

GETTING THE
DEAL THROUGH 

Structured Finance & Securitisation 2015

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CONTENTS

Global Overview	5	Mexico	38
Patrick D Dolan Dechert LLP		Andrés Nieto Von Wobeser y Sierra, SC	
Canada	7	Nigeria	42
Elana M Hahn, William (Bill) K Jenkins and Dennis R Wiebe Dentons Canada LLP		Chike Obianwu, Alex Ezenagu and Modupe Dabiri Templars	
Denmark	12	Russia	46
Michael Steen Jensen and Mikkel Fritsch Gorrissen Federspiel		Konstantin Kroll Orrick, Herrington & Sutcliffe LLP	
France	17	Singapore	51
Olivier Hubert De Pardieu Brocas Maffei		Matthew Hebburn, Lian Chuan Yeoh, Louise Hennessey and Ming Wei Loo Allen & Overy LLP	
India	22	Turkey	56
Justin Bharucha, Sugandha Kamal and Eva Tanna Bharucha & Partners		Hakan Yazıcı and Pınar Başdan YazıcıLegal	
Japan	27	United Kingdom	61
Motohiro Yanagawa, Takashi Tsukioka and Yushi Hegawa Nagashima Ohno & Tsunematsu		Sanjev Warna-kula-suriya, Tolek Petch and Rory Botros Slaughter and May	
Malta	33	United States	66
Richard Ambery and Nicholas Curmi Ganado Advocates		Patrick D Dolan and Kira N Breton Dechert LLP	

Preface

Structured Finance & Securitisation 2015

First edition

Getting the Deal Through is delighted to publish the first edition of *Structured Finance & Securitisation*, which is available in print, as an e-book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the 13 jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Patrick D Dolan of Dechert LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH 

London
March 2015

Malta

Richard Ambery and Nicholas Curmi

Ganado Advocates

General

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

The Securitisation Act (Chapter 484, the Laws of Malta) (the Act) provides the legal framework for the establishment of securitisation vehicles and the securitisation transactions undertaken by those vehicles.

2 Does your jurisdiction define which types of transactions constitute securitisations?

The Act is extremely broad in scope. Securitisation transactions are defined by the Act as transactions or arrangements pursuant to which a securitisation vehicle:

- acquires securitisation assets from an originator (ie, true sale securitisation);
- assumes risks from an originator (ie, synthetic securitisation); or
- grants a secured loan or other secured facility to an originator (ie, whole business securitisation).

3 How large is the market for securitisations in your jurisdiction?

To date, nine securitisation vehicles have been established in Malta under the Act, with an aggregated balance sheet of €1.4 billion as of the third quarter of 2014. These figures are expected to double in 2015.

Regulation

4 Which body has responsibility for the regulation of securitisation?

The competent authority responsible for the regulation of securitisation in Malta is the Malta Financial Services Authority (MFSA).

5 Must originators or issuers be licensed?

There is no requirement for originators to be licensed in order to participate in a securitisation transaction.

With regard to the issuer, the Act distinguishes between public securitisation vehicles and private securitisation vehicles. A public securitisation vehicle is a securitisation vehicle that issues or intends to issue financial instruments to the public on a continuous basis. A private securitisation vehicle is, by implication, a securitisation vehicle that does not issue or intend to issue financial instruments to the public on a continuous basis. Private securitisation vehicles are not required to be licensed by the MFSA but are required, pursuant to article 18 of the Act, to notify the MFSA of their intention to enter into one or more securitisation transactions prior to commencing business. This notification must be made in the standard form prescribed by the MFSA (the Notification Form). See question 17.

Public securitisation vehicles are required to be licensed by the MFSA prior to issuing financial instruments to the public. At the time of writing, there are no public securitisation vehicles licensed by the MFSA.

