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Asset-backed securitisation in Turkey

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In the last 10 years the major banks in the republic of Turkey have securitised:

- international credit card receivables;
- export receivables;
- cheques and travellers' cheques remittances;
- electronic remittance payments (generated primarily from Turkish workers in Germany); and
- diversified payments in the international financial markets.

These future-flow transactions have provided long-term, lower-cost hard currency financing to banks in Turkey.

Turkish banks with high-quality assets but lower ratings from credit rating agencies have been able to get cheaper funds through securitisation than by borrowing from the money markets. The major banks involved in international asset securitisation have become more liquid, thus reducing risk and cost.

This chapter examines the Turkish legal issues involved in an international credit card receivables securitisation.

Background

Under Turkish law, Turkish banks are the originators of transferred receivables. On the initial closing date of a transaction the originator sells and assigns the transferred receivables to a special purpose vehicle (SPV) incorporated outside Turkey.

The relevant certificates are issued by a trust. The SPV transfers a promissory note to the trustee for the benefit of the certificate holders, which is secured by the SPV's right to, title to and interest in the transferred receivables and transaction documents. The securities issued by the trust on the closing date represent undivided beneficial ownership interests in the trust's assets. The aggregate principal amount and interest rate of the certificates should match the principal amount and interest rate of the SPV note.

An insurance company, pursuant to the terms of a financial guaranty insurance policy, guarantees payments of principal and interest on the certificates issued to the certificate holders.

True sale

Under Turkish law, a 'true sale' is recognised as the assignment of existing and future receivables, provided that the assignor makes such an assignment to the assignee without recourse to the assignor. However, in the event of the assignor's insolvency, bankruptcy or non-performance, the assignee has recourse against the assignor. This does not affect the validity of the true sale.

Thus, the originator's true sale of transferred receivables to the SPV results in a transfer. This effectively removes the assets in question from the originator's estate, putting them beyond the reach of the originator's third-party creditors or its receiver, liquidator, administrator or trustee in bankruptcy.

Under Article 163 of the Code of Obligations (Law 818), an assignment is valid provided that the assignor and assignee conclude a written agreement for it. Giving notice to a debtor does not affect the agreement's validity, while the absence of such notice releases a debtor from its obligations where it pays the assignor directly.

The same legal requirements apply to a true sale of both existing and future receivables.

If a Turkish bank faces financial difficulties, the Banking Supervisory Board will either transfer its management and shares to the Savings Deposit Insurance Fund or cancel its banking licence by declaring insolvency. If transferred to the Savings Deposit Insurance Fund, the bank is

considered solvent and continues all its banking activities in accordance with its licence. However, if its banking licence is cancelled, liquidation ensues. Thus, a true sale of transferred receivables would include future receivables arising after the originator's management and shares had been transferred to the Savings Deposit Insurance Fund, but not after the commencement of insolvency, bankruptcy or receivership proceedings.

The originator cannot generate further receivables if its banking licence is cancelled.

If a banking licence is going to be cancelled, the originator's creditors cannot challenge the originator's receivables or receivables incurred until this has been done. However, upon cancellation no receivables are incurred, as the originator is unable to perform any activities to generate receivables.

Furthermore, cash from those receivables credited to the SPV account cannot be challenged by the originator's creditors, trustee or receiver in bankruptcy.

Even if the transaction is structured as a present sale, making it immune to claims from creditors or a receiver, liquidator or trustee in bankruptcy, there is no risk that it could be reclassified as a transaction in which the originator retains an interest in future receivables because an assignment of future receivables would be recognised as a true sale.

If the originator's banking licence is cancelled as a result of financial difficulties or insolvency, it cannot re-acquire requisition amounts. All amounts owed from the sale of the receivables become due and payable and must be registered as an unsecured claim with its liquidators. In addition, neither the originator nor its affiliates may continue to service the transferred receivables or act as collection agents during the period following the sale once its licence is cancelled.

Perfection and priority

The Civil Code (Law 4721) governs the granting of a security interest over present and future receivables. According to Article 954, a pledge can be established over credits and other assignable rights. An agreement to constitute a pledge of a credit that is not represented by

a negotiable instrument must be in writing (Article 955). The pledgee and pledgor may notify the debtor of the pledge. Under Article 939, title ownership of the credits and rights pledged to a pledgee remain with the pledgor. The pledgee can only cash them in and offset the cash against its claims secured by such a pledge. Thus, although granting a present security interest in future receivables (including post-petition receivables) is possible, such a security interest does not constitute a true sale. However, in the event that the receivables are cashed and deposited into a bank account in, for example, the United States, a security interest may be granted under US law due to the Turkish conflict of law rules.

