership, officers or directors with the SPC or the trustee. The Originator or Seller may act as the servicer with the approval of the SEC or the BSP, as the case may be.

SECONDARY MORTGAGE INSTITUTIONS (SMIs)

An SMI is designed to provide a liquidity mechanism to primary mortgage lenders/ holders and developing a secondary market for mortgage and housing-related ABS.

An SMI must be registered with the SEC and is subject to the same disclosure requirements as an SPC. An SMI also needs to register its ABS with the SEC. Upon filing a registration statement for the registration of its ABS with the SEC, an SMI must also submit its business and operational plans and feasibility study.

An SMI may engage in any or all of the following activities:

- wholesale purchase of residential mortgages and housing-related contract receivables;
- buy and sell any residential mortgage and housing-related ABS;
- provide loans to primary lending institutions against residential mortgages;
- issue housing-related ABS through an SPE and issue bonds and other debt instruments;
- perform ancillary functions, including title insurance (through a subsidiary) and loan servicing; and/or
- perform such other functions as the SEC may deem necessary to mobilise and channel funds from the capital markets to the mortgage and housing finance sector.

Any SMI for the housing sector must be a stock corporation and must have an initial paid-up capital stock of PHP 2 billion (approximately USD 40 million). The total obligations (actual and contingent) of an SMI cannot exceed 15 times its paid-up capital. Moreover, the total actual obligations of an SMI cannot exceed 10 times its paid-up capital.

Subject to the requirements of their governing charters, financial institutions and corporations owned or controlled by the Government of the Republic of the Philippines (GRP) may collectively hold and own up to a maximum of 30% of an SMI's capital.

A GRP financial institution may invest up to a maximum of 10% of its total investible funds in housing-related assets, or 5% in non-housing related assets. However, such investments must not exceed 5% of the total amount of each ABS issue.

Within 10 years from its incorporation, the SMI must offer and list at least 20% of its common shares with the stock exchange. The 10-year period may be extended only upon approval from the SEC.

The SMI is prohibited from the following:

- originating or financing individual mortgage loans;
- providing loans to other parties engaged in a business other than that approved in the Plan submitted to the SEC; and
- providing capital equity to other companies except companies that provide ancillary services.

SMIs are also entitled to the same tax and fiscal incentives and benefits available to an SPE under the Securitisation Law and the Rules.

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Poland

Legal framework

With the exception of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation, creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (the **EU Securitisation Regulation**), there is no specific securitisation legislation in Poland. Certain provisions pertaining to securitisations are contained in the Polish Act on Investment Funds since Polish law allows certain types of investment funds to act as issuing entities in securitisations. In addition, certain provisions on securitisations originated by banks are contained in the Polish Banking Law, although these provisions are regarded as inadequate. Therefore, the general principles of Polish law will apply to most securitisation transactions, including securitisations backed by trade receivables. The uncertainty connected with the incompleteness of the legal regime applicable to securitisations in Poland may be eliminated by the use of well-thought-out legal structures.

The Polish Financial Supervision Authority supervises compliance with the provisions of the EU Securitisation Regulation. The Financial Supervision Authority is empowered to control the activities of entities participating in the securitisation processes and impose administrative sanctions or remedial measures if irregularities are detected.

Incorporating a special purpose vehicle (SPV)

It is key for most, if not all, funded securitisations that the SPV is bankruptcy remote. Consequently, it is usually a prerequisite that it is not controlled by the Originator. In the context of bank-originated transactions, this requirement has been specifically formulated in the Polish Banking Law. The Banking Law requires that the SPV must not be formally linked to the bank-Originator (whether organisationally or through capital links).

Polish law does not recognise the concept of a trust, which is used in common law systems to create an independent ownership structure for SPVs. Instead, an SPV created and controlled by independent third parties (Polish or foreign) should be considered to ensure it is bankruptcy remote. SPVs controlled by both Polish and foreign foundations have been used in securitisations in Poland.

Importantly, an SPV does not need to be licensed or otherwise qualified to be able to perform its role in the securitisation structure. In particular, it does not need to be a bank or a financial institution under Polish banking regulations. However, in the case of banking securitisations, the Banking Law specifically requires that the only business of the SPV must be the acquisition of receivables, the issuance of debt securities to fund the acquisition and related activities.

Under the Act on Investment Funds a special type of closed-ended funds designated as "securitisation funds" (*fundusze sekurytyzacyjne*) can be created. These investment funds are allowed to fund the acquisition of pools of receivables from Originators or to fund the subparticipation in such pools through the issuance of securities called investment certificates. The creation of such funds by relevant fund management

companies will require the consent of the Polish Financial Supervisory Authority which will also regulate and supervise them. It should be noted that the possibility to create securitisation funds does not override the rule described in the paragraph above. The issuers of debt instruments to fund the pools of assets will not have to be licensed entities as it will still be up to the Originator to decide whether to securitise its assets through a licensed securitisation fund or through any other (whether Polish or foreign) SPV.

Method of transfer

TRUE SALE

The common method of transfer of receivables governed by Polish law is by way of assignment (*przelew* or *cesja*). This is achieved by an agreement between the assignor and the assignee, i.e., between the Originator and the special purpose vehicle (SPV). Assignment (unless it is subject to a condition precedent) involves a true transfer of the underlying receivables from the Originator to the SPV. The transfer of a proportion of a trade receivable (e.g., 50%) is also possible.

Trade receivables are generally assignable under Polish law without the consent of the debtors, unless the contracts between the Originator and the underlying debtors provide otherwise. Therefore, such contracts should be reviewed to see if they contain restrictions on assignment. If this is the case, no valid assignment is possible without the consent of the debtors.

It is important that the assignment be structured in a way that it is indeed a true sale and not an assignment for security purposes. This is possible provided that the transaction is structured so that the transfer of the underlying receivables is effected against a consideration (i.e., the purchase price). Assuming that a true sale approach is adopted, it is recommended (although not a prerequisite) that any assignments of receivables be concluded in writing. In the case of assignments that are not true sale assignments, more stringent requirements apply. Under the Polish Bankruptcy Law, if an assignment is for security purposes only, it must be in writing with a date certified (by a notary or otherwise in line with the Civil Code) for its effectiveness on the bankruptcy estate in the case of the declaration of the Originator's bankruptcy. In the case of a true sale assignment, no such requirement exists.

A valid assignment is constituted without the need for notice to be given to the underlying debtors/obligors (unless the agreement between the Originator and the underlying debtor provides for assignment restrictions). Nevertheless, as long as the debtors are not notified by the Originator of an assignment they may validly discharge their obligations by paying the Originator instead of paying the SPV. Therefore, notifying the underlying debtors is considered a prudent step from a legal perspective (even if there is no contractual requirement vis a vis the underlying debtor in this respect). It may be made by, for example, including a note on invoices sent to the debtors.

Unless the relevant contractual limitations provide otherwise, an undisclosed assignment will also be valid and structures involving such assignment can be contemplated, especially if the Originator believes that notice of assignment may impair its business relations with the debtor. In this case, the bank accounts to which the payments are to be made by the debtors should be owned by, or secured in favour of, the SPV. However, there is a residual risk that the debtors might pay the Originator directly (e.g., in customer service offices in

cash). To deal with this concern, the Originator should undertake to promptly forward any proceeds received to the SPV.

Under Polish law, debtors or obligors have the right to set off any claims under the assigned receivables even after the assignment, unless the claim to be set off by a debtor has become due and payable after the same occurred with regard to the assigned receivable. Where set-off claims arise from ordinary complaints, the risk should be dealt with through over collateralisation. The terms of the transaction may also incorporate buy-back provisions. Any buy-back provisions should be structured in such a way as to not disturb the true sale nature of the assignment.

Future flows securitisations are possible under Polish law. It should be noted that the proper identification of future receivables is crucial for a valid assignment. Identification by reference to a defined contractual right (even though the payment is not due at the time of transfer) should be sufficient to effect a valid assignment.

SUBPARTICIPATION

As an alternative to assignment, entities acting as Originators (e.g., banks) may consider subparticipation. A subparticipation agreement consists of an obligation for the Originator to transfer all proceeds under a class of receivables without transferring the receivables to the SPV. It should be concluded in writing under pain of nullity. Subparticipation does not require the Originator to abide by the formalities and limitations connected with an assignment (whether true sale or not and whether disclosed or undisclosed). However, the subparticipation does not remove the underlying assets from the Originator's balance sheet nor does it transfer them to a bankruptcy remote entity. It should also be noted that the receivables that are the subject of the subparticipation agreement are not included in the bankruptcy estate of the bankrupt entity being a party to this agreement. In that case, the securitisation fund assumes the rights resulting from these receivables and from their securities. What is more, in the event of a bank acting as an Originator, the tax regime for subparticipation will be more advantageous than if the Originator is another type of entity.

Over collateralisation/yield

Both a discount (to cover funding costs) and a deferred element (to cover over collateralisation) can be incorporated into the purchase price paid for the securitised receivables without disturbing the true sale nature of the transaction. The price paid, however, should not be so low as to be considered of little or no commercial benefit to the Originator. If this occurs, the transaction may be regarded as a transaction at an undervalue or a preference on the insolvency or restructuring proceedings of the Originator.

Polish law provides that, in certain circumstances, the effectiveness of a valid transfer of an asset may be challenged by creditors of the transferor or by the receiver if the transferor enters certain restructuring proceedings or is declared bankrupt (i.e., it could be deemed ineffective vis a vis the transferor's remedial estate or bankruptcy estate, as applicable). The same rules apply to the transfer of assets from the Originator to the SPV. Hence, any creditor of the Originator could challenge the transfer of receivables

effected to the detriment of the creditors if the Originator knew that it would be detrimental to them and the SPV either knew about it or could have discovered it.

Furthermore, if any transfer of assets is characterised as a gratuitous disposal or as a transaction at a "striking" undervalue, it may be challenged by the receiver where the Originator is declared bankrupt as a result of a petition filed within one year from the date of transfer (the same applies if the undervalue was "material" and the Originator files for remedial restructuring proceedings within one year from the date of the transfer). Should this be the case, the purchaser (the SPV) may be obliged to make a supplemental payment to the bankruptcy or remedial estate, as applicable, which would constitute the difference between the actual value of the receivables assigned and the price paid. It should be underlined that not any "under-valuation" of the assets could be challenged by the receiver; such under-valuation must be classified as either "striking" (bankruptcy regulation) or "material" (restructuring regulation). There is some risk involved, however, as there is no sufficient case law available to determine what constitutes such undervalue.

Tax

TAX TREATMENT

Income tax

Generally, the remuneration received by the seller of receivables within securitisation arrangements is treated as taxable income which can be reduced by deductible costs (though no obligation to recognise taxable income may be applicable to the securitisation of leasing receivables or the sale of bank loans to securitisation funds).

The sale of receivables should be performed at arm's length if an Originator and the SPV are related parties. Otherwise, the tax authorities may adjust the price for tax purposes to reflect an arm's length price.

A key issue with the transfer of non-performing receivables is the non-deductibility of the loss on the sale from a corporate income tax perspective (this issue would not be that relevant for the sale of trade receivables where the loss can be recognised up to the taxable revenues recognised in the past by the seller). In the case of banks, the sale additionally requires taxable reversion of provisions for such non-performing loans (i.e., provisions created by banks to cover for risk stemming from non-performing loans and treated as deductible costs for tax purposes must be "reverted" and recognised as taxable income upon the sale). Therefore, the sale of non-performing banking loans is only made in practice to securitisation funds (such sales enjoy a more beneficial tax treatment).

Withholding tax (WHT)

Withholding tax of 20% is applicable to interest and lease payments by Polish entities to non-Polish entities. The withholding tax on interest can be reduced under the relevant treaty on avoidance of double taxation concluded between Poland and the country of the purchaser's tax residency. The discount from the nominal value of receivables sold should generally not be treated as interest but a case-by-case analysis of each transaction is recommended.

From 1 January 2022, the rules for withholding tax collection have significantly changed. In the case of passive payments made to related parties and exceeding PLN 2 million in one tax year to one foreign recipient of payment, the withholding tax will have to be collected by the withholding tax agent at statutory rates (19%/20%). This means that the application of reduced rates or a tax exemption by the withholding tax agent (at source) will not be possible.

A foreign recipient (or in certain cases a withholding tax agent) will have the right to apply for a refund of withholding tax to the Polish tax authorities. When filing the request for a refund, the taxpayer (or withholding tax agent) would be required to file the documentation supporting the payment and evidencing that the conditions for reduced rates or a tax exemption to apply were met (documentation will need to contain proof of beneficial ownership and business substance in the country of the income recipient's residence). Withholding tax should be refunded within six months from the filing of the refund application.

In specific cases, however, the withholding tax agent will be allowed to apply the reduced rate or tax exemption at source. This will be possible if: (i) the withholding tax agent files a statement to the Polish tax authorities (under pain of criminal fiscal liability of the management board and additional tax liability of the withholding tax agent) stating that it holds all documentation required to apply the reduced tax rate/exemption as well as confirming that all additional requirements have been met (regarding the beneficial ownership status and business substance of the recipient); or (ii) the taxpayer obtains an opinion from the Polish tax authorities authorising to apply a withholding tax reduction (the opinion should generally give protection for 36 months).

Given the above, securitisation transactions that involve a non-Polish SPV might be especially complex as a result of the new requirements.

VAT

There is no direct regulation in the VAT law relating to securitisation. However, based on the practice of administrative courts and tax authorities, the sale and assignment of receivables under securitisation arrangements should be considered as an element of VAT-able services rendered by a purchaser of receivables to the assignor (i.e., the sale of the receivables should not constitute a separate transaction for VAT purposes). The courts and tax authorities generally accept that the service supplied by the purchaser of the receivables should be considered as a VAT-exempt service consisting of providing financing to the seller of receivables (a transaction concerning the granting, negotiation and the management of credit). However, there are also some examples of the Polish tax authorities' rulings claiming that securitisation should be treated as a debt collection/factoring service, which should be subject to 23% VAT (the VAT has to be calculated based on the positive difference between the amount paid by the securitisation fund and the amount collected).

On the other hand, in some tax rulings the tax authorities indicate that when (a) the securitisation concerns non-performing receivables, and these receivables are transferred for the price that reflects the actual economic value of the receivables, and (b) no additional remuneration is paid to the securitisation fund, then the transaction is not subject to VAT at all. This, in turn, reflects the transfer tax consequences of the transaction.

There is limited practice and uncertainty relating to the VAT treatment of sub participation transactions. The Polish tax authorities and courts issue some rulings/verdicts qualifying subparticipation transactions as being subject to 23% VAT but there have also been decisions from the administrative courts confirming a VAT exemption of subparticipation. Recently, the Supreme Administrative Court referred the preliminary question to the European Court of Justice to clarify if an exemption from VAT in respect of transactions concerning the granting, the negotiation and the management of credit is applicable to subparticipation (case C-250/21). On 12 May 2022 the Advocate General delivered the opinion (which is not binding for the European Court of Justice) that exemption from VAT does not apply to the supply of services provided under the sub-participation since sub-participation does not cover the credit risk transferred by the originator to the sub-participant.

Due to the often-vague practice of the tax authorities, the market practice is to obtain tax rulings to confirm the tax treatment of crucial elements of a transaction's structure.

In addition, in the case of securitisation of trade receivables, the VAT regulations regarding (i) a split payment mechanism and (ii) a so-called white list of taxpayers that have been introduced in 2019 and 2020 should be considered. The VAT split payment mechanism requires that the payment of the VAT part of the trade receivable for the sale of certain goods and services be made to the segregated VAT account. On the other hand, the regulations related to the white list of taxpayers require that the payments be made to the bank account listed on the white list.

Tax on Civil Law Transactions

The civil transaction tax of 1% is generally paid on the transfer of receivables. However, if the securitisation agreement is subject to or exempt from VAT (please see the comments above) transfer tax should not be applicable.

General Anti-Abuse Rules

Under the Polish General Anti-Abuse Regulations (GAAR), the Polish Tax Authorities may challenge transactions or other arrangements as tax avoidance under the GAAR. The GAAR applies to transactions with the main purpose(or one of the main purposes) of achieving tax benefits. As a rule, securitisation transactions are implemented for non-tax reasons. However, when structuring a securitisation transaction, the GAAR should be taken into account, and documenting business reasons and substance might be recommended in order to mitigate GAAR risks.

Mandatory Disclosure Rules

From 1 January 2019, mandatory disclosure rules (MDR) have been implemented in Poland. The MDR require reporting of certain reportable arrangements to the Polish tax authorities. Under the MDR, the reporting obligation covers not only typical tax planning arrangements but also transactions or business operations that are not related to any tax benefits. Therefore, each securitisation transaction should also be analysed from the perspective of reporting obligations under the MDR.

Accounting treatment

Under Polish law, there are no specific rules setting out the accounting treatment of a securitisation transaction. Accordingly, generally accepted accounting principles are applied. These principles provide that a transfer of receivables shown in the Originator's balance sheet should be removed if the transfer is absolute (i.e., unqualified). Any remaining risk that the Originator retains could jeopardise the off-balance sheet treatment.

Regulatory concerns

REGULATORY ISSUES

Data protection, banking secrecy and related legislation

The General Data Protection Regulation (GDPR) requires careful consideration in relation to the securitisation of individuals' debts. Generally, the GDPR provides that individuals' personal data may only be transferred upon their consent given freely by statement or by their affirmative action. Any transfer without the consent of the individuals concerned is only permissible if it is to enable the transferor to achieve its "legally justifiable goals." It is understood that this is the case if the data is transferred in connection with an assignment of receivables to a third party. These provisions also apply to a transfer of data from the Originator to the SPV. The SPV involved in a securitisation of personal debts may be an administrator of personal data within the meaning of the term in the GDPR. If so, it will be required to register its collection of personal data with the Office of Data Protection (ODP). Further limitations apply if the SPV processes data abroad. Transfers of personal data without the consent of the individuals involved would be valid but the Originator and the SPV may be subject to sanctions imposed by the President of the ODP.

As far as deals originated by Polish banks are concerned, the Banking Law specifically allows the transfer of the data covered by banking secrecy laws to an SPV.

There may also be other legislation applicable where certain trade receivables are securitised. For example, the Polish Telecommunications Law contains provisions relating to confidential telecoms information.

The burdens of the GDPR and similar legislation can be avoided. Where a transaction is structured so that no personal data is transferred from the Originator to the SPV and the data is processed by the Originator (also performing the duties of the servicer), the ODP and other similar legislation are unlikely to apply.