Other than the licensing requirement for public securitisation vehicles, Maltese securitisation vehicles are specifically exempt from licensing or authorisation requirements (in Malta) of any kind for the sort of activities in which they might engage. Activities that would normally require licensing of an entity not established as a securitisation vehicle would include those that would require authorisation (under the Investment Services Act, the Banking Act or the Financial Institutions Act, for example). Of

particular relevance to transactions with a managed or dynamic portfolio of assets, the Act provides that Maltese securitisation vehicles are not to be considered collective investment schemes (including in the form of an 'alternative investment fund' under the Alternative Investment Fund Managers Directive), thereby exempting them from the local regulatory regime applicable to collective investment schemes (including the regime for alternative investment funds).

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

In determining whether to grant a public securitisation vehicle licence, the MFSA will consider whether:

- the vehicle has an adequate organisation and adequate resources to exercise its business;
- the persons who direct the business of the vehicle are suitable persons to ensure its prudent management; and
- the vehicle satisfies such other conditions as may be imposed by the MFSA.

The MFSA may impose restrictions on or revoke a securitisation vehicle's licence if:

- any document or information provided to the MFSA is false in any material particular or if the holder of a licence conceals from, or fails to notify to the MFSA of any information (or change in information) that it was required to reveal or notify to the MFSA under the Act;
- a licensed vehicle fails to comply with any of the provisions of this Act or any directives issued under the Act or with any conditions under which the licence was granted; or
- if the holder is likely to become unable to meet its obligations.

7 What sanctions can the regulator impose?

In addition to the restrictions that may be imposed on, or the potential revocation of, a securitisation vehicle's licence, article 19 of the Act makes it an offence for a public securitisation vehicle to issue securities to the public without an MFSA licence, or to fail to comply with any condition, obligation, requirement directive or order made under article 19. If guilty of such an offence, the vehicle shall be liable to a fine not exceeding €116,469.

Eligibility

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

There are no restrictions on which entities can be originators.

9 What types of receivables or other assets can be securitised?

All types of assets and receivables can be securitised, whether existing or future, movable or immovable, tangible or intangible.

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

There are no such limitations.

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

There are no restrictions on who may be a service provider of a Maltese securitisation vehicle. Naturally, each service provider must be appropriately licensed (in its own jurisdiction and possibly in Malta), if a licence is required for it to provide its particular services, irrespective of the fact that the person receiving those services is a securitisation vehicle.

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

There are no special considerations in relation to originators, assets, investors and service providers for securitisations that involve a public sector element.

Transactional issues

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

Securitisation vehicles established in Malta pursuant to the Act can take the form of a company, partnership, trust or any other legal structure that the MFSA may permit, by notice, to be used for a securitisation transaction.

The Act contemplates the possibility of foreign legal structures being established as securitisation vehicles that are subject to the Act, provided that these legal structures are established in a jurisdiction recognised by the MFSA. However, to date all securitisation vehicles established under the Act have been incorporated in Malta, and the MFSA has not yet expressly recognised any particular jurisdictions in this regard. Also, the potential benefits of having a foreign vehicle established pursuant to the Act have yet to be identified.

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

A securitisation vehicle can be incorporated in Malta within a day or two of submission of its organisational documents to the Registry of Companies (in the case of a securitisation vehicle established as a company or partnership).

If the vehicle is established as a company and does not intend to list its securities or offer them to the public, it can be established as a private limited company with a single director, two shareholders (one of whom can hold a single non-voting and non-participating share) and a minimum authorised and issued share capital of €1,165 (a minimum 20 per cent of which must be paid up). The Registry of Companies registration fee for a private limited company (calculated on the minimum amount of authorised share capital) is currently €245.

If the vehicle is established as a company and intends to list its securities or offer them to the public, then it must be established as a public limited company with two directors, two shareholders (one of whom can hold a single non-voting and non-participating share) and a minimum authorised and issued share capital of €46,588 (a minimum 25 per cent of which must be paid up). Share capital can be applied towards the initial and ongoing expenses of the company, whether it is a private or public company. The Registry of Companies registration fee for a public limited company (calculated on the minimum amount of authorised share capital) is currently €750.

