Structured Finance & Securitisation

Contributing editor
Patrick D Dolan

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Structured Finance & Securitisation 2017

Contributing editor

Patrick D Dolan

Norton Rose Fulbright US LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2015
Third edition
ISSN 2058-5594

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Structured Finance & Securitisation 2017

Third edition

Getting the Deal Through is delighted to publish the third edition of *Structured Finance & Securitisation*, which is available in print, as an e-book 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 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 the contributing editor, Patrick D Dolan of Norton Rose Fulbright US LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2017

Global overview

Patrick D Dolan*

Norton Rose Fulbright US LLP

The issues that appeared to attract the most attention in the US securitisation industry during 2016 were (i) the Regulation AB II asset-level disclosure requirements for all asset types other than residential mortgage loans (that became subject to the Regulation AB II asset-level disclosure requirements during 2015), which became effective in November 2016 for registered offerings of asset-backed securities; and (ii) the risk retention requirements, which became effective for both registered and unregistered asset-backed securities offerings on 24 December 2016. While the collateralised loan obligation market has been focused on complying with the risk retention requirements for the last few years, it seemed that 2016 was when the commercial mortgage-backed securities (CMBS) market started to focus intently on the risk retention requirements.

The traditional form of risk retention in CMBS securitisations has been the B-piece. But under the new risk retention requirements for CMBS, the B-piece, because it is a form of horizontal risk retention, has to be valued at fair value for US GAAP purposes. This requirement means B-pieces are more expensive than what traditional B-piece buyers are used to paying for them. As an alternative, at the end of 2016 a few of the larger banks active in the CMBS market used vertical risk retention to satisfy the risk retention requirements. These banks were also hoping to receive favourable bank regulatory capital treatment for their vertical risk retention interest.

That same year also saw many securitisation sponsors putting in place the infrastructure to comply with the asset-level disclosure required by Regulation AB II. The data points required for commercial mortgage loans and residential mortgage loans track data points compiled by related industry trade organisations, so compliance for those two asset types should be easier. However, there was initially some concern that securitisation sponsors in the subprime auto loan space would have difficulty complying with the asset-level disclosure requirements for auto loans due to a lack of the necessary infrastructure to compile the required information data points, but those concerns seem to have receded by the November 2016 deadline.

The early focus in 2017 has been on trying to anticipate which parts of Dodd-Frank and the related rules and regulations the new Trump administration will try to repeal. In early January 2017, it seemed that financial regulatory reform was not going to be a top priority for the Trump administration but during the first week of the new administration's term in office the President himself mentioned financial regulatory reform as a top priority.

While it is difficult to predict which parts of Dodd-Frank and the related rules and regulations the Trump administration will focus on repealing or modifying, one possibility is that the new administration will use US congressman Jeb Hensarling's bill, the Financial Choice Act, as a starting point. Of particular interest to the securitisation industry, the Financial Choice Act calls for significant changes to the structure and funding of the Consumer Financial Protection Bureau (CFPB). The Financial Choice Act contemplates the CFPB being run by a bipartisan committee rather than a single director and that the CFPB will be funded through the congressional appropriations process rather than by the Federal Reserve System. Interestingly, US Treasury Secretary Mnuchin, during his confirmation hearings, suggested that the CFPB needed to be modified rather than done away with altogether.

Of at least equal interest to the securitisation industry, the Financial Choice Act also proposes eliminating risk retention requirements for all asset types other than residential mortgage loans on the theory that it was subprime residential mortgage loans that led to the credit crisis of 2008 and not the other asset types. The Financial Choice Act also calls for the repeal of the Volcker Rule on the grounds that it is negatively impacting legitimate market-making activities on the part of underwriters and thus hindering liquidity and economic growth.

Given that President Trump seems focused on growing the US economy and creating more jobs, the US securitisation industry could end up being the beneficiary of significant statutory and regulatory relief during 2017. It should be noted, however, as pointed out in the weekly newsletter of the Structured Finance Industry Group for the week of 23 January 2016, whether a particular administrative agency's rule or regulation affecting the securitisation industry would be repealed in the event that Dodd-Frank is repealed or modified may depend on whether the rule or regulation is based on the administrative agency's own rule-making authority as opposed to a particular section of Dodd-Frank.

In Europe, by contrast, it is less the imposition of new rules than the delay in implementing already announced initiatives that has been a focus of the asset-backed securities industry. The European Securities Market Authority (ESMA) announced that it did not have statutory funding to implement the reporting website required by the Credit Rating Agencies III directive (CRA III) and accordingly would not be establishing such website. From January 2017, the reporting requirement under CRA III applies to all structured finance transactions (effectively securitisations as defined under the European Capital Requirements Regulation, which is the main prudential regulation of banks in Europe) whether or not rated. The reporting requirement has not itself been revoked or suspended, leaving issuers and sponsors in a somewhat uncomfortable position of being unable to comply with a regulatory requirement. ESMA's preferred solution appears to be to wait for the long-trailed European Securitisation Regulation (which would consolidate various European regulations covering securitisation, including the CRA III reporting requirement) to be implemented, at which point the lack of a statutory basis for funding will be rectified. However, there is as yet no firm timetable for the implementation of the Securitisation Regulation and it is currently delayed by disagreements between the European Parliament and the European Commission, both of whom need to approve it. Most issuers and sponsors have responded pragmatically to the current impasse, on the basis that they cannot be held responsible for the failings of a regulator (and indeed, it does not appear that CRA III grants the regulator any power to sanction issuers or sponsors). Brexit has also been a major theme in 2016, with many participants trying to establish how it will affect them and their operations. However, the vote for Brexit itself does not appear to have dented market enthusiasm. If anything, market activity increased after the vote, with post summer transactions showing strong demand and pricing at, or close to, pre-crisis levels.

The following chapters outline the key issues and considerations in implementing a securitisation transaction in Canada, the Cayman Islands, Denmark, France, India, Japan, Portugal, Switzerland, Turkey and the United States. Each chapter answers a similar set of questions about, among other things, the securities law, the bankruptcy law and the tax law considerations of closing a securitisation transaction in the related jurisdiction. While the chapters are not designed to cover every possible issue that may be encountered in a securitisation transaction, they do give the reader a substantial head start in getting up to speed on the relevant securitisation-related issues in each jurisdiction.

* *The author would like to thank David Shearer, partner at Norton Rose Fulbright LLP (London), for his assistance with this overview.*

Canada

William (Bill) K Jenkins, Peter E Murphy and Dennis R Wiebe

Dentons Canada LLP

General

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

No. Canada does not have a specific securitisation law at either the federal or provincial levels. Various aspects of securitisation legal structures and documentation, and the consumer contracts underlying securitisations, are governed by common law and federal and provincial statutes, as further discussed herein. Some parties to securitisations are regulated entities (see questions 4 and 5).

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

No. As Canada does not have a specific securitisation law, there is no general Canadian law definition of 'a securitisation'. However, aspects of securitisations are governed by Canadian common law and federal and provincial statutes, and some of the parties to securitisations are regulated entities in Canada, as outlined herein. Some of these Canadian statutes and regulations contain definitions of securitisation concepts for their purposes.

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

According to the Dominion Bond Rating Service (DBRS) Securitization Servicer Report (Canadian Securitization Market Overview; September 2016), as of 30 September 2016, the total amount of securitisations outstanding in the Canadian market was C$91.9 billion.

Regulation

4 Which body has responsibility for the regulation of securitisation?

Canada does not have a specific securitisation at the federal or provincial level (see question 1); therefore, there is not a single regulatory body in Canada that has responsibility for securitisation per se.

However, various regulatory bodies at the federal and provincial levels have responsibility for the administration of statutes that are relevant to securitisation legal structures, and documentation and the consumer contracts underlying securitisations. Also, certain parties to securitisations in Canada are regulated entities, and their activities (including securitisations) are regulated – for example, financial institutions are regulated by the Office of the Superintendent of Financial Institutions (OSFI). Certain public sector securitisation programmes, such as the National Housing Act residential mortgage-backed securities programme (NHA MBS) of Canada's housing agency (the Canada Mortgage and Housing Corporation (CMHC)), are quasi-regulated through the requirements of the CMHC.

5 Must originators, servicers or issuers be licensed?

Canada does not have a specific securitisation law at the federal or provincial level, and therefore, Canadian originators or issuers are not required to be licensed in order to engage in securitisation per se.

However, certain parties to securitisations in Canada are regulated entities – for example, financial institutions and their activities (including holding and servicing of consumer receivables and engaging in securitisation, whether as originators or servicers) are regulated by the OSFI. Similarly, trustees must be licensed in any provinces in which they engage in the trustee business. Certain Canadian provinces have collection agency statutes or mortgage broker licensing requirements that may apply to any entity that collects mortgages or other receivables. The applicability of Canadian bank, servicer and trustee licensing requirements on the securitisation structure must be looked at on a case-by-case basis, particularly in the case of a non-Canadian issuer, since this depends on the nature of the parties, the receivables, the jurisdiction of the parties and the receivables, the servicing structure, and the nature of the sale.

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

Not applicable.

7 What sanctions can the regulator impose?

Not applicable.

8 What are the public disclosure requirements for issuance of a securitisation?

Securities issuances in securitisations are made either by way of an offering to the public using a prospectus, or pursuant to a private placement exemption under applicable securities legislation in Canada.

In either case, the entity that issues securities is required to comply with the registration and prospectus requirements (or the exemptions therefrom), of applicable securities legislation in Canada. Each province of Canada has enacted its own securities legislation. Compliance with securities legislation is enforced by a securities commission or equivalent regulatory body in each province. The provincial bodies coordinate regulatory initiatives through the Canadian Securities Administrators (CSA). In fact, the CSA, a voluntary umbrella organisation, has made progress in pursuing a national system of harmonised securities laws. The CSA has implemented a national passport system in every province other than Ontario, which allows issuers and registrants to deal with only the regulator in their principal jurisdiction, and exempts such issuers and registrants from certain legal requirements in other provinces and territories.

Each of the Securities Act (British Columbia) (the BC Act), the Securities Act (Alberta) (the Alberta Act), the Securities Act (Ontario) (the Ontario Act) and the Securities Act (Quebec) (the Quebec Act) include detailed rules governing information that must be made available to investors in order to ensure that they have adequate information available to them on which to base their investment decisions. These disclosure requirements can be broken down into two categories: prospectus disclosure requirements and continuous disclosure requirements (see question 9). In cases where a prospectus is required for a public offering, it must be prepared in accordance with, and contain the information required by, the relevant securities laws and the rules and regulations promulgated thereunder. None of the Canadian provinces has specific prospectus disclosure rules for securitisation securities; the general rules applicable to securities issuers apply. Each of the BC Act, the Alberta Act, the Ontario Act and the Quebec Act, and the rules and regulations promulgated thereunder, contain certain specific exemptions from the prospectus requirement. National Instrument 45-106 – Prospectus and Registration Exemptions (NI 45-106), creates a national set of exemptions with only a few provincial differences.

The most commonly relied on exemption for the private placement of securitisation securities is the 'accredited investor' exemption, which includes institutional investors (eg, financial institutions, insurance companies, pension funds). In addition, highly rated short-term debt securities (ie, asset-backed commercial paper) can be distributed under an exemption from registration and prospectus requirements.

Where a prospectus exemption applies, the prospectus public disclosure rules do not apply. Resale restrictions applicable under provincial securities legislation apply to securities issued in reliance on an exemption. Under the 'closed system' of securities regulation in Canada, the first trade in securities issued in reliance on a prospectus exemption must generally either be made under a prospectus, pursuant to a further prospectus exemption or in compliance with the relevant resale restrictions (including hold period requirements), of provincial securities legislation. In contrast, when securities are distributed by way of a prospectus, they are thereafter freely tradeable, unless they form part of a control block.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

The mechanisms employed in each of the BC Act, the Alberta Act, the Ontario Act and the Quebec Act to achieve their policy objectives include detailed rules governing information that must be made available to investors in order to ensure that they have adequate information available to them on which to base their investment decisions. As noted in question 8, these disclosure requirements can be broken down into two categories: prospectus disclosure requirements (see question 8) and continuous disclosure requirements. Such securities legislation contains provisions requiring public entities that are 'reporting issuers' under such legislation, to promptly report any material changes in their affairs, and to prepare quarterly interim and comparative annual financial statements, with accompanying notes and management discussion, and analysis of financial condition and results of operations.

Further, most reporting issuers are required to file an annual information form that provides supplemental analysis and background material relating to the issuer. Certain foreign reporting issuers, who are registrants under US securities legislation, are afforded relief from Canadian continuous disclosure requirements, provided that they comply with applicable foreign disclosure requirements. However, for Canadian private placement securitisations, the issuer is not considered to be a 'reporting issuer' subject to continuous disclosure requirements. In these cases, ongoing investor disclosure is driven principally by investor requirements and securitisation market practices. None of the Canadian provinces have specific ongoing public disclosure rules for securitisation securities; the general rules applicable to securities issuers apply.