Consumer protection

As far as consumer receivables are concerned, the legislation relating to unfair terms may apply. This provides that, if a term is unfair and was not individually negotiated

with the customer, it may not be binding on the customer and thus not enforceable by the Originator (or the SPV as assignee). For example, a prohibition of set-off would be regarded as unenforceable. It is therefore imperative that standard terms and conditions of the Originator and the associated standard agreement forms be carefully reviewed before entry into a transaction.

Foreign exchange law

There are no material restrictions on foreign exchange dealings involving entities from the European Union (EU), the Organisation for Economic Co-operation and Development (OECD) and European Economic Area (EEA) member states. Accordingly, if the transferee SPV is resident in Poland or in an EU, OECD or EEA member state, no foreign exchange restrictions will apply even if the SPV enters into foreign liquidity facilities or is a counterparty to a hedging transaction provided by a foreign entity.

Conclusion

Taking into account the fact that securitisation is a relatively novel concept in the Polish market, careful analysis of any proposed structure is imperative. From a legal perspective, the review of receivables transferred to the SPV should include general terms and conditions used by the Originator and should particularly focus on any restrictions imposed on their transferability. In cases where Polish SPVs are used, bankruptcy remoteness and independence from the Originator should be reviewed before structuring any deal. Other matters to consider include the use of personal data as well as the provision of security by the SPVs or third parties.

Needless to say, no securitisation structure or any other commercial transaction may be designed without analysing its tax and accounting implications.

Taking into account the advantages of securitisation and the growing interest of both potential Originators and financial advisers, the next few years appear to be very promising, and it seems that they will be breakthrough years for the Polish capital markets in relation to the wider use of securitisations.

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Russia

Background

The Russian securitisation market began in 2003. Numerous securitisations have been completed so far and various asset classes have been securitised, including mortgages, auto loans, consumer loans, credit cards, SME loans, lease receivables, diversified payment rights (DPRs) and factoring (trade) receivables.

Most of the securitisations (over 30 transactions) completed before 2008 used cross-border structures and involved a sale of receivables from a Russian Originator to an offshore special purpose vehicle (SPV) (typically located in the Netherlands, Luxembourg or Ireland) and the issuance of asset-backed notes to public or private international investors.

Since the global financial crisis of 2008, the Russian securitisation market has been dominated by domestic mortgage securitisations and the issuance of domestic residential mortgage-backed securities (RMBS) and covered bonds. The growth in the domestic mortgage market was primarily driven by the refinancing programmes and support from the Agency for Housing Mortgage Lending (AHML) and Vnesheconombank (VEB), which allowed Russian banks and mortgage Originators to refinance their mortgage portfolios at attractive funding rates. Apart from the AHML and VEB, the domestic investor base includes Russian banks, pension funds and insurance companies.

Following the global financial crisis, a number of cross-border securitisations were completed in Russia in 2011-2012 involving auto loans, consumer receivables and DPRs. These deals have typically been concluded with private investors.

In November 2013, Home Credit and Finance Bank completed a landmark consumer loans securitisation in Russia. The deal used a dual-SPV structure with the asset SPV located in the Netherlands and the funding SPV located in Russia. The deal allowed the bank to securitise consumer loans through the issuance of domestic rouble bonds placed with various domestic investors. The bonds received investment grade ratings from rating agencies, Standard & Poor's and Moody's. The structure of the deal allows any type of assets to be securitised both domestically and outside of Russia.

On 1 July 2014, the new securitisation law (the "**Securitisation Law**") came into effect. The new law allows domestic securitisation of various asset classes (including future flows) via a domestic SPV and the issuance of domestic asset-backed securities (ABS). The law envisaged the adoption of various secondary regulations. These were passed in the course of 2014-2015 and, in 2015, the Securitisation Law became fully operational. A number of deals have already been completed under the new law — auto loans, consumer loans, leasing receivables and SME loans. The law turned a new page in the history of the Russian securitisation market.

Despite the ongoing COVID-19 pandemic, some notable and innovative deals continue to appear on the Russian market. In 2021, Tinkoff Bank, a subsidiary of LSE listed holding, completed the first-of-a-kind securitisation of home equity loans represented by electronic mortgage certificates. The transaction is built on a highly innovative and technologically advanced legal and IT platform. The offering received extremely positive feedback from investors and other market participants. In 2020 and 2021, there were multiple SME loans securitisations sponsored by the Russian Small and Medium Business Corporation.

Asian-Pacific Bank and Housing Finance Bank, two Russian mid-sized banks, completed several multi-Originator mortgage securitisations achieving capital relief, and created a multi-Originator platform for further cost-efficient transactions. The debut transaction through the multi-originator platform was the first multi-originator transaction in Russia to be rated by a domestic credit rating agency, ACRA.

There has been a growing interest for the securitisation of alternative assets, such as trade receivables, consumer loans and leasing receivables. Several major transactions are currently in various stages of development.

Legal framework

The securitisation of mortgages is primarily regulated by Federal Law 152-FZ, "On Mortgage-Backed Securities," dated 11 November 2003 (the "**MBS Law**"). The securitisation of all other asset classes is primarily regulated by the Securitisation Law.

The Securitisation Law is not a standalone legal act but rather it introduces multiple changes to existing laws, including the following:

- Civil Code of the Russian Federation;
- Federal Law 39-FZ on the Securities Market (22 April 1996);
- Federal Law 127-FZ on Insolvency (Bankruptcy) (26 October 2002); and
- Tax Code of the Russian Federation, and a number of other legislative acts.

Tax

TAX IMPLICATIONS

The tax implications arising in connection with a securitisation transaction under Russian law include those related to withholding tax, value-added tax (VAT) and corporate profits tax. Russian law imposes no stamp duty in connection with the sale of receivables to an SPV. The tax implications of a particular securitisation may also depend on the type of receivable, as well as on whether the transaction is cross-border or purely domestic.

WITHHOLDING TAX

Any interest payable by Russian debtors to an offshore SPV that has no permanent establishment in Russia is subject to a 20% withholding tax. The SPV may, however, be exempt from Russian withholding tax pursuant to a double tax treaty (currently, there are more than 80 such treaties in force, including treaties with the UK, Luxembourg and Ireland).

VAT

The sale of receivables is generally not subject to VAT under Russian law, unless the underlying receivables are subject to VAT (e.g., trade receivables, rentals, leasing receivables) or are sold at a premium (in which case, 20% VAT would apply to the premium).

PROFITS TAX

The sale of receivables to an SPV for the purpose of securitisation will generally result in the receivables being discounted or sold at par; that is, the sale will not generate taxable profit for the Originator. Otherwise, a 20% profits tax is payable by the Russian Originator on any positive difference between the balance-sheet value of the securitised receivables and the purchase price paid upon their assignment to the SPV.

On the SPV side, neither the mortgage agent nor the SFC is subject to corporate profits tax on proceeds obtained from their authorised activities.

Other information

MORTGAGE-BACKED SECURITIES

The MBS Law recognises two types of mortgage-backed securities:

- mortgage-backed bonds, which may be issued by banks (covered bonds) and specialised mortgage agents (SPVs); and
- mortgage participation certificates, which may be issued by banks and companies licensed to manage investment, unit investment and non-state pension funds.

Mortgage-backed bonds are debt securities secured by a mortgage pool on a balance sheet of a bank (covered bonds) or a specialised mortgage agent. Both RMBS and covered bonds require registration with a Russian stock exchange or the Central Bank of Russia (CBR).

Unlike mortgage-backed bonds, mortgage participation certificates have no nominal value and are similar to a unit in a mutual fund. A mortgage participation certificate records the undivided right of ownership of the certificate holder in the mortgage pool.

The CBR restricted issues of mortgage participation certificates starting from 5 September 2021. Mortgage participation certificates issued before that date will be gradually redeemed in accordance with their terms and conditions and eventually phased out.

ASSET-BACKED SECURITIES

The Securitisation Law significantly extends the list of assets that may be used as security for domestic bonds — receivables (monetary claims), including future receivables; securities; and real estate. Effectively, any monetary claim may now be securitised under the Securitisation Law. The CBR may extend or limit the type of assets that may be securitised under the law as well as establish various conditions for their securitisation.

TRUE SALE

Under Russian law, receivables are generally transferred by way of assignment, which can be carried out by agreement of the parties or, in certain limited cases, by operation of law.

As a transfer mechanism, the assignment is distinguished from the legal transaction underlying such transfer (e.g., purchase and sale, factoring, swap, gift or security agreement). Accordingly, the transaction underlying the assignment may be a sale by the Originator to the SPV, a factoring arrangement, a swap or a transfer by way of capital contribution.

The Securitisation Law expressly permits the assignment of future receivables. Moreover, a contractual prohibition of assignment of receivables (monetary claims) will not invalidate a relevant assignment but may lead only to contractual penalties for the assignor (seller).

In general, a true sale can be achieved under Russian law, provided that: (i) the intention of the parties and the wording of the transaction documentation make it clear that the receivables are transferred by way of sale, rather than by way of security or otherwise; and (ii) the results of the transaction (including the discretion and the level of control afforded to the purchaser and the amount of recourse to the Originator) are consistent with the sale.

NOTICE REQUIREMENT

A transfer by way of assignment is valid without regard to whether the relevant debtor has been given notice of the transfer. However, the purchaser bears the risk of any unfavourable consequences resulting from failure to give such notice. Until notice is given, the debtor can discharge its debt to the assignor rather than to the assignee. In order for the assignee to assert a direct claim against the debtor, a written notice of assignment is required. The notice may be given by the assignor or the assignee (in the case of the assignee, proof of assignment may be required).

BANKRUPTCY REMOTENESS

In general, in a securitisation transaction the issuer of ABS (a mortgage agent under the MBS Law or the special finance company under the Securitisation Law, collectively referred to herein as the "**SPV**") should be structured as a bankruptcy-remote entity; that is, there should be little or no risk of the SPV becoming subject to voluntary or involuntary insolvency proceedings. In addition, the insolvency of the Originator should not contaminate or affect in any way the activity of the SPV. The structure of a transaction should provide the means to ensure that assets are available to make interest and principal payments in a timely manner, notwithstanding the insolvency of the Originator. Both the MBS Law and the Securitisation Law allow the SPV to be set up as a bankruptcy-remote entity.

Under the MBS Law, the mortgage agent may be incorporated in the form of a Russian joint-stock company or a limited liability company. Mortgage agents have limited capacity and are allowed to conduct specific activities related to the issuance of RMBS and the purchase of mortgage loans. A mortgage agent is not allowed to have employees; it should be managed by a management company.

All mortgage securitisations involve a special entity, a specialised depository, which monitors and controls all operations with mortgage collateral that is pledged under

mortgage bonds. In the event of bankruptcy of the mortgage agent, the mortgage collateral is excluded from the bankruptcy estate by operation of law and is used solely to discharge obligations under the mortgage-backed securities.

The special finance company (SFC) is a domestic entity, introduced by the Securitisation Law, which is entitled to issue bonds secured by pledge of various types of receivables, securities and other assets. The structure of an SFC in many ways resembles that of a mortgage agent, and as such, the SFC may be incorporated in the form of a Russian joint-stock company or a limited liability company. Its capacity is limited to the purchase of specific assets (monetary claims) and the issuance of ABS. Unlike in mortgage securitisations, the law does not require the SFC to engage a specialised depository, and all proceeds from the receivables must be credited to a special account opened by the SFC and pledged in favour of the bondholders (a pledge account). All assets of the SFC, including receivables and proceeds on the pledge account, are pledged in favour of the bondholders whose claims should be satisfied in priority upon enforcement of the pledge.

Similar to the mortgage agent, the SFC may not enter into any employment agreements, and its management operations must be outsourced to an external management company. A company willing to manage an SFC must be enrolled in a special register maintained by the CBR.

The bankruptcy-remote status of Russian SPVs (an SFC or a mortgage agent) is further enhanced by a limitation that only a bondholder trustee (representative) rather than an individual bondholder may initiate insolvency proceedings against the SPV on the basis of a decision of the general bondholders' meeting.

Limited recourse and non-petition

The concept of limited recourse was introduced into Russian transactions by the Securitisation Law. Such provisions were initially only applicable to SFCs, but have since been extended to apply to mortgage agents as well. The terms and conditions of the bonds issued by an SFC or a mortgage agent may provide that bondholders' claims not satisfied after realisation of the underlying security (collateral) will terminate. Limited recourse provisions may also be included in other agreements entered into by a Russian SPV (an SFC or a mortgage agent) with its creditors.

The agreements entered into by a Russian SPV with its creditors may also include non-petition language limiting the ability of other creditors to the SPV to initiate insolvency proceedings against the SPV.

Risk retention rules

The Securitisation Law requires the Originators in all non-mortgage securitisations to retain risks related to each securitisation transaction in the amount of 20% of the nominal value of the issued bonds. The CBR has adopted regulations specifying various forms of such risk retention, which include retention of the junior tranche, provision of a subordinated loan to the SFC or a guarantee in relation to the senior tranche and some others.

Disclosure of information and personal data protection

Under Russian law, a bank is under an obligation to preserve bank secrecy — that is, the secrecy of accounts, deposits, client transactions and information relating to the clients. Such information may be provided to the clients themselves, their representatives and, in limited cases, public authorities. In addition, Russian law protects against the unauthorised disclosure of commercial secrets; that is, information that:

- has commercial value due to the fact that it is unknown to third parties;
- is not freely accessible; and
- is preserved as confidential by its owner.

Persons who wrongfully disclose banking and commercial secrets may be liable for penalties and damages and subject to criminal prosecution.

Arguably, the limited disclosure of information on the agreements underlying the receivables should be permitted, and the disclosure of such information should not affect the validity of the transfer of receivables. The authority for this is derived from the provisions of the Civil Code requiring the Originator to pass on to the SPV documents proving its rights to the receivables, as well as to disclose information that is relevant for the SPV's exercise of its rights under the assignment. Furthermore, recent amendments to consumer credit and personal data legislation directly permit the disclosure of borrowers' personal data upon assignment of rights under loan agreements.

Data protection rules have recently been amended to clarify certain rules on cross-border transfers of personal data. The new regulations expressly allow the transfer of personal data to foreign companies that are registered in countries that are parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, dated 28 January 1981. This convention has been ratified by the majority of European countries, including Luxembourg, Ireland and the Netherlands — jurisdictions that are often used for cross-border securitisation transactions originating from Russia.

CBR LOMBARD LIST

The CBR has adopted specific rules that allow RMBS and ABS to be included in the "Lombard List" of securities, which may be used as collateral with the CBR for refinancing. The CBR has discretion over which securities are admitted to the Lombard List. Apart from such material factors as volume of issuance, liquidity of the notes and others, the CBR will also take into account the following requirements:

- The level of the rating assigned by one of the CBR-accredited rating agencies should not be lower than "A+(RU)" (ACRA) or "ruA+" (Expert RA). In the absence of a rating for domestic RMBS, a state or AHML guarantee is required.
- The notes should be traded on a Russian stock exchange or listed on a foreign stock exchange in a country recognised as a developed country by the CBR (e.g., the UK, Ireland or Luxembourg). Settlement should be cleared through a Russian depositary, which should also act as the registrar of the notes.

Various RMBS and ABS notes, including international notes originated from Russia, have been included in the Lombard List.

IMPLEMENTATION OF BASEL III AND STS FRAMEWORK

In 2018, the CBR adopted regulations that implemented key principles of Basel III. A formula-based standardised approach (SEC-SA) became the basis for calculating credit risk for securitisation exposures. The regulations generally provide favourable treatment for investors in senior tranches, as well as for Originators retaining the junior tranches. The CBR also introduced the Simple, Transparent and Standardised (STS) criteria, which could result in lower-risk weights for various exposures in line with Basel III rules.

Conclusion

The Russian legal framework for securitisation is constantly developing. The Securitisation Law is expected to provide a further boost to the development and diversification of the Russian securitisation market.

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South Africa

Legal framework

Securitisation is regulated in South Africa under the South African Banks Act 1990 (the "**Banks Act**") and a set of regulations (commonly referred to as the "**Securitisation Notice**") promulgated thereunder dealing specifically with securitisations. These regulations, together with a well-regulated financial services sector, facilitated strong growth in the South African securitisation market between 2002 and 2008. The regulations were amended in 2008 in line with international best practice just before the global credit crisis, which, from a defaults perspective, the South African securitisation market survived relatively unscathed.

THE REGULATORY ENVIRONMENT

Briefly, the Securitisation Notice regulates and prescribes the circumstances in which an issuer of debt instruments pursuant to a securitisation scheme will fall outside the ambit of being considered to be conducting the business of a bank and will thus not be required to obtain a banking licence or be regulated as a bank under the Banks Act, provided that a number of conditions exist. These conditions are set out in paragraph 2 of the Securitisation Notice.

The Prudential Authority oversees the securitisation market and its authoritisation must be obtained by an issuer before the issue of securities in a securitisation scheme. In South Africa, there are two types of securitisation schemes recognised under the Securitisation Notice, namely a "traditional securitisation scheme" (or asset-backed securitisation, which includes mortgage-backed securities) and a "synthetic securitisation scheme." The same special purpose vehicle (the "**SPV**") issuer may not issue debt instruments in terms of both a traditional securitisation scheme and a synthetic securitisation scheme.

A traditional securitisation scheme is defined as a scheme whereby an SPV issues commercial paper (a term used generically in the Securitisation Notice to include both long-term and short-term debt instruments, such as written acknowledgments of debt, debentures and preference shares), which are claims against the assets transferred or acquired, to investors. The proceeds derived from such issuance are primarily used to invest in assets or receivables sold to it by an Originator. Payments by the SPV on the commercial paper are made from the cash flows arising from the assets transferred to the SPV and the various facilities that may be provided to the SPV in accordance with the provisions of the Securitisation Notice. Accordingly, a traditional securitisation scheme results in the transfer of the underlying asset/exposure. The benefit of a traditional securitisation scheme is that when the transfer of the assets constitutes a "true sale," the relevant bank may be allowed to exclude the assets sold from the calculation of its required capital and reserve funds.

A synthetic securitisation scheme is defined as a scheme where an SPV issues commercial paper to investors but the proceeds derived from such issuance are used to obtain credit risk exposure and to hedge such credit risk, usually through credit derivative instruments, and to acquire collateral. Accordingly, the underlying asset/exposure is not transferred, as is the case with traditional securitisation schemes. Rather, only the risk is transferred. Payments by the issuer on the commercial paper issued under a synthetic securitisation scheme are derived from cash flows arising from such collateral and from the fees or premium paid to the issuer by the counterparty to the relevant credit derivative instrument.