It is expected that the Companies Act (Chapter 386 of the Laws of Malta) (the Companies Act) will be amended shortly to allow private limited companies to list their debt securities, provided that they are not also offered to the public.

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

Yes, there is no restriction on the governing law of the assignment of receivables (or transfer of assets) to the securitisation vehicle. In fact, article 17 of the Act expressly provides that the parties to a securitisation transaction shall be free to choose any law to govern contracts relating or ancillary to a securitisation transaction. In practice, these agreements (as well as the security agreements) are almost always governed either by the law of the jurisdiction of the assets or receivables or the governing law of the funding instruments.

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

It is possible for a securitisation vehicle to have a dynamic portfolio of assets. There are no restrictions or conditions applicable to the acquisition or transfer of assets by a vehicle following the issuance of its securities. It is also possible for a securitisation vehicle to enter into multiple securitisation transactions, as well as issue different series (or tranches, or both) of securities, subject to the public securitisation vehicle authorisation requirement in the case of an issue of securities to the public on a continuous basis.

17 What are the registration requirements for a securitisation?

A private securitisation vehicle is required, pursuant to article 18 of the Act, to notify the MFSA of its intention to enter into one or more securitisation transactions prior to commencing business as a securitisation vehicle. The Notification Form must include the basic corporate information of the securitisation vehicle and details of the securitisation transaction, including in relation to the nature of the securitisation and the total value of the securitisation transactions to be undertaken or financial instruments to be issued.

The Notification Form must also include details on the vehicle's reporting agent for the purposes of Regulation (EU) 1075/2013 of the European Central Bank (the FVC Regulation). A securitisation vehicle established under the Act qualifies as a 'financial vehicle corporation' under the FVC Regulation, and is accordingly required by the FVC Regulation to inform the Central Bank of Malta of its existence within one week from the date on which it has taken up business. Thereafter, the vehicle is required to submit data on its quarterly assets and liabilities to the Central Bank of Malta on a quarterly basis by the 15th day following the end of the quarter to which the data relates.

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

Article 1471 of the Civil Code (Chapter 16 of the Laws of Malta) requires a debtor to be informed by judicial act of an assignment in order for the assignee to be able to exercise a right assigned to him (ie, for the assignment to be effective). However, article 13 of the Act modifies this rule of general application and provides that, in the case of an assignment of a securitisation asset to a securitisation vehicle, a debtor will be deemed to be notified of the assignment upon notice to the debtor in writing by any means or upon publication of a notice in a daily newspaper circulated wholly or mainly in the jurisdiction where the majority of the debtors reside (or, where there is doubt as to where the majority of debtors reside, in a daily newspaper that has wide international circulation). Articles 11 and 12 of the Act set out the specific features of the class of receivables that must be included in the notice of assignment for it to be effective, which features vary depending on whether it is an assignment of existing or future receivables.

Articles 10 to 14 of the Act were specifically introduced to disapply or modify various provisions of the Civil Code relating to assignment of rights in order to relax what are generally considered to be overly onerous procedures (stemming from Malta's civil law tradition) within a securitisation context. The rules concerning debtor notification for pledges of debts (ie, perfection of security over receivables) are similarly relaxed.

19 What information must issuers disclose to investors and prospective investors? How must it be disclosed?

The Act does not contain any specific requirements concerning disclosure to investors. If the securities issued by a securitisation vehicle are offered to the public or listed on a regulated market in the European Economic Area, the vehicle will be required to publish a prospectus that complies with the relevant disclosure requirements of the EU Prospectus Directive (Directive 2003/71/EC, as amended and as transposed into the Companies Act) and the EU Prospectus Regulation (Commission Regulation 809/2004, as amended and supplemented).

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

Article 21 of the Act provides that any data or information that is transferred between persons within the context of a securitisation transaction (including but not limited to information transferred among the originator, securitisation vehicle, service providers, investor representatives or credit

rating agencies) is so transferable without any restriction or limitation. The provisions for data protection (Chapter 440 of the Laws of Malta) concerning the transfer of personal data are specifically relaxed for this purpose.

