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Securitisation in Switzerland: A steadily developing market

Introduction

Securitisation has found legal and commercial acceptance in Switzerland without the benefit of legislation or regulations specifically governing the issuance of asset-backed securities (ABS). A series of public and private transactions since 1994 has produced a triedandtrue securitisation transaction structure – readily recognisable by participants in such transactions in other jurisdictions – in which a trustee issues securities to investors, loans the proceeds on an unsecured basis to a special purpose Swiss corporation, which in turn acquires the relevant assets and engages the originator to service them. The first public transaction based on this structure was Tell, a residential mortgage securitisation which came to the market in 1998 and which was originated by Swiss Bank Corporation (today UBS AG). Other public transactions modelled on this structure are Swissact, a residential mortgage securitisation originated by Zürcher Kantonalbank in 2001, and Eiger, a commercial real estate mortgage securitisation in 2003 originated by the Swiss branches of two Bermuda companies controlled by a Lehman Brothers real estate fund. Lawyers of Walder Wyss and Partners acted as counsel to the originators in each of these transactions. Although there was virtually no securitisation activity in the Swiss term market in 2004, Moody's Investors Service expects that in 2005 new transactions will be launched in Switzerland, with new originators and new asset classes entering the market. Also, the Swiss commercial real estate market is said to very active and it may be expected that new Swiss CMBS transaction will be launched shortly.

The use of a trustee as the issuer of the asset-backed securities is a typical feature of securitisation transactions, but Swiss law lacks the Anglo-Saxon concept of the ownership of assets by a trustee for the benefit of others. As a result, this element of the structure must be imported from a jurisdiction with a suitable law of trusts.

Swiss law also does not provide for the types of transaction-specific special purpose vehicles (SPVs) often used in other jurisdictions. All of the public Swiss securitisation transactions completed to date have used a corporation (*Aktiengesellschaft/société anonyme*) which is restricted in its articles of incorporation to the business activities necessary to carry out the securitisation transaction. The Swiss SPV often is an essential part of the structure to comply with applicable Swiss laws and regulations, such as banking secrecy and data protection. The Swiss SPV is usually not required in a securitisation of unsecured trade receivables through a purchaser of such receivables which is not resident for tax purposes in Switzerland.

Many traditional asset classes originated in Switzerland – residential mortgages, commercial real estate, equipment leases and warehouse receipts – have been securitised. Further, some originators have chosen synthetic securitisation structures in order to avoid difficulties that may arise with the assignment of some kinds of assets.

In addition to ABS transactions originated in Switzerland, a number of foreign issuers have listed ABS issues on the SWX Swiss Exchange in Zurich. Helpfully, the SWX Swiss Exchange has adopted guidelines for the listing of asset-backed securities on the SWX Swiss Exchange which supplement the standard listing rules for debt securities. English language offering documents are acceptable to the SWX Swiss Exchange and the listing process is not burdensome. Walder Wyss and Partners advised Citibank in 2004 in connection with the listing on the SWX Exchange of Swiss franc denominated notes issued by the Citibank Credit Card Issuance Trust (CHF1.2bn).

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Assignment of assets, true sale and bankruptcy remoteness

The assignment of a claim or an account receivable must be made in writing and claims or assets to be transferred must actually be transferred to the purchaser. In the absence of specific statutory or contractual restrictions, there is no general obligation to obtain consent from, or to give notice to, the obligor of a transferred receivable in order for the transfer to be valid. Nevertheless, in the absence of notice of the assignment, if the obligor pays the debt owed to the originator, the obligor will be discharged from liability on the debt. Further, a waiver of set-off will be needed in any transaction involving an obligor who may have an independent claim against the originator, such as a bank depositor in the case of a mortgage or credit card securitisation. Finally, consent may be needed to eliminate a specific contractual or statutory notice or consent obligation. As a result of these issues, it usually advisable for the originator to update its form agreements and general business terms and conditions to give notice to the obligors that the relevant accounts receivable, loans, leases or other assets may be securitised and to obtain a waiver of the obligors' set-off rights.

There is no system analogous to Article 9 of the Uniform Commercial Code in the US for filing of notice of an assignment of accounts receivable or notice of a security interest in order to perfect the assignee's claim under assigned accounts receivable or related security interests.

Receivables which have not yet been created but which will arise in the future may be

validly assigned under Swiss law if the future claims can be defined with sufficient specificity. For example, future receivables under a credit card account or lease agreement which is in existence on the transfer date may be capable of the required specification, but future receivables arising under a credit card account or lease agreement which was not in existence on the transfer date may not. A separate assignment of the existing and future receivables in these accounts or leases may be advisable. An otherwise valid assignment of future receivables will cease to be valid if the originator of the receivables becomes subject to bankruptcy proceedings and receivables coming into existence after the opening of the bankruptcy proceedings will be included in the originator's assets which are administered in any bankruptcy proceedings applicable to it.