Incorporating an SPV

An SPV is usually incorporated as a ring fenced company in terms of the Companies Act 71 of 2008 (although it can be founded as a trust), most typically with all its issued shares owned by a trust. It should be noted that if the SPV intends to trade publicly or be listed on the Johannesburg Stock Exchange (the "**JSE**") then it must be registered as a public company. The founding documents of the SPV must contain restrictions limiting its purpose to conduct activities related to the securitisation scheme. These documents must be filed with the Companies and Intellectual Property Commission to effect registration.

Method of transfer

In terms of the Securitisation Notice, transfer in a traditional securitisation scheme takes place by the sale and actual transfer of the assets (i.e., the receivables owed to the Originator are transferred from the Originator to the SPV). In a synthetic securitisation scheme, transfer takes place by the transfer of risk in a pool of assets to the SPV by means of a credit derivative instrument, a guarantee or another method of transfer authorised by the Prudential Authority.

Under the Securitisation Notice, there must be a "true sale," meaning that the transfer must totally divest the transferor and all its associated companies (and, when the transferor is a bank, divest any other institution within the banking group of which such a bank is a member) of all rights and obligations in respect of the underlying transactions and all risks in connection with the assets transferred or acquired.

Accordingly, for a true sale to occur for a traditional securitisation scheme, the Securitisation Notice regulates the following, among other things:

a. the effective or indirect control that the transferor may continue to exercise over the assets transferred (other than through a servicing relationship or the like);
b. the right of recourse in respect of losses incurred in relation to the assets transferred;
c. the nature of warranties that may be given;
d. clean-up calls or rights to repurchase assets transferred; and
e. the ownership and control that a bank acting in a primary role under the relevant scheme (that is as Originator, remote Originator, sponsor or repackager) may exert.

In a synthetic securitisation scheme, in order to ensure an adequate transfer of risk for risk mitigation purposes, the Securitisation Notice regulates the following, among other things:

a. the prohibition of significant materiality thresholds below which the credit protection will not be triggered;
b. the prohibition on an increase of costs of the credit protection based on a deterioration in the underlying asset quality;

c. the level at which an Originator bank may invest in the commercial paper issued by the SPV so as to ensure a material portion of the risk is transferred to third-party investors; and

d. the ownership and control that a bank acting in a primary role under the relevant scheme (that is as Originator, remote Originator, sponsor or repackager) may exert.

To effect the sale of receivables under a traditional securitisation scheme, the Originator would normally conclude an assignment agreement of all its rights, title and interest in and to such assets to the SPV. The validity of an assignment in South Africa is regulated by common law and there are no statutory formalities to give effect to such assignment, though this may be dependent on the nature of the assets transferred. Generally, if only rights are transferred, this may take place without the cooperation, consultation or consent of the obligor (unless otherwise stipulated in the underlying contract). However, an assignment of rights and obligations would require the consent of the underlying obligor. An upfront consent contained in the relevant receivables contract would suffice.

Over-collateralisation/yield

A credit enhancement facility may be provided to the issuer to improve the credit rating assigned to the commercial paper issued. The purpose of a credit enhancement facility is to protect investors in a securitisation scheme from losses occurring in the pool of assets or risk exposures acquired by the SPV. Credit enhancement facilities may be provided on a transaction-specific or programme-wide basis. The Securitisation Notice regulates the provision of credit enhancement facilities by banks and members of the banking group and allows for the provision of both a first-loss and a second-loss credit enhancement (though these are required to be documented separately and the first-loss facility is required to provide substantial protection to the second-loss facility). A first-loss credit enhancement facility may be provided through over-collateralisation, guarantees or subordinated loans. Where a bank transfers assets to an SPV at a price less than the book value of those assets, the difference between the book value and such price will be regarded as first-loss credit enhancement. The extent of credit enhancement provided to an SPV under a securitisation scheme must be determined at the commencement of the scheme, and there are numerous provisions of the Securitisation Notice that ensure that no additional implicit support is subsequently provided unless with the consent of the Prudential Authority.

A liquidity facility may also be provided, which enables the SPV to make timely payments of principal and interest amounts to investors, notwithstanding any market disruptions or timing differences in the receipt of the principal and interest amounts from the underlying pool of assets. The Securitisation Notice provides details of a number of salient features that must be included in any liquidity facility provided to an SPV.

Tax

The primary tax concern with regard to securitisation transactions is the avoidance of double taxation of income from the assets and, accordingly, the issuer should be set up as a tax-neutral entity. A withholding tax of 15% is payable on interest payments made

to or for the benefit of foreign persons from a South African source, unless reduced by an applicable double tax treaty or if an exemption applies under the Income Tax Act. For example, if the commercial paper is listed on a recognised exchange (which would currently include the JSE), the interest paid on such commercial paper would be exempt from such withholding tax.

No securities transfer tax is payable under the Securities Transfer Tax Act of 2007 on the issue, cancellation, redemption or transfer of notes, or on the transfer of the receivables from the Originator to the issuer SPV.

The South African government has entered into a Model 1 intergovernmental agreement with the US government in relation to compliance with the US Foreign Account Tax Compliance Act (the "**FATCA**"). This was published in Government Notice 93, Government Gazette 38466 of 13 February 2015 and came into effect on 28 October 2014. Accordingly, transaction parties that qualify as reporting South African financial institutions must comply with the reporting requirements in respect of US reportable accounts and payments to certain non-participating financial institutions.

There will also be value-added tax considerations that should be taken into account, but these may depend on the relevant asset class being transferred.

Accounting treatment

The International Financial Reporting Standards (the "IFRS") are often applied to SPVs in South Africa.

Regulatory concerns

Depending on the nature of the underlying asset that is the subject of the securitisation, different legislation and regulatory requirements may apply. We have dealt with only a few below.

DISCLOSURE

The Securitisation Notice prescribes the disclosure obligations on an SPV issuing commercial paper under a securitisation scheme. Investors must be made aware that the instruments in which they invest do not represent deposits in a bank, but are subject to investment risk, including possible delays in repayment and loss of income and principal amounts invested, and do not guarantee the capital value or performance of such instruments. The Securitisation Notice provides details on what provisions must be included in a disclosure provided to an SPV.

In addition, if the commercial paper is to be listed on the Interest Rate Market of the JSE, the issuer and the relevant disclosure document must comply with the listings requirements of the JSE relevant to debt listings.

CONSUMER PROTECTION

Insofar as the receivables contracts pertain to goods or services, the supply of such goods and services may be governed by the Consumer Protection Act 2008 (the "**CPA**"). The CPA contains various provisions that grant the consumer various rights pertaining to the quality of goods or supply of services and remedies if such goods or services are defective. The purchaser of such receivables contract will have to bear the provisions of the CPA in mind.

The receivables contract itself and the provision of credit may be governed by the National Credit Act 2005 (the "**National Credit Act**"), which governs consumer credit agreements in South Africa and applies to credit agreements entered into after 1 June 2007. The National Credit Act applies to natural persons and juristic persons but does not apply to juristic persons that (together with any related entities) have an asset value or annual turnover of more than ZAR 1 million, nor to juristic persons with an asset value or annual turnover of less than ZAR 1 million that enter into a mortgage agreement or an agreement with a loan value of more than ZAR 250,000. Thus, when evaluating the securitisation of such receivables, the National Credit Act should be taken into account, as the issuer SPV may be required to register as a credit provider under the National Credit Act and would then be required to comply with the requirements for credit agreements and enforcement processes.

Where the Originator or servicer is a bank and the National Credit Act does not apply, the bank should also give due consideration to its obligations under the Conduct Standard for Banks 2020 (issued by the Financial Sector Conduct Regulator on 3 July 2020).

DATA PROTECTION

The processing of the debtors personal information under the original receivables contracts as well as the Originator's and the SPV's personal information under the securitisation scheme will be regulated by the Protection of Personal Information Act , 2013 (the "POPIA"). POPIA is South Africa's primary data protection and privacy law. POPIA aims to give effect to the constitutional right to privacy and establishes the minimum requirements for the processing of personal information.

POPIA applies to the processing of personal information entered in a record by or for a responsible party (akin to a data controller under the GDPR) by making use of automated or non-automated means, provided that when the recorded personal information is processed by non-automated means, it forms part or is intended to form part of a filing system. Where personal information is entered into a record and is processed by a responsible party domiciled in South Africa or a responsible party who is not domiciled in South Africa, but makes use of automated or non-automated means in South Africa, POPIA will be applicable to such processing, unless the means are used only to forward personal information through South Africa. Personal information is defined to include the personal information of an identifiable natural, living person and the personal information of an identifiable, existing juristic person.

In the context of the above, the parties to a securitisation scheme, particularly the Originator as well as the SPV, will have to comply with the provisions of POPIA. In this regard, the Originator will be regarded as a data controller in relation to the personal information collected from debtors in terms of the receivables contracts and the SPV will regarded as a data controller in relation to the personal information collected following the transfer of the assets (in respect of the traditional securitisation scheme) or risks (in respect of the synthetic securitisation scheme). POPIA details eight conditions for the lawful processing of personal information which will have to be complied with by the Originator and the SPV, namely:

- Accountability: The Originator and the SPV must each be accountable for complying with POPIA.

- Processing Limitation: There must be a lawful basis for the processing of the personal information by the Originator and the SPV as set out in POPIA (i.e. the data subjects/debtors have consented to the processing, the processing is necessary to carry out the conclusion of a contract or to comply with a legal obligation). The processing of the personal information must also be adequate, relevant and not excessive. In addition, the personal information must be collected directly from the data subject unless one of the exceptions to this principle as set out in POPIA are of application (i.e. the information is derived from a public record or has been made public by the data subject, the data subject has consented to the collection of the information from another source or the collection from another source does not prejudice a legitimate interest of the data subject, collection from another source is necessary to comply with a legal obligation or compliance would prejudice a lawful purpose of the collection or is not practical in the circumstances).
- Purpose Specification: The personal information must be collected for a specific, explicitly defined and lawful purpose and the personal information must not be retained for any period that is longer than necessary for achieving the purpose of the collection.
- Further Processing Limitation: The further processing of personal information must be compatible with the purpose for which it was initially collected.
- Information Quality: The Originator and the SPV must each take reasonable practicable steps to ensure that the personal information is complete, accurate and up to date.
- Openness: The Originator and the SPV must each take reasonable practicable steps to ensure that data subjects are aware of certain facts in respect of the processing of their personal information, including the information collected, the purpose for the collection and the sources from whom the information is collected, the persons with whom personal information is shared, whether the personal information will be transferred outside of South Africa, the details of the responsible party, whether the supply of personal information is mandatory or voluntary and the consequences of not supplying the personal information.
- Security Safeguards: The Originator and the SPV are required to comply with the various security safeguards set out in POPIA. The Originator and the SPV will also be required to comply with the security breach notification requirements set out in POPIA.
- Data Subject Participation: The Originator and the SPV will have to ensure that it has mechanisms in place to comply with data subject rights requests.

In addition, the Originator and the SPV will have to comply with those provisions in POPIA dealing with automated decision making (including profiling), direct marketing and the transfer of personal information outside of South Africa to the extent that any of these activities are undertaken by the Originator and the SPV.

FOREIGN EXCHANGE CONTROL

In terms of the Exchange Control Regulations published under the Currency and Exchanges Act 9 of 1933, South Africa has a system of exchange controls that applies to all South African residents (including external companies registered in South Africa,

which are deemed to be South African residents for exchange control purposes). These exchange controls prohibit the export of capital and/or revenue, whether directly or indirectly, or dealing in foreign exchange, without the prior approval of the South African Reserve Bank (the "**SARB**"). Nonresidents may be granted a general approval, pursuant to the exchange control rulings issued by the Financial Surveillance Department of the SARB, to deal in assets located in South Africa and to invest and disinvest from South Africa. However, South African residents intending to attract investment from non-residents in debt securities are required to adhere to the exchange control rulings and especially the securities control provisions thereof.

Residents will be required to obtain exchange control approval from the SARB for the issuance or listing of debt securities to investors who are non-residents provided that the non-resident is not a related party to the SPV, the securities are issued in South Africa and the interest rate to be paid or discounted is higher than prime overdraft plus 3% per annum or issued in another currency and the interest is higher than the rate published by the SARB plus 2% per annum. This threshold may be amended from time to time. The JSE will not grant the listing of debt securities until the exchange control approval has been obtained. Most South African commercial banks act as authorised dealers for the SARB, and gaining approval is a relatively straightforward process.

FINANCIAL SECTOR REGULATION ACT

The Financial Sector Regulation Act 9 of 2017 (the "**FSRA**") was signed into law by the president on 21 August 2017 and came into force on 1 April 2018. All financial institutions are regulated under the FSRA, which establishes a regulatory and supervisory framework for the financial sector. The FSRA introduced a new regulatory oversight framework including two new regulators, being the Prudential Authority and Financial Sector Conduct Authority. The remaining provisions of the FSRA, including provisions seeking to replace the existing ombud schemes in the financial sector and proposed changes to licensing processes for certain financial sector activities came into effect on 1 April 2022.

FINANCIAL MARKETS ACT

The provisions of Financial Markets Act 19 of 2012 (the "**FMA**") and the notices published under th FMA seek to ensure the competitiveness, fairness, efficiency and transparency of the market while promoting confidence in regulated persons and reducing risk. The FMA requires that regulated persons are licensed when dealing in securities. A few of the categories listed in the FMA include but are not limited to issuers of securities, trade repositories and clearing houses. The provisions of the FMA are in effect but will be amended in the near future.

Other information

ISSUING COMMERCIAL PAPER

The Securitisation Notice provides various conditions that must be met by the SPV when issuing a commercial paper, whether for a traditional or synthetic securitisation scheme. These conditions require that the commercial paper be:

a. issued or transferred only in minimum denominations equal to or greater than an initial principal value of ZAR 1 million, unless the commercial paper is:
   - listing on a licensed financial exchange;
   - endorsed by a bank;
   - issued for a period of longer than five years; and
   - backed by an explicit national government guarantee.
b. issued only by a juristic person authorised in writing by the registrar to issue commercial paper pursuant to a traditional or synthetic securitisation scheme

SECURITY STRUCTURE

Generally, in South African securitisation transactions, a separate ring-fenced SPV is set up to provide a guarantee to the holders of the commercial paper. As mentioned above, this SPV can be in the form of either a company or a trust. Where the SPV is a company, the shares of the company SPV are owned by an independent owner trust. The SPV receives an indemnity from the issuer, indemnifying it against any claims made under the guarantee by the holders of the commercial paper, and the issuer's obligations under the indemnity are secured by security granted over the underlying assets. Such security may take various forms, such as mortgage bonds, notarial bonds and cessions in security, among other things.

Unlike many jurisdictions, the security vehicle does not typically act as a security agent on behalf of the holders of commercial paper, but rather as a principal with contractual obligations in relation to the holding and realisation of security. This is in order to accommodate certain statutory restrictions in South Africa around holding certain types of security as an agent and various provisions of common law relating to splitting security interests.

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Spain

Background

THE SPANISH SECURITISATION FUNDS

Under Spanish law, securitisations are arranged through a special purpose vehicle without legal personality called a securitisation fund ("**Securitisation Fund**") managed by a management company. Spanish law does not allow a securitisation vehicle to be set up as a securitisation company.

Securitisation Funds in Spain are separate estates without legal personality, whose assets consist of financial assets along with other rights and whose liabilities consist of debt securities and loans granted to them by third parties. In general, a Securitisation Fund seeks to do the following:

- Group the credit rights that have been assigned to the Securitisation Fund by the Originator under its assets, which may be of different nature (i.e., the assets may not necessarily be homogeneous).
- Carry out the necessary legal transactions for the adaptation of the characteristics of the credit rights and the neutralisation of their differences, normally by means of reinvestment agreements, credit facilities, financial swaps, etc.
- Issue homogenous fixed-income securities, giving the holders of such securities returns consistent with those obtained by the credit rights as a whole and transferring to such investors the risks resulting from the effective repayment thereof.

There are currently no restrictions as to the composition of the liabilities of a Securitisation Fund. The prior regulation required that at least 50% of the liabilities of an (assets) Securitisation Fund should consist of the securities issued by the fund. Additionally, the liabilities of the Securitisation Fund may include loans granted by any third parties as well as contributions of institutional investors.

The securities issued by the Securitisation Fund may be admitted to trading on a multilateral trading facility (and not only on an organised secondary market), except where such securities are solely addressed to institutional investors, in which case no trading requirement applies. However, there is no need for the issued securities to obtain a rating from a rating agency.

Securitisation Funds in Spain may be either closed funds or open funds. Closed funds may not vary their assets or liabilities, although assets may be replaced and rectified in certain circumstances. Open funds may vary their assets and liabilities during the life of the fund, which allows, for example, revolving assets to be securitised.

Finally, Law 5/2015 enabled Securitisation Fund Management Companies to perform an "active management" of the fund's portfolio that allows the development of future activities by securitisation funds, which until now have been configured as fully static estates. In this regard, Securitisation Fund Management Companies may modify the patrimonial elements of the fund's assets, for purposes of maximizing profitability,

securing the quality of the assets, performing correct risk assessments or maintaining the conditions set forth in the deed of incorporation of the fund. Securitisation Fund Management Companies assuming the active management of securitisation funds must establish a special supervision committee and define in advance the remuneration for such services.

THE SPANISH SECURITISATION FUND MANAGEMENT COMPANIES

Spanish law entrusts to specific entities, called Securitisation Fund Management Companies, the creation, management and legal representation of Securitisation Funds. Spanish law also submits to the review of the CNMV the process of incorporation of the Securitisation Fund and the issuance and placement of the securities to be created by the same, through the application of the rules and requirements governing the issuance and public offering of tradable securities.

As a consequence of the provisions introduced by Law 5/2015, Securitisation Fund Management Companies have also been entrusted with the administration and management of the assets grouped in the fund. Likewise, Law 5/2015 enables Securitisation Fund Management Companies to delegate or sub-delegate their duties to third parties and clarifies that Securitisation Fund Management Companies may also be in charge of incorporating, managing and representing funds and special purpose vehicles similar to securitisation funds constituted abroad. These reforms clearly evidence a trend seeking to enable Securitisation Fund Management Companies to develop and grow on an international level.

Finally, Securitisation Fund Management Companies may create several compartments or sub-funds within a single Securitisation Fund, each of whose assets and liabilities would be ring-fenced from those of the other sub-funds. This possibility, which in the past had been allowed in practice by the CNMV, has been expressly recognised under the Law 5/2015.