Eligibility

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

There are no general Canadian legal restrictions on which entities can be originators. However, in Canadian securitisations, like in other jurisdictions, there will be practical, commercial and marketing considerations as to which type of entity will be acceptable or appealing to investors and will support a credit rating of the securities.

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

There are no general Canadian legal restrictions on which receivables or other assets can be securitised. However, in Canadian securitisations, like in other jurisdictions, there will be practical, commercial and marketing considerations as to which type of entity will be acceptable or appealing to investors and will support a credit rating of the securities. In particular, like in other jurisdictions, the assets must have a predictable payment and default pattern to generate a steady cash flow and provide sufficient collateralisation for the issued securities.

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

There are no general Canadian legal restrictions on the classes of investors that can participate in a securitisation offering. However, in Canadian securitisations, like in other jurisdictions, there may be practical, commercial and marketing considerations of the originator, issuer and underwriter as to which types of investors the securitisation will be offered to – for example, whether the securities will be broadly marketed publicly or only marketed to institutional investors as a private placement.

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

There are no general Canadian legal restrictions on who may act in these roles. However, depending on the nature and location of the receivables and the parties, the parties playing these roles may need to be licensed (see question 5). Also, in Canadian securitisations, as in other jurisdictions, there may be practical, commercial and marketing considerations of the originator, issuer and underwriter, and credit rating agency requirements as to which parties may perform these roles.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

Certain Canadian public-sector securitisation programmes, such as the NHA MBS programme of the CMHC (see question 4), are quasi-regulated. Receivables due from the federal government and from certain provincial governments are generally not assignable (including to a securitisation special purpose vehicle (SPV)) unless certain procedural steps are taken under the Financial Administration Act or analogous provincial legislation.

Transactional issues

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

Canada does not have specific laws pertaining to securitisation SPVs.

There are a range of securitisation legal structures used in Canada that use a range of SPV entities (including corporations or partnerships). The most common SPV entity used in Canadian securitisations is a common-law trust.

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

A common-law trust SPV can be formed quickly and easily (at little legal cost) using a standard Declaration of Trust document in which a settlor designates an SPV trustee. The trustee will be a licensed entity that typically will be required to meet minimum independence and credit quality requirements (see questions 5 and 23). In cases of corporate or partnership SPVs, those entities can also be formed quickly, easily and inexpensively.

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

Matters of contract law, such as receivables purchase agreements, are governed by provincial laws in Canada. Canadian provincial laws do not require a sale of receivables to be governed by the same law as the law governing the receivables. A Canadian court should recognise the choice of a foreign law, provided that the choice of law is bona fide and there are no public policy grounds for avoiding it. However, there are a number of limitations to how foreign law would be applied in a Canadian court, including but not limited to the following:

- the court will apply Canadian provincial law to any procedural aspects of a matter;
- the court may only give effect to foreign law if it is pleaded and proven by expert testimony; and
- the court will apply Canadian provincial laws that have overriding effect (for example, certain provisions of the Personal Property Security Act (PPSA) in each province relating to enforcement).

Aside from recognising a choice of law, a Canadian court should recognise that a sale under foreign law is effective against the seller and other third parties in Canada as a true sale, provided that the Canadian law requirements for a true sale are satisfied (see question 33). However, while choice of law and true sale may be recognised by a Canadian court, as a practical matter, a true sale opinion is typically required for securitisations, and Canadian lawyers are only able to opine on the enforceability of a receivables purchase agreement governed by Canadian law for these purposes. For these reasons, the parties will often choose

Canadian provincial law as the governing law for the receivables purchase agreement when the securitisation involves a seller located in Canada and a true sale opinion is required. Also, regardless of choice of law governing the sale, see questions 19 and 20 as to the perfection requirements for a sale of receivables located in Canada to be effective.

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

Yes; under Canadian law, a seller may sell to an SPV receivables that are acquired or originated by the seller after issuance of securities by the SPV. While the SPV may commit to purchase future receivables at the time of issuance of its securities, the sale is only considered to occur when the receivable comes into existence. See question 28 as to identification. However, it should be noted that for any receivables that come into existence following the insolvency of the seller, there is a risk that the seller or an insolvency official may validly disclaim the sale.

19 What are the registration requirements for a securitisation?

A securitisation per se does not need to be registered. However, the perfection of the sale of receivables to the SPV and of any security granted by the SPV is achieved through registration in relevant registries (see questions 20 and 26).

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

There is no general Canadian legal requirement for obligors to be informed of a securitisation. However, in order for the sale to be effective against an obligor located in Canada, the obligor must be notified of the sale. Nonetheless, subject to Quebec law requirements for perfecting sales of Quebec receivables (outlined below), this is not typically required for Canadian securitisations. To the extent that obligors are notified, there is no specific legal form or delivery method required by law. It should be noted that if the obligors of the underlying receivables are located outside Canada, the effectiveness of the assignment against the foreign obligor would be governed by the law of the jurisdiction where the obligor was located. Notice to the obligors is not required in order for the sale to be effective against the seller and its creditors, provided that perfection requirements under relevant provincial law were satisfied in provinces other than Quebec. Instead, perfection is achieved by registration under the province's PPSA (that deems an absolute assignment of receivables to be a security interest), by registering a financing statement in the PPSA registry. In Quebec, an assignment of a 'universality of claims' (ie, a sale of all receivables of a particular type generated by a seller between two specified dates) may also be perfected by registration. However, in cases of sales of receivables in Quebec that are not sales of a 'universality of claims', the transfer must be perfected by notice to the obligors. Special procedures must be followed to assign receivables from government obligors (see question 14).

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

The Personal Information Protection and Electronic Documents Act is federal legislation that applies to the use, collection and disclosure of personal information in Canada. Certain provinces have also enacted data protection laws. While these laws only relate to data pertaining to individuals, the definition of 'personal information' is very broad. Individual consents to collection, use and disclosure are constrained.

In practice, caution is required in transferring, handling and storing data pertaining to consumer credit, and other receivables that contain personal information and portfolio data may need to be anonymised.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

In 2012, National Instrument 25-101 – Designated Rating Organizations (NI 25-101) came into force and, for the first time ever, subjects credit rating agencies to targeted regulation in Canada. NI 25-101 permits any credit rating organisation to apply to become a 'designated rating organisation' (DRO), and stipulates that a credit rating organisation must become a DRO for its ratings to be included in a Canadian offering document. NI 25-101 imposes certain requirements on DROs, including adoption and publication of a code of conduct; incorporating procedures to ensure ratings are based on a thorough analysis of all available information; the establishment of managerial oversight committees; and various ratings of integrity, transparency, governance and independence mechanisms. Under NI 25-101, DROs must not make a recommendation to an issuer about the corporate or legal structure, assets, liabilities or activities of the issuer, and DROs must disclose the details of compensation arrangements with the issuer. In addition, many of the credit rating agencies rating Canadian securitisations are US-headquartered (for example, Moody's Investors Service, Standard & Poor's Ratings Services and Fitch Ratings), and therefore will also be subject to US regulations applying to them extraterritorially. The factors that rating agencies focus on in Canadian securitisations are outlined in their global or North American ratings methodologies for the relevant asset class (subject to adjustment for any Canadian law and market practice particularities). The Canadian rating agency, DBRS, publishes specific Canadian securitisation ratings methodologies based on the global and North American ratings methodologies.

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

The most common SPV entity used in Canadian securitisations is a common-law trust (see question 15). The trust's actions are carried out by the SPV trustee and, as such, there are no directors and officers of such a SPV. The chief duties and obligations of the SPV trustee are governed by the Declaration of Trust and general Canadian common law and statutory law pertaining to trustees. In cases where a corporate or partnership entity is used in a securitisation, the obligations of the directors and officers of the SPV, or the general partner of the SPV, are no different than those that would exist at law more generally (by application of Canadian common law and relevant provincial or federal company or partnership statute provisions). This includes a fiduciary duty to the corporation they serve, and a duty of care. There is no specific Canadian legal requirement that the trustee or directors and officers must be independent of the originator entity. However, legal structuring and credit rating agencies' methodologies may impose certain independence requirements (see questions 13 and 32). In the case of financial institution originators who are seeking favourable Canadian capital treatment for the securitisation, OSFI Guidelines B-5 and B-5A create capital requirement disincentives for financial institutions setting up SPVs that are not fully independent. In cases where independence is required, a provision in the company's or partnership's constitutional documents to the effect that certain actions may not be taken without an independent director's approval should be legally effective, to preclude such action from being validly taken without such approval. A contractual restriction entered into by the SPV would mean that an action without such approval would be a breach of contract, but the action itself may not be invalid as a matter of corporate law.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Canada does not have such regulations. The CSA has taken the position that the Canadian securitisation market is, for the most part, free from incentive misalignment, due to a number of factors:

- a large portion of the Canadian securitisation market is comprised of government-guaranteed securitised products (such as the NHA MBS);
- Canadian securitisers are generally subject to prudential oversight; and
- the 'originate-to-distribute' model is not prevalent in Canada.

Canadian securitisations also use forms of credit enhancement, which the CSA suggests achieve the objectives of risk retention:

- over-collateralisation;
- excess spread; and
- cash reserve accounts that trap cash-to-pay investors.

As a result of these factors, the CSA has specifically stated that Canadian securities regulators will not be introducing mandatory credit risk retention. However, the CSA does take the position that issuers should disclose clearly to investors whether and how a securitisation has been structured to align the interests of the securitisation parties with

investors, and the extent of any risk retention. It should be noted that, to the extent that the securities of a Canadian securitisation are offered to US or European investors, US or European risk-retention rules may apply to the securitisation extraterritorially.

Security

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

The SPV typically enters into a trust indenture with an indenture trustee. The trust indenture (and, in some cases, other ancillary security documents) typically includes a grant of security in the receivables and any other assets held by the SPV (including any bank accounts) to the indenture trustee on behalf the bondholders (or other relevant investors) and other secured creditors. In provinces other than Quebec, while security is granted by means of a written agreement, no particular document formalities need be followed. In Quebec, a Quebec law hypothec document must be used and formalities pertaining to the granting of a hypothec must be followed. Where security is taken in bank accounts, the method for taking security depends on the type of account and the transaction structure.

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

In provinces other than Quebec, perfection of security interests in personal property (including receivables and bank accounts) is achieved by registering a financing statement in the PPSA registry under each province's PPSA. Each PPSA requires the attachment of a security interest to the collateral for the security interest to be effective. The PPSAs provide that when attachment occurs – for example, a security interest in a receivable would 'attach' when the receivable comes into existence – value is given and the grantor has signed a security agreement in which the description is sufficient for the receivables to be identified. In Quebec, registration of the hypothec is required.

A security interest in real property (including a mortgage) is perfected by registering the interest in the applicable provincial land titles registry system. Typically, this would not be done at the time of the closing of the securitisation. Instead, a power of attorney will be granted to the indenture trustee that will allow it to register the interest at a later date in the event that certain trigger events occur. In addition, there are specific statutes, such as the Bills of Exchange Act and the Securities Transfer Act of most provinces, which govern the perfection of assignments and security interests in specific types of assets.

Whether or not these are relevant for a securitisation will depend on the relevant transaction structure and the types and location of assets over which security is being granted. Security interests in certain types of personal property may require the holder of the security interest to take possession or control of the asset. See question 20 regarding notice to obligors.

27 How do investors enforce their security interest?

The PPSAs in provinces other than Quebec, and the Civil Code of Quebec, contain comprehensive rules dealing with the rights and remedies of secured creditors following default by their debtors. The rights of a secured party include, but are not limited to, the right to take possession of the collateral, the right to retain the collateral or the right to dispose of the collateral. The PPSAs also enumerate the rights and remedies of the debtor. These include, but are not limited to, the right to redeem the collateral or a right to reinstate the security agreement, and the right to receive notice of the creditors' intentions on default. Each PPSA also specifies that, in addition to the rights and remedies enumerated in the PPSA, the principles of law and equity continue to apply, unless they are inconsistent with the express provisions of the legislation. Despite the differences in terminology, practices and procedures between Quebec and the PPSA provinces, in most cases, substantially the same or similar rights and remedies are available to creditors in Quebec as those that apply in PPSA jurisdictions.

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

Commingling of collections can present an issue in Canadian securitisations. It is not necessary for each specific receivable to be identified in order for sales to be legally effective. However, the receivables purchase agreement must contain a sufficient description for receivables to be identified as belonging to the relevant class or classes of receivables.

It should be noted, though, that this type of identification of receivables classes may affect whether the receivables are considered to be a 'universality of claims' under Quebec law (see question 20). As a practical matter, even if the securitisation documents contain a term that the seller is holding collections belonging to the purchaser on behalf of the purchaser, commingling of collections with the seller's assets can be a risk to the extent that the collections cannot be clearly identified.

