LEXOLOGY
Getting The Deal Through

Structured Finance & Securitisation

in Switzerland

Table of contents

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Switzerland

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GENERAL FRAMEWORK

Legislation

What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

Switzerland has enacted no specific primary legislation covering securitisation transactions. Instead, securitisation or asset-backed securities transactions are structured within the general legal framework. Applicable legislation includes the Code of Obligations and the Civil Code, which are relevant for establishing special purpose vehicles and the requirements for a valid transfer of underlying assets or receivables. For the listing of securitised debt, the SIX Swiss Exchange listing rules must be followed. However, these rules contain no specific rules for the listing of securitised debt, which is subject to the same requirements as ordinary straight bonds.

Applicable transactions

Does your jurisdiction define which types of transactions constitute securitisations?

As Switzerland has enacted no specific legislation relating to securitisation transactions, it also does not define which types of transaction constitute securitisations.

Market climate

How large is the market for securitisations in your jurisdiction?

The Swiss market for (true sale) securitisations is rather small, particularly when compared to the market in Germany and a number of other European jurisdictions. However, requests have been made for the introduction of structured finance solutions in Switzerland in the past 12 months with respect to all debt structures, including true sale securitisations and synthetic balance sheet securitisations. Most of the public (true sale) securitisation transactions which closed in the past 12 months related to Swiss credit card receivables and auto leases. Further, there were a number of trade and loan receivables securitisation transactions by Swiss originators. Finally, the Swiss market has seen several non-public synthetic balance sheet securitisations. These transactions are usually initiated by larger, systematically important banks with the aim of reducing the relevant institutions' risk-weighted assets.

REGULATION

Regulatory authorities

Which body has responsibility for the regulation of securitisation?

As there is no specific securitisation regime in Switzerland, there are no specific regulatory bodies which regulate securitisation transactions. However, certain authorities are relevant when it comes to the regulation of such structures. These include the SIX Swiss Exchange with respect to any listing related matters, and the Swiss Financial Market Supervisory Authority (FINMA) with respect to certain regulatory matters. As there may be some uncertainty relating to licensing requirements and the scope for the qualification of entities as financial institutions, it is standard procedure to obtain negative confirmations from FINMA and other relevant (cantonal) authorities, particularly if the securitisation relates to consumer loan portfolios. Further, the parties usually obtain advance tax rulings from the Swiss tax authorities with respect to each transaction in order to avoid any undesirable tax consequences.

Licensing and authorisation requirements

Must originators, servicers or issuers be licensed?

Due to the fact that Switzerland has enacted no specific rules governing securitisation transactions, there are no specific licensing requirements for originators, servicers or issuers. However, it is advisable to carefully analyse the securitisation structure on a case-by-case basis in order to ensure that no specific licensing requirements apply based on the underlying asset and/or the nature of the originator's business. For example, such licensing requirements apply to any originators which are active in the consumer loan business if they do not fall under a specific exemption.

What will the regulator consider before granting, refusing or withdrawing authorisation?

As no specific securitisation legislation exists in Switzerland, this question is not relevant.

Sanctions

What sanctions can the regulator impose?

As no specific securitisation legislation exists in Switzerland, this question is not relevant.

Public disclosure requirements

What are the public disclosure requirements for issuance of a securitisation?

As Switzerland has enacted no specific legislation covering securitisation transactions, there are no public disclosure requirements relating to such transactions. If securitised debt is offered to the public and/or listed at the SIX Swiss Exchange, the general prospectus and listing requirements provided for in the Code of Obligation and the listing rules of the SIX Swiss Exchange must be taken into account and fulfilled. These rules correspond to the rules which apply to ordinary straight bond issuances.

What are the ongoing public disclosure requirements following a securitisation issuance?

Each special purpose vehicle issuing and listing securitised debt on the SIX Swiss Exchange must comply with the ongoing reporting obligations provided for in the SIX listing rules. Regular reporting obligations exist with respect to the publication of the annual financial statements of the issuer, changes to the issuer's company name, address details or external auditor, specific events relating to the debt listed (eg, without limitation, increases, early redemption and change of paying agent) or bankruptcy and similar proceedings. Further, issuers of securitised debt must inform the market of any price-sensitive facts which have arisen in their sphere of activity (ad hoc publicity).

ELIGIBILITY

Originators

Outside licensing considerations, are there any restrictions on which entities can be originators?

There are no restrictions on which entities can act as originators in a Swiss securitisation transaction. The most active

companies acting as originators in Switzerland are auto-leasing companies and credit card providers. Further originators include banks and other financial institutions and market lending platforms.