Although a true sale is not a formal concept under Swiss law, an originator will be considered to have made a true sale of assets from a factual point of view if the price paid by the purchaser to the originator has been determined at arm's length [fair market value]. Care must be taken to ensure that the purchase price fairly reflects the value of the assets sold, with an appropriate discount for credit risk, in order to guard against a claim by creditors that they were defrauded by the sale. In addition, any deferred purchase price paid to the originator or credit enhancement supplied by the originator may not be so high as to suggest the originator has retained the credit risk inherent in the assets. For tax purposes, the amount of such recourse to the originator should not exceed 15% to 20% of the principal amount of the transferred receivables, depending on the nature of the assets and the chosen transaction structure.

In addition to structuring the transaction to achieve a true sale of assets, the bankruptcy remoteness of the assets will be buttressed in all transaction documents with agreements from the counterparties of the purchaser that they will not (i) assert any claims against


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the purchaser in excess of their claims under the transaction documents and as further limited by the priority of payments governing the application of the purchaser's assets, (ii) seek the bankruptcy of the purchaser until the lapse of more than one year after the redemption or extinguishment of the ABS securities and (iii) seek to offset any claims they may have against amounts they are required to pay to the purchaser.

The following table provides an overview of the treatment of common issues in Swiss securitisation transactions:

Asset transfers under the Swiss Federal Law Concerning Mergers, Divestitures, Conversions and Asset Transfers

The Swiss Federal Law Concerning Mergers, Divestitures, Conversions and Asset Transfers provides an alternative method of transferring assets to be securitised to a special purpose corporation. Under this new legal framework, the transfer of assets and liabilities does not require the consent of other parties to the transferred contract. This piece of legislation may prove particularly beneficial to leasing securitisations or other transactions securitising future receivables.

Securitisation of loans secured by real estate

Transfer-related issues	
Is a written transfer document required?	Yes
Is a continuous assignment of receivables possible?	Yes, pursuant to a general assignment of all receivables of a specified type.
Is an automatic transfer of assets related to the transferred assets possible?	Generally yes, but there are exceptions.
Is the notification of debtors a condition to a valid assignment?	No
Is a public filing required to perfect a security interest in transferred receivables?	No
Is an optional public filing permitted to give notice of a transfer of receivables?	No
Does a transfer preclude a debtor from asserting defences in respect of the receivable which it had against the originator against the transferee?	No. For example, objections or defences in relation to receivables which came into existence before the date of receivables which came into existence before the date of notification of the assignment can still be asserted.
Is there a limit on the amount of recourse (credit enhancement; deferred purchase price) the purchaser may have against the originator?	For tax purposes, the amount of recourse should not exceed 15-20% of the receivables balance.

In Switzerland, security for the repayment of a loan used for the purchase of real estate is generally created by the obligor executing a *Schuldbrief* and delivering it to the lender.The *Schuldbrief* is independent evidence of the obligor's debt and it is usually recorded in a public land register as an encumbrance on the relevant property.The *Schuldbrief* is usually issued to the obligor in bearer form and the security interest is created by the obligor delivering the *Schuldbrief* to the lender pursuant to a security assignment (*Sicherungsübereignung*).If the *Schuldbrief* has been issued in registered form, then it also must be endorsed by the obligor in favour of the lender.The security assignment gives the lender the power to seek what is tantamount to the sale of the property in foreclosure proceedings if the obligor defaults on its obligations.

The lender/originator in a commercial or residential real estate securitisation also will make a security assignment to the purchaser in the ABS transaction of each *Schuldbrief* which was delivered pursuant to a security assignment made by an obligor to the lender/originator when the relevant loans were originated.Careful structuring is needed to ensure that the purchaser has taken delivery of the *Schuldbriefe* securing real estate loans in an ABS transaction and that any servicer may take possession of the *Schuldbriefe* when needed for debt enforcement purposes.

Swiss law permits the direct ownership of commercial real property in Switzerland by foreign persons and entities, but residential property may only be owned by Swiss citizens and foreigner who are long-term residents of Switzerland.The trustee therefore may never acquire title to the real property securing the portfolio of residential loans or residential leases.

Swiss Federal Data Protection Law

Switzerland's Federal Law Concerning Data Protection (*Bundesgesetz üben den Datenschutz*) places limitations on the scope of the collection and use of personal information, as well as other types of information.The definition of personal information – any information which refers to a specific legal or natural person or a legal or natural person capable of being specifically identified – is sufficiently broad that the disclosure of information relating to accounts receivable and other assets to be securitised will be restricted or prohibited.Care therefore must be taken to ensure that the requirements of this law are met while at the same time ensuring that the purchaser of assets in the ABS transaction will have access to the information required to enforce its claims under the receivables if the originator of the assets is no longer the servicer of the assets.

