

Key considerations regarding asset classes and assignability of receivables

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Introduction

In recent years, the number of publicly placed and listed securitisation transactions in the car leasing and credit card sectors has increased significantly. The driving force behind this development is economic rather than legislative, as Swiss law places no specific restrictions on asset classes eligible for securitisation. However, compliance with certain Swiss legal concepts is crucial when setting up a securitisation transaction involving Swiss law-governed receivables.

This article provides a short overview of key considerations regarding asset classes and the assignability of receivables.

Variety of asset classes

Swiss securitisation transactions have historically been based not only on car leasing and credit card receivables, but also on:

- trade receivables;
- commodity warehouse receipts;
- residential mortgage loans;
- commercial real estate loans; and
- loans to small and medium-sized businesses.

As mentioned above, Swiss law is silent on this topic. Accordingly, any type of asset can be securitised; however, besides general considerations relating to asset suitability, the legal matters outlined below must also be considered.

Assignability of receivables as key requirement

Under Swiss law, contractual parties may restrict the assignability of receivables by mutual agreement in a variety of ways, from strict bans of assignment to mere notification obligations. Further, certain legal assignment restrictions apply. Any prohibition of assignment is effective against a potential assignee and an assignment made in contradiction thereto will be invalid.

Unlike in other jurisdictions, there is no scope under Swiss law to benefit from legal override provisions or alternative solutions dealing with prohibitions on assignment or transfer in underlying contracts. Therefore, the free assignability of receivables to be securitised must be ascertained when conducting prior due diligence of a contemplated securitisation transaction. Where contractual restrictions of the assignability are revealed thereby, a respective waiver by and/or consent of the relevant contractual counterparty must be sought.

Receivables involving public sector element

Special attention must be paid to transactions involving receivables that originate in the public law sector which, depending on the circumstances, may be governed by public law and subject to legal restrictions on the assignability. In addition, a special regime may apply to the enforcement of such receivables.

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As a general rule, the assets of public entities are split into administrative and financial assets. 'Administrative assets' are those necessary for public law entities to fulfil their public duties and cannot therefore be pledged or seized (ie, enforced). 'Financial assets' serve the purpose of fulfilling public duties only indirectly. Typically, financial assets consist of liquidity, equity, real estate and other seizable assets. However, Swiss cantonal law may also exclude financial assets from being seized.

Therefore, due diligence on the legal nature of the relevant contracts and the classification of the assets involved must be conducted with great care in order to ascertain that no (residual) risks will be incurred in respect of both the assignability and enforceability of the relevant assets in the context of the securitisation transaction.

Future receivables

Existing and future receivables (ie, those which do not yet exist) can be validly assigned under Swiss private law. However, from an insolvency law perspective, the Federal Supreme Court has ruled that future receivables are legally owned by the assignor (at the moment they arise) before they pass to the assignee, even though such receivables have been validly assigned to the assignee prior to their coming into existence. As a result, the Federal Supreme Court holds that such receivables will fall into the assignor's bankrupt estate if they come into existence after the opening of bankruptcy over the assignor despite a valid assignment thereof being in place. Depending on the type of contract and asset, the time at which the relevant receivable arises may be subject to different interpretation. This case law clearly puts the assignee at risk, particularly if the purchase price for such receivable has already been paid.

With a view to strengthening the overall insolvency and structural analysis of transactions involving (potential) future receivables, a mitigant often considered is the transfer of the entire underlying agreement (instead of a mere assignment of the receivables stemming therefrom) so that the future receivable will directly arise with the purchaser. However, depending on the content of such underlying agreements, other concerns will have to be carefully considered and analysed, given that in the context of a securitisation transaction, a purchaser must avoid incurring contractual liabilities outside the transactional framework.

Comment

Swiss law allows for the assignment of various asset types and thus provides for a liberal assignment regime. Nonetheless, as certain structural legal points must be considered when contemplating the securitisation of Swiss law-governed assets, careful legal due diligence is required.

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