



Ursula Rath

Supreme Court ruling may make bank securitisations more onerous

schönherr
ATTORNEYS AT LAW



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Introduction

A recent seminal ruling⁽¹⁾ of the Supreme Court has clarified that banking secrecy rules substantially limit the ability of a credit institution to transfer its loan receivables. These limitations are particularly relevant in relation to securitisation transactions and loan portfolio sales, which are popular means of improving the regulatory capital and liquidity structure of credit institutions.

Because assignments of loan receivables that violate banking secrecy rules are invalid, particular care must be taken when structuring securitisations and loan portfolio sales.

Supreme Court ruling

Facts

The case was initiated by a Czech undertaking (a non-credit institution) that had acquired loan receivables by way of assignment from an Austrian credit institution. In the course of the assignment, the Austrian credit institution transferred certain information relating to the borrowers (eg, names and addresses) to the assignee.

Decision

The court recognised that information such as the names and contact data of a borrower or client, as well as details of the loan, its volume and repayment terms, is protected by banking secrecy. It also observed that tension may arise between the necessary transfers of information in the course of a receivables assignment and the confidentiality interests of a banking client.

Whether the interests of clients in keeping their banking affairs secret outweigh the

bank's interests in assigning its loan receivables must be answered by balancing the interests involved. In this respect, the court clarified that legitimate privacy interests of a client will prevail, as long as the bank has not obtained a final judgment. As soon as information covered by banking secrecy is made public in the course of civil proceedings and the credit institution obtains a final judgment, legitimate privacy interests of a client will come second to the interests of the credit institution.

Based on this reasoning, the court concluded that a transfer of bank receivables that are not yet due and for which the credit institution has not yet obtained a final judgment is permissible only if:

- the assignee is itself subject to banking secrecy rules; or
- the client has explicitly consented to the transfer of information.

A loan assignment in violation of banking secrecy rules would be invalid.

Impact on bank securitisations

Under Austrian law, a securitisation special purpose vehicle (SPV) is defined as a company:

- whose sole purpose of business is to carry out securitisation transactions;
- which is structured in such a way as to separate the company's own obligations from those of the originator; and
- whose legal and economic owners can pledge or sell the associated rights without restriction.

As long as a securitisation SPV acts within its limited scope of business activities (eg, issuing debt securities, taking out loans, entering into hedges and ancillary transactions relating to this business activity) to purchase an originator's receivable or to assume risk associated with such receivables, no banking licence is required. The licensing exemption also applies to foreign securitisation SPVs, provided that they act within such limited scope of activities.

With regard to receivables where the originator is a credit institution, the securitisation SPV must comply with banking secrecy obligations in the same way as the credit institution acting as originator and the credit institution which administers such receivables (this being either the originator or another credit institution).

Although the court did not specifically rule on this (because the assignee was not a securitisation SPV), leading commentators have argued that since securitisation SPVs are themselves bound by banking secrecy and a customer's privacy interests would therefore be sufficiently protected, an assignment of loan receivables to a securitisation SPV should be permissible irrespective of whether:

- the debtor is in default;
- the claims are due and payable; or
- a final judgment has been obtained.

While credit institutions may be inclined to transfer part of their loan book in light of increasingly stringent own funds requirements, the ruling will certainly have an impact on structuring bank securitisations and loan portfolio sales in future. This change will

apply equally to performing loans and to non-performing loans where the bank has not yet obtained a final judgment. Although other ways to assign loan receivables validly may exist - and it remains to be seen whether the Supreme Court will uphold its stringent approach - the ruling will likely enhance the position of securitisation SPVs, since the feasibility of alternative structures appears rather limited due to the restrictions outlined by the court.

For further information on this topic please contact Ursula Rath or Teresa Fritzsche at Schoenherr by telephone (+43 1 53 43 70), fax (+43 1 53 43 76100) or email (u.rath@schoenherr.eu or t.fritzsche@schoenherr.eu).

Endnotes

(1) Supreme Court, November 26 2012, 9 Ob 34/12h.

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