Banking secrecy

The Swiss Federal Law Concerning the Banks

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and Savings Institutions (*Bundesgestz über die Banken und Sparkassen*) provides that "whoever discloses a secret that was entrusted to him in his capacity as a director, officer, employee [or] agent of a bank" as defined in the statute shall be subject to fines and imprisonment.This law is the legal source of Switzerland's well-known banking secrecy and it is understood to prevent the disclosure of the existence of any information related to a banking relationship, including the existence of the banking relationship and the identity of the customer.Though receivables subject to banking secrecy laws cannot be assigned without consent of the bank customer, solutions have been found by most banks to allow the transfer of loans for securitisation purposes.In addition, regulators like the FBC and the Swiss Federal Office of Private Insurance are supportive in giving advanced clearance on various regulatory issues such as regulatory capital requirements for banks, non-application of insurance laws, etc.

Money laundering

The Swiss Federal Law for the Prevention of Money Laundering in the Finance Sector of 10 October 1997 (*Bundesgesetz zur Bekämpfung der Geldwäscherei im Finanzsektor von 10. Oktober 1997*) – the Money Laundering Law – specifies measures to be undertaken by a wide range of financial intermediaries, including factoring and finance companies, for the prevention of money laundering.Generally speaking, the Money Laundering Law requires a financial intermediary to identify its contractual counterparties and the beneficial owner of financial assets, to ascertain the business purpose or background of a transaction and to report suspicious transactions to the relevant authorities.Recognised self-regulatory bodies play a significant supervisory role under the Money Laundering Law and a financial intermediary which is not a member of such a self-regulatory body must obtain a license to conduct its business from the control authority established under the law.The scope of regulation under the Money Laundering Law can be difficult to determine and, unlike many other agencies of Swiss government, the control authority under the Money Laundering Law does not provide advance rulings or comfort letter on compliance issues.

Synthetic securitisation

Originators sometimes decide that it is too expensive or too disruptive to their business to comply with requirements related to asset transfers, banking secrecy and data protection and therefore choose a synthetic securitisation.Typically the originator enters into a credit default swap to transfer the credit risk in a pool of assets to the special purpose vehicle.In 2000, UBS AG was the first originator in Switzerland to apply this technique by transferring credit risk in a portfolio of loans to

Markus J Kroll

small and medium-sized enterprises in Switzerland to the capital markets in a public transaction (Helvetic Asset Trust or "HAT").This transaction was structured to allow UBS to actively manage the portfolio and therefore its credit risk.UBS completed a second synthetic transaction (HAT II) in 2003.Credit Suisse also completed a US$2.4bn fully funded synthetic transaction in July 2003 – Chalet I – which referenced a portfolio of residential real estate loans and Chalet II and a US$2bn follow-up transaction in the fourth quarter of2003.Care must be taken in structuring the credit default swap in synthetic transactions to ensure that it is not a contract of insurance under Swiss law.Walder Wyss and Partners have acted as counsel to the originators in all of the public, Swiss synthetic securitisation transactions.

Alternative risk transfer

The synthetic securitisation concept was extended to fund noncancellable coverage for certain losses which the Fédération Internationale de Football Association (FIFA) could expect to suffer if it were necessary for any reason to cancel the 2006 FIFA World Cup in Germany, including a cancellation resulting from terrorist attacks.This transaction, which closed in 2003, allows FIFA to retain absolute discretion to cancel the 2006 FIFA World Cup final match, so a mechanism was needed to address so-called moral hazard concerns that FIFA could arbitrarily cause the event triggering a payment from the proceeds of the issue. This concern was resolved by creating a determination committee composed of independent arbitrators that must confirm that defined criteria have been satisfied before any payment from the proceeds of the bonds is made.The arbitration procedures of this committee are governed by the Swiss Federal Act on Private International Law (Art. 176, et seq).An important legal issue in the transaction was ensuring that no transaction party, including investors in the issue, would be considered to be carrying on insurance business in any relevant jurisdiction.Walder Wyss and Partners acted as counsel to FIFA in this transaction.

Taxation of ABS Transactions

Each Swiss ABS transaction will involve tax issues which must be addressed by the structure.It is both possible – and advisable – to obtain an advance ruling on the tax treatment of the structure.

If a Swiss SPV is used, then it will be subject to income and capital tax.This is not a significant impediment to the transaction because the SPV is thinly capitalised (typically with a paid in capital of CHF150,000) and because tax authorities have accepted the deductibility of all of the SPV's expenses.This results in a nominal amount of income and capital tax to be paid by the SPV.

If securities are issued by a Swiss issuer, then an up-front issue stamp duty will be imposed – at a rate of 12 basis points per annum if the financing is provided pursuant to identical debt instruments by more than 10 non-bank lenders and at a rate of 6 basis points per annum if the financing is provided pursuant to debt instruments with different terms by more than 20 non-bank lenders.