Taxation

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

The income tax considerations will be specific to each originator. Canadian originators pay income tax in Canada in accordance with income calculated in a manner conforming with Canadian generally accepted accounting principles. In 2010, the handbook of the Canadian Institute of Chartered Accountants (CICA Handbook) was revised to incorporate International Financial Reporting Standards (IFRS) and Accounting Standards for Private Companies (ASPE). Public companies are required to adopt IFRS, and non-public companies may choose to adopt either IFRS or ASPE. Specific provisions under Canada's Income Tax Act apply to certain types of originators – for example, there are rules for financial institutions holding and disposing of specified debt obligations. See question 30 as to the applicability of value added taxes to service fees and sales of tangible assets.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

Federal goods and services tax and provincial sales tax are applicable to servicing fees and to the transfer of certain tangible assets in Canada.

Consequently, it is most common in Canadian securitisations to structure the assignment and servicing of receivables so that the receivables are sold to the issuer on a fully serviced basis, without a separate servicing fee being paid. It is worth noting that, with respect to cross-border transactions involving non-Canadian issuers, Canada has eliminated withholding tax on interest paid to arm's-length lenders other than participating debt interest. Therefore, withholding tax is no longer a concern for interest revenue from Canadian receivables purchased by an issuer outside of Canada. However, in the case of a non-Canadian issuer, an intermediate Canadian SPV will, in any event, often be established to purchase the receivables in order to mitigate the risk of the non-Canadian issuer being subject to Canadian income tax by being considered to be 'doing business in Canada' through the ownership and servicing of Canadian receivables. However, this needs to be looked at on a case-by-case basis, since the question of whether an entity is considered to be 'carrying on business in Canada' is very dependent on the specific facts and circumstances. Withholding tax of 25 per cent continues to be applicable on cross-border lease, royalty and dividend payments, subject to certain exceptions and to reduction under specific bilateral treaties.

31 What are the primary tax considerations for investors?

The income tax considerations will be specific to each investor, depending on where the investor is resident and in terms of how interest payments and sale, redemption or repayment of the bonds are treated in the investor's jurisdiction of residency. Canadian corporate investors pay income tax in Canada in accordance with income calculated in a manner according to Canadian generally accepted accounting principles. With respect to non-Canadian investors, Canada has eliminated withholding tax on interest paid to arm's-length lenders other than participating debt interest. Therefore, withholding tax is no longer a concern for interest payments to non-Canadian investors.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

In order to mitigate the risk of consolidation (see question 34), the SPV is typically established as an orphan trust under the control of an arm's-length trustee. If corporate or partnership entities are used in the securitisation structure, they will typically be set up to have one or more

independent directors (see question 23). The SPV is typically set up in a manner that ensures that it is operationally distinct from the originator; for example:

- it holds its own bank accounts;
- its assets are not commingled with those of the originator and are transferred to the SPV in a manner that satisfies the indicia for a true sale (see question 33);
- it has its own financial statements prepared;
- corporate formalities are followed in transferring assets and interacting with originator; and
- there are no originator guarantees.

Also, in order to ensure that the SPV is bankruptcy-remote, the SPV is set up in a manner to ensure, through its constitutional documents and contractual obligations, that it has no premises, no employees and only engages in the business of holding the receivables, issuing the bonds and related ancillary activities, such that it should have no creditors other than the securitisation creditors.

33 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)?

Generally speaking, Canadian courts should respect the intent of the parties for the transaction to be a sale, as evidenced by the documents, communications and conduct of the parties. In Canada's leading case on the recharacterisation of a sale as a secured loan, the court noted a number of factors including the transfer of risk, ability to identify the sold assets, level of recourse to the seller, any right of redemption by the seller or right to retain collections, responsibility for collections and ability to calculate the purchase price. The most important indicator for the sale being recharacterised as not a true sale is the seller retaining a right of redemption in the assets or for the receivables to be sold back to it.

34 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 are no substantive consolidation provisions in Canadian insolvency statutes and there is very little Canadian case law on the topic.

However, substantive consolidation does fall within the general equitable jurisdiction of a Canadian court in an insolvency proceeding; therefore, it is acknowledged that this is a theoretical legal risk in the case of insolvency. The limited Canadian case law indicates that Canadian courts follow a balancing of prejudice test similar to the test used by US courts, in which the court weighs up the prejudice that will be suffered by creditors if there is no consolidation against the prejudice that the debtor will suffer from its imposition. In applying the balancing of prejudice test, the court will look at the facts and circumstances and a number of factors, including the extent to which the SPV is operationally distinct from the originator or seller (see question 32).

大成 DENTONS

William (Bill) K Jenkins **bill.jenkins@dentons.com**
Peter E Murphy **peter.murphy@dentons.com**
Dennis R Wiebe **dennis.wiebe@dentons.com**

77 King Street West
Suite 400
Toronto
Ontario M5K 0A1
Canada

Tel: +1 416 863 4511
Fax: +1 416 863 4592
www.dentons.com

Cayman Islands

James Burch and Shamar Ennis
Walkers

General

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

The Cayman Islands is a major participant in the global securitisation market and while there is little by way of domestic securitisation in the Cayman Islands, a vast number of securitisation transactions have a Cayman Islands exempted company as the issuer.

Cayman Islands legislation evolves continually to ensure that it is in step with the demands of the securitisation market and that a Cayman Islands exempted company is the securitisation vehicle of choice. A good example of this is the statutory recognition of non-petition clauses, which is one of the pillars of securitisation structuring, within section 95(2) of the Companies Law. The Cayman Islands has also enhanced the section of the Companies Law dealing with mergers to allow for a foreign entity to merge with a Cayman Islands company, which has been used to great effect in the collateralised loan obligation (CLO) space.

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

No, there is no such definition under Cayman Islands law.

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

While there are no securitisations of domestic assets in the Cayman Islands, the securitisation of non-Cayman Islands assets through use of Cayman Islands vehicles is considerable.

Regulation

4 Which body has responsibility for the regulation of securitisation?

There is no regulatory body responsible for the regulation of securitisation in the Cayman Islands.

5 Must originators, servicers or issuers be licensed?

Provided that the originators and servicers are not carrying on business from within the Cayman Islands, and that the issuer will not be making an invitation to the public in the Cayman Islands to subscribe for any of its securities, there is no requirement under Cayman Islands law for such transaction parties to be licensed.

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

Not applicable. See question 4.

7 What sanctions can the regulator impose?

Not applicable. See question 4.

8 What are the public disclosure requirements for issuance of a securitisation?

Provided the securities are not listed on the Cayman Islands Stock Exchange, there are no public disclosure requirements in the Cayman Islands.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

Provided the securities are not listed on the Cayman Islands Stock Exchange, there are no ongoing public disclosure requirements in the Cayman Islands.

Eligibility

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

No, there are no restrictions under Cayman Islands law.

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

It should be noted that almost all securitisations using Cayman Islands vehicles involve assets that were originated offshore. Cayman Islands law does not prescribe particular types of receivables or asset classes that may be securitised. It should be noted that there are no Cayman Islands provisions that would restrict the acquisition of foreign receivables by a Cayman Islands special purpose vehicle (SPV).

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

No, there are no limitations under Cayman Islands law applicable where a Cayman Islands SPV is the issuer, assuming that no invitation to subscribe for the securities is made to the public in the Cayman Islands.

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

Cayman Islands law does not prescribe who may act as custodian, account bank and portfolio administrator or servicer, and these roles are usually carried out by transaction parties operating and based outside the Cayman Islands. The Cayman Islands Monetary Authority regulates local service providers including banks.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

No, there are no special considerations.

Transactional issues

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

In the vast majority of securitisation transactions, the SPV will be incorporated as a Cayman Islands exempted company with limited liability whose shares will be held on trust (ultimately for charitable purposes) by a Cayman Islands-licensed trust company as share trustee, which assists with insolvency-remoteness requirements. Some transactions (mostly Latin American securitisations) may involve a trust rather than a corporate SPV, in which case a Cayman Islands trust company would declare a trust over the transaction assets and issue debt backed by the trust property. While rare, partnerships have also been formed as SPVs to participate in securitisation transactions. Legislation was recently introduced in the Cayman Islands to provide

for limited liability companies (LLCs). While LLCs have not yet been used in the context of securitisation transactions, there is scope for these vehicles to be used for a number of purposes including as risk-retention vehicles in CLO transactions, holding companies or SPVs.

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

Setting up an SPV in the Cayman Islands is flexible and quick. A Cayman Islands SPV can be set up in as little as 24 hours.

Upon the filing with the Registrar of Companies in the Cayman Islands (the 'Registrar') of: the memorandum and articles; the appropriate filing fees; and a declaration from the subscriber to the effect that the operation of the SPV will be conducted mainly outside the Cayman Islands, the SPV shall be deemed to be registered, and the Registrar shall issue a Certificate of Incorporation.

The Cayman Islands remain relatively inexpensive and the set-up costs for SPVs in the Cayman Islands are still low. Fees payable to the Cayman Islands government upon incorporation and annually thereafter are based on the SPV's authorised share capital. In a typical transaction, the government fees would be US$854 at incorporation and annually thereafter.

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

Yes. Provided the choice of laws of the jurisdiction selected to govern the assignment has been made in good faith and will be regarded as a valid and binding selection that will be upheld in the courts of that jurisdiction and all relevant jurisdictions, such law chosen would be upheld as a valid choice of law in any action in respect thereof in the courts of the Cayman Islands. In some cases where the seller of assets (eg, a hedge fund or another securitisation vehicle) and the SPV are both incorporated under Cayman Islands law, the parties may select Cayman Islands law to govern the sale and assignment documentation in order to simplify the true sale analysis and confine insolvency and recharacterisation issues to one jurisdiction.

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

There are no restrictions arising pursuant to Cayman Islands law preventing an SPV from acquiring new assets or from transferring its assets after issuance of its securities.

19 What are the registration requirements for a securitisation?

There are no registration requirements under Cayman Islands law. There may be filings and registrations for the issuing entity pursuant to the Foreign Account Tax Compliance Act (FATCA) and other tax information sharing legislation depending on the classification of the entity.

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

Few, if any, domestic assets are securitised, so with no local originators, there are no notification requirements under Cayman Islands law.

Where there has been an assignment of a receivable arising under an agreement governed by Cayman Islands law, the assignment would be perfected by giving notice to the obligors (see question 18).

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

Under Cayman Islands common law, which follows English common law in this regard, a general equitable duty of confidentiality applies to information coming to the knowledge of a person in circumstances where it would be unconscionable for the recipient to disclose it. More important in a Cayman Islands context, however, is the Confidential Information Disclosure Law 2016 (CIDL). The CIDL was introduced as a direct replacement for the previous Confidential Relationships (Preservation) Law 1976 (CRPL). A significant change made by the CIDL is the decriminalisation of breaches of confidence; while the CRPL provided that breaches of the law were punishable by substantial terms of imprisonment, the CIDL moves to a model based on the remedy of a civil action for breach of confidence. Similarly, the former provisions of the CRPL, which gave the law extraterritorial effect, have been removed. As such, the practical effect of the CIDL is likely limited to information that is either held within the Cayman Islands or held overseas by entities that maintain a physical presence within the Cayman Islands. Once confidential information is passed to a third party located outside of the Cayman Islands, it is likely the CIDL will cease to apply to that third party and the information will then be held subject to the confidentiality laws applicable in the recipient country.

Confidential information may be disclosed within the ordinary course of business, with the consent of the principal, to specific public authorities, in accordance with directions from the Grand Court of the Cayman Islands and when engaging a statutory defence.

It should be noted that parties divulging confidential information in accordance with the Tax Information Authority Law, facilitating the automatic exchange of tax information between the Cayman Islands and other jurisdictions, shall not commit an offence.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

There are no rules in the Cayman Islands regulating the relationship between credit rating agencies and issuers. It should be noted that where applicable, Cayman Islands issuers are bound by, and are, where required, complying with, Securities and Exchange Commission (SEC) Rule 17g-5.

There are a number of factors that rating agencies consider when determining a particular rating for securitised issuances. The factors that are particularly applicable from a Cayman Islands perspective are true sale, bankruptcy-remoteness and taxation issues.

Standard & Poor's has evolved specific ratings requirements for Cayman Islands SPVs, given that the Cayman Islands is such a prominent jurisdiction for securitisation.

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

As a general matter, the Cayman Islands Companies Law does not specify the general or fiduciary duties of directors. The Cayman Islands courts have adopted the English common law principles relating to directors' duties, which can generally be summarised as:

- a duty to act in what the directors bona fide consider to be the best interests of the company;
- a duty to exercise their powers for the purposes for which they are conferred;
- a duty of trusteeship of the company's assets;
- a duty to avoid conflicts of interest and of duty;
- a duty to disclose personal interest in contracts involving the company;
- a duty not to make secret profits from the directors' office; and
- a duty to act with skill, care and diligence.

