



**HOW IS THE DOMESTIC  
REGULATION EVOLVING?  
WHAT REGULATION WILL  
FACILITATE DOMESTIC  
ISSUANCES?**

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**C L I F F O R D  
C H A N C E**

# Questions For Discussion

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- Legal Issues Relating to Assignment
- Insolvency Rules
- Bank Secrecy and Data Protection Rules
- Currency Control Rules
- Laws on Domestic Securitisations

# Legal Issues Relating to Assignment

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## Information Letter of SAC No. 120

- assignment to non-banking institutions
- partial assignment (including partial assignment of security securing obligations under assigned rights)
- transfer of asset documents upon assignment
- identification of assets in the assignment contract

# Legal Issues Relating to Assignment (cont.)

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## Information Letter of SAC No. 120 (cont.)

- transfer of rights to security securing obligations under assigned rights
- assignment of a right which did not arise at the time of assignment (assignment of future rights)
- the possibility of assignment is not conditional upon whether the claim is being contested by the debtor or on the performance of any obligation of the creditor under the underlying agreement

# Legal Issues Relating to Assignment (cont.)

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## Information Letter of SAC No. 120 (cont.)

- acquisition price upon assignment should not be nominally equal to the nominal value of the assigned rights (reference to the factors affecting the market price of the assigned rights: creditworthiness of the debtor; existence of a dispute over the claim; assignor's liabilities towards the assignee regarding the validity of and performance under the claim; other factors affecting the factual value of the claim)
- notifications of the debtors (if the debtor is notified by the assignor, then the presentation of the assignment agreement is not required)

# Insolvency Rules

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## Draft Amendments to the Credit Organisations Insolvency Law

### *Transfer of the Servicing to the Back Up Servicer*

- upon initiation of the temporary administration but until the management is replaced:
    - the temporary administrator should endeavor to assist with the transfer of the servicing function to the back up servicer
    - consent of the temporary administrator is not required to the transfer of the servicing function to the back up servicer
  - upon replacement of the management by the temporary administrator or appointment of a liquidator, the latter should transfer the servicing functions to the back up servicer upon occurrence of any servicer event
- \* the servicing agreement is defined as an agreement which provides, *inter alia*, for: collection of receivables; enforcement; transfer of cash to the creditor (issuing vehicle); and regular reporting about collections and which is entered into as an agency, trust management or other type of agreement envisaged by the Russian civil legislation or foreign legislation.

# Insolvency Rules (cont.)

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## Draft Amendments to the Credit Organisations Insolvency Law (*cont.*)

### *Moratorium*

- Moratorium on payments does not apply to:
  - claims of mortgage agents (in domestic securitisations) in respect of cash to be received from the servicing bank under the securitised portfolio
  - claims of issuing vehicles (SPVs) in respect of cash to be received from the servicing bank under the securitised portfolio

# Insolvency Rules (cont.)

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## Draft Amendments to the Credit Organisations Insolvency Law (cont.)

### *Repudiation of Contracts*

- the temporary administrator does not have the right to repudiate servicing agreements in respect of credits and loans with mortgage agents and issuing vehicles (SPVs)

### **BUT**

- the servicing agreements must provide for a procedure to transfer servicing to the back up servicer upon occurrence of a servicer event



# Insolvency Rules (cont.)

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## Draft Amendments to the Credit Organisations Insolvency Law (cont.)

### *Invalidation of Transactions at an Undervalue*

- assignment of receivables to the mortgage agent (in domestic securitisations) or to the issuing vehicle (SPV) can be challenged by a court at the request of the head of the temporary administration, the liquidator or a creditor of the bank if the terms of the transaction are materially worse than the terms of analogous transactions occurring **only within 3 MONTHS** of the register of the report of the results of the issuance (in domestic securitisations) or of the issuance of the foreign securities abroad, **instead of 3 YEARS** in other cases

# Insolvency Rules (cont.)

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## Draft Amendments to the Credit Organisations Insolvency Law (cont.)