Generally, interest and dividend payments made in respect of the securities of a Swiss issuer are subject to withholding tax at a rate 35% per annum.A Swiss taxpayer may take credit for, or claim a refund of, this withholding on the annual income tax return.Non-Swiss taxpayers who are beneficiaries of some double taxation treaties may be able to partially reclaim or take credit for this withholding tax.Swiss withholding tax is a major

Tax issues	
Is stamp duty or any other tax imposed on the transfer of receivables?	No, so long as a tax true sale for tax purposes is recognised.If the receivables arise under a loan secured by Swiss real estate, then a source tax on the interest payments will apply.
Is value-added tax imposed on the transfer of receivables?	No
Is value-added tax imposed on the fee paid to the servicer of the receivables or ABS assets?	Yes, if the servicing is provided by a Swiss servicer to a Swiss SPV. No, if servicing is provided by a nonSwiss servicer to a nonSwiss SPV.Casebycase review is applied if the servicing is provided by a Swiss servicer to a nonSwiss SPV.
Is withholding tax imposed on payments to an off-shore recipient which are not interest payments?	No
Is withholding tax imposed on payments to an off-shore recipient which are interest payments?	Subject to some detailed exceptions, yes.
Is a purchaser of receivables or other ABS assets from a Swiss originator subject to taxation in Switzerland.	If the purchaser does not have permanent establishment in Switzerland, no.

issue in the structuring of ABS transactions originating in Switzerland and structures are available which will not result in the imposition of withholding tax on the holders of the securities issued through the ABS transaction.

The following table provides an overview of recurring tax issues in Swiss securitisation transactions:

Bankruptcy issues

Switzerland does not apply the concept of substantive consolidation in bankruptcy proceedings, so it is possible that one company in an originator's corporate group could become bankrupt without affecting the other member companies of the group. Once bankruptcy proceedings have been opened, creditors and other claimants are not permitted to bring legal actions in Switzerland outside of the administration of the debtor in bankruptcy.If during the period of one year before the commencement of bankruptcy proceedings, the debtor has transferred assets for less than fair value or ha transferred assets during a period in which its liabilities exceeded its assets, then the these transfers can be rescinded. If the debtor has transferred assets in a manner which can be considered a fraud on creditors at any time during a period of five years before the commencement of bankruptcy proceedings, then these transfers also may be rescinded.

Conclusion

Over the last ten years, securitisation has established itself in Switzerland as a recognised financial technique.In addition to a limited number of one-off public issues, there has been a steady flow in the private placement market, and there is an increasing interest in securitising a number of different assets.The Swiss securitisation market is building a deeper pool of structured finance experience, both in terms of transaction precedent and professional familiarity.

Our firm's creative, innovative approach to issues and its breadth of vision come from handling many types of securitisations, derivative and structured finance transactions. We develop novel structured finance products that lower financing costs and achieve the legal, tax, corporate and financial objectives of all transaction parties. Our landmark transactions include:

- Swiss transaction counsel in virtually all public placements of asset-backed securities in Switzerland (including MBNA, GMAC, Citibank, UBS, Holmes, Credit Suisse);
- Swiss transaction counsel in all Swiss residential mortgage securitisations (Swiss Bank Corporation, TELL 1998, Zürcher Kantonalbank Swissact 2001);
- Swiss transaction counsel in the US$2,4bn fully funded CLO(Chalet Finance 1) referenced to a portfolio of residential mortgaged loans held by Credit Suisse as well as the US$2bn follow-up transaction (Chalet Finance 2);
- Swiss transaction counsel in the firstSwiss CMBS transaction, a E699m securitisation (Eiger Trust) with WTF Holdings (Switzerland) Ltd. as originator and Lehman Brothers Ltd. as arranger; the transaction refinanced bank loans which were used by WTF to finance the acquisition of a real estate portfolio from Swisscom;
- Swiss counsel to the USD 750,000,000 securitisation of inventory with Glencore International AG as originator;
- Swiss transaction counsel and advisor to Fédération Internationale d'Association Football (FIFA) in a US$260m ART transaction by which FIFA transferred cancellation risk of the 2006 FIFA World Cup TM to the capital markets;
- Swiss transaction counsel and advisor to Fédération Internationale d'Association Football (FIFA) in the increase of its securitisation of football marketing rights in relation to the 2006 FIFA World Cup TM;
- Swiss counsel in the first Swiss synthetic CLO (HAT I) referenced to a portfolio of loans to small and medium-sized Swiss businesses held by UBS AG;
- Swiss counsel in the world's presumably largest and most international trade receivables securitisation (Glencore, US$1,2bn); and
- Currently advising a number of Swiss and foreign banks on the establishment of domestic and international CMBS securitisation platforms.

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