Emerging Issues Involved In Cross-Border Securitization- A Critical Review

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INTRODUCTION

Cross-border securitization can take place without a governing country law, or under a very lax, fully enabling, country law. Yet, market and institutional intermediation are unlikely to arise, let alone flourish, without a legal infrastructure that provides uniform, predictable, stable rules of behavior. Or in other terms, international securitization is a process in which companies raise the funds from the foreign established capital markets. Traditionally, companies raise their capital by issuing securities for equity participation in the company or through loans to the company[1]. In such a case, the security holder has recourse to the company itself for the repayment of their debt and the same is not immune from the risk of the company being bankrupt. However, this risk is removed through securitization, where the source of repayment is separated from the company and, thus the security holder is not dependent on the company for the repayment and not threatened by the company bankruptcy.

'Securitization' may be defined as "a process of homogenizing and packaging financial instruments into a new fungible one." In securitization, a company partly 'deconstructs' itself by separating certain types of highly liquid assets from the risk generally associated with the company[2]. The company then can use these assets to raise funds in the capital markets at lower cost by issuing debt or equity[3]. The company retains the savings generated by these lower costs, while investors in the securitized assets benefit by holding investments with lower risk.

OUTLINE TO CONCEPTION OF SECURITIZATION AND CROSS BORDER DEALS

Section 2 sub clause z of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) defines securitization as a means for acquisition of financial assets by any securitisation company or reconstruction company from any originator, whether by, raising of funds by such securitisation company or reconstruction company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial assets or otherwise.

Frankel says 'securitization is a process by which illiquid financial assets are converted into securities, to facilitate their sale and trade'[4].

One salient feature of the securitization process is its "disjoined" or "decomposed" nature. The activities that comprise a securitization can be performed by different actors in different places, and in some cases, at different times. Thus, a bank can make loans and either keep them to maturity, securitize them immediately, or securitize them later. A promoter can buy or make loans and securitize them immediately or build an inventory for later securitization. It has been generally said that the activities that comprise a securitization can be performed by different actors in different places, and in some cases, at different times. Thus, a bank can make loans and either keep them to maturity, securitize them immediately, or securitize them later. A promoter can buy or make loans and securitize them immediately or build an inventory for later securitization. The term securitization may be defined as a process of homogenizing and packaging financial instruments into a new fungible one[5]." In securitization, a company partly deconstructs itself by separating certain types of highly liquid assets from the risks generally associated with the company[6]. This is achieved through the establishment of a separate entity known as a Special Purpose Vehicle ("SPV") to which these assets of the company are transferred. The SPV, in turn, issues securities to raise funds from the capital markets[7]. Thus, the company uses these assets to raise funds in the capital markets[8] at a lower cost than if the company had raised funds by directly issuing the debt itself. The company retains the savings generated by these lower costs, while the buyers of the securities, issued by the SPV, benefit by holding investments with lower risk. Generally, in broadest

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sense, the term "securitization" implies a process by which a financial relationship is converted into a transaction. A financial transaction is the coming together of two or more entities; a financial relationship is their staying together.[9]
Frank J. Fabozzi & Vinod Kothari, elaborates further through example, a loan to a corporation is a financial relationship; once the loan is transformed into a tradable bond, it is a transaction. There have been several illustrations in the past of the evolution of finance of relationships that have been converted into transactions. The creation of "stock" representing ownership in a corporation is one of the earliest and most important examples of this process because of its impact on the growth of the corporate form of business organization. Commercial paper is another example of securitization of relationships as it securitizes a trade debt. In today's capital markets, the term securitization has acquired a more specific meaning, which for the sake of distinction is referred to as "asset securitization."

Nowadays, securitization means a process by which an entity pools together its interest in identifiable future cash flows, transfers the claims on those future cash flows to another entity that is specifically created for the sole purpose of holding those financial claims, and then utilizes those future cash flows to pay off investors over time, either with or without credit support from a source other than the cash flows.

THE PROCESS OF SECURITIZATION & ITS ADVANTAGES

This part will explain procedure of securitization. Generally, it's said that the process of securitization is a typical structured finance; the company seeking to raise funds transfers assets to a "Special Purpose Vehicle" SPV (organized especially for this purpose) to reduce the likelihood of bankruptcy. The transferring company is called the originator, because it is the original company that supplies the assets[10]. The assets themselves are typically payment obligations, which are owed to the originator from third parties. Broadly, these obligations are referred to as receivables or financial assets. The entities obligated to pay the receivables are known as obligors[11].