Receivables

What types of receivables or other assets can be securitised?

Securitised assets in Swiss securitisation transactions include:

- auto-lease assets;
- trade receivables;
- credit card receivables;
- (customer) loan portfolios;
- residential mortgage loan portfolios; and
- commercial real estate loans.

In principle, any type of asset may be used in a securitisation transaction from a Swiss law perspective. However, the limiting factor is usually the view of the market on whether a specific asset is suitable in a securitisation context.

Investors

Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

No, there are no such restrictions.

Custodians/servicers

Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

There are no specific requirements posed by Swiss law with respect to the person acting as custodian, account bank and portfolio administrator or servicer in a securitisation transaction. In public securitisation transactions where it is usually necessary to appoint a paying agent, the listing rules of the SIX Swiss Exchange require such paying agent to be a bank or securities dealer with the necessary professional and technical capabilities and which is supervised by the Swiss Financial Market Supervisory Authority.

Public-sector involvement

Are there any special considerations for securitisations involving receivables with a public-sector element?

No special considerations apply for securitisations involving receivables with a public-sector element. However, depending on the status of the relevant originator, it may be necessary to address certain additional questions in the due diligence process, such as the potential immunity of the originator which may affect the enforceability of the securitised assets.

TRANSACTIONAL ISSUES

SPV forms

Which forms can special purpose vehicles take in a securitisation transaction?

If the parties decide not to use a trust structure governed by foreign law (which is generally recognised in Switzerland), they will often use a Swiss SPV. This is particularly the case for transactions relating to an underlying real estate asset portfolio located in Switzerland, as in this case the use of a non-Swiss SPV may lead to the incurrence of cantonal withholding taxes on interest payments under the issued debt which is secured by the relevant real estate assets. The establishment of a foreign SPV may also not be an option for data-protection reasons. Swiss issuance vehicles can either take the legal form of a stock corporation or a limited liability company.

SPV formation process

What is involved in forming the different types of SPVs in your jurisdiction?

In practice, it does not make a big difference whether the parties decide to set up the SPV in the form of a stock corporation or limited liability company. From a transactional perspective, the main difference between these two entities are the initial capital requirements – the minimum capitalisation for stock corporations is Sfr100,000 (of which a minimum of Sfr50,000 must be paid in), whereas it is only Sfr20,000 for limited liability companies. Setting up an SPV usually takes one to two weeks. In order to ensure that the SPV is bankruptcy remote, the purpose of the SPV (which is set out in its articles of association) is usually limited to the securitisation transaction in question. Further, it may be necessary to implement golden shareholder structures (ie, structures where an independent shareholder has certain veto rights) in order to fulfil the requirements of rating agencies, as Swiss SPVs are typically held by the originator.

Governing law

Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

The parties to a receivables or asset purchase agreement are generally free to choose the governing law. They are also free to have the transfer governed by another law than the governing law of the asset. However, when making a choice of law with respect to the transfer and assignment of receivables, the parties must consider Article 145 of the Private International Law Act, which provides that a choice of a law other than the law governing the receivables cannot be asserted against the third-party debtor without the latter's consent and a party could also raise objections to the validity of the assignment under the law governing the assigned rights. As a result, the parties of a securitisation transaction typically choose to govern the sale of receivables or other rights by the law governing the relevant receivables or rights.

Asset acquisition and transfer

May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

In order to ensure that the SPV is bankruptcy remote, the purpose of the SPV (which is set out in the articles of association) is usually limited to the securitisation transaction in question. This has, among other things, the effect that a SPV may transfer its assets only after issuance of its securities in very limited circumstances. The acquisition of new

assets is quite common in revolving securitisation transactions, which by their nature require this transactional element. The acquisition of assets is in any case subject to certain conditions, limits and eligibility criteria.

Registration

What are the registration requirements for a securitisation?

In Switzerland, no registration requirements exist for a securitisation.

Obligor notification

Must obligors be informed of the securitisation? How is notification effected?

If the underlying agreements governing the receivables do not exclude an assignment, notification of the creditors of the assignment is not required. However, the parties to the transaction may have an incentive to notify the underlying obligors, as such a notification will prevent them from validly discharging their obligations by making a payment to the originator as debtor. If the parties decide to transfer the receivables via an assumption of contract, the consent of the underlying obligors is required for the transfer to be valid and effective. Notification is usually effected by informing the obligors in writing.