THE SPECIFIC LEGAL FRAMEWORK FOR THE SECURITISATION OF MORTGAGE LOANS

Spanish law allows credit institutions to securitise mortgage loans through the issuance of mortgage backed securities, which may be incorporated as part of the assets of a securitisation fund, using the mortgage loans as collateral. The law also limits the loans that may be securitised to those mortgage loans that comply with certain provisions, including the following:

- Each loan must be backed by a first ranking mortgage created over the ownership of the entire property.
- The value of the loan backed by the relevant mortgage may not exceed 60% of the assessed value of the mortgaged property and if the construction, restoration or acquisition of the property is financed, the value of the loan may not exceed 80% of the assessed value of the property.
- The mortgaged property must have been appraised by the Originator's appraisal services.
- The mortgaged property must be insured against damages for the assessed value of the property.

However, the above requirements may be more flexible depending on the concrete instrument used to securitise the mortgage loan.

SYNTHETIC SECURITISATION FUNDS

The rules that specifically govern synthetic securitisations, which were introduced in Spain in 2003 and slightly developed by Law 5/2015, essentially parallel those rules set forth for ordinary securitisation funds.

Synthetic Securitisation Funds ("**Synthetic Securitisation Funds**") may securitise, in synthetic form, loans and other credit rights through the settlement of a credit derivative with one or more third parties. Spanish regulations allow the use of credit derivatives to replicate the effects of a true sale securitisation in which, although there is no legal transfer of the assets subject to the securitisation, the credit risk of the assets is transferred through credit derivatives.

The legal framework introduced by Law 5/2015 expressly broadened the possibility of securitising loans and other credit rights in synthetic form by means of entering into financial derivatives with third parties "or by means of granting personal guarantees or financial guarantees in favour of the holders of such loans or other credit rights". This allows an important degree of flexibility in these types of securitisation transactions.

Furthermore, it should be noted that there are no restrictions in relation to the entities that can act as eligible counterparties of credit derivatives (under the previous regulation, the counterparties ought to be credit institutions, investment services companies or foreign entities, resident and authorised to carry out these transactions in Spain).

ALTERNATIVES FOR STRUCTURING FINANCING TRANSACTIONS

In line with the idea of strengthening securitisation as a financing mechanism different from corporate financing, Law 5/2015 opened new possibilities to asset securitisation. In the context of Securitisation Fund's liabilities, the law expressly provides that "securitisation funds may grant security in order to secure third party liabilities", allowing new alternatives for structuring financing transactions that involve a specific portfolio of assets as security. In this regard, the isolation of the portfolio is a fundamental pillar in the structuring of these type of transactions, with the aim of benefitting from the bankruptcy protection regime that would apply to securitised assets in the event of the issuer's bankruptcy.

SAREB (ENTITY FOR THE MANAGEMENT OF ASSETS RESULTING FROM THE RECONSTRUCTION OF THE BANKING SECTOR) AND FABS (BANKING ASSETS FUNDS)

In 2012, by means of Law 9/2012 and Royal Decree 1559/2012, SAREB was created by the Spanish Government to restore the banking sector to health. Law 9/2012 was replaced by Royal Decree Law 1/2022, of 18 January, which contemplates the possibility of SAREB being controlled by FROB (*Fondo de Reestructuración Ordenada Bancaria* - the Spanish bad bank), who currently owns more than 50% of SAREB's share capital. The creation of SAREB was a condition set by the European Union in exchange for the provision of aid of up to EUR 100 billion to the Spanish banking restructuring process.

Consequently, SAREB is a sole purpose asset management company acting as a "bad bank", acquiring, at a significant discount, full and unconditioned foreclosed real estate assets and loans for real estate development from aided Spanish banks ("**Purchased Assets**"). The Purchased Assets are being divested by SAREB, either by means of their direct sale to investors or, alternatively, by means of their transfer to a Banking Asset Fund (FAB), without any guarantee or assurance by SAREB that there will be a return on the investment, so that the full risk of the assets is borne by the relevant transferee.

A FAB is a special purpose vehicle without legal personality created by SAREB, which enables SAREB to transfer the assets (achieving off-balance sheet treatment) and the investor to acquire indirect ownership and control over the assets by holding a controlling stake of the securities or participations issued by the FAB. A FAB was a new type of vehicle under Spanish law, which is conceived as a hybrid between a securitisation fund and a collective investment scheme. This dual nature allows for greater flexibility for the benefit of both SAREB and potential investors. Similarly to a securitisation fund, a FAB is managed by a Securitisation Fund Management Company. Furthermore, as in a securitisation fund structure, the FAB allows for the return of the underlying assets to be passed through to the investors (net of the costs associated to the management of the FAB and the underlying assets).

Legal framework

Asset securitisation was introduced in Spain by Act 19/1992 of 7 July, which regulates Mortgage Securitisation Funds that were specifically created to securitise certain eligible mortgage loans and mortgage backed securities. Further significant legislation in relation to securitisation was set forth in (amongst other laws) Royal Law Decree 3/1993 of 26 February, Act 3/1994 of 14 April, Royal Decree 926/1998 of 14 May and Law 62/2003 of 30 December, which developed and extended the legal framework of securitisation in Spain.

Law 5/2015 of 27 April on promoting corporate financing ("**Law 5/2015**"), enacted in 2015, expressly derogated the former securitisation legal framework and consolidated into one piece of legislation the previously existing dispersed set of laws on securitisation in Spain. Law 5/2015 also modernised the securitisation legal framework and provided more legal flexibility in line with the laws of neighbouring jurisdictions.

Upon the issuance of the Law 5/2015, the Spanish Securities Market Commission (*Comisión Nacional del Mercado de Valores* — "**CNMV**") passed Circular 2/2016 of 20 April, on accounting regulation concerning securitisation funds, which derogated the previously existing regulation on accounting for securitisation funds.

The improvement of the Spanish securitisation regulatory framework intended to promote the use of these transactions and reinforce the investor's protection while offering flexibility to structure different types of securitisation funds and structures.

The legal framework of securitisation in Spain under Law 5/2015 applies to securitisation funds set up as of 29 April 2015. Securitisation funds created prior to the entry into force of Law 5/2015 continue to be governed by the previous regime.

Tax issues

DIRECT TAXATION

Securitisation Funds are subject to the general corporate income tax regime in Spain and, thus, they will be taxed at the tax rate of 25%.

In this respect, it should be noted that there is a specific withholding exemption on account of the corporate income tax in relation to interest received by Securitisation Funds and paid on hypothecary participations (defined as the transfer of a debtor's right in property to a creditor without the corresponding transfer of possession or title to the creditor), loans and other rights that are considered income for Securitisation Funds.

FABs are subject to Spanish corporate income tax at a reduced 1% tax rate.

FAB investors who are subject to Spanish corporate income tax, personal income tax or nonresident income tax with a permanent establishment in Spain will be taxed as shareholders or stakeholders of Undertakings for Collective Investments in Transferable Securities (UCITS). However, for personal income tax taxpayers, it is expressly provided that the capital gains deferral will not be applicable. Nonresident investors without a permanent establishment in Spain will be exempt from tax on income received from the FAB.

INDIRECT TAXATION

The incorporation of Securitisation Funds is exempt from capital tax. The issue of securities by a Securitisation Fund is exempt from VAT, transfer tax and stamp duty. In addition, the services provided by the relevant management company, including the management and depositary services, are exempt from VAT.

With regard to FABs, the main peculiarities are that the transfer of assets and liabilities by SAREB to FABs is exempt from Spanish transfer tax and stamp duty (ITP-AJD) and not subject to local taxes (Municipal deemed capital gains tax or "*Impuesto sobre el Incremento del Valor de los terrenos de Naturaleza Urbana*").

A stamp duty exemption also applies to the mortgages granted to finance the acquisition of real estate to SAREB or FABs. In addition, SAREB and FABs may enjoy certain tax benefits (mainly a stamp duty exemption) related to the novation of loans mutually agreed by debtor and creditor when the creditor is SAREB or a FAB.

REGULATORY ISSUES

In addition to the regulation of the creation and operation of Securitisation Funds and FABs, the CNMV has wide-ranging powers regarding the verification and registration of documents in relation to securitisation transactions. These powers include, but are not limited to, the review and registration of:

- the constitution of Securitisation Funds and FABs and their corresponding Securitisation Fund Management Companies;
- reports on the pool of assets subject to a securitisation;
- reports required by the CNMV, including rating agency reports, auditors' statements and other reports; and
- the prospectus, if required, in relation to the Securitisation Funds, the FABs and their assets and liabilities.

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Sweden

General legal framework

There is no specific securitisation legislation in Sweden and the legal framework is based on general principles of Swedish law, market practice and case law. Furthermore, securitisation is covered in the Swedish Banking and Financing Business Act and is treated as a regulated activity (subject to the exceptions described below). In addition, the European Capital Requirements Regulation includes provisions regarding capital adequacy and exposure requirements in connection with securitisation.

Special purpose vehicles (SPVs)

Sweden does not have any specific laws providing for the establishment of SPVs. Instead, general company law and contract laws and regulations need to be taken into account. The SPV may be funded through the issuance of notes. Any issuance of commercial paper that will be distributed to the public in Sweden would be required to conform to Swedish prospectus regulations and other applicable securities legislation.

Method of transfer

TRANSFER OF CLAIMS

The standard method of transferring a claim governed by Swedish law is the assignment or sale of the claim through a written agreement (a receivables purchase agreement (the "**RPA**")) between the seller and the purchaser. Swedish law imposes a general requirement that the sold receivables should be clearly identifiable. The parties are generally free to choose a different law for the RPA than the law governing the receivables. It should be noted that, according to the Rome I Regulation governing the law applicable to contractual obligations, the relationship between the seller and the purchaser will be governed by the law that applies to the RPA. The law governing the receivable will determine its assignability, the relationship between the purchaser and the obligor, the assignment's validity towards the obligor and the issue of whether the obligor's obligations have been properly discharged.

Under general principles of Swedish law, the law governing the formalities required to make a sale of receivables enforceable against other creditors of the seller (the perfection requirements) is considered to be the law of the country in which the relevant asset is located (the *lex rei sitae*). The prevailing view in Sweden seems to be that a receivable is "located" in the obligor's domicile, and that the perfection requirements set out in the substantive law of such domicile shall be applied. However, it is recommended that the requirements of other relevant jurisdictions are satisfied as well, if the requirements differ.

Swedish law distinguishes between claims evidenced by negotiable promissory notes and non-negotiable promissory notes in respect of the perfection requirements. A negotiable promissory note must be delivered (in original) to the purchaser (with certain exceptions for credit institutions and investment firms where the negotiable promissory note may remain in custody with the seller for safekeeping), whereas the sale of non negotiable promissory notes is generally perfected through notification

to the obligor (and such notification may be recommended for negotiable promissory notes as well). In addition to being a perfection requirement, there are other benefits to giving notice in relation to non-negotiable promissory notes. Notice would prevent the obligor from discharging its obligations under the receivable by paying the seller and would cut off certain set-off rights of the obligor.

In respect of dematerialised instruments held by Euroclear Sweden (the sole Central Securities Depositary in Sweden), a registration of the sale is required for directly held instruments, whereas a notice to the nominee is required for instruments held through a nominee.

It is generally not necessary to obtain the consent of the obligor for the sale of a receivable to be effective unless there are contractual restrictions on the transferability of the claim.

Swedish consumer protection laws may impose additional mandatory requirements in respect of, for example, the form of the underlying contract, the notification of the assignment of the claim and any set-off rights (and will thus affect the purchaser as well).

The seller may commit to a continuous sale of receivables (i.e., sale of receivables as and when they arise) or to sell receivables to the purchaser that come into existence after the date of the RPA, and the notice given to the obligors can also apply to future receivables. However, based on certain Swedish case law, the sale may not be considered perfected until the receivables have been "earned" (or accrued).

Tax

WITHHOLDING TAX AND STAMP DUTY

Sweden does not apply any withholding taxes on interest payments made out of Sweden or other payments on receivables in the context of a securitisation, irrespective of whether they bear interest, the nature of the receivables or their term to maturity. Furthermore, Sweden does not impose any stamp duties or other documentary taxes on the sale of receivables.

Regulatory concerns

REGULATORY ISSUES

Under Swedish law, an entity whose business involves regulated financing business would require a licence as a credit institution from the Swedish Financial Supervisory Authority (the "**SFSA**"). An entity engaged in securitisation would be regarded as engaging in financing business to the extent it involves the purchase of receivables using "repayable funds" raised from the "general public". Based on recent guidance from the SFSA, this would capture a typical bond or note issue (even if distributed to limited group of investors), unless the investors falls within certain specified categories (e.g. banks and certain other regulated institutions) and certain strict transfer restrictions are implemented under the bond terms. However, a specific exemption from the licensing requirement is available for securitisation vehicles that purchase receivables and raise funds only a limited number of times. This exemption is believed to allow securitisation vehicles to purchase receivables and raise funds, including by way of issuing bonds or notes, for such purpose at least three times during the term of the securitisation.

DATA PROTECTION

The Swedish Data Protection Act supplements the General Data Protection Regulation and applies to all processing of personal data. The obligors are required to give their consent to the processing of personal data, and a consent form may be included in a notice.

Other information

TRUE SALE AND RECHARACTERISATION

The question of whether (and under what circumstances) an intended sale under a securitisation transaction would be regarded as a true sale has not been established by court precedents or legislation in Sweden, nor have the exact criteria for when a sale of receivables governed by Swedish law may be reclassified as a security assignment (*Säkerhetsöverlåtelse*). However, in Swedish legal doctrine, it is argued that there may be a risk that a sale of receivables would be reclassified as a security assignment in the event that: (i) the seller under the RPA is considered to have assumed the credit risk for non-payment of the obligors; (ii) the purchaser has an obligation to account for the difference between the amounts received on a purchased receivable and the price paid for such receivable; or (iii) the seller has a right to repurchase the sold receivable. When determining whether or not a transaction is deemed to be a security assignment, a Swedish court is likely to review the relevant transaction as a whole, and the risk of a reclassification would increase if the facts set out in (i) to (iii) above apply. The intent of the parties would be an important factor and a Swedish court would likely take a "substance over form" approach.

Furthermore, the general rule under Swedish law is that a sale of receivables is only effective in relation to third parties if the seller is prevented from making dispositions with respect to the assigned receivables. Based on Swedish case law in relation to leasing, it has been accepted that the relevant assets are transferred to a closely related company of the seller as long as that closely related company acts in the best interest of the purchaser and follows the purchaser's instructions with respect to the transferred assets. While there is some uncertainty as to whether this principle is applicable to securitisation, the market practice and generally accepted view in relation to securitisation transactions is that the seller may act as servicer of the receivables on behalf of the purchaser subject to it meeting certain conditions.

The concept of trust is not recognised under Swedish law. However, there are other ways whereby collections received by the seller on behalf of the purchaser in respect of sold receivables can be protected from the seller's creditors should the seller become insolvent, such as regular cash sweeps or security over the collection account.

Another factor that may impact the risk of a reclassification is the accounting of the transactions contemplated by the assignment in the books of the parties to the assignment agreement.

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Switzerland

Background

Securitisation in Switzerland is still under development. Following a change in the general tax framework a few years ago, the number of public securitisation transactions listed in Switzerland has increased, particularly in the credit card and auto lease sector, but, to date, it has not reached the same attractiveness as abroad. The recognition of the concept of a trust under Swiss insolvency laws also facilitates the implementation of transaction structures involving the holding of security through a trustee. Furthermore, considering the attractiveness of the Swiss real estate market, residential mortgage securitisations are expected to become more frequent. In addition, privately placed securitisations of commodity trade receivables are quite common, as Switzerland is a leading centre for commodity trading. Finally, recently, under the Distributed Ledger Technology Act, new rules have been introduced in Switzerland allowing securities to be created and transferred on the blockchain, which may also be used for securitisation purposes.

Legal framework

Currently, there is no specific securitisation legislation in Switzerland. The relevant legal issues are generally governed by the Swiss Code of Obligations, including with respect to assignments of receivables, transfers of contracts and special purpose vehicle (SPV) incorporation formalities, the Swiss Civil Code in relation to real estate and collateralisation aspects, and certain specific laws such as the Consumer Credit Act for leasing and credit card arrangements with private customers.

Incorporating an SPV

Swiss law does not provide for a specific type of securitisation vehicle. The commonly used forms for incorporating an SPV are a joint-stock corporation (*Aktiengesellschaft/ société anonyme*) or a limited liability company (*Gesellschaft mit beschränkter Haftung/ société à responsabilité limitée*). However, certain tax and commercial considerations may prompt the parties to incorporate the SPV in a foreign jurisdiction rather than in Switzerland, even if the Originator and securitised assets are located in Switzerland. The determination of the location of the SPV is, therefore, an essential step of the structuring process.

Unlike other jurisdictions, Switzerland is not a specifically appropriate jurisdiction for the establishment of charitable trusts or similar structures. Hence, Swiss securitisation vehicles are in most cases owned by the Originator, so that, in terms of corporate governance, the independence of the SPV is achieved through the election of independent directors (or managing officers for an SPV incorporated as a limited liability company). Independent directors may be entrusted with veto rights on all decisions that potentially affect the interests of the investors. The uninterrupted presence of independent directors on the board of the SPV and the maintenance of their prerogatives should be warranted through the insertion of corresponding provisions in the SPV's constituent documents.

Method of transfer

A written assignment is required to assign claims governed by Swiss law. Claims that are subject to an assignment prohibition (contractually or otherwise) are not assignable. The acceptance of the assignment may be effected by conclusive means, such as the payment of a purchase price by the SPV. The assignment of receivables may not be sufficient to confer upon the SPV a proprietary interest in assets securing the securitised receivables, such as automotive vehicles or mortgages. In such cases, the entire contractual relationship between the Originator and the obligor may need to be transferred to the SPV. This implies a preliminary consent from the obligor, which can be obtained in the respective contract. Swiss law further provides that, under certain circumstances, a transfer (outright transfer or transfer for security purposes) of assets may be made by way of agreement among the parties if the assets are directly held by a third party (e.g., the lessee). A notification of the third party is at least recommended.

Data protection considerations may also have an impact on the actual transfer. Where the Originator is a regulated bank, Swiss banking secrecy protects the relationship of the bank with each obligor and a conclusive waiver of confidentiality by the obligor must be obtained prior to the transfer.

Over-collateralisation/yield

Credit enhancement is typically achieved through the grant of a subordinated loan by the Originator or its subscription for junior notes issued by the SPV. However, the purchase price payable for the sold receivables may include a discount (for covering funding costs) and/or a deferred element (for covering over-collateralisation levels) without impairing the assessment of the true sale characterisation of the transaction. As most transactions are made with the support of a tax ruling, the level of the discount and magnitude of the deferred element must align with the expectations of the tax authorities.