The transfer is intended to separate the assets from risks associated with the originator. The originator will often structure the transfer so that it constitutes a true sale, which is a sale that is sufficient under bankruptcy and commercial law to remove the assets from the originator's bankruptcy estate. Therefore, special consideration must be given to ensure that the transferred assets are protected from the claims of the creditors of the originator. Instead of structuring the securitization transaction through a sale, the parties may structure the securitization through a secured loan, thus reducing the transaction costs[12].

In such cases, however, the transaction documents must ensure that the loan forwarded by the SPV is adequately secured. The loan advanced by the SPV must be secured by a charge on the receivables, so that the SPV becomes a secured creditor of the originator. Further, the SPV must ensure that local law permits the SPV, as an interested creditor, to enforce its charge against the receivables in the event of bankruptcy by the originator. Under the bankruptcy laws of the United Kingdom and most other jurisdictions, secured creditors of a company approaching insolvency can appoint a receiver to control and manage the company purely for the creditors' benefit, thereby satisfying the debt owed to the secured creditor. The priority granted to secured creditors to appoint an administrative receiver is respected in these jurisdictions, whereas priority is routinely violated in other countries. In many jurisdictions, however, the SPV has a security trustee who acts on the behalf of the investors. Should the originator become bankrupt, the trustee has extensive powers. In exercise of such powers, the trustee may consider and implement alternate uses for the company's assets. Strategies to explore those uses are included in the transaction documents.

An SPV must be organized in such a way that the likelihood of bankruptcy is remote. This is because the interest of the prospective buyers for the securities issued by the SPV is a function of the degree to which the SPV is bankruptcy proof and sheltered from the demands of the originator's creditors, in the event that the originator becomes bankrupt. The SPV should be a legal entity distinct and independent from the originator. This prevents creditors of the originator from having claims against the SPV that enables creditors to file an involuntary bankruptcy petition against the SPV.[13]
Therefore, the SPV must observe all appropriate third-party formalities with the originator. These additional steps help to reduce the risk that the originator, if bankrupt, will either cause the SPV to voluntarily file for bankruptcy or persuade a bankruptcy court to substantively consolidate the assets and liabilities of the SPV with those of the originator. In conclusion, the foregoing safeguards ensure that the transfer of receivables is better protected against conflicting interests of third parties in the event the securitization transaction is structured through a sale. Where the

securitization transaction is structured through a secured loan between the SPV (as creditor) and the originator (as borrower), the rights of the SPV are better protected. This is because the assets of the SPV are not consolidated with the originator in the event of bankruptcy proceedings.

ADVANTAGES OF SECURITIZATION

By the process of securitization, the following advantages may be achieved; the originator to separate these assets from their corresponding liabilities. ***Firstly,*** the originator is able to raise funds at a lower cost through securities issued by the SPV, as compared to raising funds by issuing securities directly [14] . ***Secondly***, in case the originator is a bank or a financial institution, securitization could also permit the originator to sell receivables for which it would otherwise be required to maintain capital. That reduces the bank's effective cost funds [15]. ***Thirdly,*** compliance with restrictions relating to quantum of debt restrictions -an originator may be restricted by its indenture covenants from incurring or securing debt beyond a specified level. As such, securitization through the sale of receivables would enable the originator to raise funds in compliance with such covenants, because the originator sells the receivables and does so without incurring debt; the debt is incurred by the SPV [16] .

OVERVIEW ON WORLDWIDE PERSPECTIVE TO SECURITIZATION

Cross border securitization implies a securitization process in which portions of the processes are conducted in a foreign country. Here, the SPV is established in a foreign country, where securities are issued to generate funds from the foreign community. In the recent past, there has been substantial movement towards internationalization of securitization, and the world has witnessed a boost in cross-border securitization transactions [17]. This is predominantly because many countries do not have a developed capital market. The United Nations Commission on International Trade Law has undertaken a project to simplify cross-border receivables financing and to reduce its cost. To that end, UNCITRAL has drafted the Convention on the Assignment of Receivables in International Trade (UNCITRAL Convention).The Convention deals exclusively with the assignment of receivables and specifically avoids involvement in any other part of the financing contract.