### *Invalidation of Preference Transactions and Transactions with Interested Parties*

- assignment of receivables to the mortgage agent (in domestic securitisation) or to the issuing vehicle (SPV) **CANNOT** be challenged by the court at the request of the head of the temporary administration, the liquidator or a creditor of the bank on the grounds that:
  - they entail preferential satisfaction and were entered into during the "hardening period"; or
  - they were entered into with interested parties

# Insolvency Rules (cont.)

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## **Draft Amendments to the Credit Organisations Insolvency Law (cont.)**

### *Status of Cash Received by the Servicer*

- Cash received by the servicing bank in its capacity as a servicer is not included in the competitive pool available for distribution to other creditors

# Insolvency Rules (cont.)

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## Draft Amendments to the Credit Organisations Insolvency Law (*cont.*)

### *Question*

- Why do the new rules apply only to credit institutions?

# Bank Secrecy and Data Protection Rules

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## *No Change in the Legal Position*

- Article 26 of the Banking Law (bank secrecy)
- Article 857 of the Civil Code (bank secrecy)
- Law on Data Protection

# Currency Control Rules

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Passport of the Transaction (*passport sdelki*) requirement is still an issue for securitisations involving legal entities as debtors, such as:

- SME Securitisations
- Lease Receivables Securitisations
- CMBS Transactions

# Laws on Domestic Securitisation

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## *Fundamental Issues*

- limitation to mortgages only as asset class for domestic securitisations
- although amendments in July 2006 to the Mortgage Backed Securities Law allowed Gazprombank and AHML domestic securitisations to proceed, the Mortgage Backed Securities Law may require further amendments
- cumbersome implementation process which takes more time and effort than cross-border securitisations
- concerns of rating agencies over the bankruptcy remoteness of the mortgage agent (SPV)
- attempts to over-regulate the asset backed securities structures lead to the lack of flexibility in structuring the transactions

# Laws on Domestic Securitisation (cont.)

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## *Required Changes in the Mortgage Backed Securities Law*

- provision for the ability of investors and other creditors of the mortgage agent to be able to contractually agree not to file bankruptcy petitions against the mortgage agent
- net assets value trigger for liquidation should not apply to the mortgage agent (Article 99 of the Civil Code and Article 35 of the Joint Stock Company Law)
- given timing issues on the establishment of mortgage agents it would be good to provide for a compartmentalised mortgage agent structure with limited recourse to the assets of the relevant compartment



# Laws on Domestic Securitisation (cont.)

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## *Required Changes in the Mortgage Backed Securities Law (cont.)*

- timing of transfer of the mortgage collateral (i.e. transfer should not be required to be made prior to filing of the prospectus)
- rule on payment of interest on an annual basis must be abolished
- more flexible rules for tranching
- the ratios for the amount and sufficiency of mortgage collateral should not be regulated by law and may be subject to determination by FSFM (if government intervention in such matters is at all needed)

# Laws on Domestic Securitisation (cont.)

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## *Required Changes in the Mortgage Backed Securities Law (cont.)*

- disclosure rules must be adequate to the nature of asset backed securities (otherwise they do not reflect what the investor wants to know about securities)
- the procedure of vetting the prospectus and decision of issuance must be changed in line with procedures in developed jurisdictions
- given timing issues, the antimonopoly requirements for the appointment of the management company of the mortgage agent and acquisition of more than 10% of the bank's assets by the mortgage agent must be abolished
- more clear rules on covered bonds

# Laws on Domestic Securitisation (cont.)

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## *Draft Law On Securitisation*

- allows securitisation of wide range of asset classes
- regulates special purpose vehicles (*spetsyalizirovannoye finansovoye obshchestvo*)
- introduces the concept of a pledge of bank accounts
- introduces a concept similar to the concept of a trustee (*predstavitel vladeltsev obligatsyi*) and the concept of bondholders meetings
- regulates the issuance of asset backed securities

# Laws on Domestic Securitisation (cont.)

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## *Draft Law On Securitisation (cont.)*

- limits asset classes to receivables only
- inherits the problems of the Mortgage Backed Securities Law:
  - does not fully address bankruptcy remoteness of the special purpose vehicle
  - contains inflexible rules in respect of the operation of the special purpose vehicle
  - contains inflexible rules in respect of the issuance of securities and tranching
  - tends to over-regulate the process

# Laws on Domestic Securitisation (cont.)

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## *Draft Law On Nominal Accounts*

- introduces the concept of nominal bank accounts, which would help to solve the commingling risk at the servicer level

# Conclusion

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Much has been done – but there still remains much to do...



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