Tax

There is no specific tax regime applicable to securitisations in Switzerland. Typically, advance rulings may be obtained from the relevant competent tax authorities, which may include the Federal Tax Administration (Swiss withholding taxes, Swiss stamp duties and VAT) and certain cantonal tax authorities ((corporate) income taxes), for instance, those of the canton where the SPV is incorporated, as the case may be, or where the majority of the obligors are domiciled.

The issuance of securitised debt by a Swiss SPV generally qualifies as an issuance of bonds from a Swiss tax law perspective. Accordingly, any interest payments on the notes will trigger Swiss withholding tax at the current rate of 35%. For Swiss investors, the withholding tax is fully recoverable, provided that they duly and adequately disclose the underlying income in their tax return. The level of the recoverability for foreign investors depends on the domicile of the investor and the applicable double tax treaty.

Swiss withholding tax may be avoided by choosing a non-Swiss issuance vehicle. However, such structures are scrutinised by the Swiss tax authorities and may qualify as a tax avoidance scheme, and we would recommend obtaining an advance tax ruling from the competent Swiss tax authorities. Non-Swiss structures may also lead to additional complexity with respect to other aspects of the structure, such as, without limitation, issues in connection with data transfers abroad. In case the underlying asset portfolio relates to real estate located in Switzerland, the use of a non-Swiss issuance vehicle may further lead to the incurrence of cantonal withholding taxes on interest payment if the transaction is secured by Swiss real estate. This cantonal withholding tax may be recoverable based on applicable double tax treaties.

Swiss resident entities and individuals holding the securities as part of their business assets may have to include any income and gains (or loss) realised in their profit and loss statement relevant for corporate income distributions.

Swiss resident individuals holding the securities as part of their private assets have to include any interest payments as taxable income in their personal Swiss tax returns. A capital gain realised upon the sale of the securities should qualify as a tax-exempt capital gain. A realised capital loss is not tax deductible.

Depending on the kind of assets transferred, the transfer of the underlying assets potentially triggers transfer taxes and VAT. A transfer of Swiss real estate might trigger real estate transfer taxes. In addition, any undisclosed reserves on the assets transferred may be deemed realised and subject to corporate income tax. In certain specific cases, a transfer of the underlying assets to an SPV might be structured as a tax-exempt restructuring.

Regulatory concerns

The SPV is not deemed to accept public deposits on a professional basis and thus is not regulated under the Swiss Banking Act, provided that certain information about the issuer and the terms of the notes are provided to the investor. In addition, typical SPV structures are not subject to other provisions of the Swiss financial legislation, in particular they should qualify neither as collective investment schemes under the Federal Act on Collective Investment Schemes nor as structured products under the Federal Act on Financial Services. Related confirmations from the Swiss Financial Market Supervision Authority (FINMA) can usually be obtained.

The granting of residential mortgages is subject to restrictions under the Federal Act on the Acquisition of Real Estate by Persons Abroad (the so-called Lex Koller). Such restrictions imply that the characteristics of the securitised loans must be in line with Swiss mortgage standards, e.g., in respect of the maximum debt-to-equity ratio. It is possible for the parties to seek in advance a confirmation from the Federal Office of Justice that the sale of residential mortgages to the SPV does not trigger licensing requirements under the Lex Koller.

Further, the public offering of notes in Switzerland is subject to the prospectus requirements under the new Federal Act on Financial Services. The prospectus rules provide that a prospectus must be published and submitted to a reviewing body prior to publication, unless one of the legal exemptions applies.

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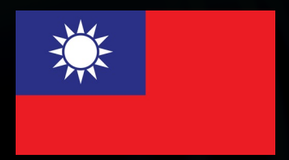

Legal framework

The securitisation market in Taiwan has developed since 2002 with the announcement and enactment of the Financial Asset Securitisations Act ("**Act**"), which provides holders of financial assets with a legal system to improve the liquidity of financial assets through securitisation and protect investments.

According to the Act, the Originator ("**Originator**") is a financial institution or an institution approved by the Financial Supervisory Commission (FSC) that entrusts financial assets ("**Assets**") to a trustee ("**Trustee**") or transfers the Assets to a special purpose company (SPC). The Originator can initiate a securitisation arrangement if it owns the Assets that are to be used as the underlying assets backing the securitisation.

The Act provides that an Originator may use the following Assets within a securitisation transaction:

- rights under automobile loans or other chattel secured loans, along with their respective security interests;
- rights under housing loans or other loans secured by real estate mortgages, along with their respective security interests;
- rights under leases, credit cards, account receivables or other monetary rights;
- beneficial interests derived from a trust contract entered into by and between the Originator and a trust enterprise with regard to Assets of a type listed above; and
- other rights approved by the competent authority.

Incorporating a special purpose vehicle (SPV)

ESTABLISHMENT/INCORPORATION OF A SPECIAL PURPOSE VEHICLE

The Act provides two models for securitisation. The Originator may: (i) entrust the Assets to the Trustee; or (ii) transfer the Assets to an SPC pursuant to the Act, whereby the Trustee or the SPC issues beneficial securities or asset-backed securities on the basis of such Assets.

Entrust the Assets to the Trustee

Only a licenced trust enterprise rated above a certain level by a credit rating institution recognised by the FSC may be used as a Trustee. Furthermore, the Originator and the Trustee must not be the same affiliated enterprise, and the documentation and information related to the trust property must be provided to the Trustee without false statements or concealments. The Originator and the Trustee will enter into a special purpose trust contract in writing and such contract must cover the required items set out in the Act.

In order to monitor the operation of the special purpose trust and use of the trust funds, the rights of beneficiaries and the trustor of a special purpose trust must be exercised pursuant to the beneficiaries' meeting or by the trust supervisor.

Transfer the Assets to an SPC

An SPC will be established by a financial institution, and will be a company limited by shares with only one shareholder. The financial institution and the Originator may not be the same affiliated enterprise. An SPC must expressly show that it is an SPC in its official name registered with the registry.

The total amount of shares set forth in the articles of incorporation of the SPC may not be issued in instalments and the sole shareholder of the SPC may not transfer its shares to any other entity without the prior approval of the FSC.

Except for the business of asset securitisation, the SPC is not permitted to engage concurrently in any other business.

Method of transfer

METHOD OF TRANSFER OF RECEIVABLES

Under the Civil Code in Taiwan, the transfer of receivables will not be effective as against the debtor until the debtor has been notified of such transfer by the transferor or by the transferee. When the receivables are being transferred, all the securities of the receivables and other accessory rights are transferred together, except those rights that cannot be separated from the transferor. The creditor (i.e., transferor) is bound to deliver to the transferee all documents that serve as evidence of the claim, and to provide all the information necessary for the assertion of such receivables.

To facilitate and simplify the notification process, the Act provides that public notification to the debtors is allowed and valid against the debtor, if either of the following conditions is met:

- The Originator is appointed or entrusted by the Trustee or the SPC as the servicer to collect the payments from the debtor and such appointment or entrustment has been announced pursuant to the Act.
- The Originator and the debtor have entered into a contract under which the use of other means to replace the notification or mailing of the certificate of announcement as required under the Act is agreed.

The form and content of such announcement must be in line with the requirements prescribed by the FSC.

Tax

TAX IMPLICATIONS FOR SECURITISATIONS

There are certain special tax treatments benefiting securitisation vehicles that have been favourable to the securitisation market. For instance, the revenues of the special purpose trust property will be subject to business tax at the rate applicable to banks, i.e., 2%-5%. The transfer of the Assets will be exempted from stamp duty, deed tax and business tax. With regard to amending the registration of real estate, real estate mortgage, movable properties subject to registration requirements and various security interests, the Trustee and the SPC may apply to the competent registration authority for registration; the registration fees will be exempted if the relevant certificate issued by the competent authority is presented.

Other than beneficial securities being recognised as short-term bills by the FSC, the trading of beneficial securities will be subject to securities transaction tax at the tax rate applicable to corporate bonds. The securities transaction tax on corporate bonds is currently exempted from levy from 1 January 2010 to 31 December 2026.

Accounting treatment

Based on the offering terms of different types or durations of asset-backed securities, the SPC will establish a separate account to keep records pertaining to the management and disposal of the transferred Assets, calculate its profits and losses and distributed amounts related thereto, and will periodically prepare written reports with regard to the book value of the transferred Assets, principal received or other interests, collectable payments, bad debts and other material information, and submit such reports to the supervisory institution appointed by the SPC ("**Supervisory Institution**") and notify the asset-backed security holders. The content of such reports must contain no false statements or concealments.

The SPC must prepare an annual report at the end of each fiscal year, and must register the operational report and financial report audited by the company's supervisor to the FSC and deliver such reports to the Supervisory Institution within 15 days after the same are approved at a meeting of the board of directors.

Other information

TRUE SALE

It is explicitly required under the Act that, after the SPC issues the asset-backed securities, the Originator and the SPC must complete the procedure of the asset transfer within the transfer period set forth in the asset securitisation plan without any delay or false acts. With regard to such asset transfer, the accounting treatment will comply with Generally Accepted Accounting Principles. Furthermore, where the Originator processes the asset transfer in compliance with the above and acquires consideration for transferring the Assets in accordance with the asset securitisation plan, it will be deemed as a non-gratuitous act prescribed in Article 244, paragraph 2 of the Civil Code.

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Thailand

Legal framework

The Emergency Decree on the Establishment of Special Purpose Vehicles, B.E. 2540 (1997) ("**Act**") provides the framework and requirements for securitisation programmes in Thailand.

Securitisation programmes must also comply with the regulations of the Securities and Exchange Commission of Thailand ("**SEC**"), the Office of the SEC, and the Capital Market Supervisory Board ("**CMSB**"). Under the SEC Notification[1] (defined in the footnote) an Originator that is qualified to submit an application for approval of a securitisation programme to the Office of the SEC must be one of the following

a. an entity incorporated under Thai law that is:
   i. a financial institution; [2]
   ii. a securities company, under the law on securities and exchange
   iii. a juristic person established by virtue of a specific law
   iv. a private limited company or a public limited company

b. an entity incorporated under foreign law that is one of the following:
   i. a unit or organisation of foreign government
   ii. a juristic person incorporated under foreign law

If the Office of the SEC is to grant approval for setting up a securitisation programme, the following must be proven:must be proven that:

a. If the debentures under the securitisation programme are to be offered by way of public offering and the Originator was incorporated in Thailand, none of the directors, executives or controlling persons of the Originator have untrustworthy characteristics of directors and executives as specified in the regulations of the SEC.
b. The programme specifies a clear plan for the debenture offering and includes the name and address of the servicer.
c. The underlying assets are receivables of the same kind (or relevant to one another), which create future cash flow; and the Originator may not revoke, depreciate or subordinate such receivables.
d. There is a guideline for the investment of the proceeds derived from the receivables transferred to a special purpose entity (SPE) (whose substance is in compliance with the SEC Notification).
e. There are details of the allocation of proceeds derived from the current receivables to repay the principal and interest to the debenture holders and for the payment of expenses, including the return of all remaining proceeds and benefits to the Originator, which are in accordance with the Office of the SEC regulations.

1 SEC Notification No. KorChor. 7/2552 re: Rules, Conditions, and Procedures for Approval of a Securitisation Program, dated 13 March B.E. 2552 (2009), as amended ("**SEC Notification**").

2 "**Financial institution**" is defined in the SEC Notification as: (i) a commercial bank, finance company or credit foncier company under the law on financial institution businesses; or (ii) a financial institution established under a specific law that is considered a financial institution under the law on interest on loans by financial institutions.

Incorporating a special purpose entity (SPV)

INCORPORATING A SPECIAL PURPOSE ENTITY

The Act provides two models for securitisation. The Originator may transfer the assets: (i) by setting up a trust established pursuant to the Trust in Capital Market Transactions Act, B.E. 2550 (2007), as amended; or (ii) to an SPE that may be in the form of a private limited company, a public limited company or any other type of juristic person as prescribed by the SEC, whereby the trustee or SPE issues securities and pays the purchase price to the Originator using the proceeds derived from the issuance and offering of the securities. However, the matter is complicated. Notwithstanding the provision in the Act that allows for the utilisation of trust in securitisation transaction, the SEC Notification and other subordinate regulations have not provided any rule to implement the trust model, which renders the trust-model securitisation in Thailand impracticable. The most similar trust-structure debt instrument that could be considered would be Sukuk, which will fall under another regulatory regime.

The SEC has not prescribed any other type of juristic person to be a permitted form of the SPE under the Act. In addition, an SPE is a legal entity set up temporarily to conduct a securitisation programme, and each SPE can only conduct one securitisation programme at any point in time. The SPE needs to be in a form that enables it to be set up easily and be subsequently liquidated or dissolved easily. For this reason, the SPE is usually set up as a private limited company established under the Thai Civil and Commercial Code (CCC), as the process and requirements for setting up a private limited company are more straightforward than those for a public limited company.

In order to set up a private limited company, three promoters, all of whom must be individuals, are required. The set-up process involves preparing the memorandum of association and the articles of association, organising the establishment meeting, subscription to and allocation of shares, and passing on the business to the directors. The total number of shareholders in a private limited company must not be less than three persons (individuals or juristic persons).[3] The establishment process may be completed within one day.

Method of transfer

TRANSFERENCE OF ASSETS TO THE SPE AND PERFECTION

A transfer of receivables is made by way of an assignment of rights under the CCC. For an assignment of rights to be valid, it must be made in writing.[4] The assignment is valid against the debtor or other third parties only if: (i) a written notice of the assignment has been given to the debtor; or (ii) the debtor has agreed to the assignment. There is no regulatory requirement regarding the content or the formality of a notice of assignment. However, it is advisable to specify the following information in the duly signed notice:

a. date of the notice;
b. description of the assigned asset;

3 Under Section 1237(4) of the CCC, if a company has fewer than three shareholders, the court can order the dissolution of the company.

4 Section 306 of the CCC.

c. description of the agreement pursuant to which the asset is assigned;
d. effective date of the assignment; and
e. statement requesting that the recipient give consent.

If a debtor has given consent without reservation, the debtor cannot then raise against the assignee a defence that they may have made against the assignor.[5] On the other hand, if the debtor has only received a notice of assignment, the debtor may raise against the assignee any defence that the debtor had against the assignor before having received the notice. [6]

To facilitate the securitisation markets, the Act provides that the transfer of rights will be lawful without notice being given to the debtor, if one of the following conditions has been met:

a. assignment whereby the original payee of the assigned asset (e.g., the Originator) acts as the servicer
b. assignment whereby the original payee of the assigned asset has been charged by virtue of law as a consequence of a merger of those entities

Despite the above provision, in any of the above cases, the debtor is still able to raise any defence it may have against the assignor before the assignment.

Under the CMSB Notification,[7] underlying assets in the minimum amount as prescribed in the approved securitisation programme must be transferred to the SPE within six months from the approval date, and the offering of the debentures approved under the securitisation programme must be completed within three years from the approval date.

Over-collateralisation/yield

There is no regulatory requirement under Thai law on over-collateralisation or other forms of credit enhancement. However, certain credit enhancement mechanics may render the securitisation transaction noncompliant with applicable accounting standards for the purpose of accounting true sale, and thus could not satisfy the requirement of the Originator intending to achieve an off-balance sheet objective.

Tax

As the SPE is set up in the form of a company, it will be subject to corporate income tax. However, the SPE may be entitled to income tax exemptions under the following royal decrees enacted under the Revenue Code of Thailand ("**Revenue Code**").

Under Royal Decree No. 389, B.E. 2544 (2001), an SPE established under the Act is entitled to be exempt from corporate income tax on the amount equal to reserves that are set aside for bad debts or doubtful debts, in the first accounting period, and which represents an increase on that type of reserve appearing in the balance sheet

5 Paragraph one of Section 308 of the CCC.

6 Paragraph two of Section 308 of the CCC.

7 Clause 36 of CMSB Notification No. ThorChor. 42/2563 re: Application for Approval, and Approval of the Offering for Sale of Newly Issued Debentures for Securitisation Purposes, dated 17 July B.E. 2563 (2020), as amended ("**CMSB Notification**").

of the SPE's previous accounting period. However, if the reserve, which was already exempt from corporate income tax, is reduced, the SPE must include the amount equal to the reduced reserve as a deduction of its expenses in the calculation of net profit for corporate income tax purposes.

Under Royal Decree No. 441, B.E. 2548 (2005), the SPE will also be entitled to a corporate income tax exemption on any income generated from undertaking a securitisation programme approved by the Office of the SEC, provided that: (i) the SPE transacts the securitisation according to the allocation of the future cash flow policy; (ii) the SPE does not pay any dividend to its shareholders until it transfers all the remaining assets and benefits back to the Originator, and the special purpose vehicle status of the SPE is terminated.

The SPE is also subject to specific business tax[8] (SBT) and value-added tax (VAT). [9] The Revenue Department is unclear on whether undertaking a securitisation programme

(i.e., transfer of the assets to the SPE) is subject to SBT or VAT. However, under Royal Decree No. 334, B.E. 2541 (1998) and Royal Decree No. 333, B.E. 2541 (1998), the transfer of assets between the Originator and the SPE under a securitisation programme approved by the Office of the SEC will be exempt from SBT and VAT, respectively.

Execution or importation of dutiable documents listed in the Stamp Duty Schedule of the Revenue Code is subject to stamp duty. However, under Royal Decree No. 335, B.E. 2541 (1998), documents executed between the SPE and companies or other juristic persons under a securitisation programme approved by the Office of the SEC are exempt from stamp duty.

Accounting treatment

Thai companies, including an SPE, are subject to the Thailand Financial Reporting Standards (TFRS) and Thailand Accounting Standards (TAS), which adopt the International Financial Reporting Standards and the International Accounting Standards. TFRS 9 (Financial Instruments), TFRS 7 (Financial Instruments: Disclosure) and TAS 32 (Financial Instruments: Presentation) have been announced and are in effect for the accounting period starting from 1 January 2020. These standards provide classifications, measurements and derecognition of financial assets and financial liabilities, including impairment assessment and disclosure. If the Originator is seeking "off-balance sheet" accounting treatment, applicable accounting standards must be observed.

Regulatory concerns

The offering and issuance of debentures by the SPE under the securitisation programme are governed by the CMSB Notification. Debentures may be offered via public or private placement.

8 Generally, SBT is imposed on gross receipts generated from certain businesses or transactions prescribed under Section 91/2 of the Revenue Code and the royal decrees issued thereunder. It is applicable to banking businesses, regular transactions similar to banking businesses, and the sale of immovable property, transacted in Thailand.