In other words, the UNCITRAL Convention does not deal with the contract between the originator and the obligors, nor does the UNCITRAL Convention deal with any financing documents related to the issuance of securities by the SPV[18]. International securitization is a complex process and involves multiple legal systems with unfamiliar terms and unfamiliar rules. Furthermore, the dynamic and fast changing domain of securitization causes difficulty when trying to attain a firm grasp in the securitization process.

A firm dealing in international securitization should familiarize itself with relevant local laws in order to grasp the fundamental legal principles of cross-border finance. This enables the firm to ask appropriate questions to foreign counsels and better understand the responses and any resulting implications.

OVERVIEW ON CROSS BORDER SECURITIZATION LAW

The Creation of International Securitization Law is having crucial impact on professionals, such as investment bankers and lawyers, have a vital importance in the development of international securitization law. Often, lawyers draft the documents and contracts involved in a cross-border securitization transaction, which (1) provide guidelines for reference and (2) constitute a private law between them. Therefore, international securitization law is created by the lawyers who develop these private contracts. Hence, an accurate name and description of cross-border securitization lawmaking is lex juris-a law that is developed and established by the lawyers who structure these international securitization transactions. Such laws may also be known as lawyer-made laws ("LML"). Lawyers determine most of these terms and legal frameworks, as well as the laws governing the transactions and the locations in which the various components of the transaction will be performed. This leads to the conclusion that international securitization law is created through contracts and belongs to the genre of LML.

APPROACH TO SYSTEM OF LAWYER-MADE LAWS

Studying the system created by LML plays an important role in understanding the growth of international securitization law. In civil law countries, courts give great weight to interpretative opinions of scholars and the academic commentaries [19]. These opinions have an extremely persuasive effect on the law of the country, which in turn helps to achieve standardization [20] .The law-making process through private contracts, lex juris or LML, has been analogized to lex mercatoria-law created by merchants in dealing with each other-as well as to the rules created by their institutions, such as guilds [21]. There are, however, significant distinctions between the two. The institutions in which lawyers are organized, and which produce unified products, are not entirely similar to those of merchants' trade organizations. Generally, lawyers' institutions forge stronger ties among members because lawyers who are expelled from these institutions are often times expelled from their professions as well [22]. Some trade organizations may exercise similar powers over their members. However, many trade organizations do not exercise these powers, and members who wish to follow their own lonely path may do so.

Thus, the nature and origin of LML are distinct from lex mercatoria. Other LML consist of the legal documents that lawyer's draft, such as partnership agreements, trust instruments, and constitutional documents for organizations. As mentioned earlier, these documents become the law for the parties [23]. With passage of time, these contracts between various parties become standardized, forming a system of private law making.

BENEFITS ACCRUING FROM THE SYSTEM OF LAWYER-MADE LAWS

There are various advantages in the law-making process that have fostered the growth of international securitization laws. Some of the advantages are as follows:

Benefits Of Lawyer-made Laws Lead To Standardization: Standardization facilitates the development of markets by reducing information costs and risks, as well as offering predictability [24]. Recognizing the benefits of standardization, many industries have developed standardized contracts and procedures that also extend to securitization transactions[25].

The practice of following precedent and path dependence [26] are also forms of efficient standardization. In the US, while law firms create innovative and unique contracts, the firms frequently adhere, with minor revisions, to forms they have previously created. Standardized contracts and other legal documents have developed in various spheres and are contained in numerous publications, websites, and other databases. By allowing easy access to accurate information on domestic laws all over the globe, these databases enhance uniformity of cross-border securitization [27].

CURRENT ISSUES INVOLVED IN CROSS- BORDER SECURITIZATION

There are a variety of considerations and issues that are involved in a typical cross-border securitization transaction. Since the various processes of securitization are subject to the laws of the country in which they occur, ensuring that there is compliance with applicable local law is necessary. These issues are discussed below under different heads.

✠ISSUES CONCERNING COMMERCIAL FINANCE

The securitization agreement must secure the interests of the SPV and safeguard its assets from the claims of the originator and the originator's creditors. In this context, various legal considerations must be addressed to determine how the SPV and its investors stand against the originator's creditors: whether the securitization transaction is potentially preferential or fraudulent, and whether other legal impediments exist to prevent securing the interests of the SPV.