In the event that the originator grants an assignment of, or security interest in, the receivables to more than one purchaser or secured lender through fraud, mistake or otherwise, the purchaser that first notified the debtor of the assignment or security interest has priority over other purchasers. The assignment or pledge agreement with respect to the receivables is binding upon the debtors only if they are notified accordingly.

Notice of assignment

Credit card networks have no obligations and no liability if they make payments directly to the originator if they are not notified of the assignment of a receivable (including a future receivable). However, the absence of such a notice does not affect the validity of the assignment or its enforceability against the originator.

Where the credit card networks receive notice of the assignment, they must pay the assignee. If they pay the originator after receiving notification, they remain obliged to pay the same amount to the assignee. This is also binding on any of the originator's third-party creditors.

Agreement and consent forms and a notice of sale delivered to and acknowledged by the credit card networks in connection with the transaction are adequate for the trustee to secure the benefit of any obligor notice. Other than execution, delivery and acknowledgment of the notice's receipt, no other formality need be observed in order to establish that such notice has become effective.

Notice of assignment may be given to the credit card networks in respect of future receivables arising after the date of such notice. However, they will be released from their payment obligations if they have made any payment to the originator before such notice.

Bankruptcy

According to Article 324 of the Commercial Code (Law 6762), a company may file a petition for voluntary bankruptcy if it cannot pay its debts or loses two-thirds of its net worth (ie, paid-up capital plus legal reserves). Any creditor can also bring a petition for the commencement of bankruptcy proceedings against a debtor should a debt fall due. In both voluntary and involuntary bankruptcy procedures, the commercial court of first instance must declare the company's bankruptcy.

However, according to the Banks Act (Law 5411), if an originator's banking licence has been cancelled all executionary and bankruptcy procedures against it are suspended and only the Savings Deposit Insurance Fund can petition for its bankruptcy. In this event, no third-party creditors, including the SPV and/or trustee, can take legal action against it.

In insolvency proceedings the originator's business and/or assets are liquidated and sold by bankruptcy officials. The purchaser is allowed to acquire such business and/or assets subject to the SPV's and/or trustee's rights in the future receivables.

The SPV's and/or trustee's claims against the originator are unsecured claims ranking equal with those of all other unsecured creditors.

If the originator carries out the present sale of transferred receivables (including future and post-petition receivables), there is no basis in domestic law for any of the following to rescind or void the sale, or otherwise claim any right or interest in any such receivables or proceeds thereof:

- the originator's creditors;
- the receiver or liquidator;
- the originator itself; or
- a trustee in any applicable insolvency proceedings.

There are no grounds for voiding the sale unless the assignee is aware of, or has acted together with the assignor in, a fraudulent transfer. Third parties cannot prevent the SPV from acquiring any of the future receivables and related collections as they are generated.

In the event of the originator's bankruptcy or receivership, any existing contract with the credit card companies is automatically terminated. The originator becomes unable to enter into a new contract with any credit card company that is free from the SPV's and/or trustee's claims.

According to Article 280 of the Execution and Bankruptcy Law (Law 2004), an assignment of receivables becomes null and void if the assignor makes it in the five years before its insolvency or bankruptcy with the intention of preventing the collection of claims by third-party creditors and the assignee is aware of this intention.

Tax liability

The SPV's payment to the originator is regarded as a consideration made against the true sale. The SPV, trust, insurance company, certificate holders and trustee are not subject to Turkish taxes, or deemed to be licensed or to have permanent representation in Turkey. The transaction is treated as a current sale of all current and future receivables by the originator to the SPV.