Of these the duties of loyalty, honesty and fidelity are considered to be the core fiduciary duties.

In a typical off-balance sheet securitisation, the SPV will enter into an administration agreement with a corporate services provider (the 'administrator'), a company that provides administrative or corporate support services to SPVs. Among the services provided, the administrator will provide the independent directors and officers of the SPV. The directors and officers of the SPV will typically be independent of the originator but may be employees of the share trustee (as defined in question 15). Even if they are employed by the share trustee (or by the originator), directors of a Cayman Islands SPV will owe fiduciary duties to the SPV and will need to act in the best interests of the SPV.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

There are no such regulations under Cayman Islands law, although structures involving Cayman Islands SPVs are structured to comply with US and EU risk-retention requirements. In addition, Cayman Islands vehicles have been employed in various ways to facilitate compliance with risk-retention requirements in CLO structures.

Security

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

In most off-balance sheet securitisations, security is granted over the underlying assets by the SPV in favour of the note trustee or security trustee for the benefit of the secured parties. Such security interests will typically exclude:

- the corporate benefit fee paid to the issuer in respect of the transaction;
- the amounts (if any) remaining from the proceeds of the issuance and allotment of the issuer's ordinary shares; and
- any accounts maintained in the Cayman Islands maintained in respect of such funds.

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

In general, no filings are required in respect of mortgages, charges or security interests under the laws of the Cayman Islands in order to perfect the same. A Cayman Islands company is, however, required to make entries in its register of mortgages and charges in respect of such security interests, although this register is an internal register of the company and is open to inspection by a creditor or member of the company only, and not generally by third parties.

The Cayman Islands does have special rules dealing with security over aircraft, ships, land and limited partnership interests where these are registered in the Cayman Islands or constituted under Cayman Islands law. Such assets have not been subject to extensive securitisation to date.

27 How do investors enforce their security interest?

The Cayman Islands are internationally recognised as being a creditor-friendly jurisdiction. Much will depend on the remedies and processes as set out in the relevant security document. Other than the remedy of foreclosure, investors are permitted to enforce their contractual rights under the relevant security documents without making an application to a Cayman Islands court or a liquidator (in the case of an insolvency), pursuant to section 142 of the Cayman Islands Companies Law.

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

Typically, the subject receivables are not originated by a Cayman Islands originator and are almost never paid into a domestic Cayman Islands account.

Taxation

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

As mentioned previously, there are no domestic originators in the Cayman Islands (see question 20). Nevertheless, there are no additional taxes imposed by the Cayman Islands should a transaction be structured using, for example, a Cayman Islands SPV. The Cayman Islands provides a tax-neutral platform for originators and institutions who wish to establish the issuing vehicle there.

Stamp duty arises in the Cayman Islands where the relevant instrument is signed in or physically brought into the Cayman Islands after signing. Accordingly, documents are typically executed by power of attorney outside the Cayman Islands.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

See question 29.

In a typical securitisation transaction, the issuer will apply for an undertaking from the Cayman Islands Governor to the effect that, for a period of 20 years, from the date of such undertaking no law enacted in the Islands after such date, which imposes taxes on an entity or its shares or debentures, will be applicable to the issuer.

31 What are the primary tax considerations for investors?

The Cayman Islands is party to numerous tax information exchange agreements and subject to both the US FATCA and the Common Reporting Standard. Reporting entities incorporated or formed in the Cayman Islands will, therefore, be bound to provide information regarding their investors to the Cayman Islands Tax Information Authority as and when required by law.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

The orphan SPV structure detailed in question 15 would mitigate the consolidation risk as between the SPV and the originator or share trustee, or both, on the bankruptcy or insolvency of the originator or the share trustee, or both. Subject to certain assumptions, the holding of the ordinary shares of the SPV by the share trustee would not result, as a matter of Cayman Islands law, in the SPV being regarded as a beneficially owned subsidiary of the share trustee.

In addition to regular orphan structures, a degree of bankruptcy-remoteness can be achieved for SPVs that are wholly or partly owned by transaction parties through a combination of company law and structural arrangements. This has facilitated a number of innovative securitisation transactions.

33 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)?

In circumstances where the sale agreement is governed by the laws of another jurisdiction, the Cayman Islands courts would respect the characterisation of the transaction under that governing law. In order to make a determination as to whether there has been a 'true sale' as a matter of Cayman Islands law, it would be necessary to review the agreement as a whole to determine if it constitutes a sale. The Cayman

WALKERS

James Burch **james.burch@walkersglobal.com**
Shamar Ennis **shamar.ennis@walkersglobal.com**

190 Elgin Avenue
George Town
Grand Cayman KY1-9001
Cayman Islands

Tel: +1 345 949 0100
Fax: +1 345 949 7886
www.walkersglobal.com

Islands courts would likely follow the established English law cases, which would be persuasive although not binding in the Cayman Islands, and in particular the criteria set out by Romer CJ in *Re George Inglefield Ltd* [1933] Ch 1 as to the differences between a sale and a charge. These are:

- there is no right held by the vendor allowing it to reacquire the assets by repaying the price received on the sale;
- there is no obligation on the purchaser to account to the vendor for any profit made upon realisation of the assets; and
- the purchaser has no right of recourse against the seller if a particular asset within the pool of assets realises an amount less than the price paid for it.

Any transaction should be on an arm's-length basis with appropriate separation between the seller or originator and the purchaser or issuer.

Essentially, this requires that the job of administering the SPV is handled professionally, by competent administrators who understand the commercial rationale and the legal structure of the transaction, and that none of the transaction parties attempt to exert an unacceptable level of control over the SPV and its directors.

34 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 established doctrine in the Cayman Islands of 'substantive consolidation', by which we mean the principle that the assets and liabilities of two companies may be treated as though such assets and liabilities were owned and incurred by one entity on a bankruptcy, liquidation or other insolvency proceedings (though see further below).

English case law, which would be persuasive in the Cayman Islands, broadly illustrates that it is only in exceptional circumstances that the basic principle of the separate legal personality of a company is ignored and the 'corporate veil' is 'lifted', for instance where the device of incorporation is used for some illegal or immoral purpose, is a sham, or where the company is otherwise party to some form of fraud or where public interest concerns must prevail.

All three reported Cayman Islands cases have closely followed the English authorities.

In one case, the Grand Court of the Cayman Islands exercised its discretion under the Companies Law (as amended) in approving a pooling arrangement agreed between the liquidators of group companies where there was a substantial and tangible benefit to the liquidation to be derived from entering into such arrangements. In another case, the Grand Court consolidated the parents of a group of companies where there had been systematic fraud by the owners and management of the companies. Such factors are unlikely to be relevant in the context of a securitisation structure.

Denmark

Michael Steen Jensen and Mikkel Fritsch
Gorrissen Federspiel

General

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

In general, there is no common legislation on securitisation and off-balance sheet treatments. Therefore, securitisation must be fitted into general rules of law. With respect to securitisation in trade receivables and other receivables, the legal rules of relevance must be derived from the Danish Act on Instruments of Debt.

As of 1 January 2014, the Danish Financial Business Act adopted new rules that enable banks to establish refinancing registers for securitisation purposes by issuing securities backed by pools of loans and credits to enterprises. With the permission of the Danish Financial Supervisory Authority, banks are able to establish refinancing registers and sell their rights in loans and credits to an authorised entity.

Registration of the transferred loans and credits constitutes perfection, and once the assets are entered into a refinancing register there is a transfer of ownership. Consequently, the bank's creditors cannot seek satisfaction on assets registered in a refinancing register.

In addition to these rules, the securitisation market is subject to various EU regulations, which are very complex and fragmented, relating to, inter alia, credit ratings, transparency and disclosure. This includes the Basel III and CRD IV framework (relating to regulatory capital and liquidity ratios) aimed at the banking sector generally, the Solvency II-regulation (Directive 2009/138/EC) aimed at insurance companies and the Prospectus Directive (Directive 2003/71/EC) aimed at issuance of securities.

It should be noted that special purpose vehicles (SPVs) funded by way of debt or other non-equity instruments do not qualify as alternative investment funds under the Alternative Investment Fund Managers Directive (Directive 2011/61/EU; the AIFMD), which has been implemented into Danish law. Consequently, an SPV used for a securitisation will usually not need to seek authorisation or appoint an alternative investment fund manager pursuant to the AIFMD regime.

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

No. Under Danish law, a general definition of securitisation transactions does not exist.

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

Prior to the credit crunch of 2008, there was increasing interest in securitisation of Danish assets, in particular in the period from 2003 to 2007. During the financial crisis the market has been almost non-existent, other than the special securitisation scheme made available by the Danish National Bank in 2011 to Danish banks as a mechanism to access liquidity.

In the last couple of years, the Danish securitisation market has begun to show a few weak signs of revival. In 2013, Santander Consumer Bank AS, through its Danish branch, completed the first ever auto-loan securitisation in Denmark. The total size of the transaction was 5.936 billion Danish kroner.

A form of securitisation, the traditional Danish market for mortgage bonds issued by Danish mortgage credit institutions, has remained active through the financial crisis, and the Danish mortgage bond market remains one of the largest in Europe based on value, turnover and number of issues. Under this system, Danish real estate mortgage credit institutions are, on a continuous basis, issuing bonds backed by pools of mortgage deeds acquired by the mortgage institutions from real estate owners wishing to use their real estate as means of raising finance.

Danish real estate mortgage credit institutions are regulated by specific legislation; the institutions being under the supervision of the Danish Financial Supervisory Authority. The legislation only covers mortgages in real estate, so on this basis only issues bonds by approved real estate mortgage credit institutions. The system differs from other types of securitisation by the illiquid assets (the mortgage deeds) not being transferred from the credit institution (the originator) to any SPVs.

Regulation

4 Which body has responsibility for the regulation of securitisation?

The Danish Ministry of Business and Growth has the main responsibility for all policies regarding the financial sector. The Danish Financial Supervisory Authority is part of the Ministry of Business and Growth and contributes to the preparation of financial legislation. The Danish Financial Supervisory Authority's main task is to supervise compliance with financial legislation by financial undertakings and issuers of securities, as well as investors on the securities markets.

5 Must originators, servicers or issuers be licensed?

In general, the originator, servicer or issuer does not need to be licensed under Danish law.

However, any entities that purchase any receivables or other assets from an originator and fund their acquisitions by issuing bonds to the general public in Denmark might become subject to obtaining a banking licence pursuant to the Danish Financial Business Act. The Danish Financial Supervisory Authority has, however, recently issued new guidelines on this subject, which entails that any issues of bonds (and other securities) that are subject to preparation and publication of a prospectus will not be required to obtain a banking licence pursuant to the Danish Financial Business Act.

Under the well-known Danish mortgage bond system, Danish real estate mortgage credit institutions are, on a continuous basis, issuing bonds backed by pools of mortgage deeds acquired by the mortgage institutions from real estate owners wishing to use their real estate as means of raising finance. Danish real estate mortgage credit institutions are regulated by specific legislation and the institutions are under the supervision by the Danish Financial Supervisory Authority.

The legislation covers only mortgages in real estate and only bonds issued on this basis by approved real estate mortgage credit institutions.

Banks and real estate mortgage credit institutions may also issue covered bonds in accordance with the rules set out in the CRD IV framework, which has been implemented into Danish law. Banks and real estate mortgage credit institutions that intend to issue covered bonds must apply to the Danish Financial Supervisory Authority for permission.

If a third-party servicer carries out debt collection on behalf of the SPV, such services must only be performed subject to the prior approval from the Danish National Police in accordance with the rules set out in the Danish Debt Collection Act.

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

Not applicable; see question 5.

7 What sanctions can the regulator impose?

Not applicable; see question 5.

8 What are the public disclosure requirements for issuance of a securitisation?

When a public offer of securities is made in Denmark, it is generally required that a prospectus is prepared. The prospectus requirement applies to public offerings of debt and equity as well as primary and secondary offerings.

The Prospectus Directive (Directive 2003/71/EC) has been implemented into Danish law. Generally speaking, the rules provide that a prospectus must contain all information that investors and their professional advisers would reasonably need for the purpose of making an informed assessment of the securities being offered and of the issuer.

If the securities are not to be listed on a regulated market, the private placement exemptions contained in the Prospectus Directive may generally be relied on, although the Danish implementation rules may vary from those of other jurisdictions within the EU.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

The ongoing disclosure requirements set out in the Danish Securities Trading Act will apply, if the issuer is either listed in Denmark or a Danish company listed in a member state within the EU.

The issuer is under an obligation to immediately publish information of a precise nature relating to the issuer, securities or market conditions which, if it were made public, would be likely to have a significant effect on the price (ie, inside information). To constitute information of a precise nature, the circumstances must exist or be reasonably expected to come into existence and must be precise enough to enable a conclusion as to the effect on price. In order to fulfil the requirement of significant effect, it must be considered to be information that a reasonable investor is assumed to use as part of their investment decision.