9 The sale or importation of goods or the provision of services is subject to VAT. However, VAT is exempt for certain types of goods or services, or under certain situations.

The SPE must not have been approved by the Office of the SEC to issue debentures under any other securitisation programme (unless the debentures are no longer outstanding). As a result, if the SPE wishes to issue both senior and junior tranches of debentures, it has to do so at the same time.

The approval and filing processes vary depending on the type of targeted investors, whereby a private placement to a limited number of investors is the least onerous. Certain types of private placement are deemed approved if the prescribed conditions are met, while a public offering requires separate approval from the Office of the SEC in addition to the approval of the securitisation programme. In terms of filing requirements, the SPE must file a registration statement and a draft prospectus with the Office of the SEC if it wishes to make a public offering or an offering to certain types of investors. A private placement to a limited number of investors is exempt from this filing requirement. The disclosure in the registration and draft prospectus for a public offering is also more rigid than other types of offering.

Other information

TRUE SALE AND REVOCABLE TRANSFER UNDER THE CCC AND BANKRUPTCY ACT

In general, the assignment of rights, even if duly assigned (pursuant to the requirement of serving a notice as described above), is subject to the fraudulent conveyance provisions under the CCC and the Bankruptcy Act, B.E. 2483 (1940), as amended ("**Bankruptcy Act**"), and to the undue preference provision under the Bankruptcy Act. The court may set aside an assignment of rights under a contemplated securitisation programme in a civil case or bankruptcy proceeding, as elaborated upon below.

(A) Fraudulent conveyance

Thai law regarding fraudulent conveyance provides that a creditor, or an official receiver, is entitled to claim cancellation by the court of bankruptcy proceedings if a transaction, transfer, payment, or any act made or performed by a debtor is considered a fraudulent conveyance under Section 237 of the CCC or Section 113 of the Bankruptcy Act. The difference between Section 237 of the CCC and Section 113 of the Bankruptcy Act is that Section 237 of the CCC would be used by a creditor in a civil case, whereas a similar right to cancel a fraudulent act would be used by an official receiver in a bankruptcy case.

A transaction or transfer may be regarded as an act of fraudulent conveyance, and can be revoked by the court, if a creditor or an official receiver, alleging that the transaction was a fraudulent conveyance, can prove to the court that the act was done by a debtor, with the knowledge of both the debtor and the enriched person (or with the knowledge of the debtor only, in the case of a gratuitous act), and would prejudice the creditor at the time of the act.

Section 114 of the Bankruptcy Act provides presumptions for an act of fraudulent conveyance under bankruptcy proceedings; it will be presumed, prima facie, that the debtor and the person enriched knew that the act would be prejudicial to the creditors where a transaction, transfer, payment or any act affecting the property of a debtor:

i. is made or performed during a one-year period before the application of the bankruptcy proceeding, or afterwards
ii. that is a gratuitous act
iii. results in the debtor receiving consideration that is less than a reasonable amount

To summarise, any transfer having any of the characteristics described in items (i) to (iii) above will be presumed to be an act of fraudulent conveyance.

In that case, the duty of proof to rebut the presumption that the transfer is fraudulent will be shifted to the bankrupt or insolvent debtor.

(B) Undue preference

Section 115 of the Bankruptcy Act provides that a transaction, transfer, or any act performed, or allowed to be performed, by a debtor, that took place within a three-month period before the application for bankruptcy proceedings or afterwards (notwithstanding the knowledge of the debtor or adequate consideration, and an official receiver can prove to the court that the debtor entered into a transaction, or made the payment, or performed the act with the intention to give one creditor preference over other creditors), can be cancelled by the court.

If the assignment of rights under the securitisation programme from the Originator to the SPE falls under the described scenario, the assignment can be cancelled by the court in a civil case or in bankruptcy proceedings, subject to the requirements under the aforementioned provisions.

(C) True sale under the Act

Section 20 of the Act provides a rule for the determination of the isolation of the underlying assets in insolvency of the Originator. This provision is an exemption to the application of fraudulent conveyance and undue preference, by stating that a transfer of assets from the Originator to the SPE will be deemed to be made (i) with fair consideration and not as a transfer in which the debtor receives less than a reasonable amount in consideration; and (ii) is **not prejudicial to the creditors** of the assignee, if the consideration for the transfer is either:

i. the book value of the assets, in accordance with accounting standards
ii. a value that is, in the opinion of a financial adviser who is not an adviser to the securitisation programme, fair consideration for the transfer of assets for securitisation purposes, taking into account the credit enhancement aspect of the transaction

Therefore, if the Originator and the SPE can prove that the consideration for the transfer of assets falls under either item (i) or (ii) above, the condition (a transaction that prejudices creditors) that may lead to fraudulent conveyance or undue preference will not be met, and Section 237 of the CCC and Sections 113-115 of the Bankruptcy Act will not be applied to the parties.

THAILAND

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Turkey

Background

Securitisation is a financing method used by Turkish companies to create liquidity and manage cash flow. Many companies have relied on special purpose vehicles (SPVs) established overseas to securitise their receivables — assigning their receivables to and issuing asset/mortgage-backed securities through SPVs.

This situation changed at the beginning of 2010's with the introduction of new regulations by the Capital Markets Board (CMB), the authority responsible for regulating and supervising the capital markets in Turkey.

Legal framework

The Turkish Code of Obligations No. 6098 (TCO) and the Capital Markets Law No. 6362 (CML), together with communiqués issued under the CML, are the main legal acts governing Turkish securitisation transactions, both abroad and domestically.

The CML entered into force on 30 December 2012, abolishing Capital Markets Law No. 2499. The CML offers no substantial changes relating to securitisation, although it does provide broader authority to the CMB to regulate the relevant instruments, through implementing regulations. Following the enactment of the CML, the CMB modified the secondary regulations on securitisation to reflect the new CML rules and to provide a more secure environment for investors.

Under the current securitisation regime, the CMB regulates asset-covered and mortgage-covered securities under the Covered Bonds Communiqué No. III-59.1 ("**Covered Bonds Communiqué**"), which entered into force on 21 January 2014. Parallel to this, asset-backed securities and mortgage-backed securities are now both regulated under the CMB-issued Asset/Mortgage-Backed Securities Communiqué No. III-58.1 ("**Asset/Mortgage-Backed Securities Communiqué**"), which entered into force on 9 January 2014.

Incorporating a special purpose vehicle (SPV)

The practice of incorporating a special purpose vehicle (SPV) or an orphan SPV no longer exists thanks to the changes in the CMB regulations which requires that asset-covered and mortgage-covered securities and asset-backed securities and mortgage-backed securities are issued only by the institutions authorized under the Covered Bonds Communiqué and the Asset/Mortgage-Backed Securities Communiqué.

Method of transfer

ASSIGNMENT OF RECEIVABLES

The assignment of receivables is primarily governed by the TCO. Under the TCO, a creditor may freely assign its receivables to third parties, without regard to nationality, by simple written agreement between the assignee and assignor. The debtor's consent is not required unless otherwise required by law or contract (e.g., the lessee's right to use leased real estate cannot be assigned to a third party without the landlord's consent; rights conferred upon a borrower by a commodatum agreement cannot be assigned). Moreover, in certain circumstances, the characteristics of a contract may prevent the assignment of receivables, for instance, members of an association cannot assign their membership rights to a third party.

If an assignment is granted in return for consideration, the assignor is deemed to have guaranteed the existence of receivables and the debtor's ability to pay, even if the assignment agreement is silent on this issue.

The assignment automatically results in the transfer of all rights and interests attached to the assigned receivable to the assignee, except the rights and interests attached to the assignor. For instance, the collateral given to secure the assigned receivable is automatically transferred to the assignee once the receivable has been assigned.

The assignment of receivables may not negatively affect the debtor's position. Consequently, the debtor may raise all defences and counterclaims arising out of the contractual relationship with the former creditor against the assignee, such as the right to set off.

Over-collateralization/yield

With respect to mortgage covered bond issuances (ipotek teminatlı menkul kıymet), the net present value of the assets registered with the register ledger must exceed the net present value of total obligations of the covered bond at a ratio determined by the issuer at the issuance. In any case, this ratio cannot be less than 2%.

The same rule applies to asset-covered bonds (varlık teminatlı menkul kıymet); however, with respect to asset-covered bonds the minimum over-collateralization ratio differs as to whether asset-covered bond issuance is subject to stress test. As per the Covered Bonds Communiqué, stress test is required when the currency or interest types (fixed or floating interest) of asset-covered bond and covered assets are different.

For asset-covered bonds that are not subject to stress test, the net present value of the assets registered with the register ledger must exceed the net present value of total obligations of the covered bond with the following ratios: 15% for consumer loans, 15% for commercial loans, 20% for receivables arising from financial leasing agreements, 25% for receivables arising from insured factoring agreements, 25% for proceeds of real estate sales (on an instalment basis and subject to agreement) by the Public Housing Administration (TOKİ), 25% for secured proceeds arising from sales and preliminary contract for real estate sale regarding the real estates included within the portfolio of real estate investment trusts, and 10% for long-term loans provided in foreign currency to the Ministry of Treasury and Finance (Treasury) by commercial banks for project-based financing.

For asset-covered bonds that are subject to stress test, the net present value of the assets registered with the register ledger must exceed the net present value of total obligations of the covered bond with the following ratios: 2% for consumer loans, commercial loans and for receivables arising from financial leasing agreements, 3% for receivables arising from insured factoring agreements, for proceeds of real estate sales (on an instalment basis and subject to agreement) by the Public Housing Administration (TOKİ) and for secured proceeds arising from sales and preliminary contract for real

estate sale regarding the real estates included within the portfolio of real estate investment trusts, and 1% for long-term loans' lease agreements, provided in foreign currency to the Treasury by commercial banks for project-based financing.

Accounting treatment

The Public Oversight, Accounting and Audit Standards Authority (POA) determines the accounting standards in Turkey. However, other standards are set out by: (i) the CMB for companies carrying out capital markets activities under the CML; and (ii) the Banking Regulatory and Supervisory Authority for banks operating in Turkey. The POA has issued Turkish Accounting Standard 39, which is a translation of the International Accounting Standard 39 ("IAS 39") issued by the International Accounting Standards Board (IASB). The CMB accepts that IAS 39 applies to companies operating within the CML's scope.

Other information

TRUE SALE

Under Turkish law, a true sale is recognised as the assignment of existing and future receivables. An assignment agreement will be validly concluded even if the parties' signatures are not certified by a notary. The assignor, however, is required to notify the debtor of the assignment to enable the debtor to pay its debt to the assignee. Failure to notify the debtor does not affect the validity of the true sale. If the debtor is unaware of the assignment, however, it may still pay the assignor, in which case the debtor may be validly discharged from its obligation. Notifying the debtor is also important as the debtor may pay the receivables to a third party appointed by a court, in which case there is a conflict as to the creditor/assignee's identity. A provision whereby the assignor undertakes liability for the assignee's default does not affect the true sale, provided that the receivables are validly transferred to the assignee.

COVERED BONDS

Under the Covered Bonds Communiqué, covered bonds (*teminatlı menkul kıymetler*), consisting of asset-covered bonds and mortgage-covered bonds, are general (on-balance sheet) obligations of the issuer that are issued against certain asset cover. Asset-covered bonds can be issued by banks, financing companies, factoring companies, financial leasing companies, mortgage finance corporations, real estate investment trusts, government entities authorised to issue securities pursuant to their special laws and other CMB-specified issuers. Only housing finance corporations (including certain banks, financing companies and financial leasing companies) and mortgage finance corporations can issue mortgage-covered bonds.

Assets that may be the subject of asset-covered bonds include:

- banks and financing companies' consumer loans and commercial loans receivables;
- receivables arising from financial leasing and insured factoring agreements;
- proceeds of real estate sales (on an instalment basis and subject to agreement) by the Public Housing Administration (TOKİ);
- secured proceeds of real estate sales by and receivables arising from real estate investment trusts;
- long-term loans' lease agreements, provided in foreign currency to the Treasury by commercial banks for project-based financing substituting assets such as cash and state bond; and
- other CMB-specified assets.

Assets that may be the subject of mortgage-covered bonds include:

- banks' and financing companies' receivables arising from housing finance activities that are secured by mortgages;
- receivables arising from financial leasing agreements regarding housing finance;
- banks, financial leasing companies and financing companies' commercial loans and receivables secured by mortgages;
- proceeds of real estate sales (on an instalment basis and subject to agreement) by the Public Housing Administration with respect to the mortgage-covered bonds issued by a mortgage finance corporation;
- substituting assets such as cash and state bonds; and
- other CMB-specified assets.

Covered bonds can be issued through a public offering or a sale to qualified institutional buyers: international and local brokerage firms; banks; portfolio management companies; collective investment institutions; pension funds; insurance companies; mortgage finance corporations; asset management companies; retirement and emergency funds; governmental authorities; the Turkish Central Bank; international finance institutions such as the World Bank and the International Monetary Fund; other investors specified by the CMB; and institutions having met at least two of the following criteria: (i) total assets exceeding TRY 50 million; (ii) annual net sales proceeds exceeding TRY 90 million; and (iii) equity exceeding TRY 5 million. Additionally, real persons and legal entities meeting at least two of the following criteria can qualify as qualified buyers upon their written request: (i) holding at least TRY 1 million in cash and/or securities; (ii) having entered into at least 10 transactions of a total volume of TRY 500,000 within each three-month period in the last year, which should be conducted in the markets in which such investor wishes to transact; and (iii) having worked as a senior executive in the finance sector for at least two years or as a qualified person in capital markets for at least five years, or holding an advance level licence or derivatives licence. Covered bonds may also be issued through a private placement, provided that the nominal value of the privately placed securities is at least TRY 100,000 per unit. However, such limit is not applicable to private placements outside Turkey.

Covered bonds offered to the public must be listed on Borsa Istanbul, the Turkish stock exchange. Therefore, in addition to applying to the CMB for public offering, a simultaneous application must be made to Borsa Istanbul.

The issuance limit set by the Covered Bonds Communiqué for covered bonds issued by issuers other than mortgage finance corporations is 10% of their total assets, whereas mortgage finance corporations are not subject to any such limit. Annual financial

statements for the latest fiscal period prior to the issuance application are considered for both issuance limits. These limits are doubled for financial institution issuers with one of the top three "investment grade" ratings.

The Covered Bonds Communiqué also sets forth that covered bonds issued in Turkey must be issued in an electronically registered form, and the related interest recorded, in the Central Registry Agency (*Merkezi Kayıt Kuruluşu*) (CRA).

In case of an issuance abroad, issuers are required to notify the CRA regarding the amount, issue date, ISIN code, first payment date, maturity date, interest rate, name of the custodian, currency of the covered bonds, the country of issuance and any change to this information, if any, including an early redemption, within three business days from the date of issue of the covered bonds or, in the case of any change to this information, the relevant change.

The CMB may require that the issuance of a specific covered bond be guaranteed by a local bank or another legal entity or be subject to insurance coverage. The CMB may also require that the asset pool be managed by a service provider or be kept by a bank or a mortgage finance corporation, or that the issuance to be made through a sale only to qualified investors.

The issuer must monitor and account for the assets covering the bonds by segregating them from its assets. Until and unless the debt has been redeemed, the underlying assets: (i) cannot be disposed of, seized or pledged; (ii) cannot be included in a bankruptcy estate; and (iii) cannot be subject to an interim injunction, including those granted for the purpose of the collection of public debts.

An independent CMB-licenced auditor must be appointed as trustee by written agreement prior to the issuance of covered bonds. The trustee cannot be selected among the independent auditors auditing the issuer's financials, or its foreign parent company or any other local entity to which the auditor is legally connected. The trustee is liable for, among other factors: (i) the appropriateness of the assets included in the asset records; (ii) the stress test results' accuracy; and (iii) the monitoring of the assets' compliance with asset compliance principles.

ASSET/MORTGAGE-BACKED SECURITIES

Asset-backed securities and mortgage-backed securities are off-balance sheet obligations that are issued against certain asset cover isolated in an asset finance fund or housing finance fund. These securities can be issued by banks, financing companies, financial leasing companies, mortgage finance corporations and certain brokerage firms. In addition, pursuant to a recent amendment to the Asset/Mortgage-Backed Securities Communiqué, it became possible for asset management companies to become founders of funds to issue asset-backed securities. Accordingly, asset management companies are entitled to establish funds to issue asset-backed securities by acquiring non-performing loans. Prior to this amendment, the securitisation of non-performing loan receivables was not possible under Turkish law. With the recent amendment, it became possible for asset management companies to dispose of their non-performing loan portfolios by way of securitizing them.

Funds (i.e., no separate legal entity) are pools of assets that are operated in accordance with fiduciary ownership principles. The fund should be established in Turkey. Funds may be formed for a definite or indefinite term, and their assets must be segregated from those of the founder, service provider and Originator. Until and unless the debt has been redeemed, the fund portfolio: (i) cannot be disposed of; (ii) cannot be included in a bankruptcy estate; and (iii) cannot be subject to an interim injunction, including those granted for the purpose of the collection of public debts. The CMB's approval is required to form a fund and issue asset/mortgage-backed securities. Funds established by financing companies, financial leasing companies and asset management companies can only issue asset/mortgage-backed securities by taking over their founders' assets, whereas funds established by banks, mortgage finance corporations or brokerage firms can issue securities by taking over other Originators' assets as well.

Two types of these funds in Turkey are provided for under the Asset/Mortgage-Backed Securities Communiqué, namely housing finance funds and asset finance funds.

Assets that can be included in a housing finance fund (*konut finansmanı fonu*) include:

- housing finance receivables secured by mortgages;
- receivables arising from financial leasing agreements, commercial loans and bank, financial leasing company and financing company receivables secured by mortgages;
- proceeds of real estate sales (on an instalment basis and subject to agreement) by the Public Housing Administration;
- derivatives proceeds; and
- other assets specified by the CMB.

Under the Asset/Mortgage-Backed Securities Communiqué, an asset finance fund (varlık finansmanı fonu) portfolio may include, among others:

- bank and financing company consumer loans and commercial loans receivables;
- financial leasing receivables;
- proceeds of real estate sales (on an instalment basis and subject to agreement) by the Public Housing Administration;
- covered bonds issued by banks and mortgage finance corporations in Turkey or abroad; and
- other assets specified by the CMB.