✠PERFECTION AND PRIORITY

The term perfection refers to the protection of a transferee's interest in transferred assets from creditors of the transferor and from the transferor's trustee in bankruptcy [28]. In a securitization transaction, perfection means protecting the SPV's interest in the transferred receivables from claims of the originator's creditors and all other conflicting interests. Due to the fact that receivables are intangible and therefore not physically located in any particular jurisdiction, the law of the originator's jurisdiction usually governs perfection [29].

There are different modes in which the transferee's interest is perfected in different jurisdictions. Some jurisdictions have a filing or other public notice system for perfection, while other legal systems may require notification to obligors, which may be expensive. Often, the local perfection procedures may be unclear or impractical, in which case, investors are forced to rely on the originator's representations, warranties, and covenants that the receivables transferred to the SPV are unencumbered. This illustrates the need for a uniform perfection regulatory system at a global level. The term priority is defined as the “ranking of multiple claims against a transferred asset.”[30]. In the securitization context, however, priority means that the claims of the SPV on the transferred receivables should be made superior to any third-party claims. In most jurisdictions, priority is established by the chronological sequence in which the filing required for perfection has been completed. If the originator is located in a jurisdiction that does not have a filing requirement or other registration systems to indicate priority, the investors may have to rely on the originator's representations, warranties, and covenants-creating a much greater risk of fraud than in jurisdictions that use public filing systems.

In some cases, the securitization may involve the transfer of receivables that will be created at a future date, therefore, it is prudent to ask whether local laws permit this type of transaction. Absent a system that makes transfers of receivables publicly ascertainable, securitization is discouraged because an SPV will not be able to determine its priority at the time of the transfer. UNCITRAL's Convention proposes an optional centralized registration system that could be used to provide such notice. For states opting in, this form of centralized registration would provide that between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which data about the assignment are registered under a centralized registration system established by the Convention, regardless of the time of transfer of the receivable [31].

✠ISSUES CONCERNING COMMINGLING

Another risk is that cash received on account of the receivables, the money which is realized when the receivables mature, may be mixed or commingled with the originator's own funds. In situations where the originator is freely permitted to use collections realized from maturity of the receivables, a court may find the originator's control inconsistent with the SPV's claim that it has a perfected interest in the collections. Local tracing laws may ameliorate this risk to an extent. Commingling may also be prevented by using lockboxes or by segregating cash flows. [32.] If these approaches are not available, one should ascertain whether proceeds are traceable and ask local counsel whether traced proceeds are protected.

Under the UNCITRAL Convention, the risk of commingling is minimized [33] .As per the UNCITRAL Convention, if upon maturity of the receivables, the proceeds are received by the originator, then the SPV will have a priority over the right of any other party, if either of the following conditions are satisfied: (1) the originator has received them under instructions from the SPV to hold the proceeds so received for its benefit, or (2) the proceeds are held by the originator for the benefit of the SPV separately and are reasonably identifiable from the assets of the originator.

✠ PREFERENTIAL AS WELL AS FRAUDULENT TRANSFER ISSUES

The bankruptcy laws of some jurisdictions may permit or require a bankrupt company or its representative to avoid transfers of assets or obligations incurred by the company prior to its bankruptcy. Some of these laws are referred to as preference laws, because they avoid preferential transfers. These laws are intended to ensure equality of distribution of the company's assets among all of its creditors. The laws of some jurisdictions may also provide that transfers made or obligations incurred by a troubled company for less than equivalent value be deemed fraudulent and, therefore, voidable. Thus, in securitization transactions, the transfer of receivables from the originator to the SPV should be at arm's length, and the laws relating to preferential and fraudulent transfers in the jurisdiction of the originator should be thoroughly reviewed.

The UNCITRAL Convention does not cover these issues directly, but the document does generally specify which law or jurisdiction governs preferential transfers. For instance, Article 30 provides that in an insolvency proceeding initiated in a country other than the country where the assignor (i.e., the originator) is located, any preferential right that arises by operation of law and that has priority over the rights of the assignee (i.e., the SPV) continues to enjoy such priority.