The information must be disclosed as soon as possible to the Danish Financial Supervisory Authority and NASDAQ Copenhagen A/S, if the issuer is listed in Denmark.

Furthermore, the issuer is subject to various specific ongoing reporting obligations such as periodical financial information and major shareholding of treasury shares.

Eligibility

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

No. The originators may be Danish as well as foreign companies.

It should be noted that if the entity is not incorporated within the EU there could be data protection issues if some or all of the customers of the originator are individuals.

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

In general, there are no restrictions on the type of assets that can be securitised under Danish law. However, special legislation relates to transfer of bank loans and consumer credits.

It is possible to transfer future receivables provided that they are sufficiently identified. The originator (seller) can, to a certain extent, enter into a receivable transfer agreement concerning future receivables, provided that the contractual relationship between the originator and the obligor, which gives rise to these future receivables, can be described in detail. However, under Danish law it is not entirely clear to what extent it is possible to serve only one notice to the relevant obligors in connection with the entry into such agreement.

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

Under Danish law, there are no general limitations on which type of investors may purchase the issued securities. This is, however, subject to the usual investor protection rules under the Markets in Financial Instruments Directive, which has been implemented into Danish law.

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

Custody services in Denmark (ie, services such as safekeeping and administration for investor accounts) qualify as investment services.

An entity providing such services is therefore subject to a licensing requirement in accordance with section 9 of the Danish Financial Business Act and shall either be licensed as a bank or as a securities dealer in order to render such services. Deposit taking as an account bank is also subject to obtaining a banking licence in accordance with section 7 of the Danish Financial Business Act.

There are no restrictions under Danish law on which types of entities may act as portfolio administrator. However, if the portfolio administrator renders investment services, the portfolio administrator is subject to a licensing requirement as a security dealer as described above.

In order to ensure a 'true sale', the originator should be deprived of access to the transferred receivables. This would normally be achieved by way of opening a collection account in the name of the issuer (operated by a cash manager) to which payments on the receivables are made. As long as the originator is deprived of access as described above, the originator can act as servicer, provided that the issuer has a right to terminate the originator as servicer without cause and with short notice. By applying an analogy to an old Supreme Court case and using principles from consignment sale, we believe that the assignor could, under certain circumstances, also act as collection agent. It is required that strict, effective and thorough control is exercised by the issuer, or their representative, in order to make sure that the originator does not benefit from the collections. These requirements are being applied very strictly by the Danish courts and an otherwise perfected assignment may be disregarded and set aside by a Danish court if proper control of the handling of payments has not been performed.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

No. Any receivable that evidences a debt of the government or a government or other public agency can, in general, be sold to any third party in the same manner as other receivables. There are, however, certain formal rules that must be observed in relation to transfer of tax and VAT claims against the Danish government.

Transactional issues

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

There are no restrictions under Danish law as regards the type or nationality of an SPV, and accordingly, a non-Danish entity could be used.

If a Danish SPV is elected, it usually takes the form of a public company limited by shares incorporated in accordance with the Danish Companies Act.

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

Public limited companies must have a minimum share capital of 500,000 Danish kroner (or the equivalent euro amount).

In connection with the incorporation of public limited companies, articles of association must be adopted and filed with the Danish Business Authority. The Danish Companies Act sets out the minimum requirements specifying information that must be included. Danish company law is largely based on a principle of freedom of contract, which allows shareholders to organise their company as they see fit. Consequently, shareholders are free to include provisions relating to issues other than those listed in the Danish Companies Act in the articles of association, subject to compliance with the provisions of the Danish Companies Act.

A public limited company comes into legal existence once it is registered with the Danish Business Authority. Registration of the public limited company with the Danish Business Register is subject to a registration fee of 2,150 Danish kroner.

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

In general, there is freedom of contract to determine which law should govern the assignment, in other words, the sale agreement between the assignor (the originator) and the assignee (the SPV), just as the assignor is free to agree the governing law in relation to the receivable. A different issue is which law governs the question of perfection of the sale when the obligors are domiciled outside of Denmark (to obtain protection against the assignor's creditors).

There is no clear case law on this issue in Denmark, but it has been generally assumed that lex situs applies. The answer therefore depends on the interpretation of the term lex situs. As receivables have no physical domicile, it is normally found that receivables exist in the country where the obligors under the assigned receivable are domiciled.

The legal theory cannot agree on whether the law of the creditor's (the originator's) domicile, in this case Danish law, or the laws of the obligors' domicile apply. A number of scholars have recently argued that where a great number of similar assets are transferred or there is a transfer of receivables, the law of the creditor (the originator) should apply. In a securitisation, this seems to make sense and there is also one supporting case. A Danish law notification should therefore be sufficient, although to avoid any uncertainty, the law of the obligors' domicile should also be observed if different from Danish law.

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

There are no restrictions under Danish law on an SPV's ability to acquire new assets or transfer its assets after issuance of its securities.

This would usually be subject to the agreed terms and conditions set out in the securitisation documentation.

19 What are the registration requirements for a securitisation?

In general, there are no registration requirements for a securitisation.

As mentioned in question 1, Danish banks may, with the permission of the Danish Supervisory Authority, choose to create a refinancing register with respect to a securitisation of bank loans and credits granted to commercial enterprises.

Furthermore, if a bond representative has been appointed to act on behalf of the investors, such bond representative must be registered with the Danish Financial Supervisory Authority.

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

Notice to the obligor is a perfection requirement and must be served by the originator or the issuer. No consent is required from the obligor (unless otherwise specifically required in the contract). An acknowledgment, although not required, would minimise the procedural risk of evidencing the notification having reached the obligor.

No particular requirements apply to the form of notice or to the effective service, as it may be served orally or in writing. Danish law operates on the basis of substance over form; however, the notice must be clearly defined and precise in order for the obligor to become fully aware of the transfer. The notice must reach the obligor in order for perfection to be duly obtained, and that burden of proof lies with the one serving the notice. In addition, it may be required that foreign obligors are notified in their languages. Normally, a notice is delivered in connection with or following the sale, but it may be delivered earlier if the receivables can be clearly specified and identified.

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

The Danish Data Protection Act applies to the processing of personal data relating to private individuals, whether they are consumers or not, and to some extent to corporate entities (primarily in relation to the processing of credit information by credit agencies). Danish data protection law will not prevent the assignment of receivables to the SPV, but there are certain data protection obligations that must be complied with.

The term 'personal data' means information about an identified or identifiable physical person. 'Processing' is any operation or use of the personal data. A data controller is the person (or persons) who makes decisions about how the personal data is used.

According to the provisions of the act, personal data may only be gathered for, and subsequently processed, for specifically stated purposes and must be processed in accordance with good data processing practice. The SPV must put in place measures to ensure compliance with the data protection principles set out in the act, such as the obligations to:

- keep and process data only for specified and lawful purposes;
- keep personal data that is adequate, relevant and not excessive;
- keep data accurate and up to date;
- not keep data for longer than necessary for the purpose for which the data was collected;
- inform the data subjects of their rights (see below);
- process data in accordance with the data subjects' rights;
- apply appropriate technical and organisational measures to protect data; and
- not transfer data outside of the European Economic Area (EEA) unless special conditions are complied with.

If the SPV is acting as a joint data controller, the SPV is also obliged to inform the data subject about the extent of the processing and the purposes hereof, unless the originator has already informed the data subject hereof. The information given to the data subject on the processing shall include a listing of the categories of data processed, the categories of receivers of the personal data, and finally, information on the data subjects' right to insight and correction on the processing.

If the SPV will be acting only as a data processor, a written contract must also be prepared with the originator. The SPV will be categorised as a data processor, if the SPV only processes data on behalf of and under the instruction of the originator. The contract shall stipulate that processing of personal data is only to be done under the instruction of the originator. The contract shall furthermore commit the SPV to take appropriate technical and organisational security measures to protect data against accidental or unlawful destruction, loss or alteration, and against unauthorised disclosure, abuse or other processing in violation of the provisions laid down in the Danish Data Protection Act. If the SPV is located in another country within the EU, the contract must also stipulate that the provisions on security measures laid down by the law in that country must be complied with by the SPV. If data is transferred to a country outside the EU, a contract in accordance with the EU Commission's Standard Contractual Clauses must be made.

In addition, the processing of personal data will require a legal basis. Such legal basis will, with respect to the SPV's processing of personal data as a data controller be: (i) the consent of the data subject; (ii) that the processing is necessary for the fulfilment of a contractual obligation; or (iii) an assessment of whether the interest of the SPV overrides those of the data subject. If the data is of a sensitive nature, processing will generally require consent as a legal basis for processing the data. Under Danish law 'sensitive data' is personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or data concerning health or sex life and personal data about criminal offences, serious social problems, and other purely private matters than those mentioned.

The Danish Financial Business Act will apply if the originator is a financial institution. According to the Danish Financial Business Act all persons acting on behalf of the institution have, as a general rule, an obligation of confidentiality concerning the information obtained during the performance of their duties. The board of the financial institution can, however, chose to divulge information concerning the institution, but not the clients. Client information can only be divulged if the relevant financial institution has obtained an informed consent in writing from the client. This does not apply for usual information on client matters for the performance of administrative tasks. Usual information on commercial clients may also be divulged for the purposes of marketing.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

When a credit rating agency rates a structured finance instrument (ie, an instrument resulting from a securitisation transaction, EU Regulation No. 1060/2009 on credit rating agencies (as amended in May 2011 by EU Regulation No. 513/2011 and in June 2013 by EU Regulation No. 462/2013)) sets out specific information requirements

to be disclosed in the credit rating. The credit rating agency is, among others, obliged to disclose their loss and cash flow analysis, their assessment of the due diligence performed, methodologies, models and key rating assumptions. In addition, the rating agency is obliged on an ongoing basis to disclose all securitisation products submitted for their initial review or preliminary rating. Such disclosure shall be made even though the issuer does not contract with the credit rating agency for a final rating. In addition, three new delegated regulations have been adopted by the European Commission on technical standards and the regulation of credit agencies, which entered into force in June 2015.

Rating agencies are in general concerned about the variety of legal risks associated with the securitisation that will emanate from both the location of the SPV and the type of assets securitised. In particular, they have concerns over the speed and ease of the enforcement and the jurisdiction that will govern insolvency proceedings. The agencies will also take other factors into account, such as the historic performance of the securitised assets, any credit enhancement, liquidity facilities and the credit standing of the administrative parties, and the structure and legal integrity of the transaction.

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

A public limited company must choose between two different types of management structure:

- a board of directors and a management board; or
- a supervisory board and a management board.

The management board shall consist of at least one general manager, appointed by the board of directors or the supervisory board. A legal entity is not eligible for election as a general manager.

There are no specific rules under Danish law that stipulate that the board of directors and the management must be independent of the originator and owners of the SPV. However, in order to keep, in particular, the originator and the SPV as two separate legal entities and avoid the risk of assets being consolidated, it is advisable that the board of directors and the management of the SPV are independent from the originator (see question 32).

The board of directors is responsible for supervising the management board, establishing general policies and making decisions on extraordinary transactions and shall, inter alia, consider from time to time whether the financial position of the company is sound in the context of the company's operations.

The board of directors must ensure proper organisation of the company's business and ensure, among others, that:

- the bookkeeping and financial reporting procedures are satisfactory, having regard to the circumstances of the company. The annual report shall be submitted for approval at the annual general meeting;
- adequate risk management and internal control have been established, and that the company has adequate insurance coverage;
- they supervise activities and ensure that the company is managed in compliance with the articles of associations, policies and guidelines, and applicable rules and regulations;
- the board of directors receives ongoing information as necessary about the company's financial position;
- the executive management performs its duties properly as directed by the board of directors; and
- the financial resources of the company are adequate at all times, and that the company has sufficient liquidity to meet its current and future liabilities as they fall due. The board of directors is therefore required to continuously assess its financial position and ensure that the existing capital resources are adequate.

The supervisory board (if any) is responsible for supervising the management board. As opposed to the board of directors, the supervisory board is not responsible for establishing general policies and making decisions on extraordinary transactions, and the supervisory board may not bind the company.

The management board is in charge of the day-to-day operations of the public limited company. Since the SPV's business activities will usually be limited to those related to the securitisation transaction and with no employees, the management board will only have limited duties. The management of the SPV will usually be independent from the originator, ensuring that the SPV operates on a stand-alone basis in order to achieve insolvency remoteness. The management's main tasks may be provided by a corporate service provider.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Under Danish law, there are no general rules requiring originators and sponsors to retain a net economic interest in their securitisation transactions.

However, under EU Regulation No. 575/2013, risk retention rules apply to certain institutions (namely credit institutions and investment firms) located within the EEA. The EU risk retention rules prohibit affected investors from becoming exposed to the credit risk of a securitisation unless the sponsor, the originator or the original lender in the transaction discloses that it will retain an interest of not less than 5 per cent of the securitised exposures. Should an affected investor invest in a securitisation transaction that does not meet the risk retention, due diligence and disclosure requirements of the EU risk retention rules in any material respect by reason of such investor's negligence or omission, the competent authorities must impose a proportionate additional risk weight against the relevant securitisation position equal to no less than 250 per cent (capped at 1,250 per cent) of the original risk weight of that position.