What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

In order to comply with Swiss data protection laws, the parties typically obtain a waiver from the underlying obligor. Such waivers are often included in the underlying agreement governing the receivables. If the relevant waiver is drafted properly, it is generally considered to be valid from a Swiss law perspective. In any case, a breach of any applicable data protection or similar law does not have the effect that the assignment would not be valid and binding.

Credit rating agencies

Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

As there is no overall securitisation framework, Swiss law does not provide for any specific rules regulating the activities of credit rating agencies and their relationships with issuers. The relationship between credit rating agencies and issuers is therefore only governed by the contractual arrangements existing between these parties in connection with securitisation transaction.

In Swiss issuances, credit rating agencies consider various factors when assessing asset-backed securities structures, including:

- whether the underlying receivables agreement contains any transfer restrictions or restrictions on the assignability of the receivables;
- the availability of true sale opinions;
- which credit enhancement methods have been chosen;
- the constitution of the board of directors of the special purpose vehicle (SPV) (ie, the appointment of an independent board member); and

- the ownership structure of the SPV (ie, a wholly owned subsidiary of the originator or a vehicle held by independent shareholders).

Directors' and officers' duties

What are the chief duties of directors and officers of SPVs? Must they be independent of the originator and owner of the SPV?

Absent specific securitisation regulation, there exist no specific rules for directors and officers of SPVs acting as issuers. However, Swiss corporate law provides that the members of the board of directors of a Swiss stock corporation and the managers of a Swiss limited liability company have certain non-transferable and inalienable duties.

These duties include the following elements:

- the ultimate management of the company and the issuing of the necessary directives;
- the establishment of the organisational structure of the company;
- the structuring of the accounting system and of the financial controls, as well as the financial planning to the extent that this is necessary for the management of the company;
- the appointment and the removal of the persons entrusted with the management and representation and the granting of signing authority;
- the ultimate supervision of the persons entrusted with the management, particularly in view of compliance with applicable laws, the articles of association and regulations and directives;
- the preparation of the annual report, as well as the preparation of the general meeting of shareholders and the implementation of its resolutions;
- the notification of the relevant court in the case of over-indebtedness of the company;
- the passing of resolutions regarding the subsequent payment of capital with respect to non-fully paid-in shares; and
- the passing of resolutions confirming increases in the share capital and related amendments to the articles of association.

In addition, Swiss law does provides for no rules according to which the director or officers of the SPV must be independent of the originator and owner of the SPV. However, from a Swiss corporate law perspective, the board of directors or managers is (subject to a very limited number of exceptions) not to be considered to be the shareholders' (or originator's) agent, but only has responsibility towards the company. However, it is a standard request of credit rating agencies that at least one independent board member is appointed.

Risk exposure

Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

As Switzerland has enacted no legislation governing securitisation transactions, there are no skin-in-the-game or similar risk-retention requirements for originators or arrangers in place in Switzerland. However, in order to fulfil certain rating requirements, many transactions include similar covenants, as this is the case in transactions which fall under the European securitisation regime, including specific skin-in-the-game covenants.

SECURITY

Types

What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

In Swiss securitisation transactions, the use of comprehensive security packages is common. The most commonly used forms of security taken out are:

- an assignment for security purposes of the underlying trade or other receivables;
- pledges over bank accounts of the special purpose vehicle; and
- the assignment of certain claims under the transaction documents.

Perfection

How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

The security is typically held by a security trustee for the benefit of the investors. The formal and procedural requirements to perfect the security depend on the form of the security and the type of asset which serves as collateral.

Enforcement

How do investors enforce their security interest?

Security established in connection with Swiss securitisation structures may be enforced by either private enforcement or official enforcement proceedings. In the course of private realisation, the assets serving as security can be either sold to a third party in a private sale or auction or acquired by the security trustee or agent for the account of the secured parties. Any such transaction must be made at market value. Private enforcement is permitted only if the security provider has consented to this enforcement method in advance. If the security trustee or agent chooses to enforce the security by way of official enforcement proceedings, it must apply for the commencement of debt-collection proceedings with the competent debt-collection office. Such proceedings involve multiple states, some of which require court involvement and are cumbersome. The actual enforcement typically takes the form of a public auction.

Commingling risk

Is commingling risk relating to collections an issue in your jurisdiction?