Asset/mortgage-backed securities can be issued through: (i) a public offering; (ii) a sale to qualified institutional buyers; or (iii) a private placement, provided that the nominal value of the privately placed securities is at least TRY 100,000 per unit. In addition, the asset-backed securities the Originator of which is an asset management company can only be issued abroad. For asset/mortgage-backed securities to be issued abroad or without a public offering, an issuance limit will be set by the CMB. Like covered bonds, in case of a public offering in Turkey, asset/mortgage-backed securities must be listed on Borsa Istanbul and registered with the CRA. However, in case of an issuance abroad, founders are required to notify the CRA regarding the amount, issue date, ISIN code, first payment date, maturity date, interest rate, name of the custodian, currency of the securities, the country of issuance and any change to this information, if any, including

an early redemption within three business days from the date of issue of the securities or, in the case of any change to this information, the relevant change.

FUND TRANSFERS

Pursuant to Decree No. 32 on the Protection of the Value of the Turkish Currency, residents and nonresidents may freely transfer Turkish lira and foreign currency abroad through banks in Turkey. These banks are required to inform the Treasury of transfers exceeding the equivalent of USD 50,000, excluding payments for import and capital exports, as well as invisible transactions, within 30 days of the transfer date.

CLAWBACK RISK

Articles 277 through 280 of the Turkish Enforcement and Bankruptcy Code (TEBC) grant a bankruptcy receiver a right of action to set aside certain transactions executed by the debtor before bankruptcy. Through this annulment procedure, the receiver can claw back payments made by the debtor prior to bankruptcy. Under the TEBC, three groups of transactions may be annulled: (i) transactions executed within the two years prior to bankruptcy made for no consideration, such as donations; (ii) certain transactions concluded within the year prior to the bankruptcy: (a) pledges given by the debtor as security for a legal and valid debt, other than security previously granted by the debtor, (b) payments made other than with money or other common payment instruments, (c) payments for an undue debt and (d) annotations on title deeds for the benefit of third parties; and (iii) transactions concluded within five years prior to bankruptcy that were intended to damage its creditors.

In a securitisation, as the debtor will be making payments for a legal and valid debt, the risk of a clawback may arise only if the debtor has paid before the debt became due or if the payment was made other than with common payment instruments.

These clawback provisions also apply to assignments between the assignor and the assignee, as these transactions are among the disposals that can be clawed back under Turkish law. In a securitisation, the assignment may be clawed back if: (i) the assignment has been made for no consideration; (ii) the consideration for the assignment has been paid by payment methods other than money or other common payment instruments; or (iii) the assignment has been made to damage the assignor's creditors.

Various time limits apply to how far back in time the transaction may be, ranging from one to five years depending on the type of transaction. There is no time limit for transactions executed to defraud creditors.

DATA PROTECTION AND CONFIDENTIALITY

After almost a decade of legislative struggles, on 7 April 2016, Law No. 6698 on Protection of Personal Data ("**Data Protection Law**") entered into force. The Data Protection Law aims to harmonise Turkish data protection laws with European Union Directive 95/46/EC ("**EU Directive**"), which was recently replaced by the General Data Protection Regulation (GDPR), and the Council of Europe's Strasbourg Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 ("**Strasbourg Convention**"), which Turkey ratified on 18 February 2016. Articles 1-16 of the Data Protection Law, which regulate the purpose, subject, definitions,

scope and general principles of the Data Protection Law, are parallel to the Strasbourg Convention, the EU Directive and the GDPR, although there are nuances in the legislation and its local implementation in Turkey. The Turkish Personal Data Protection Authority's ("**Authority**") establishment is also in line with the EU Directive and the GDPR. Most significantly, the Data Protection Law introduces principles with which data controllers must comply. Such principles include proportionality, fairness and lawfulness. Furthermore, in line with the Turkish Constitution, the consent of the data subject is required for the processing of personal data where other grounds for processing do not exist. Consent must be explicit under the Turkish Constitution and the Data Protection Law. "Explicit consent" is defined as consent that is "specific, informed and declared with free will," in parallel with EU practice. Under the Data Protection Law, data controllers must provide data subjects with information on: the data controller's and its representative's, if any, identity; the purposes of processing; the recipients to whom the data will be transferred, and the purposes of such transfer; the method and legal grounds for the data collection; and the rights of the data subject as set out under the Data Protection Law. Additionally, the data controller must limit the use of personal data to activities absolutely necessary for the purposes identified during data collection. Moreover, the data controller must ensure that appropriate technical and organisational measures are implemented to prevent unlawful and illegal access to or processing, destruction, loss, amendment, disclosure or transfer of the personal data. The data controller is also obliged to notify a data breach to the relevant data subjects as soon as possible and to Turkish Personal Data Protection Board as soon as possible and at most, within 72 hours of becoming aware of such breach.

In the absence of specific provisions within the Data Protection Law and in addition thereto, general provisions of Turkish law apply to data protection, such as the Turkish Constitution, Turkish Criminal Code No. 5237 ("**Criminal Code**"), Labour Code No. 4857, the TCO, Turkish Civil Code No. 4721 and E Commerce Law No. 6563. Moreover, sector-specific regulations also include specific provisions that might apply to personal data, such as rules under Banking Law No. 5411 ("**Banking Law**"), the Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions No. 6493 and Electronic Communications Law No. 5809. As such, the processing or transfer of personal data is regulated under various Turkish laws in addition to the Data Protection Law. Clearly, the adoption of the Data Protection Law provides more clear guidelines both on the processing of personal data and its cross-border flow.

Indeed, Article 9 of the Data Protection Law lays down the requirements for cross-border data flows. For the Data Protection Law, any transfer of data qualifies as processing and, thus, both local and international data transfers will be subject to certain rules. Currently, as a rule and in practice, the cross-border transfer of personal data is allowed only based on explicit consent. However, a cross-border transfer is possible without consent if the data controller has a legal basis for the transfer (e.g., a prevailing legitimate interest subject to a balance test) and one of the following conditions exists:

- the target jurisdiction has an adequate level of protection as determined by the Turkish Personal Data Protection Board (no jurisdiction has been announced as safe yet);
- both parties of the transfer sign a written commitment (based on the Authority's template) and obtain the Turkish Personal Data Protection Board's approval; or

- the group implements Binding Corporate Rules (*Bağlayıcı Şirket Kuralları*) and obtains the Turkish Personal Data Protection Board's approval.

If none of the foregoing conditions exists, the explicit consent of the data subject is be the only available legal basis for cross-border transfers. It should also be noted that the Turkish Personal Data Protection Board concluded in one of its decisions that Convention 108 is not a valid legal ground for cross-border data transfers.

At this stage, it is not clear which jurisdictions will be deemed to have "adequate protection" and how these framework rules will reconcile with the sector-specific localisation and data transfer principles. As a side note, further to the Turkish Personal Data Protection Board's decision no. 2019/157 dated 31 May 2019, use of platforms (e.g., WhatsApp, Microsoft Exchange, SAP etc.) whose servers are located out of Turkey constitutes cross-border transfer of personal data. Accordingly, data subjects' consents are required where data is stored or otherwise processed in a tool, application or software whose servers are located out of Turkey or which can be accessed by those outside of Turkey.

The Authority, established in January 2017, actively initiates investigations into companies upon complaints or *ex officio*, and imposes administrative fines for violations of the Data Protection Law.

The Authority published the Regulation on Deletion, Destruction or Anonymisation of Personal Data on 28 October 2017, which entered into force on 1 January 2018. This Regulation lays out the principles and procedures with respect to the deletion, destruction and anonymisation of personal data.

The Regulation on the Data Controllers' Registry (i.e., VERBIS) was published on 30 December 2017, establishing the procedures and rules with respect to the Data Controllers' Registry. The Authority also established exemptions from the registration obligation in its decision No. 2018/32 of 2 April 2018. The online Data Controllers' Registry is currently available, and data controllers must assess whether they are under the obligation to register. The registration deadline, which was delayed numerous times, expired on 31 December 2021 and the Authority has recently announced that the Authority will start imposing fines on entities who have failed to register with the Data Controllers' Registry in due time.

On 10 March 2018, the Authority published the Communiqué on Procedures and Principles on Notice Requirement and the Communiqué on Procedures and Principles for the Application to Data Controller to detail and regulate the implementation of the notice requirement provided in Articles 10 and 11 of the Data Protection Law. Further, a legally binding decision was adopted by the Authority with regard to mandatory security measures to be taken by data controllers in relation to the processing of special categories of personal data. The Authority also published the guidelines to date, which shed light on how the Authority interprets rules surrounding the grounds of personal data processing, personal data security and the disposal of personal data. The Authority has also published its recommendations on processing biometric data and its draft guideline on use of cookies, which has not been finalized yet. In addition, the Authority has published the Communiqué on the Procedures and Principles Regarding the Personnel Certification Mechanism ("DPO Communiqué") by the end of 2021 and introduced the concept of data protection officers. Unlike the GDPR, the DPO Communiqué does not regulate the concept of data protection officers in detail and

does not impose any obligation on data controllers regarding the appointment of a data protection officer.

Under the Data Protection Law, if the data controller fails to make the proper notifications to the data subjects, it may be fined between approximately TRY 13,000 and TRY 270,000. If the data controller fails to comply with the data security obligations, it may be fined between TRY approximately 40,000 and TRY 2,700,000. If the data controller fails to comply with an order from the Turkish Personal Data Protection Board to remedy violations of the Data Protection Law, it may be fined between TRY approximately 54,000 and TRY 2,700,000. Moreover, if the data controller fails to register with the Data Controllers' Registry, it may be fined between TRY 40,000 and TRY 2 million. The amounts of the administrative fines stipulated herein are the rounded-up figures updated by the annual revaluation rates since 2016. Further, Article 138 of the Criminal Code sentences those that fail to delete, destruct or anonymise personal data following the termination of the retention period to imprisonment for one to two years. According to Article 140 of the Criminal Code, if a data privacy crime is committed within the scope or as a result of a legal entity's operations, the relevant entity might be subject to security measures for the relevant crimes. The security measures may be: (i) revocation of the licence/permit; and/or (ii) confiscation of property or material interests relating to the offence/crime per Article 60 of the Criminal Code.

To ensure compliance with the Data Protection Law and to avoid administrative fines, prison sentences and judicial fines, certain actions are recommended, including the following:

- Conduct a data compliance audit within the organisation to check whether personal data is collected and processed in line with the provisions of the Data Protection Law.
- Delete, destruct or anonymise noncompliant data and data for which the purposes of processing cease to exist.
- Adopt adequate administrative and technical measures to provide security of personal data.
- Ensure that all departments within the organisation have the necessary procedures and policies in place to collect and process personal data in line with the provisions of the Data Protection Law.
- Provide periodical data privacy trainings for employees to keep employees informed and updated on applicable requirements and to discuss potential data privacy issues.
- Ensure necessary organizational structure is in place to respond to data subject applications and complaints.

Under the Asset/Mortgage-Backed Securities Communiqué, any confidential information regarding third parties obtained by the fund board, fund auditors, fund operations manager or service provider in the performance of their duties must not be used for their own interests or disclosed to any party other than those authorised by these communiqués or by special regulations. Furthermore, under the Banking Law,

management members and bank personnel must not: (i) disclose any information relating to their customers that these banks acquire as part of their duties to persons other than those who are authorised by the Banking Law; or (ii) use such information for their own or others' benefit. Additionally, Turkish Commercial Code No. 6102 prohibits the unlawful disclosure of confidential information on third parties' trade secrets without regard to how the information was obtained.

Tax treatment

CORPORATE INCOME TAX

The difference between the book value of the asset and the assignment value can be taken into account to determine the corporate income tax base of the creditor. In this respect, if the book value of the asset is less than the assignment value, the creditor can deduct the difference from the corporate income tax base. If the book value of the asset is higher than the assignment value, the difference would be subject to corporate income tax, save for the corporate income tax exemption for real estate transfers under certain circumstances.

Income derived by the SPV from the securitisation transactions is subject to corporate income tax if the SPV is resident in Turkey.

WITHHOLDING TAX

If the receivables were assigned to a nonresident SPV that is a foreign financial institution, the interest payments to be made by Turkish debtors to foreign financial institutions would be subject to 0% withholding. However, in case of an assignment of receivables to a non-financial SPV, a 10% withholding tax would apply on the interest payments (save for applicable double tax treaty provisions).

The income derived by investors from securities may be subject to withholding tax in Turkey depending on various conditions (such as the residency of the taxpayer, the status of the taxpayer, the nature and maturity of the security, etc.) under the Corporate Income Tax Law and the Income Tax Law.

VAT

The assignment of receivables is not subject to VAT in Turkey. Other asset transfers may trigger VAT if the SPV is not a Turkish resident asset management company.

In case of an assignment of receivables to foreign financial institutions, the interest payments made by Turkish debtors to foreign financial institutions are exempt from VAT. In case of an assignment of receivables to non-financial institutions, the interests payable are subject to 18% VAT in Turkey through a reverse charge mechanism. The VAT paid through the reverse charge mechanism can be offset from output VAT if the debtors are VAT-registered taxpayers.

The issuance of the securities and interest payments made to the investors are not subject to VAT.

RESOURCE UTILISATION SUPPORT FUND (RUSF)

If the receivables are assigned to a nonresident SPV, RUSF burden at the level of debtors may arise depending on the maturity and currency of the receivables.

STAMP TAX

The agreements made for the assignment of receivables to banks, foreign credit institutions and international institutions would be exempt from stamp tax. Otherwise, the agreements executed for the assignment of receivables would be subject to 0.948% stamp tax over the highest transaction value in the agreement. Note that assignment of receivables regarding exportation transactions are also, in principle, exempt from stamp tax. In addition, agreements regarding real estate transfers may be exempt from the stamp tax if the circumstances stated in the Stamp Tax Law are fulfilled.

According to the Stamp Tax Law, documents drawn up in connection with the issuance of capital markets instruments, housing finance transactions of housing finance institutions and the issuance by such institutions of mortgaged capital markets instruments, the issuance of securities representing asset-based securities and asset financing funds, as well as the receipts and documents drawn up in connection with the collaterals subject to such issuance, are also exempt from stamp tax.

Accounting treatment

The Public Oversight, Accounting and Audit Standards Authority (POA) determines the accounting standards in Turkey. However, other standards are set out by: (i) the CMB for companies carrying out activities under the CML; and (ii) the Banking Regulatory and Supervisory Authority for banks operating in Turkey. The POA has issued Turkish Accounting Standard 39, which is a translation of the International Accounting Standard 39 ("**IAS 39**") issued by the International Accounting Standards Board (IASB). The CMB accepts that IAS 39 applies to companies operating within the CML's scope.

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UAE

Legal framework

The UAE is a civil law country that follows a Civil Code inspired by Egyptian and French law. Sharia or Islamic law has little relevance in commercial transactions.

The main UAE sources of law are:

i. **The UAE Civil Transactions Code of 1985** ("**Civil Code**") governs general contractual liability and the award of damages under UAE law.

ii. **The Explanatory Note on the UAE Civil Code** ("**Commentary**"), issued by the UAE Ministry of Justice: According to established case law, this Commentary is indicative of the intentions of the UAE legislature and is as such relied upon as a source for the interpretation of the UAE Civil Code. This is also confirmed by the preface to the Commentary in the following terms:

> The Commentary is a substantial and scholarly work published by the Ministry of Justice in 1987, which provides an analysis of the historical, jurisprudential and comparative background of each of the various parts of the Civil Code and, in most cases, of individual articles. It also provides numerous examples of how many of the provisions work in practice. Although the Commentary does not have statutory authority, it is nevertheless so important, so profuse in its guidance, and held in such respect by the courts of the United Arab Emirates, that it can properly be said that it is an essential tool for the correct interpretation of the statutory provisions of the Code, and that it is often unsafe to rely on the words of the Code alone in determining their meaning and effect. [1]

iii. **Comparative doctrine on Civil Law and, in particular, Egyptian legal doctrine**.[2] Note that in this context the UAE shares with other Gulf and Arab countries the same civil law system. After the formation of the Federation in 1971, the UAE was guided by Egypt, which is inspired by the French civil law tradition, for the drafting of its major codes. For this reason, Egyptian legal experts and Egyptian as well as French legal doctrine exerted considerable influence on the legislative processes in the formative years of the UAE. Even today, many years after the formation of the Federation, UAE courts will take account of Egyptian authorities for guidance in the event of ambiguities in the provisions of UAE law. The fact that many judges sitting in the UAE courts are Egyptian lends further support to the practical importance of Egyptian legal doctrine, which in turn has its origin in the French civil law tradition and therefore itself takes guidance from French law and jurisprudence, in the interpretation and application of UAE law. However, it would be an oversimplification to state that the UAE codes are no more than copies of the Egyptian codes or that the Egyptian authorities will always apply. The UAE's legislation does differ from that of Egypt in the finer detail.

iv. **Relevant case law of the competent UAE courts**. It is noted that even though — contrary to the situation in common-law jurisdictions — case law from the UAE courts does not constitute judge-made law, it does provide important guidance in the interpretation of individual provisions of the various UAE codes of law.

1 Preface to the Commentary of the UAE Civil Code.

2 Abdel Razzak Al Sanhouri, The Treatise of Civil Law, Volume 1: The General Theory of Obligations, Sources of Obligations, edition 2004. For the avoidance of doubt, it is noted that Al Sanhouri constitutes the leading source of Egyptian doctrine, which is heavily relied on in UAE interpretive practice.

However, in addition to the UAE "mainland" (referred to as on-shore), the UAE has created, by a constitutional amendment and a federal law, financial free zones (FFZs). In FFZs, UAE federal civil and commercial laws are not applied either in favour of a codified common law (in the context of the Dubai International Financial Centre (DIFC)) or of English law amended by regulations (in the case of the Abu Dhabi Global Markets (ADGM)). Those FFZs also have their own courts and financial regulators.

Retired common law judges from common law jurisdictions (England, Australia and Singapore, among others) preside in the courts that follow a slightly amended version of the Code of Civil Procedure.

Incorporating a special purpose vehicle (SPV)

IN THE UAE "ON-SHORE"

The new UAE Commercial Companies Law no.32 of 2021 has introduced the concept of special purpose vehicle for the first time in UAE legislation and has defined it as *a company established with the aim of separating the obligations and assets associated with a particular financing operation from the obligations and assets of the person who incorporated it, and used in credit operations, borrowing, securitisation, issuance of bonds, and transfer of risks associated with insurance, reinsurance, and derivatives operations, in accordance with the provisions of the decision issued by the Emirates Securities and Commodities Authority to regulate this activity.*

This together with the Assignment of Receivables and Factoring Law referred to below should allow for the development of securitization operations in the UAE.