It should be noted that similar risk retention rules apply to EU insurance companies via Solvency II (Directive 2009/138/EC) and alternative investment funds via AIFMD.

Security

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

Usually the underlying assets and related bank accounts and collection accounts are granted as security interest to the investors in a securitisation.

In relation to receivables, the security is granted by way of assignment.

As of 1 January 2014, a bill was enacted that resolved past uncertainty with respect to trustees under Danish law, by recognising the use of security agents and trustees in syndicated loans and, subject to certain conditions, the use of bondholder representatives and security trustees in bond issues. The rules provide that security interests can be granted directly in favour of the representative (the security agent) acting on behalf of the secured parties from time to time, thus, making perfection and preservation of security interests in connection with bond issues more feasible.

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

Requirements to perfect security will depend on the asset and the form of security taken.

In order to create a security interest over the receivables and any related security, the parties would have to enter into a pledge agreement in relation to these assets. The pledge will usually be granted in favour of the bond representative acting as security agent on behalf of the investors.

The perfection requirement would be notice to the obligors along the same lines as in relation to a true sale (see question 33). In addition, the issuer must be deprived of control over the receivables, as well as over any income deriving from these receivables.

Pursuant to the Danish Registration Act, no person may grant security interests over all of his or her present or future assets, whereby the purchaser is unable to grant security interests over all of its assets. As an exemption, the purchaser may grant a floating business charge over some of its assets (including receivables, intellectual property, etc) by way of registration with the Danish Registry of Chattel Mortgages. Perfection is subject to a stamp duty of approximately €200, and an additional 1.5 per cent of the nominal amount of the charge.

It is possible to create a pledge over related bank accounts and the collection account (if any) under Danish law. A pledge over accounts is perfected by delivering notice to the account bank and effectively blocking the pledgor's access to the account. In order to evidence notification, it is common to request that the account bank execute an

acknowledgement; however, this is not a legal requirement for the perfection of the pledge. There are no registration requirements in relation to the pledge; however, the pledged account must be effectively blocked at all times in order for the pledge to be perfected. Accordingly, the secured party must consent to each and every release from the pledged account. Account pledges may therefore not work from a practical perspective depending on the account in question.

27 How do investors enforce their security interest?

With respect to the transferred receivables and any related bank accounts, the bond representative (on behalf of the investors) will be able to:

- collect the receivables directly from the obligors as they fall due; and
- take possession of the funds on the pledged account.

Deposits on accounts and receivables may be enforced in accordance with the agreed terms in the pledge agreement without preceding a court order.

In relation to all other assets, the basic rule is that security be enforced by a sale of the secured assets at an auction following an order of the bailiff's court (unless otherwise agreed) and after notice has been given to the pledgor. However, different rules apply for different assets. The initiation of enforcement procedures in Denmark is not conditional on the obligors being subject to insolvency proceedings, nor will the enforcement automatically trigger any insolvency proceedings.

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

Yes, commingling is a risk under Danish law. Ideally, any payments collected from the obligors should be made directly into a separate collection account held in the name of the assignee. The assignor can, however, be given the right to act as agent in administering and collecting the receivables as long as the assignor cannot freely dispose of the incoming receivables and the arrangement is carefully monitored by the assignee. It is also possible for payments to be made into an account of the assignor, provided that funds are credited on a daily or very frequent basis to a separate bank account held in the name of the assignee.

Payments thereto should not be commingled with any other funds of the assignor as this would jeopardise the security interest. If bankruptcy occurs in relation to the assignor, funds standing to the credit of the assignor's bank account will belong to the assignor's estate.

Taxation

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

Transfer of assets, including receivables, is a taxable disposal subject to capital gains taxations.

No transfer, stamp, registration, value added tax (other than on fees, such as payments to a service provider, which may be subject to value added tax in Denmark) or other similar taxes, duties or charges are payable pursuant to the laws of Denmark on, or in connection with, transfer of receivables.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

Payments by obligors under the assigned receivables of interest and principal may be made without withholding or deduction for, or on account of, any taxes or duties in Denmark, except for payments in respect of controlled debt (intergroup debt).

To the extent the securities are considered debt for Danish tax purposes, the issuer is allowed interest deductions. Such deductions will reduce the taxable income arising from the issuer's receivables.

For securities not considered debt, entity-level taxation will not apply if the issuer is organised in a form transparent for tax purposes, which means that its income is allocated to, and taxed only to, the issuer's owners. Generally, partnerships are considered transparent for Danish tax purposes. Danish partnerships may, however, be classified for tax purposes as corporations in some circumstances, such as under the Danish reverse hybrid entities rules.

Update and trends

In the context of its efforts to build a capital markets union, the EU Commission proposed a regulation on 30 September 2015 that lays down common rules on securitisation and provides a framework for simple, transparent and standardised securitisations. Thus, the aim of the proposal is twofold: to simplify the current framework for all securitisations by replacing the various rules on the process with a uniform regime, and to create a framework to identify simple, transparent and standardised securitisations, with the final aim to increase investor confidence and restore market activity.

This framework is accompanied by an amendment to the treatment of regulatory capital requirements for credit institutions that originate, sponsor or invest in securitisations.

The ECON Committee of the EU Parliament adopted a compromise text on the securitisation regulation on 8 December 2016 (together with a related text in relation to amendments to the EU capital requirements regulation). This text was subject to a formal reading in the EU Parliament on 16 January 2017. After this, it is expected that the trilogue process will begin during early 2017, and that a political agreement between the EU bodies may emerge by mid-2017. Though the exact timing of these and subsequent events are uncertain, this implies that the securitisation regulation would take effect at some stage during 2019, assuming (as is usual for similar EU legislation) that the regulation comes into force two years after it is formally published in the EU's Official Journal.

If the issuer is organised offshore outside of Denmark, no Danish taxation should apply to the issuer.

31 What are the primary tax considerations for investors?

Except for controlled debt, no withholding taxes or other taxes are levied in Denmark on payments under the receivables of interest and principal, unless the receivables are to be allocated to a Danish permanent establishment or other Danish entity subject to Danish tax. If the investor is subject to tax in Denmark, the investor is taxable on financial income, including interest and capital gains on receivables.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

Insolvency remoteness is usually achieved by the SPV through implementing the following measures:

- utilisation of a newly formed limited liability company as an SPV, which will have no operating history and a limited number of known creditors;
- appointing members of the board of directors and the management of the SPV who are independent of the originator;
- the shares of the SPV are owned by a foundation or foreign trust;
- limiting the SPV's business activities to those related to the securitisation transaction;
- not having any employees;
- outsourcing all business services (in particular, services being provided by a third-party service provider); and
- inserting limited recourse and non-petition clauses into agreements entered into by the SPV.

33 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)?

In general, a debt owed according to a receivable can be assigned or sold to a third party by agreement between the originator and the issuer, whereby the receivable is assigned to the issuer. For legal analysis it makes no difference whether it is characterised as a sale, transfer or assignment. Consent of the obligors is not required unless otherwise specifically called for in the receivable, or the mutual relationship between the assignor and the assignee is deemed to be of special importance, or the receivable relates to certain public payments.

A true sale would normally be achieved by observing the due perfection of the assignment. An assignment of receivables is perfected by notification to the obligors of the assignment. In addition, the originator must be deprived of control over the receivables, as well as over any income deriving from these receivables. Thus, the debtors

under the receivables must pay all debt arising thereunder directly to the issuer or to a bank account pledged and fully blocked in favour of the issuer.

The transaction must accurately reflect the intention of the parties, and the terms must be consistent with a sale. Generally speaking, a true sale would require that the originator and the issuer enter into an agreement whereby the receivables are transferred to the issuer effectively without recourse to the originator. The Danish courts will look at the substance of the transaction and examine the economic effects of the transaction and whether it creates rights and obligations consistent with a sale. In particular, it is crucial that the credit risk should pass to the issuer as the transaction would otherwise be at risk of being recharacterised as a secured loan transaction. In assessing this, one should take all aspects of the transfer into account and not just rely on a few factors. It is evident that the economic effects of such transfer are key factors in making this determination. In this respect, the Danish courts will be likely (although there is practically no case law to rely on) to recharacterise a sale as a secured loan if the risk and benefits in relation to the receivables in general remain with the originator.

If there is a right of repurchase or redemption, this jeopardises the true sale characterisation and is recharacterised as a secured loan. In particular, an obligation of repurchase or redemption with respect to defaulted receivables is deemed to weaken the true sale characterisation considerably. The terms and conditions of the repurchase or redemption should not effectively mean that the vast majority of the credit risk remains with the originator.

34 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?

In general, Danish corporate law distinguishes between the originator, the SPV and its affiliates. Each are regarded as separate legal entities, whose rights and liabilities must be addressed separately.

The Danish courts have, in some cases, deviated from this when the economy and management of entities have been interconnected to such an extent that the boundaries of the legal entities become blurred, or if the entities have tried to take advantage of the corporate structure and its limited liability in order to favour certain creditors.

Gorrissen Federspiel

Michael Steen Jensen **msj@gorrissenfederspiel.com**
Mikkel Fritsch **mfr@gorrissenfederspiel.com**

Axel Towers
Axeltorv 2
1609 Copenhagen V
Denmark

Tel: +45 33 41 41 41
Fax: +45 33 41 41 33
www.gorrissenfederspiel.com

France

Olivier Hubert
De Pardieu Brocas Maffei

General

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

Specific securitisation legislation governs securitisation activities and securitisation entities in France. Such legislation has been codified into the French Monetary and Financial Code (MFC), which incorporates the provisions of Law No. 88-1201 of 23 December 1988, as amended by the Financial Security of Law of 1 August 2003, and a 2013 ordinance transposing the European Alternative Investment Fund Managers Directive (AIFMD) under French law.

This French legislative framework, developed over the years, provides an efficient and secured tool for securitising either French or foreign receivables. Although it remains to be coordinated with the legislation of other EU member states, it enjoys the specific exemption from the AIFMD applicable to ad hoc securitisation structures.

The French securitisation legal framework has been supplemented by Law No. 2015-1786 of 29 December 2015 with new provisions allowing certain types of Alternative Investment Fund (AIF) to acquire loans or to extend credit facilities. The purpose of this reform is to diversify the available source of financing for the economy. Such law authorised certain types of French professional funds to extend loans to undertakings, either under the conditions provided for by the Regulation on European Long-Term Investment Funds (ELTIF), Regulation (EU) 2015/760 of 29 April 2015, or under conditions specified by an implementing decree.

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

The MFC does not specifically define which transactions constitute a securitisation transaction, however, it defines the purpose of securitisation entities as being devices exposed to risks, including insurance risks, by acquiring receivables, granting loans, concluding forward financial instruments or contracts transferring insurance risks, and such securitisation entity finances or covers those risks by issuing securities (shares or debt instruments) or forward financial instruments or borrowing money or through other resources (L214-168 of the MFC).

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

The French securitisation market has followed the same trends as the European market. Since 2010, it has progressively restarted. According to a survey published by the Banque de France, as of June 2013, France ranked fifth out of the eurozone countries for the aggregate amount of securitised receivables. Securitisation receivables represented 8.4 per cent of the total amount of loans granted by banking institutions in France, compared with the eurozone average of 12.7 per cent. Securitised receivables amounted to €215 billion in total, showing the importance of the securitisation market in France.

For investors, securitisation offers interesting investment opportunities with yields that are on average higher compared to those offered by corporate bonds with yields reaching 400 basis points on BBB-rated tranches of collateralised loan obligation.

Residential mortgage loans and auto loans represent a significant part of the total amount of securitised assets.

Securitisation is of major importance to banks as a refinancing tool and for easing compliance with ratios imposed on banking institutions by the Basel Committee on Banking Supervision. In France, securitisation activity is fuelled by three main arranging banks; by investors; and by legal counsels developing the required high level of expertise.

Regulation

4 Which body has responsibility for the regulation of securitisation?

The main market institution having responsibility for the regulation of securitisation is the Financial Markets Authority (AMF). The AMF General Regulation (RGAMF) contains a number of detailed rules applying to the creation of securitisation entities and to their management by a licensed fund management company.

It should be noted that French securitisation entities are regulated entities that are not directly supervised by the French market authorities. However, their management companies and custodians are entities that are supervised. The management company is overseen by the AMF and the custodian is generally supervised by the French Prudential Supervisory Authority.

Besides that, the custodian has a legal duty to ensure, on an ongoing basis, that decisions made by the management company comply with the constitutive documents and regulations of the securitisation entity, and with the provisions of French law. In addition, the accounts of the securitisation entity are audited on a yearly basis.