In the international securitisation context, the commingling risk is usually addressed by implementing a trust structure. Although the concept of a trust does not exist under Swiss law, Switzerland accepts the Hague Trust Convention which has the effect that foreign trust structures are generally recognised and can thus be used to mitigate any commingling risk. However, structures making use of a trust are the exception in the Swiss market. Rather, the commingling risk is addressed by the following (non-exhaustive) measures:

- the introduction of short intervals for the transfer of collections to the special purpose vehicle (SPV);

- instructing debtors to make all payments directly to a bank account held by the SPV (in any case or after certain trigger events); and
- the introduction of mechanisms to ensure that debtors are notified immediately following certain trigger events and are instructed to make all payments to the SPV.

TAXATION

Originators

What are the primary tax considerations for originators in your jurisdiction?

The main tax considerations of originators in Switzerland relate to transfer and value-added taxes. Depending on the kind of assets transferred, such taxes may be triggered by entering into a securitisation transaction. A transfer of real estate can also trigger real estate transfer taxes. In addition, any undisclosed reserves on the assets transferred may be deemed to be realised and subject to corporate income tax.

In order to get the necessary comfort without specific tax legislation covering securitisation transactions, the parties involved usually obtain advance tax rulings from the competent Swiss tax authorities covering the necessary tax aspects.

Issuers

What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

Swiss special purpose vehicles (SPVs) are subject to ordinary income tax. In specific cases, a special tax status may be applicable (eg, the holding regime). However, since the income and expenses must match the level of the SPV, there should be no substantial taxable profit. Interest payments may be subject to Swiss withholding tax.

Investors

What are the primary tax considerations for investors?

The issuance of securitised debt by a Swiss special purpose vehicle generally qualifies as an issuance of bonds from a Swiss tax law perspective. Accordingly, any interest payments will trigger Swiss withholding tax (currently 35%). For Swiss investors, the withholding tax is fully recoverable. The level of the recoverability for foreign investors depends on the domicile of the investor and the applicable double tax treaty.

The payment of withholding tax may be avoided by choosing a non-Swiss issuance vehicle. However, such structures are scrutinised by the Swiss tax authorities and may be judged to be part of a tax avoidance scheme. Non-Swiss structures may also lead to additional issues with respect to other aspects of the structure (eg, issues in connection with data transfers abroad). If 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, if the transaction is secured by Swiss real estate. This cantonal withholding tax may be recoverable, depending on applicable double tax treaties.

Swiss resident entities and individuals holding securities as part of their business assets may need to include any income and gains (or losses) realised in their profit and loss statement relevant for corporate income distributions.

Swiss resident individuals holding the securities as part of their private assets must include any interest payments as

taxable income in their personal tax return. A capital gain realised on the sale of the securities should qualify as a tax-exempt capital gain. A realised capital loss is not tax deductible.

BANKRUPTCY

Bankruptcy remoteness

How are SPVs made bankruptcy-remote?

The main way to make an SPV bankruptcy remote is to limit the corporate purpose of the SPV to the specific securitisation transaction in question and to provide for specific restrictions on the change of the legal form or any amendments to the SPV's constitutional documents. Other elements include the introduction of limited recourse and non-petition provisions and waivers of the set-off provisions for any counterparties dealing with the SPV.

True sale

What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

Neither statutory law nor case law provide for a straightforward test to define whether a sale of securitisation receivables qualifies as an effective or true sale. In order to mitigate any risk of re-characterisation of the asset transfer by a bankruptcy court, parties of securitisation transactions lay particular emphasis on the transfer of the credit risk from the seller (originator) to the purchaser (SPV). The fact that the seller will remain in control of the collection process does not lead to a re-characterisation of the transaction as not being a true sale, provided that the purchaser has the right to notify the creditors at any time and direct them to pay it directly. Further, the asset transfer should meet the arm's-length test, as this element would likely be taken into account by a court when making a true sale analysis. Finally, the parties will usually avoid introducing any repurchase obligations of the originator other than standard repurchase obligations relating to ineligible receivables. The mere option of the originator to repurchase receivables is usually not considered to cut across the true sale analysis.

Consolidation of assets and liabilities

What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

Swiss law, as a general rule, does not provide for the concept of 'consolidation' in the case of an insolvency. Nevertheless, the parties to a Swiss securitisation transaction will usually ensure that the SPV and its shareholders are managed independently and have different branding to completely rule out that the SPV is not qualified as being part of the same group of companies as the originator.

UPDATES AND TRENDS

Recent developments

Are there any rules governing securitisations pending in your jurisdiction or reforms under way, such as prohibitions on financial firms betting against the securities they package, improved disclosure and oversight of the asset-backed securities market, rules limiting bank compensation structures that incentivise risk, etc?

Not applicable.

LAW STATED DATE

Correct on

Give the date on which the information above is accurate.

1 June 2019.