

“You Shall Not Pass”: Consequences of Serbian F/X Restrictions in Cross-Border Loan Transfers



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Serbian F/X legislation places legal and practical restrictions on secondary trading and transfers of cross-border claims by requiring the two-fold cooperation of the Serbian resident-debtor.

This article focuses on pitfalls in the Serbian Foreign Exchange Act (*Zakon o deviznom poslovanju*) (F/X Act) related to cross-border loan transfers.

Cross-border loans to a Serbian borrower are generally transferable among non-resident lenders. The F/X Act, however, provides for borrower-friendly transfer provisions usually not seen in comparable jurisdictions: a transfer is practically dependent on the debtor’s cooperation.

The F/X law: Restrictions

Article 33 of the F/X Act broadly allows for a transfer of a cross-border loan if all of the following conditions are met:

- transfer transactions are performed on the basis of:
 - (i) an agreement made by all parties (ie, the original lender, the new lender and the borrower) or
 - (ii) a borrower’s statement confirming notification of the transfer;
- the above documents contain details of the parties, the underlying loan agreement, the currency and amount of transferred claims and debts; and
- the resident borrower (the only one with authority to do so) registers changes of the lender with the National Bank of Serbia (NBS) as the competent F/X regulator (without this formal change, all Serbian commercial banks would refuse to make outbound transfers to the new lender).

Thus, a cooperative borrower is needed (i) when making a three-party agreement or issuing a required statement and (ii) when executing the NBS forms for registering a new lender of record.

Practical consequences of the restriction: Case law

In the wave of the financial crisis and distress in the Eurozone, several countries have experienced a recession that induced austerity measures and governmental rescue plans. In one of them, the rescue included restructuring the banking sector where certain banks were wound down and new ones stepped into the shoes of the previous lenders of record. In that case, and where a Serbian resident was a borrower, such change of lender of record had to be registered with the NBS.

We have witnessed cases in practice where borrowers easily obstructed lawful changes of creditors that took place by operation of law or governmental decree. This hidden transfer restriction is blocking the free trade with non-performing cross-border loans and is a major obstacle to the development of a proper NPL market. Where possible, lenders often resort to more cumbersome synthetic transfer structures in attempts overcome local transfer restrictions.

The NBS has acknowledged that the issue exists and has noted that it can be solved only once the primary source of legislation—the F/X Act—is amended. This was/is a cumbersome process requiring the coordination of the Ministry of Finance. Possible solutions and options have been contemplated, including (i) a declaratory ruling from the lender’s jurisdiction court, which would have to be recognised by the Serbian Court, as legal basis for repatriating the proceeds from Serbia and (ii) the initiation of misdemeanour proceedings and putting pressure on the resident debtor.

Both paths are time consuming and burdensome. Ultimately, the Serbian FX regime could not adapt to the “non-cooperative debtor” roadblock.

Conclusion

Once the case was boiled down to its main point, the question that remained is not why this particular resident-debtor selected to frustrate registration of a transfer but why the same behaviour should be imitated by others and “tolerated” just because the law is silent. But until the F/X Act is amended, the NBS will continue refusing to register the new lender of record without the borrower’s assistance, meaning the bargaining power remains in the hands of the capricious borrower.

In Serbia, the transfer of a cross-border loan is practically conditioned on the debtor’s cooperation. So the “cooperative borrower” requirement often leads to complications that may hinder, or even block, the loan transfer.

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