Notwithstanding this ability to transfer personal data without restriction, article 21 of the Act provides that the data or information transferred shall retain its secret or confidential status for all other effects and purposes (ie, outside the context of the securitisation transaction).

21 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on in securitisations?

There are no specific rules regulating the relationship between credit rating agencies and issuers. However, when a rating is sought, rating agencies will apply their standard special purpose entity legal criteria for structured finance transactions, many of which relate to the bankruptcy remoteness of the issuer from the originator.

Many of the structural enhancements offered by securitisation vehicles established under the Act, including statutory 'true sale' and bankruptcy remoteness (described in detail below), address the fundamental considerations contained in the legal criteria applied by the leading rating agencies.

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

The main duties of directors of a securitisation vehicle (excluding those duties of an administrative nature) are their fiduciary duties, which basically require them to always act honestly and in good faith in the best interests of the company. These duties are owed by the directors of all companies, whether they are established as securitisation vehicles or otherwise. Article 136A of the Companies Act sets out the general fiduciary duties of directors, providing that the directors of a company shall:

- (a) *be obliged to exercise the degree of care, diligence and skill which would be exercised by a reasonably diligent person having both (i) the knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by or entrusted to that director in relation to the company and (ii) the knowledge, skill and experience of that director;*
- (b) *not make secret or personal profits from their position without the consent of the company, nor make personal gain from confidential company information;*
- (c) *ensure that their personal interests do not conflict with the interests of the company;*
- (d) *not use any property, information or opportunity of the company for their own or anyone else's benefit, nor obtain benefit in any other way in connection with the exercise of their powers, except with the consent of the company in general meeting or except as permitted by the company's memorandum or articles of association; and*
- (e) *exercise the powers they have for the purposes for which the powers were conferred and shall not misuse such powers.*

While the director of a securitisation vehicle need not be independent from the originator as a matter of Maltese law, independent directors are generally appointed in order to satisfy credit rating agency (and investor) concerns regarding separateness between the vehicle and the originator. Despite any fiduciary obligations that directors may have under applicable law, rating agencies will assume that non-independent management will always act in the interest of the originator or parent as opposed to in the best interests of the vehicle (and the latter's obligations towards securities holders), which is why independent directors are always recommended in a rating context.

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

Article 405 of the EU Capital Requirements Regulation (Regulation (EU) 575/2013) provides that a credit institution or investment firm can only be exposed to the credit risk of a securitisation position if the originator, sponsor or original lender has explicitly disclosed that it will retain, on an ongoing basis, a material net economic interest in the securitisation position of at least 5 per cent.

Similar restrictions regarding exposure to securitisation positions also apply to alternative investment fund managers and insurers that are subject to the EU Alternative Investment Fund Managers Directive (Directive 2011/61/EU) or the EU Solvency II Directive (Directive 2009/138/EC), respectively.

It is interesting to note, however, that these 'skin in the game' requirements are structured as investment restrictions of regulated investors that wish to take on exposure to securitisation positions rather than risk retention requirements imposed on originators or arrangers, even though the end result is effectively a minimum 5 per cent risk retention by the latter when targeting regulated EU investors.

Moreover, these requirements apply only in respect of securitisation transactions where the credit risk associated with an exposure or to a pool of exposures is tranching. If a securitisation does not involve tranching of assets or exposures, then it would appear that the aforementioned risk retention requirements would not apply.

Security

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

Investors are typically granted an assignment by way of security of the issuer's rights under the various transaction documents and a pledge of cash (and, if applicable, securities) accounts of the issuer.

In addition to any security that may be granted to them, the holders of securities issued by a securitisation vehicle are granted a privilege over the securitisation assets pursuant to article 16 of the Act, which privilege extends to the proceeds derived from the securitisation assets and to any other assets acquired with those proceeds. This privilege will rank prior to all other claims at law, except for securitisation creditors who enjoy a prior ranking granted to them with the consent or knowledge of the securities holders. In other words, securitisation creditors may contractually regulate the ranking to assets held by the securitisation vehicles between them including in the event of insolvency, and the subordination of claims between various securitisation creditors (including the investors) will be respected.