If the management strategy of the relevant securitisation entity includes 'active' asset management or entry into credit derivatives transactions as protection seller, the management company will be licensed for this purpose and will have to set up appropriate organisational and risk control procedures.

5 Must originators, servicers or issuers be licensed?

No licence is required from originators for receivables to be securitised. An originator may be any type of commercial company, including any seller of goods, vehicles or commodities, any service provider or any banking or financial institution.

Securitisation entities themselves do not need to obtain a specific licence for issuing securities. However, specific requirements apply to public offers of securities (including the publication of a prospectus approved by the AMF), but this does not in itself involve requiring a specific license for the issuer.

The servicing of the securitised receivables may be handled by the originator or by any entity that was in charge of the servicing before the transfer. The servicing may also be delegated to any other entity appointed for such purpose. No specific licence is required for servicing activities; but third-party servicers have to comply with the decree relating amicable recovery activities in France.

Certain covered bonds' companies issuing bonds such as the *sociétés de crédit foncier* must be licensed as a credit institution, but they are generally not considered to be securitisation entities.

French authorities consider the purchase of non-matured receivables on a regular basis to be a banking activity requiring a banking licence; however, this requirement does not apply to French securitisation entities, which benefit from a specific exemption from the banking monopoly rules. It should be noted that this exemption does not benefit foreign securitisation vehicles per se.

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

As mentioned, no authorisation or licence is required for the creation of a securitisation vehicle under French law (see question 5). However, the management company and the custodian will need to hold the appropriate licence for acting in such a role in the operation of the relevant securitisation entity.

If the management company and the custodian do not comply with the prescribed organisational rules or the conduct rules applicable to their activities, or if they do not fulfil their commitments towards the regulator, their licence could be suspended or withdrawn.

7 What sanctions can the regulator impose?

Sanctions that can be imposed by the regulator depend very much on the relevant type of laws or regulations breached.

Sanctions can be imposed on the management company or on the custodian if the creation or operation of a French securitisation entity violates the provisions of the MFC or the RGAMF. Such sanctions may encompass suspension or withdrawal of their licence or fines in certain situations, such as the failure to appoint an auditor or the communication of inaccurate information in respect of the securitisation entity.

According to article L571-3 of the MFC, violation of French banking monopoly rules is sanctioned by three years' imprisonment and a maximum fine of €375,000.

Violation of the rules regarding the issuance of securities to the public is sanctioned, inter alia, by removal of authorisation, or a delisting.

8 What are the public disclosure requirements for issuance of a securitisation?

A French securitisation entity generally finances its activities by issuing debt instruments such as notes (in the form of *titres de créances négociables* or *obligations*). In addition, a mutual debt fund (*Fonds Commun de Titrisation*) (FCT) can issue units and a securitisation company (SDT) can issue shares. All such instruments can be issued publicly or privately and listed on a regulated exchange, or not. The choice between the two approaches is mainly driven by the transaction size and type, the type of investors targeted and their demand, appetite and constraints.

To date, there have been a number of FCT issues followed by a listing; but more unusually, FCT transactions giving rise to an offer to the public in the strict legal sense.

The offering to the public of units or notes issued by an FCT, or shares or notes issued by an SDT in Paris requires the preparation of a *note d'information*, an AMF-approved prospectus. This document takes the form of a document describing the issuer structure and the securities features.

Under article L214-170 of the MFC, if a securitisation entity issues securities that are the subject of a public offer, these securities must be rated, and the rating document must be annexed to the prospectus and sent to the potential subscribers. Since Ordinance 2013-676 dated 25 July 2013, this rating requirement no longer applies when the securities are merely admitted to trading on a regulated market, without being the subject of a public offer.

For securities that are privately placed and where no information memorandum is required, a rating is not required but may be sought for commercial reasons. It is possible to list FCT units or notes and SDT shares or notes in France as well as in other jurisdictions, such as Ireland or Luxembourg.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

France has transposed the Transparency Directive 2004/109/EC, which establishes requirements in relation to the disclosure of periodic and ongoing information about issuers whose securities are already admitted to trading on a regulated market situated, or operating within, an EU member state. This Directive only applies to securities listed on a regulated market. Although it does not apply to units issued by collective investment undertakings, it remains applicable to closed-end collective investment undertakings. Under the main rules imposed by such Directive:

- the issuer of the relevant securities shall make public its annual financial report at the latest four months after the end of each financial year and shall ensure that it remains publicly available for at least 10 years;
- the issuer of the relevant securities shall make public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest three months thereafter. The issuer shall ensure that the half-yearly financial report remains available to the public for at least 10 years;
- by way of derogation the above rules do not exclusively apply to issuers of debt securities, the denomination per unit of which is at least €50,000;
- the issuer of debt securities who is admitted to trading on a regulated market shall ensure that all holders of debt securities ranking pari passu are given equal treatment in respect of all the rights attached to those debt securities.

Eligibility

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

As mentioned, French authorities consider the purchase of non-matured receivables on a regular basis to be a banking activity requiring a banking licence (see question 5).

French securitisation entities (SDT and FCT) benefit from a specific exemption from the banking monopoly rule (see question 5). When operating on French territory, foreign securitisation vehicles should ensure that their activities are not breaching this rule.

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

Any type of receivable may be securitised including, inter alia:

- bank loans, commercial receivables and lease receivables;
- existing or future receivables (the amount and maturity of which are not determined on the relevant transfer date);
- defaulted or non-performing receivables or any type of debt instrument governed by French law or any foreign law; or
- future cash flows.

By way of example, securitisation can encompass residential and commercial mortgage loans and non-mortgage assets such as trade receivables, credit card balances, consumer loans, lease receivables and motor vehicle loans. Securitisation of an insurance risk is also expressly contemplated by the law.

In practical terms, securitised receivables must be transferable. In other words, no contractual provision of the underlying contract must prohibit or restrain the transfer of such receivables.

At the time they are transferred to the securitisation entity, securitised receivables must be identifiable; in other words, they must be sufficiently defined so that it can be easily and specifically transferred.

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

Securities issued by securitised entities are generally offered to professional investors through private placements. Any type of investor can participate in an offering made by a securitisation entity, however:

- investors from non-cooperative jurisdictions may be prevented from participating in such offerings since substantial withholding taxes will apply to payments of coupons under the issued securities; and
- offerings directed to individuals may be held within the rules applying to public offers whereby a full prospectus approved by the AMF may need to be published.

A special type of securitisation fund was created in 2013 to foster investment by insurance companies in the debt of private-sector companies.

Securitisation funds called *fonds de prêt à l'économie* must comply with certain criteria laid down by the insurance code (eg, no tranching and holding assets complying with specific criteria). Such funds issue non-rated and non-eligible securities.

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

The entity acting as custodian of a French securitisation entity must be a French credit institution or the French branch of a European credit institution, or certain other institutions designated by a specified regulation.

It should be noted that the custodian acts as the depository of the receivables acquired by the FCT and of its other liquid assets.

The entity acting as servicer of a French securitisation entity can be the originator of the securitised receivables or any third party, provided that the debtor is notified thereof.

It should be noted that the servicing of the securitised assets encompasses several actions including, inter alia:

- administering the securitised receivables;
- collecting the cash generated by these assets; and
- ensuring regular reports to the administrator that manages the special purpose vehicle (SPV).

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

According to French law, receivables can be transferred or securitised even if the debtor is a public body or government entity. However, securitisation of receivables with a public-sector element requires particular attention.

The main concern is to ensure that any recourse against the public entity is transferred to the securitisation entity. It may be necessary to combine the general rules of transfer with specific rules applicable to such public entities such as, for instance, the notification of transfer to the public accountant of the relevant public entity if the securitisation entity seeks direct payment. In addition, the transfer to the securitisation entity of unconditional payment undertakings of public entities may require special approval by such entities.

Transactional issues

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

French securitisation entities can be created either as a corporation or as an FCT.

Legally speaking, an FCT is a co-ownership of securitised receivables. It is created by both an independent management company acting as the fund manager and a fund custodian, in accordance with article L214-181 of the MFC. It has no shareholders nor legal figure head and it corresponds with the common form used to securitise receivables under French law. An FCT can be created with several compartments, whose assets and liabilities are segregated from those within the other compartments of the FCT.

French securitisation entities can also be created as a corporation or SDT. Such a corporation would be managed by a licensed management company and its assets held through a custodian. An SDT can provide significant advantages in transactions where the benefits of international tax treaties are sought.

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

The creation of a French securitisation entity mainly involves the following steps in terms of timing, costs and organisation:

- the selection of a licensed management company, of a custodian and of an auditor;
- the drafting and negotiation of the fund regulation, a receivable purchase agreement, a servicing agreement and various ancillary agreements; and
- the placement with investors of the securities issued by the securitisation vehicle (either through a public or private placement).

The costs include initial costs and ongoing costs.

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

Yes. According to article L214-169 of the MFC, the transfer of receivables to a French securitisation entity may be governed by a law other than French law.

This reflects the Rome I Regulation, whereby an international contract shall be governed by the law chosen by the parties. However, should all elements relevant to the situation at the time of the choice be connected with France alone, such a choice of law will not prejudice the application of mandatory rules in France. Besides this, the contract can be qualified as an international contract if there is a non-French element and the law must not be chosen to avoid French public policy considerations.

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

Yes, a French securitisation entity is allowed to purchase new receivables after the initial purchase and to issue additional units under two main conditions:

- the regulations of the securitisation entity must specify the circumstances and conditions under which it may purchase additional receivables; and
- an additional transfer deed must be signed in order to transfer the new assets to the fund.

19 What are the registration requirements for a securitisation?

There is no registration requirement for a securitisation under French law (without specific circumstances).

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

There is no obligation to notify obligors about the securitisation. Under the French Securitisation Law, the transfer of receivables to the SPV is effective as of the date indicated on the transfer deed, without any requirement for prior notification to the obligors or other formalities. It is considered as a silent transfer. The receivable transfer occurs as of the date indicated on the transfer date. As a consequence, the assignment becomes effective between the parties and enforceable against third parties. The obligors must be notified if the servicer of the securitised receivables is changed.

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

The rules related to the protection of confidentiality, banking secrecy or to the protection of personal data remain applicable after securitisation of the relevant receivables and may restrain the transfer of information to investors or to the securitisation entity.

By way of example, the law on treatment of personal data requires that any treatment of personal information regarding individuals is notified to the French Data Protection Authority. It also limits the transfer of personal data and aims to ensure that personal information is adequately stored and treated, ensuring that individuals have access to information relating to them.

Furthermore, when the assignor of receivables is a credit institution, confidential information is covered by strict banking secrecy legislation, prohibiting the transfer of said information to third parties without prior consent of the concerned obligors.

A waiver of confidentiality by the person protected by the confidentiality is generally available. It must be foreseen in the contract ab initio and it is necessary to name organisations to which information could be given, such as the French Tax Administration.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The relationship between rating agencies and French securitisation entities is not specifically regulated by French law. It should be noted that recent legislation removed a former obligation to procure the rating of securities issued by securitisation entities that are listed.

When a rating is sought, the rating agencies implement a rating methodology that involves multiple legal and economic factors, and depends on the type of securitised receivables. Rating agencies will look in particular at the structural features of the securitisation entity, which is expected to be bankruptcy-remote and tax-exempt, and of a 'true sale' transfer of assets and of the related security. Obviously, rating agencies also focus on the quality of securitised assets and of the election process. Indeed, rating agencies will analyse the liquidity of assets pooled into the FCT or SDT, the maturity of those assets and the strategy of the management company, especially regarding how it will react if there is lack of liquidity with its assets. The aim of the rating agency is to determine if the management company would be able to cope with its investment's decisions regarding to the credit risks, the servicer performance risk, the guarantor's risk, legal risks attached to the fund, sovereign risk, interest rate, currency risks and repayment risks.