✠ ISSUES ON CONTRACTUAL AND LEGAL RESTRICTIONS

The next issue is whether there are any contractual or legal restrictions affecting the financing. There are two main ways in which contractual restrictions can arise. First, there may be restrictions that limit origination of receivables, such as anti-assignment clauses [34]. For example, a lease may prohibit the lessor from assigning the rights to lease payments. Some jurisdictions do not permit the assignment of receivables, and, consequently, the local law must be examined [35].

While the UNCITRAL Convention permits certain assignments, notwithstanding anti-assignment clauses,[36] the document still protects obligors who would be harmed by the assignment by making the assignor liable for breach of the prohibition. The UNCITRAL Convention protects obligors by clarifying that the assignment of receivables does not increase their burden [37], and provides that the rights and obligations of the obligor or debtor are not altered without the consent of the debtor. While permitting a change in the payment instruction (with reference to the person, address, or account) in which the payment must be made, the UNCITRAL Convention does not allow any change in the currency or country in which the payment must be made.

Second, contractual restrictions may also arise through negative pledge or similar covenants contained in contracts previously entered into by the originator, such as previously existing financing documents of the originator that may limit the creation of secured debt. In these cases, financing must be restructured to get around the restrictive covenant[38].

Finally, with reference to the legal restrictions, one should inquire with local counsel as to whether the local law itself restricts the financing in any fashion, and whether the securitization transaction complies with all local regulatory and legal requirements. There can be local restrictions that arise in any securitization contract.

✠ EMERGING ENFORCEMENT ISSUES

In an international and commercial context, having theoretical rights under the law is not enough. The critical question is whether one can enforce those rights, recognizing that the legal system granting the rights may not be the same as the one in which enforcement occurs. Furthermore, foreigners may not be viewed favorably when enforcing rights against local citizens. Therefore, the investors may require the originator to submit to the jurisdiction of the country in which the investors reside or at least submit to the jurisdiction of the country where the SPV is located.

This choice of law requirement is advantageous to investors for both procedural reasons and forum convenience. Additionally, the investors would not face any bias against foreigners in the originator's judicial system. The investors can simply sue in the jurisdiction to which the originator has submitted, obtain a judgment, and take the judgment to the originator's home jurisdiction to be enforced against the assets of the originator [39].

Counsel in the originator's home jurisdiction should be consulted in advance, however, to verify that such a judgment would be legally recognized and enforced, as well as what defenses may be raised against such enforcement. Furthermore, submitting to a particular jurisdiction could require the originator to appoint a process agent in the jurisdiction to accept service of process. Another potential problem is that the originator could be immune from suit under its local law if the originator has sovereign or quasi-sovereign ownership that creates sovereign immunity [40].

✠ FOREIGN CURRENCY ISSUES: MITIGATION OF RISKS DUE TO FLUCTUATION IN FOREIGN CURRENCY EXCHANGE RATES

Issues allied to currency exchange are always pertinent in any cross-border transaction. In cross-border securitization, the problem is that the currency in which investors purchase the SPV's securities may be different than the currency the SPV receives to repay them [41]. In this context, currency exchange controls and relevant regulations must be considered. This risk is minimized if the originator has significant assets outside the originator's home jurisdiction against which the investors can enforce their claim, or if there are significant offshore obligors on receivables. Enforcement against those assets or obligors will not be subject to the local laws of the originator's country. Furthermore, arranging local currency swaps for U.S. dollars may mitigate the risk due to restrictions on export or private use of foreign currency. One should also inquire whether the originator's home jurisdiction has ever imposed, or is likely to impose, debt moratoria of the type that restricts the originator from paying its debts to foreigners. Furthermore, the investors also have to take the risk of sustaining a loss due to fluctuation in the exchange rates of the currencies involved. The exchange rate risk, which the investors bear, is generally hedged through swaps and other derivative products. To understand how this is achieved, one needs to be familiar with some basic definitions. A derivative product, in its most basic form, is a contract that creates future rights and obligations regarding an asset that underlies a larger transaction [42]. Derivative products can be broken down into forward contracts and options. In an option, one party pays for the right, but not the obligation, to buy an asset at a future date for a negotiated price. A forward contract is a contractual obligation to buy or to sell an asset, such as foreign currency, at a specified price at a future settlement date. A swap is an array of forward contracts, which cover each date that settlement is to be made [43].