The wording of the Act creates some ambiguity as to whether this privilege applies automatically or whether investors' claims must first be secured for the privilege to apply. We believe the latter to be the better view. As transaction security agreements are almost always governed by the law of the asset-backed securities or the underlying assets (which is invariably not Maltese law), the intention behind this particular provision of the Act was to ensure that all validly given security over securitisation assets would be enforced and given full effect as a first-ranking privilege of the investors under Maltese law, irrespective of the governing law of the security interests.

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

Perfection of a security interest would need to take place in accordance with the governing law of that security interest, which is generally not Maltese law as indicated above. While requirements vary from jurisdiction to jurisdiction, perfection typically takes place by registering the security interest in a public register or by notifying or obtaining an acknowledgement of the security interest from the debtor.

Where a pledge of receivables or an assignment by way of security granted by a securitisation vehicle is governed by Maltese law, perfection takes place in accordance with the same debtor notification procedure described under question 18, which again, relaxes the more onerous procedures generally required outside of a securitisation context.

26 How do investors enforce their security interest?

A trustee is typically appointed as representative of the investors, and it is the trustee who is granted the relevant security interest to hold for the benefit of the investors. Upon the occurrence of an event of default, the trustee will enforce the security interest on behalf of investors. The exact enforcement process and how it is triggered will depend on the terms of the particular security interest and the terms and conditions of the securities held by investors.

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

The rules on tracing of assets on insolvency broadly follow their equivalent under English principles of equity. Accordingly, the allocation of secured assets, including on an ex post facto basis, depends largely upon the effective segregation of assets prior to insolvency proceedings.

Taxation

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

Malta has specific rules on the tax treatment of securitisation vehicles – the Securitisation Transactions (Deductions) Rules – that enable securitisation vehicles established in Malta to eliminate tax leakage and achieve tax neutrality in Malta in respect of the securitisation transactions for which they are established. Malta also has an extensive double tax treaty network, with more than 65 treaties currently in place.

There are generally no Maltese tax implications for originators participating in a securitisation transaction with a Maltese securitisation vehicle as long as such originators are themselves not tax resident in Malta.

If an originator is Maltese tax resident, it is subject to Maltese tax on deemed income which is attributable to it if certain deductions are claimed by the securitisation vehicle. Hence, any of the following deductions claimed by the securitisation vehicle are all deemed to be income of the originator from a business or trade and accordingly arising in and chargeable to tax in Malta:

- deduction of the cost of acquisition of the securitisation assets;
- deduction of the cost of assumption of risk; or
- a further deduction of any residual income (explained in further detail in question 29).

29 What are the primary tax considerations for issuers in your jurisdiction?

Tax neutrality in Malta for the issuer can be achieved through a combination of (a) the general provisions on deductibility of expenses under the Income Tax Act and (b) further deductions specifically under the Securitisation Transactions (Deductions) Rules. The securitisation vehicle can opt to wipe out all of its chargeable income by making use of those deductions, resulting in no income tax being payable in Malta. Indeed, if the securitisation vehicle has any remaining income after deducting all allowable expenses, it may opt to claim a further deduction of an amount which is equal to the said remaining income. In this manner, the securitisation vehicle will end up with no chargeable income.

The availability of this further deduction on any residual income (after application of all other allowable deductions) can be of particular importance to securitisation transactions that involve depreciating assets such as ships or aircraft as it allows the vehicle to retain the full amount of any excess spread (ie, the difference between charter or lease payments to the vehicle and interest payments to investors) in the vehicle as cash collateral for investors or other lenders to the vehicle.

