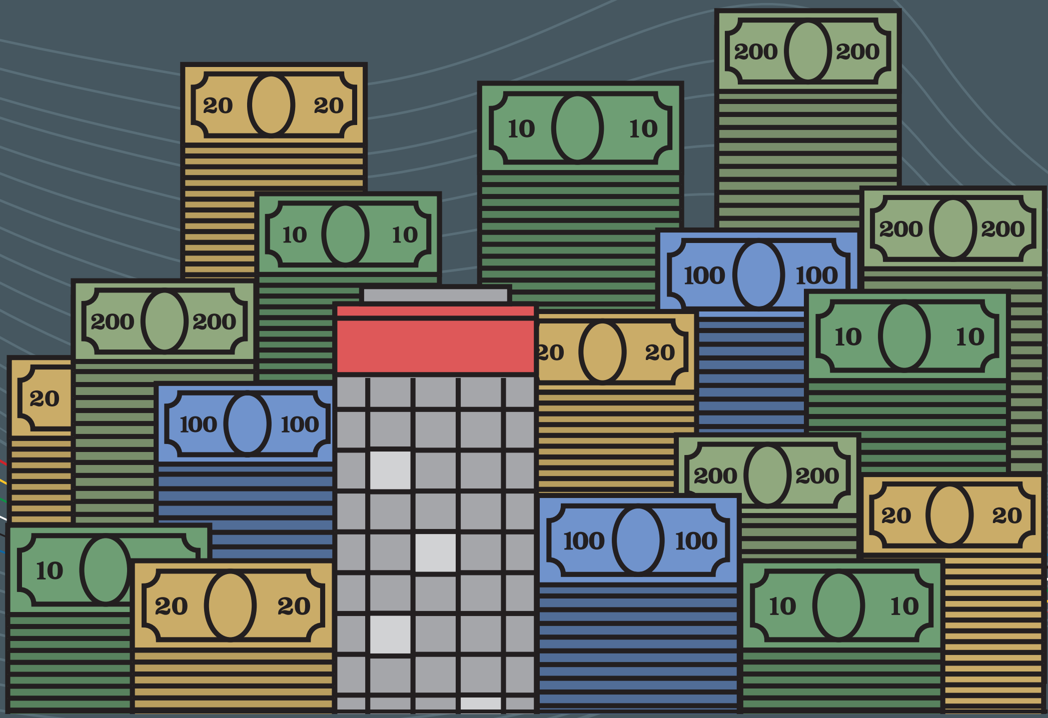

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SECURITISATION

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2015 / 2016

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Introduction

South Africa's securitisation regulations are designed to encourage securitisation issuance and foreign capital investment while managing risk to securitisation issuers and all movements of foreign exchange in and out of the country. The relevant legislation also incorporates internationally agreed-upon regulations pertaining to the finance industry and protection for both local and foreign investors.

Legislation and Regulations

Securitisation regulations

Securitisation transactions in South Africa are regulated by the South African Registrar of Banks under the Banks Act, No. 94 of 1990 (Banks Act), and its regulations, including the:

- securitisation regulations published as Government Notice 2, Government Gazette 30628 of 1 January 2008, (securitisation regulations); and
- regulations relating to banks, published as Government Notice R.3, Government Gazette 30629 of 1 January 2008 (bank regulations).

The securitisation regulations provide that securitisation issuer special-purpose vehicles are exempt from having to register as banks. They regulate, among other things:

- the corporate status, ownership and control of the issuer of the notes;
- the requirements in respect of the transfer or "true sale" of assets from the originator to the issuer;
- the provision of credit enhancement facilities; and
- the provision of liquidity facilities.

Various restrictions are placed on institutions acting in a:

- "primary role" that the securitisation regulations define as the originator, remote originator, sponsor or repackager; and
- "secondary role" that the securitisation regulations define as a credit enhancement facility provider, liquidity facility provider, underwriter, purchaser of senior commercial paper, servicing agent or a counterparty to a transaction included in the trading book of a bank.

The securitisation regulations explicitly allow synthetic securitisations as a method of securitising a pool of assets. They contain detailed conditions for the securitisation of revolving assets (such as credit card or store card receivables) and further prescribe the specific disclosure of certain additional information in the offering circular.

The bank regulations provide for effective risk management by banks and set out the capital adequacy requirements applicable to the various bank exposures, including securitisation exposures.

Exchange control regulations

The Currency and Exchanges Act, No. 9 of 1933 (Currency and Exchanges Act), empowers the President of South Africa to make regulations in regard to any matter directly or indirectly relating to currency, banking and exchanges.

The regulations made under the Currency and Exchanges Act are contained in the exchange control regulations, Order and Rules, 1961, as amended (exchange control regulations).

The National Treasury has delegated the administration of exchange controls to the South African Reserve Bank (SARB) which is responsible for the day-to-day administration and functioning of exchange control.

The Exchange Control Department (excon) of the SARB has a wide discretion, but exercises its powers within certain policy guidelines. Excon, in turn, has delegated some of its powers to deal with exchange control matters to certain banks known as "authorised dealers" in foreign exchange.

The SARB has compiled an exchange control manual which can be accessed through its website. The manual gives guidance to authorised dealers, their clients and other interested parties regarding the operation of the exchange control system in South Africa and the Common Monetary Area, which include Lesotho, Swaziland, Namibia and South Africa.