Currency hedging is accomplished by entering into a swap with a third-party-known as a swap counter-party-to exchange the relevant currencies at the future settlement dates. The parties agree in the swap contract to the exchange rate that will be deemed to apply on the settlement dates in order to ensure that the currency conversion will yield sufficient dollars to repay investors. Investors will need assurance that the counter-party can perform its swap obligations on each settlement date should the net value of the swap run against the counter-party. If there is a risk that the counter-party is unable to perform its swap obligations, the investors should minimize performance risk by requiring the counter-party to collateralize its future obligations or to obtain a third-party guarantee. Requiring the counter-party to make periodic adjustment payments that reflect the changing net value of the swap can also minimize the performance risk. This reduces the risk that the counter-party will be unable to pay the net amount due at a future date. This method of controlling performance risk is referred to as mark-to-market [44].

CROSS BORDER TAX ISSUES

Major Tax issues in cross-border securitization transactions include those relevant in purely domestic securitization transactions, as well as additional issues that may have to be determined under foreign law depending on the location of the originator, the receivables, and the SPV. In general, there are three major tax concerns that arise in any securitization transaction. The first is whether the transfer of receivables from the originator to the SPV will be treated for tax purposes as a sale, requiring gain or loss recognition, or as a loan. The second concern is the degree to which the SPV itself will be subject to tax (the so-called entity-level tax). The final concern is the tax treatment of individual investors who purchase these securities. Moreover, a cross-border securitization transaction raises additional tax issues, which are discussed below.

✠ WITHHOLDING TAX

Payments that are treated as interest for income tax purposes may be subject to withholding taxes in the jurisdiction of the payer, and the cost thereof must be factored into the particular transaction [45]. The interest payments may take place in a cross-border securitization, in the following cases: (1) if the obligors in one country pay interest on the underlying receivables to an SPV in another country due to sale of receivables, the payments made by the obligors may be subject to withholding tax regulations in the country where the obligors are resident, and, (2) if a transaction between the originator in one country and an SPV in another country is treated as a loan [46] by the tax authorities of the originator's jurisdiction, there may be withholding taxes on interest paid on the loan.

For example, the jurisdiction of the company may attempt to tax interest income of the SPV if the transfer of assets from the company to the SPV is characterized for tax purposes as a loan from the SPV to the company. Since the non-resident SPV may not be directly subject to taxes in the company's jurisdiction, that jurisdiction may require the company to withhold a portion of the amount of interest otherwise payable and pay the withheld amount to the relevant taxing authority. The final case is where an SPV in one country raises money by issuing debt instruments to investors in another country. Here, the interest that would be paid by the SPV on the debt instruments may be subject to withholding tax regulations in the country of the SPV.

Many countries impose a withholding tax on the gross amount of interest paid to certain foreign persons not otherwise engaged in business in the country from which the interest is paid. The amount is withheld by the payer on behalf of the payee and paid over to the appropriate taxing authority. Frequently, this withholding tax is reduced or eliminated pursuant to the applicable terms of a tax treaty between the country of the payee and that of the payer, but this will not always be the case. If the tax is not eliminated, it will be necessary to determine which party will bear its cost. In most cases, this cost will be borne by the payer through indemnity and gross-up provisions in the securitization contract. Under this provision, the payer is required to pay the payee an extra amount in order to compensate the payee for the tax withheld. Establishing an SPV in a tax haven jurisdiction or in a jurisdiction with a wide tax treaty network may minimize withholding tax costs.

✠ TAXATION OF THE SPECIAL PURPOSE VEHICLE AND ITS SHAREHOLDERS

As noted above, establishing the SPV in a tax haven jurisdiction is desirable. This will both minimize withholding tax on any interest payments made by the SPV and avoid mainstream tax on the net income of the SPV-assuming it is an entity subject to such tax. However, the use of a tax haven can increase the potential withholding tax burden on any interest payments made to the SPV, either by the underlying obligors on the receivables or by the originator. This is due to the fact that tax havens are not typical parties to tax treaties that eliminate withholding taxes.