However, this residual profit deduction can only be claimed by the securitisation vehicle if the originator has given its irrevocable written consent to the vehicle to do so. The securitisation vehicle must provide the Commissioner for Inland Revenue with proof of such written consent, together with details of the identity of the originator, the place where the control and management of the originator's business is exercised and, where applicable, the tax registration number for Maltese income tax purposes.

Consent of the originator is required as the amount of the residual profit deduction will be deemed to be the income of the originator for the purposes of Maltese income tax. Nevertheless, this income shall only be deemed to arise in Malta (and therefore be taxable in Malta) if the control and management of the originator's business is exercised in Malta. Therefore, even if an originator consents to a securitisation vehicle claiming the residual profit deduction, there should be no Maltese tax liability for originators that are not tax resident in Malta.

Depending on the relevant double tax treaties applicable to a particular transaction, a securitisation vehicle may opt not to make use of all of its deductions and thereby choose to pay some Maltese tax on their net profits if this enables them to make use of treaty benefits.

30 What are the primary tax considerations for investors?

The primary tax considerations for investors relate to withholding on interest payments, taxation on transfers of the securities, and stamp duty.

No Maltese tax is withheld or payable on payments of interest by a securitisation vehicle to a holder of the vehicle's securities, provided that the investor:

- is not resident in Malta; and
- is not owned and controlled (directly or indirectly) by, or acts on behalf of, an individual who is ordinarily resident and domiciled in Malta.

A securitisation vehicle established as a Maltese company qualifies for a stamp duty exemption where more than 90 per cent of its business interests are situated outside Malta. The exemption is obtained following an application on a statutory form to the tax authorities, and applies to any transfer of securities issued by the Maltese company.

Bankruptcy

31 How are SPVs made bankruptcy-remote?

One of the unique features of securitisation vehicles established in terms of the Act is that they are bankruptcy remote from the originator by operation of law. Article 7 of the Act expressly provides that no proceedings taken in relation to the originator under any law will have any effect on the securitisation vehicle, the securitisation assets acquired (or risks assumed) by the securitisation vehicle, or other assets of the securitisation vehicle, including payments due by the underlying debtors, cash-flows or other proceeds owing to the vehicle in connection with the securitised assets.

Articles 9 and 10 of the Act also specifically address the requirement of 'true sale' in asset securitisation transactions by providing that a transfer or assignment to a securitisation vehicle in accordance with the Act will be treated as final, absolute and binding on the originator, the securitisation vehicle and all third parties and will not be subject to re-characterisation for any reason whatsoever, nor will it be subject to the claims of the originator's creditors in insolvency or otherwise.

Moreover, article 16 of the Act also expressly prohibits all persons who are not securitisation creditors from applying to the court for the issuance or enforcement of any precautionary act or warrant against the securitisation vehicle and its assets, unless it is shown to the satisfaction of the court that there has been fraud on the part of the securitisation vehicle.

Article 22 of the Act further provides that the constitutive documents of the securitisation vehicle may give a person (such as a trustee) or class of creditors the right to demand the securitisation vehicle's dissolution, liquidation, winding up, reconstruction or recovery, to the exclusion of all other persons, thereby confirming that market standard non-petition clauses typically included in transaction documents will be respected (provided, of course, that exclusive petition right is actually provided for in the vehicle's organisational documents).

In addition to the statutory protections provided by the Act, securitisation vehicles are typically orphaned (from the originator) by establishing a Maltese purpose foundation (with no beneficiaries or owners), and its sole purpose being to own either all of the voting share capital of the vehicle or, alternatively, a 'golden' share with veto rights over key company actions such as amendment of the organisational documents of the vehicle or the commencement of winding up, or bankruptcy or insolvency proceedings. Although it is arguable that it is not strictly necessary to orphan a vehicle in this manner given the 'statutory' bankruptcy remoteness of a securitisation vehicle established under the Act, this is done to bolster the bankruptcy remoteness argument, particularly when rating agencies are involved who may not be fully accustomed to (and their standard considerations or criteria not necessarily adjusted to reflect) the unique benefits offered by the Act.

32 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)?