The exchange control regulations provide, broadly, that a South African resident cannot owe any obligations to a non-South African resident without the prior consent of the SARB. If a South African issuer intends for a non-South African resident to take up any of the debt issued, the issuer requires excon approval for, among other things, debt issuances that will be of a high-yield nature (defined as the South African prime rate plus 3%).

It is incumbent on any non-resident investor to instruct its authorised dealer in foreign exchange regarding the manner in which funds due to such investor, in respect of the South African notes, are to be dealt with. Such funds may, pursuant to the exchange control regulations, be remitted abroad only if the relevant South African notes are acquired with foreign currency introduced into South Africa and provided that the relevant securities account or individual certificate is designated non-resident.

Despite a stated desire to attract foreign capital into the country, the SARB keeps close control over foreign exchange movements in and out of South Africa. The rules are slowly being relaxed, but the approval of excon is still required to permit the payment of principal and interest on South African listed debt securities purchased by a non-resident of the Common Monetary Area.

Whether or not permission is granted depends on the facts of each case. The SARB's objective is not to restrict borrowing abroad, but to ensure that the repayment and servicing of debt does not disrupt South Africa's balance of payments. Excon regulates the repayment of borrowings to ensure that a bunching of repayments will not cause an inordinate strain on South Africa's foreign exchange reserves at a particular time.

Payment of principal and interest on Rand-denominated notes will not reach a non-resident investor in such notes if any Government authority that regulates South African financial markets (eg SARB) were to declare a moratorium on payments outside South Africa.

The National Credit Act

The National Credit Act, No. 34 of 2005 (the National Credit Act), was passed in December 2005. It was enacted in March 2006 and came into full effect on 1 June 2007. It replaced the Usury Act, No. 73 of 1968, and the Credit Agreements Act, No. 75 of 1980.

In relation to existing and potential securitisation transactions where the relevant credit agreements fall within the provisions of the National Credit Act, issuers have been deemed to be credit providers. This is because the National Credit Act's definition of "credit provider" includes any "person who acquires the rights of a credit provider under a credit agreement after it has been entered into".

Under the National Credit Act, borrowers can potentially delay the foreclosure process by seeking counselling with debt counsellors. If a credit provider is found to have lent recklessly by the Magistrate's Court, the Court has the power to temporarily suspend the credit arrangement, re-arrange or even set aside the borrower's obligations. If the Magistrate's Court finds the credit agreement unlawful, the asset either stays with the borrower or, if the asset would unjustly enrich the borrower, it is forfeited to the State and not returned to the credit provider.

The sale agreement between an originator and an issuer will likely be drafted to provide for a situation where a credit agreement purchased by the South African issuer is unenforceable due to non-compliance with any applicable law, including the National Credit Act. In such case the issuer will be entitled to enforce the remedies set out in the sale agreement for breach of warranty by the originator. The issuer is likely to be further indemnified by the originator against any damages which the issuer may suffer as a result of any non-compliance with applicable law by the originator.

The Insolvency Act

Sections 26 (dispositions without value), 29 (voidable preferences), 30 (undue preferences), 31 (collusive preferences), 34 (voidable disposition of a business) and 46 (set-off) of the Insolvency Act, No. 24 of 1936, may have an impact on a South African securitisation transaction in respect of the sale of assets by the originator to the issuer.

Generally, where the originator sells or transfers assets to the issuer in contemplation of its own insolvency or to favour specific creditors, the assets will be considered to form part of the assets of the originator.

The Deeds Registries Act

Primarily relevant to residential and commercial mortgage-backed securitisations, South Africa has a well-developed and accurate land registration system governed by the Deeds Registries Act, No. 47 of 1937.

With a number of notable exceptions, every piece of land has been measured and surveyed by a land surveyor and plotted on a diagram or general plan which is held in the office of the Surveyor-General. Each of those pieces of land is registered in one of nine Deeds Registries.

Taxation

Under current taxation law in South Africa there are a number of tax considerations relevant to securitisations, including the fact that a person not ordinarily resident in South Africa will be exempt from tax in South Africa on any interest received or accrued on the notes. This is unless that person is a natural person who was physically present in South Africa for a period exceeding 183 days in aggregate in the tax year, or at any time during the tax year carried on business through a permanent establishment in South Africa.

Other

Other legislation and regulations may impact on South African securitisation transactions, for example, in connection with the asset class involved.

Primary Considerations Relating to Offshore Issuances

When considering issuing offshore, South African securitisation originators and arrangers will face the following key considerations:

- ensuring that the transaction is structured in compliance with South African legislation and regulations pertaining to securitisation and exchange control, in particular, obtaining the consent of the SARB for any offshore issuance backed by existing South African assets. Deals could be structured to have a neutral impact on foreign exchange reserves, or payments of principal and interest on the notes issued offshore could be guaranteed or insured by a highly rated offshore entity;
- deciding whether to seek national scale or global scale ratings for the South African notes to be issued. Notes rated on a national rating scale are more difficult for international investors to compare to other potential investments around the world. Global scale ratings allow the international investor to make comparisons more accurately, but split ratings by different agencies regarding a particular transaction may lead to ambiguity for offshore potential investors; and
- minimising costs in respect of any currency swap between South African Rands, on the one hand, and European Union Euros or United States Dollars, on the other, and any political risk insurance or monoline wrap that may be necessary to ratchet up the rating of the notes to be issued offshore.

Conclusion

The legislation in force in South Africa balances the many investment opportunities offered through securitisation with effective risk management for its issuers. Because of the complex nature of securitisation in South Africa, investors (especially those who are non-residents) should consult knowledgeable advisers.