Article 30/7 of the Corporate Tax Law (Law 5520) states that any payments made to tax-haven jurisdictions (the list of tax-haven jurisdictions is yet to be announced by the Council of Ministers) shall be subject to 30 per cent withholding tax. In addition, Article 30/8 states that the Council of Ministers is entitled to determine the withholding rates defined within Article 30 from 0 per cent to double the rate regarding each field of activity. However, according to Article 30/7-b, interest, insurance and reinsurance payments (with respect to a loan) made to a financial institution in a tax-haven jurisdiction will not be subject to withholding under Article 30, and accordingly Article 30.5.3 of the Corporate Tax General Communiqué determines the SPVs established solely for securitisation transactions in a tax-haven jurisdiction where the originator is a Turkish bank

The assignment of receivables by the originator to the SPV or the taking of any additional steps to enforce or perfect such assignment is subject to the following taxes:

- stamp duty at 0.75 per cent (payable from the date of introduction of all relevant agreements and documents);
- court charges imposed pursuant to the Law on Charges (Law 492) – that is, 5.4 per cent of the amount in question (one-quarter of which is payable at the commencement of any suit or action and the remainder upon judgment);
- court charges payable in connection with any appeal; and
- attorneys' fees payable in accordance with the tariff in force at the time of filing a lawsuit, as published in the *Official Gazette*, together with the other court expenses.

The corresponding assignment of a security interest in order to secure the SPV note to the trustee is not subject to any tax.

Payments received by the trust, trustee, certificate holders and insurance company are not subject to Turkish taxes, provided that none of these is an entity incorporated or organised in Turkey, or:

- is engaged in trade or business in Turkey through a corporation, limited liability company, trust or partnership;
- has other contractual joint ventures or arrangements with a resident of Turkey; and/or
- is a participant in other financing arrangements with other residents of Turkey, such as lending money to a resident of Turkey or holding or guaranteeing notes from other receivables transactions sponsored by Turkish residents.

However, corporate and income taxes apply if an entity receives payment through a separate branch office in Turkey.

Authorisation, licences and collection

The following need no authorisation to do business in Turkey and do not need to obtain a licence to engage in any specific business as a result of participating in the transaction:

- the SPV;
- the trustee;
- the trust;
- the certificate holders; and
- the insurance company.

In particular, the insurance company needs no licence, nor must it meet any other requirements under Turkish insurance regulations, in order to issue a policy.

Approvals from the government or the financial authority, or other formalities, are not necessary for the SPV to purchase transferred receivables from the originator or for the trust or trustee to acquire the SPV note. In addition, no formalities exist for the SPV or the trust or trustee to:

- receive collections of transferred receivables either directly from MasterCard, Europay, American Express or Visa, or through the originator, trust or trustee; or
- enforce its rights against MasterCard, Europay, American Express or Visa, whether in its own name or in that of the originator, trust or trustee, in the Turkish courts.

On the other hand, if the SPV is established in a tax-haven jurisdiction (yet to be announced by the Council of Ministers), the originator bank is required to provide the Tax Department, within one month of issue, with information regarding:

- the incorporation capital;
- the shareholder structure;
- the manager of the SPV; and
- the number of securities issued thereby, and by whom and for how much such securities are purchased.

In addition, the originator bank must inform the Tax Department of to whom the redemption of such securities has been made within one month of the redemption.

Judgments

Under the Act on International Private Law and Procedural Law (Law 5718), a judgment made by a foreign court is unenforceable in the Turkish courts unless:

- a treaty between Turkey and the country in which the court is located provides for the reciprocal enforcement of judgments;
- there is *de facto* reciprocity in the enforcement of judgments between the two countries; or
- a provision in the law of such country provides for the enforcement of judgments of Turkish courts.

Moreover, as the foreign plaintiff(s) in any suit or action brought against the originator in a Turkish court, the SPV, trust, trustee, certificate holders and/or insurance company may be required to provide security for court costs unless the plaintiff is considered to be a national of:

- one of the contracting states of the Hague Convention (ratified by Law 1574); or
- a state that has signed a bilateral treaty with Turkey, which has been duly ratified and contains a reciprocal waiver of security.

Turkey is an emerging market with its own dynamics. Future-flow securitisations have become a popular source of funding for the major Turkish banks as these transactions allow access to lower-cost hard currency. A well-developed legal system has provided the basic framework for cross-border securitisation structures in Turkey.

With the issuance of the Law Amending the Laws related to the Housing Finance System (Law 5582) in March 2007, which aims to resolve housing problems by

establishing an efficient housing finance system, the realisation of onshore residential mortgage-backed securitisations in Turkey will also be available after issuance of certain secondary legislation, subject to market conditions.