Ensuring that the SPV will not be subject to any mainstream income tax in a jurisdiction where the SPV does not reside is also important. For example, if the SPV owns receivables of obligors in another jurisdiction and the originator services the receivables in that other jurisdiction on behalf of the SPV, the question arises: whether the SPV will be deemed to be doing business or to have a permanent establishment in that jurisdiction? Either finding could subject the SPV to mainstream income tax in that jurisdiction [47]. Generally, however, the SPV will not be subjected to such tax if the originator is performing purely ministerial functions and has no power to bind the SPV in any way.

✠ OTHER CROSS-BORDER TAX ISSUES

Since cross-border securitization involves transactions in different currencies, tax implications relating to a gain or loss caused by exchange rate fluctuation may be raised. Additionally, swaps and hedges may be subject to taxation. Furthermore, in the case of transfers between affiliated companies, pricing regulations for the transfers would also need to be considered [48].

OVERVIEW ON CROSS- BORDER SECURITIZATION AND INDIAN SECURITIZATION MARKET

New guidelines on securitization issued by the RBI on February 1, 2006, the RBI published revised guidelines on the regulatory treatment of the securitization of standard assets. This entirely reshaped the regulatory and market environment for securitization in India. Issuance levels dropped sharply following the implementation of the guidelines and although volumes have picked up again somewhat, the markets are yet to assimilate them and recover.[49.] The guidelines have also purged regulatory arbitrage by introducing a rigid treatment of capital maintenance requirements following securitization. Further key disincentives include the fact that originators can no longer book profits upfront but have to amortize them over the life of the deal. In the present scenario, if we consider Indian perspective investors in international transactions, till date, no cross-border structures with underlying Indian assets have been implemented.

The main reason for this is fact that India remains a highly regulated market with the RBI maintaining stringent regulation on the inflow and outflow of foreign currency debt.Further, the legal implications for the perfection of security interest with an SPV domiciled outside India may prove cumbersome and costly. From a credit point of view, the prevailing currency and country ratings also pose an obstacle and constraint for cross-border transactions. With the Indian rupee not being a convertible currency, the structuring of a cross-border deal may prove uneconomical as the currency rating ceiling of 'BBB-' could only be breached through the provision of additional credit enhancement or an insurance in addition to a long-term swap to hedge the FX risk. It is also to be noted that India has an established investor community and a large domestic debt market. Indian investors are familiar with the prevailing environment and hence do not have the same yield expectations as international investors when looking at Indian debt. [50.]

Although originators in India have tried to address the above issues by attempting to complete offshore CDO structures, whereby only the underlying credits were Indian but the actual loans were denominated in a foreign convertible currency, none of these attempts have actually materialized thus far. It is believed that only after the RBI relaxes current regulations, will there be true potential for international transactions and cross-border structures to establish themselves in the Indian securitization market. Since the past three years, India is a market to keep an eye on; since the deal size and frequency of domestic securitization in India has been steadily increasing over the past few years, and the researcher thinks that it is only a matter of time before India launches its first rated cross-border securitization[51].

CONCLUSION

Lastly to sum up, cross border securitization enables a company to raise funds at lower costs from capital markets in foreign countries. The structuring of a cross border securitization basically turns around two major issues: First, determining the jurisdictions in which the cross-border securitization operates, and second, ascertaining the applicable law and structuring the securitization in consonance with it. There are various factors-such as restrictive regulations for protection of investors, the relevant tax implications, and the amenities available in that country-that influence the choice of country for raising funds through securitization.

Consequently, the whole socio- economic condition of a country should be analyzed before choosing to structure a cross-border securitization. As the process of securitization turns out to be uniform, the issues linked to securitization also become uniform. Since the laws concentrating on these issues vary between countries, the establishment of a universally accepted international code specifically designed to govern these concerns at an international level would greatly facilitate cross-border securitization. The UNCITRAL Convention is a significant step towards harmonizing the laws governing international receivables financing, thereby facilitating the growth of cross-border securitization in general.

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[32] Segregating cash flows means that the funds are kept separately and operated separately. It is obvious that segregating cash flow would result in an absence of commingling.

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obligation and pay cash dividends as a means to augment shareholder value. The organization is highly captivated by EVA based system which gets reflected in the following statement, “Our adoption of EVA has been good for Harsco and for Harsco stockholders. EVA has instilled an enhanced global financial discipline within our operations that gives us a single, common framework for evaluating investments and making critical business decisions, particularly regarding our allocation of capital”, Harsco Corporation Annual Report 2006.

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