Subject to a determination of fraud or knowledge of a pending originator insolvency, a Maltese court will automatically consider the transfer or assignment of assets to a securitisation vehicle (effected in accordance with the provisions of the Act) as valid and enforceable in accordance with its terms and not subject to any form of re-characterisation or to claims of the originator's creditors. Specifically, 'statutory' true sale and bankruptcy remoteness of the vehicle will not apply where there is fraud on the part

of the securitisation vehicle or in the event of an assignment entered into at a time when the vehicle knew or ought to have known that an application for the dissolution and winding up of the originator by reason of insolvency was pending or that the originator had taken formal steps under any applicable law to bring about its dissolution and winding up by reason of insolvency.

33 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?

There is no statutory doctrine of substantive consolidation under Maltese law. Moreover, the rule in the English case of *Salomon v A Salomon & Co Ltd* (1897) AC 22 with regard to piercing the corporate veil carries persuasive authority in the Maltese courts and has been followed here. The reasoning that would be applied by a Maltese court would be the same as that applied to the true sale analysis described above. A Maltese court would therefore go no further than establishing that securitisation vehicle was established in accordance with and subject to the provisions of the Act, and in the event of a claim of fraud or knowledge of originator insolvency prior to the transfer or assignment of the securitisation assets, a determination of whether such claim has any merit.

Of greater importance is the question of jurisdiction and ensuring that any claims that may be brought against the securitisation vehicle are actually decided upon by the Maltese courts or that the opening of such proceedings in Malta will be recognised by the court of a foreign jurisdiction in which separate proceedings have been instituted. If a foreign court is able to seize jurisdiction and does not recognise the jurisdiction of the Maltese courts, there is a risk that the foreign court may decide to ignore the provisions of the Act as a matter of public policy under that jurisdiction's law.

Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (the Insolvency Regulation) provides in substance that the courts with jurisdiction to open insolvency proceedings in the EEA are those of the member state where the debtor has its centre of main interests (COMI), and that the law of the member state of the opening of the proceedings should apply to most of the issues with regard to those

proceedings. Where an entity has its COMI will ultimately be a matter for the relevant court to decide based on the circumstances existing at the time it is asked to make that decision. The UNICTRAL Model Law on Cross-Border Insolvency (the Model Law), which has been adopted by 21 jurisdictions worldwide (primarily non-EU), including the United States, uses the same term and applies largely the same analysis in determining whether foreign insolvency proceedings should be recognised as the main insolvency proceedings of the corporate debtor.

Therefore, in order to eliminate (insofar as is possible) the ability of originators and exogenous creditors of the vehicle to 'forum shop' for a jurisdiction whose laws will better suit their interests, it is essential that a strong argument can be made that the COMI of the securitisation vehicle is in Malta, so that the final decision on the winding-up of a Maltese securitisation vehicle will always rest in the hands of the Maltese courts.

Again, where a securitisation vehicle has its COMI will be a matter of fact for the relevant court to decide based on the facts and circumstances existing at the time it is asked to make that decision. COMI is not defined in the Insolvency Regulation or the Model Law, although there is a rebuttable presumption under both laws that a corporate debtor's COMI is the location of its registered office. This presumption was indeed rebutted in several judgments both within and outside the EU and applying the Insolvency Regulation or the Model Law, where (in a nutshell) the entity in question was considered to be a 'letterbox' entity with its registered office in one jurisdiction but with all of its business carried out and management decisions taken elsewhere.

In addition to the securitisation vehicle's registered office being in Malta, it is always recommended (based on the reasoning applied in these judgments) that a securitisation vehicle be put in a position to make the strongest case possible that its COMI is in Malta by, for example, ensuring that a majority of the vehicle's directors (if not all) are resident in Malta, that the majority (if not all) of the vehicle's board meetings are held in Malta and that the vehicle's bank accounts are situated in Malta. These are only examples and the various judgments actually go into a much longer list of factors that could be considered in reaching a COMI determination, but which are beyond the scope of this publication.

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