IN THE FINANCIAL FREE ZONES

Private companies are limited by shares incorporated under the laws of the DIFC or ADGM and have the following characteristics:

- no foreign ownership restrictions;
- zero tax entity;
- access to DIFC or ADGM jurisdiction and enforcement regime (common law based and easy enforcement of security);
- mandatory requirement to appoint a corporate service provider (licenced by DIFC or ADGM) whose role is similar to that of a company secretary;
- no requirement to have a physical office but must have a registered address, which can be the address of the company secretary/corporate service provider;
- no requirement to maintain, audit or file its accounts; and
- no requirement to hold an annual general meeting.

RESTRICTIONS ON USE

The purpose of the SPV must be limited to performing the "exempt activities" (whether conducted in Islamic or in the conventional manner) as follows:

- the acquisition, holding and disposal of any asset in connection with and for the purposes of a Transaction;

- obtaining any type of financing, granting of any type of security interest over its assets, providing an indemnity or similar support to its shareholders or entering into any type of hedging in connection with a Transaction;
- financing of another SPV;
- acting as trustee or agent for any participant in a Transaction;
- any other activities approved by the DIFC or ADGM Register of Companies; and
- any other ancillary activities related to the above activities.

A "**Transaction**" is defined as being an:

> Islamic or conventional structured finance transaction for the benefit of the Initiator in connection with which the SPC has been established, which shall include, without limitation, any type of securitisation or other capital markets transaction.

The term "**Initiator**" is defined as being the entity for whose Transaction the SPV has been established.

There are further restrictions that apply to SPVs. An SPV:

- cannot be used as a general corporate holding company;
- cannot operate as a trading business;
- cannot serve as general partner in an investment partnership;
- cannot conduct "financial services" unless authorised;
- is not permitted to have more than three shareholders; and
- must have shareholders that are all: (i) a nominee holding shares on trust for discretionary purposes; (ii) the Initiator; or (iii) another SPC.

Method of transfer

In the on-shore UAE, the concepts of true sale and bankruptcy remoteness do not currently exist, unlike in the FFZs where these concepts exist and are embedded in law. The Law of Security provides that this law applies to a sale of receivables that is perfected upon attachment.

Note however that the UAE has issued in 2021 Federal Decree Law no. 16 of 2021 in relation to assignment of Receivables and factoring; this has codified the assignment of receivables and has defined them as *an agreement by virtue of which an assignor's contractual rights to settle an amount owed by its debtor are transferred to an assignee, and such assignment constitutes an agreement to create a security right on the said debtor's dues, is assigned as security, and sold as a final sale.*

Was the intent of the UAE legislator to consider such an assignment as a True Sale? This question was raised to the Ministry of Finance that has sponsored the law and the reply was that it will be up to the judges to assess the situation on a case by case basis, but in our view this is the closest concept to a True Sale that can be found in UAE legislation, however the concept of bankruptcy remoteness is still lacking although as mentioned above the new Commercial Companies Law has introduced the concept of SPVs.

Over-collateralisation/yield

Over-collateralisation can be achieved through the various DIFC or ADGM security laws or the new UAE law on the pledge of movables (20 of 2016) that has for the first time created the concept of a floating charge in the UAE.

Yields will very much depend on the credit worthiness of the issuer.

Tax

The FFZ SPV is a zero tax entity.

Accounting treatment

There is no requirement to maintain, audit or file the accounts of a FFZ SPV.

Regulatory concerns

There are no particular regulatory concerns to report.

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Ukraine

Background

Since 2006, securitisation has been viewed by Ukrainian banks as an attractive vehicle for raising capital in international markets. Ukrainian Originators were eager to look at a wide range of assets for securitisation and completed two transactions before the 2008 global economic downturn curtailed all further attempts. The assets securitised in the transactions completed to date include residential mortgages and auto loans.

Legal framework

REGULATORY FRAMEWORK

The Civil Code, the Commercial Code and a number of other laws allow Ukrainian banks and other companies to raise funds through domestic and cross-border securitisation transactions.

In the mortgage lending area, the key legislation is composed of:

- Law of Ukraine "On Capital Markets and Organised Commodities Markets" No. 3480-IV dated 23 February 2006 and effective 1 July 2021 ("**Capital Markets Law**").
- Law of Ukraine "On Mortgage" No. 898-IV dated 5 June 2003 and effective 1 January 2004 ("**Mortgage Law**").
- Law of Ukraine "On Mortgage-Backed Bonds" No. 3273-IV dated 22 December 2005 and effective 24 January 2006 ("**Mortgage Bonds Law**").

The Mortgage Bonds Law permits an Originator — a Ukrainian commercial bank or an authorised financial institution — to create "mortgage assets" (i.e., a pool of rights of claim under the Originator's mortgage loans) and the related "mortgage coverage" (i.e., a pool of mortgages securing the underlying loans). Mortgage assets may be sold by the Originator to a special purpose vehicle (SPV), which would, in turn, issue mortgage-backed bonds.

Due to the reform of Ukraine's financial sector, the Law of Ukraine "On Mortgage Lending, Transactions with Consolidated Mortgage Debt and Mortgage-Backed Certificates" dated 19 June 2003 No. 979-IV, which provided for the issuance of mortgage-backed certificates (a separate type of mortgage-backed securities), has been repealed as of 1 July 2020.

Tax ramifications

VAT

Pursuant to the Tax Code of Ukraine, the sale of debt claims for cash is not subject to VAT.

WITHHOLDING TAX

In general, repayment of the loan principal by an individual to the SPV should not be subject to Ukrainian withholding tax. Any payments of interest to the SPV, provided that the interest is not effectively connected with a permanent establishment of the SPV in Ukraine, will be subject to Ukrainian withholding tax at the rate of 15%, unless the applicable double tax treaty provides for a reduced rate or exemption, subject to certain requirements of such a tax treaty being met. Such interest would be regarded as Ukrainian source income of the SPV.

Effective from 23 May 2020, Ukraine has introduced a "look through" approach to cases when there is a foreign intermediary between the Ukrainian payer and the foreign beneficial owner of the income. In brief, the tax benefits under the treaty with the country of the intermediary's residence should not apply. Instead, the tax treaty with the country of residence of the beneficial owner should govern.

At the same time, such arrangements should be subject to the Principal Purpose Test (PPT). Although the PPT — in line with the BEPS Action 6 — was introduced in the relevant Ukraine double tax treaties via the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS as of 1 January 2020, Ukraine resolved to additionally incorporate this concept in its domestic legislation. Effective from 23 May 2020, Ukraine denies the application of double tax treaty benefits to transactions where it is reasonable to conclude that "obtaining the benefit was one of the principal purposes" of the arrangement or transaction.

CORPORATE INCOME TAX

If the consideration payable by the SPV to the Originator for the assets exceeds the outstanding principal amount of the claims, such difference (gain) will be viewed as taxable income of the Originator and should be subject to corporate income tax at the rate of 18%.

Other information

TRANSFER OF ASSETS AND TRUE SALE

Ukrainian legislation expressly recognises the concept of the sale of rights of claim, including the rights of claim to money or payments (receivables). A sale is distinguished from factoring transactions or transactions creating a security interest in the rights to payment. As determined by the nature of rights to payment, their sale is carried out by way of assignment of such rights to the purchaser. The Civil Code provides that general rules governing assignment will also apply to the sale of rights to payment unless otherwise provided in the sale agreement or by the applicable legislation.

A sale of rights to payment must be documented by an agreement in writing between the assignor and the assignee. Such sale agreement must follow the form of the underlying agreement that creates the rights to be assigned. Thus, if the underlying agreement was certified by a notary, the assignment agreement must also be certified by a notary. If applicable legislation requires the underlying agreement to be registered with any state authority, the assignment agreement must also undergo such registration except where otherwise specifically provided by applicable legislation.

Unlike in many developed jurisdictions, a contractual restriction on the sale or assignment of rights in the underlying agreement (an anti-assignment clause) is enforceable and will render any purported sale or assignment invalid.

A true sale of rights of claim can be achieved under Ukrainian law provided that the relevant agreement between the Originator and the purchaser is:

- clear as to the intent of the parties to transfer unconditionally, completely and irrevocably (i.e., assign in exchange for monetary consideration or sell) the receivables from the Originator to the purchaser, rather than to collateralise the receivables as security for the financing extended by the purchaser to the Originator; and

- otherwise compliant with the legal requirements governing assignment agreements and sale-purchase agreements.

Accordingly, the proper and careful drafting of the sale agreement, and structuring of the transaction generally, is crucial to ensure its favourable treatment under Ukrainian law.

TYPES OF ASSETS SUITABLE FOR SECURITISATION

Ukrainian legislation prohibits the assignment (and, accordingly, the sale) of rights of claim that have a "personal nature," i.e., that are "inseparably connected to the person" of the Originator. Ukrainian law does not provide criteria for determining whether a particular claim may be regarded as a "personal claim." However, a fair reading of the applicable legislation, as well as the existing court practice and market practice, suggests that the category of "personal claims" should not include the lender's claims with respect to:

- repayment of principal and payment of interest under a loan agreement;
- collateral under a security agreement; and
- insurance proceeds payable under the relevant insurance contracts upon the accidental loss, destruction or damage of the collateral.

Thus, such claims are generally capable of assignment. Moreover, Ukrainian legislation provides that an assignment of the lender's claims with respect to collateral under a security agreement would result in the assignee also acquiring the related insurance claims by operation of law.

CHOICE OF LAW

Although Ukrainian conflicts of law rules permit a sale of assets to be governed by any foreign law chosen by the parties, the established international market practice (and the related market expectations) would be for the relevant sale agreements to be governed by the law that applies to the underlying assets, i.e., Ukrainian law. The legal reasoning for this is that issues of assignability of the assets and related transfer requirements and procedures would be governed by the laws of the documents evidencing such assets (i.e., the loan documentation).

The established market practice is to include in a sale agreement in an international securitisation transaction an extensive list of the Originator's representations and warranties with respect to its lending business and the portfolio of assets, as well as limited recourse, non-petition, indemnity and certain other provisions, originating primarily from English law. In civil law jurisdictions such as Ukraine, the legal standing and significance of such provisions are uncertain. As a result, recent practice in international securitisation transactions in civil law countries is to include split governing law provisions in the relevant sale agreements, whereby the asset transfer clauses of such sale agreements would be governed by the laws applicable to the underlying assets, while the other clauses would be governed by English law.

MORTGAGE-BACKED SECURITIES

The Mortgage Law provides for two types of mortgage-backed security: mortgage-backed certificates and mortgage-backed bonds. However, due to the repeal of the law that governed the issuance of mortgage-backed certificates, only mortgage-backed bonds may be issued.

The issuance of mortgage-backed bonds is regulated by the Mortgage Bonds Law, which provides for two types of mortgage-backed bonds: common mortgage-backed bonds and structured mortgage-backed bonds. Mortgage-backed bonds are registered securities and may be issued in electronic form only. The issuance of mortgage-backed bonds requires registration with the National Securities and Stock Market Commission of Ukraine.

Mortgage-backed bonds are secured by a "mortgage coverage" (a pool of mortgage assets that secure the loans). A mortgage bondholder is entitled to receive the nominal value of mortgage-backed bonds, plus a fixed or floating rate of interest. In addition, mortgage-backed bonds entitle their bondholders upon default of the issuer to obtain recovery from the underlying mortgage coverage in priority to the other creditors of the issuer of such mortgage-backed bonds.

Common mortgage-backed bonds may only be issued by the Originator, while structured mortgage-backed bonds may be issued by a special mortgage institution (i.e., the purchaser SPV) following the acquisition of the underlying mortgage assets from the Originator. Common mortgage-backed bonds and structured mortgage-backed bonds also differ in that the bondholder of common mortgage-backed bonds may obtain, upon default of the issuer, recovery from the assets of the Originator in addition to the mortgage coverage, while the owner of structured mortgage-backed bonds may satisfy its claims from the value of the mortgage coverage only.

NOTICE REQUIREMENT

Ukrainian legislation does not require the Originator to notify any of the borrowers of the sale (assignment) of the rights of claim by the Originator to a third party. Any failure of the Originator to notify the borrowers of such sale (assignment) would not affect the validity of the sale (assignment) of the rights of claim. However, the SPV as assignee would bear any negative consequences of the Originator's failure to give such notice. In particular, the respective borrower would have the right to: (i) discharge its obligations in respect of the assets to the Originator and not to the SPV until and unless the borrower has received the notice; (ii) make such objections against the claims of the SPV in respect of the assets as the borrower would be entitled to make against the Originator as of the date of receipt of notice or, in the absence of such receipt, as of the date on which the SPV makes such claims; and (iii) set-off against the monetary claims of the SPV certain monetary claims of the borrower to the Originator that have arisen from the grounds that existed at the date of receipt by the borrower of notice or, in the absence of such receipt, at the date when the SPV makes such claims. It is therefore recommended that the transaction documentation provide for the Originator's obligation to give notice to each borrower.

Although there is no express requirement under Ukrainian legislation for the Originator to notify each insurer of the sale (assignment) of the respective insurance claims (if any) that are ancillary to the assigned rights of claim under the loans, any failure to give such notice may have the same negative consequences (as regards the discharge of the insurers' payment obligations) as discussed above.

BANKRUPTCY REMOTENESS

The concept of bankruptcy remoteness entails the separation of the securitised assets from the risks associated with the Originator, such as its bankruptcy or insolvency. Ukrainian legislation provides sufficient basis to state that, once the assets are sold to the SPV, such assets are not included in the liquidation estate of an Originator that is a Ukrainian

commercial bank. At the same time, during the Originator's temporary administration and liquidation proceedings, the temporary administrator or liquidator (for a commercial bank, the Deposit Guarantee Fund) has the power to refuse or suspend performance, or terminate or declare invalid any pre-administration transfers of the Originator if such transfers cause or may cause a deterioration of the Originator's financial condition and satisfy certain other statutory criteria. Such statutory grounds are poorly drafted; the relevant concepts are vague and there is no established practice of their application by the courts. However, proper structuring of a deal can help mitigate such risks.

In addition, the Parliament of Ukraine has recently adopted a law amending the legislation on mortgage bonds, which is primarily aimed at enhancing the bankruptcy remoteness of the mortgage assets from the bankruptcy or liquidation proceedings in respect of the Originator, including during the term of temporary administration and moratorium.

Another aspect of bankruptcy remoteness relates to minimising the likelihood of bankruptcy of the SPV. The concepts of a Ukrainian SPV and its bankruptcy remoteness were introduced by the Mortgage Bonds Law, but the reach of this law is limited only to mortgage assets and to specialised mortgage entities, which can act as SPVs. As a result, in the absence of a sufficient legal framework to achieve bankruptcy remoteness through a domestic SPV, the two Ukrainian securitisation transactions closed to date used SPVs that were incorporated in other jurisdictions.

DISCLOSURE OF INFORMATION AND PERSONAL DATA PROTECTION

Ukrainian banks are required to preserve banking secrecy, i.e., the secrecy of information related to their clients and such clients' accounts, deposits and transactions. Information subject to banking secrecy may only be disclosed subject to the written consent of the owner of such information and, in some limited cases, as required by the law. In addition, no collection, processing or disclosur of the personal data of private individuals may be made without prior written consent of those individuals.

Even in the absence of the borrowers' consent, the limited disclosure of information on the client and the relevant agreements (e.g., loan, pledge or mortgage agreements) by the bank to the purchaser in the context of a sale of receivables by the bank to the purchaser should be permissible. Under applicable Ukrainian legislation, information on the loans and certain information on the borrowers (in particular, information relating to the receipt by a borrower of a loan and the security for such loan) is public information and, therefore, should not fall under banking secrecy restrictions. Such information is subject to registration in the publicly accessible state registers. These registers contain records on the assets that secure the underlying obligation, including the name of the borrower and the pledgor, their place of residence, description and location of the collateral, amount and term of the secured obligations, and information on the lender. Accordingly, the disclosure of such information in the respective sale agreements cannot be viewed as a violation of the requirement of preservation of banking secrecy.

In addition, Ukrainian legislation expressly requires an assignor to provide the assignee with the documents evidencing the assignor's rights of claim, as well as to disclose information that is relevant for the exercise by the assignee of its rights with regard to the debtor. Also, Ukrainian banking legislation expressly permits banks to disclose information, subject to banking secrecy, to private individuals and organisations for the performance of their functions or for the provision of services to such banks pursuant to the executed agreements between the banks and such individuals/organisations, in particular in accordance with assignment agreements, provided that the aforementioned functions or services concern banking activities.

The relationship between banking secrecy and protection of personal data of individuals is not entirely clear; however, it is believed that the transfer of personal data of individuals to third parties by Ukrainian banks is permissible subject to: (i) the establishment by such third party of appropriate data protection systems; and (ii) the bank obtaining prior written consent from the individual to collect, process and use their personal data as well as to transfer such personal data to third parties for specific purposes.

In the absence of an individual's consent, it is currently unclear whether the personal data of individuals that also fall within the category of banking secrecy may be disclosed by the assignor to the assignee under the assignment agreement.

REPATRIATION OF THE PROCEEDS OF ASSETS FROM UKRAINE

Although Ukraine's regime for currency exchange and cross-border payments was significantly liberalised in February 2019, repatriation (from the Ukraine to an overseas jurisdiction) of proceeds of a loan portfolio acquired by a foreign SPV would still require careful structuring and documentation to minimise the risks posed by the still restrictive regulations (which do not expressly cater for international securitisation transactions). The structures that can be considered (and elements of which have been tested in the transactions completed to date) include:

- reliance on the "foreign investment exemption" whereby the purchase of the assets is viewed as a foreign investment in property rights in Ukraine and, consequently, the payment of proceeds from such assets is viewed as a return of the investment and profit on investment; and
- the servicing of the assets based on the asset management arrangement whereby a duly licensed asset manager would transfer proceeds of the assets abroad based on its banking licence (provided that it covers certain specific operations).

MARTIAL LAW CONSIDERATIONS

In February 2022, following the Russian military invasion, martial law was introduced in Ukraine. For the duration of martial law, the National Bank of Ukraine imposed strict capital controls in Ukraine effectively restricting cross-border payments save in exceptional cases.

In addition, for the duration of martial law, the National Securities and Stock Market Commission suspended all capital markets operations, including, among others, placement, trade and repurchase of securities in Ukraine.

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Baker McKenzie provides sophisticated legal advice and services to the World's most dynamic global enterprises, and has done so for more than 50 years. We have a substantial global structured finance and securitisation practice, with expertise in numerous jurisdictions, across Europe, the CIS, the United States and South East Asia.

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