Update and trends

Extension of loans by funds

Until recently, French securitisation funds were only authorised to purchase loans on the secondary market but could not directly extend loans to enterprises. In order to diversify the available source of financing of the economy, Law No. 2015-1786 of 29 December 2015 authorised certain types of French professional funds to extend loans to undertakings, either under the conditions provided for by the European ELTIF Regulation (Regulation (EU) 2015/760 of 29 April 2015), or under conditions specified by an implementing decree. Such Decree, No. 2016-1587, was published on 24 November 2016 to specify the conditions under which the French professional specialised funds (*fonds professionnels spécialisés*) (FPS) and the French professional private equity funds (*fonds professionnels de capital investissement* (FPCI) (the 'Funds', or individually a 'Fund') will be authorised to extend loans to undertakings. Such conditions encompass in particular the following:

(a) the Fund should be managed either by (i) a French investment management company licensed by the AMF to manage AIFs; or (ii) a management company having its registered office in a EU member state other than France licensed pursuant to the AIFM Directive and authorised by its home state regulator to manage AIFs that grant loans as long as it is subject to the same conditions as French investment management companies;
(b) implementation of a quality origination process: the management company of the Fund needs to implement a programme of activity approved by the AMF consisting in, notably, having in place a credit-risk analysis system and a due-diligence procedure to ensure that the management company complies with obligations applicable to lenders (such as anti-money laundering and terrorism financing rules);
(c) the management company of the Fund must report all loans that have been granted by the Fund to the AMF on a quarterly basis;
(d) the borrowers under such loans being either: (i) individual undertakings or private legal entities whose main business activities are of commercial, industrial, agricultural, crafts or real-estate nature, with the exclusion of financial activities and collective investments; or (ii) private legal entities whose exclusive business, or as the case may be main business, in addition to carrying out commercial, industrial, agricultural, crafts or real estate activities, consist in holding directly or indirectly one or several interests in the share capital of legal entities referred in (a) above, or to finance such legal entities;
(e) requirement that the Fund retain, as a matter of principle, the loans it granted until the maturity date;
(f) the contemplated loans not be granted for a term exceeding the residual life of the Fund;
(g) limitations regarding the use of leverage by the Fund; and
(h) limitation to the redemption of the shares or units by the Fund.

This recent regulatory change opens the door to the broadening role of securitisation and other funds in financing the economy independently from traditional banks whose lending capacity is hampered by strict ratio requirements.

Under French law, securitisation entities may issue bonds or commercial paper (TCNs). No rating is required when there is no public offering of bonds. TCNs issued by a securitisation entity do not need to be rated if the holders of such TCN have the same rights in terms of ranking and are permanently backed by eligible receivables allowing a refinancing through the euro system in accordance with the Decree No. 2014-361 of March 2013.

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

A French securitisation entity is not operated like an SPV, but is managed by a licensed management company whose chief duty is to act in an independent manner in the sole interest of the note holders having regard to the fund regulations. The management company acts under the control of the custodian. FCTs have no directors or officers. SDTs have directors, but all day-to-day management functions are delegated to the management company.

The management company has a duty of best execution, meaning that a given operation will be finalised under the best market conditions for its client.

The fund management company must be independent of the originator and do not have to follow any order given by the originator.

If the securitisation entity is a corporation, it has to be managed by a licensed management company acting independently in the interest of the holders of securities issued by it.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Retention rules have been imposed in securitisation transactions by several European rules, including the Capital Requirements Regulation and directive CRD IV. Under these rules, originators or sponsors or initiators of a securitisation transaction must retain a 5 per cent exposure in the relevant securitisation.

Before the global financial crisis of 2008, credits could be originated and distributed without keeping any risk on a balance sheet. This has been changed by regulators with a view to aligning the interests of investors with those of the originators and sponsors of initiators.

Security

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

It should be noted that French securitisation entities are bankruptcy-remote by virtue of the law. Thus, investors generally do not seek security on their assets, although this has been permitted since a 2008 ordinance whereby French securitisation entities are allowed to provide collateral or security interests to investors over the receivables or other assets held by the fund. There is no specific requirement in relation to the type of security. Therefore, a pledge can be created over securitised receivables.

Credit enhancement is also possible via guarantees provided by the originator, an affiliate of the originator, a credit establishment or an insurance company. Other methods include the issuance of specific units, over-collateralisation or cash reserve funds.

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

When a pledge of receivables is created in favour of investors, the mere execution of the pledge agreement is sufficient to ensure perfection of the pledge towards third parties. The notification of the pledge improves the protection but is not a condition of the validity of the pledge.

More generally, protection of the investor's interest is ensured by the management company of the French securitisation entity. In a way, the management company will play the same role as a security trustee as it will ensure that all securitised receivables are collected and the corresponding collections are distributed in accordance with the fund's regulations.

27 How do investors enforce their security interest?

As described above, the management company of the securitisation entity will enforce any security interest or right created in favour of the securitisation entity.

If the investors have been given any security interest in the assets of the fund, they should be able to enforce it through their representatives if the securities are bonds governed by French law, and if a bond representative has been appointed.

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

In securitisation transactions where the originator remains in charge of the collection of the securitised receivables, there is a risk that, on a bankruptcy affecting the originator, the proceeds of the securitised receivables are commingled with the assets of the originator and retained by the bankruptcy administrator.

This risk can be avoided or mitigated by creating a special collection account dedicated to the collection of the securitised receivables. The sums credited on such account are not available to the creditors of

the originator if it becomes bankrupt, according to article D214-228 of the MFC.

Taxation

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

The primary tax considerations for originators encompass mainly:

- value added tax (VAT) treatment of securitised receivables;
- exemption from VAT on the sale and transfer of receivables by the originator to the securitised entity;
- whether any profits generated by the assignment of receivables to an FCT are taxable;
- if the servicing agent's fees are exempt from VAT; and
- withholding tax on payments received in relation to foreign trade receivables.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

The primary tax considerations for securitisation entities acting as issuer encompass mainly:

- whether the FCTs are exempt from corporation tax in France (article 208(3)-octies of the General Tax Code);
- whether the issuance of notes by the SPV is exempt from any stamp duty; and
- whether the management company's fees and other fees are exempted from VAT.

The main structure used to avoid entity-level taxation is the FCT; securitisation implemented through corporations having the form of an SDT may also benefit from a specific tax regime, but in the absence of clarity on certain aspects it may be advisable to seek a specific tax ruling.

31 What are the primary tax considerations for investors?

The primary tax considerations for investors mainly encompass the absence of withholding tax on securities issued by the securitisation entity and the tax treatment of the securitisation entity. As in many countries, the payment of interest and other income on debt securities established or domiciled in a non-cooperative state or territory within the meaning of article 238-0 A of the French Tax Code may be subject to a 75 per cent withholding tax.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

The MFC (article L214–175 III of the MFC) expressly provides that bankruptcy law (contained in Book No. 6 of the Commercial Code) does not apply to French securitisation entities, which means in effect that they are bankruptcy-remote.

In addition, a number of structuring features are generally used to mitigate potential insolvency risk. These include limiting the securitisation entity's activities to securitisation, ensuring that the securitisation entity has no contractual liabilities unrelated to the relevant securitisation and ensuring that the investor's and creditor's recourse is limited to the securitisation assets.

33 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)?

In making a determination of whether a true sale of the securitised receivables to a French securitisation entity has been implemented, a court would look at whether the requirements of article D214–219 of the MFC are fulfilled. The main requirements are the execution and remittance of a transfer deed on the transfer date, and the payment of the agreed purchase price. The existence of recourse against the originator should not affect the true sale of the receivables.

The risk of clawback is quite remote. It may arise if the seller of the receivables falls under a reorganisation or liquidation proceeding; then a sale of receivables may be challenged by the insolvency administrator during a suspect period fixed by the judge of up to 18 months prior to the opening of insolvency proceedings. However, the insolvency administrator must then demonstrate that the sale was made for inadequate value, or that the fund had actual knowledge or was aware of the seller's insolvency at the time of the purchase.

34 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?

Under French insolvency law, the risk of consolidation of the asset and liabilities of a company with the assets and liabilities of another company is limited to specific circumstances, which include the commingling of assets or their de facto management.

A commingling of assets is unlikely to happen in the context of a securitisation transaction, since the securitisation company will have its own accounts and its assets will be held by a custodian, strictly separated from those of the originator. Even when the originator remains as the financial servicer for the receivables transferred to the SPV, the allocation of all amounts he or she receives into an affected, especially dedicated account, should avoid that risk by making the management company the unique proprietor of the money held on such account.

The risk of a de facto management of the securitisation entity by the originator is also unlikely to be characterised, since the securitisation entity is a separate entity from the originator, and is managed by a licensed management company (not by the originator), with no interference by the originator in the daily operation of the fund.

DE PARDIEU BROCAS MAFFEI

AVOCATS

Olivier Hubert **hubert@de-pardieu.com**

57 Avenue d'Iéna
CS 11610
75773 Paris Cedex 16
France

Tel: +33 1 53 57 71 71
Fax: +33 1 53 57 71 70
www.de-pardieu.com

India

Justin Bharucha
Bharucha & Partners

General

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

Securitisation transactions are permitted under the general principles of contract law in India, such as credit factoring. However, in such cases where assignment of obligations is involved the principles of contract law require that the consent of all parties involved be obtained.

As a result, assignment of receivables must be effected by:

- the execution of a written agreement of assignment; and
- notice to the borrower of such assignment.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) is the principal legislation governing securitisation in India, and the provisions of this act have overriding effect over other legislation. The SARFAESI Act is supplemented by various guidelines and directions issued by the Reserve Bank of India (RBI), which include the Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 as amended (Securitisation Companies and Reconstruction Companies Guidelines 2003); the Revisions to the Guidelines on Securitisation Transactions for Banks dated 7 May 2012 as amended (Bank Securitisation Guidelines 2012); the RBI Master Circular on Customer Service in Banks dated 1 July 2015 (RBI Master Circular on Customer Service in Banks); the Insolvency and Bankruptcy Code 2016 (Bankruptcy Code); the Guidelines of Securitisation Transactions for Non-Banking Financial Companies (NBFCs) dated 21 August 2012 as amended (NBFCs Securitisation Guidelines 2012); and the Securities Exchange Board of India (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 dated 26 May 2008 (SEBI Debt Listing Regulations).

In addition, the RBI Guidelines on Securitisation of Standard Assets dated 1 February 2006 (Guidelines on Securitisation of Standard Assets) regulate securitisation of standard assets by banks, financial institutions and non-banking financial companies. Standard assets are defined as any assets that are not non-performing assets. Non-performing assets have been defined under the SARFAESI Act as an asset or account of a borrower that has been classified by a bank or financial institution as a substandard, doubtful or loss asset:

- in the case that such bank or financial institution is administered or regulated by an authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body; and
- in any other case, in accordance with the directions or guidelines relating to asset classifications issued by the RBI.

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

The SARFAESI Act sets out a broad, open-ended definition for what constitutes 'securitisation'. Essentially, securitisation is any transaction that deals with the acquisition of financial assets by any securitisation company from any originator. This can involve the securitisation company raising funds from investors by issue of security receipts representing undivided interest in such financial assets, or otherwise.

A securitisation company, as defined under the SARFAESI Act, means any company formed and registered under the Companies Act, 1956 and Companies Act, 2013 for the purpose of securitisation. Such a company may only undertake the business of securitisation.

The Guidelines on Securitisation of Standard Assets define securitisation as a process by which a single performing asset or a pool of performing assets are sold to a bankruptcy-remote special purpose vehicle (SPV) and transferred from the balance sheet of the originator to the SPV in return for an immediate cash payment.

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

The issuance volume of rated transactions in the Indian securitisation market was approximately 250 billion rupees for financial year 2015/16.

Regulation

4 Which body has responsibility for the regulation of securitisation?

Although securitisation is primarily governed by the RBI, various other regulatory authorities such as the Registrar of Companies, the Securities and Exchange Board of India (SEBI) and the Debts Recovery Tribunal regulate and govern securitisation.

5 Must originators, servicers or issuers be licensed?

In the context of securitisation, the SARFAESI Act defines an 'originator' as the owner of a financial asset which is acquired by a securitisation company for the purpose of securitisation. The provisions of the SARFAESI Act stipulate that a securitisation company may acquire the financial assets of a bank or a financial institution. Therefore, for the purposes of the SARFAESI Act, an originator must be a bank or financial institution.

The issuer is the securitisation company formed for the purpose of securitisation. The SARFAESI Act stipulates that it is mandatory for all securitisation companies (ie, the issuers) to obtain a certificate of registration from the RBI. The securitisation company must have an owned fund of at least 20 million rupees or such other higher amount as the RBI may prescribe.

Per the SEBI Debt Listing Regulations, a 'servicer' is any person appointed by the SPV and who is responsible for the management or collection of the asset pool or making allocations or distributions to holders of the securitised debt instrument but does not include a trustee for the issuer if the trustee receives such allocations or distributions. An originator may also be appointed as a servicer by the SPV. The SARFAESI Act and the SEBI Debt Listing Regulations do not expressly provide for any licences that a servicer must obtain.

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

For the purpose of granting or refusing to grant a certificate of registration to the issuer under the SARFAESI Act, the RBI will broadly consider the following criteria:

- the securitisation company must not have incurred losses in any of the three preceding financial years;

- the securitisation company must have made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation, and must be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified institutional buyers or other persons;
- the directors of the securitisation company must have adequate professional experience in matters related to finance and securitisation;
- any of its directors must not have been convicted of any offence involving moral turpitude;
- a sponsor must be a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the RBI for such persons;
- the securitisation company must have complied with or be in a position to comply with prudential norms specified by the RBI; and
- the securitisation company must have complied with the relevant conditions issued by the RBI.

The RBI may cancel a certificate of registration granted to a securitisation company if such company:
- ceases to carry on the business of securitisation;
- ceases to receive or hold any investment from a qualified institutional buyer;
- fails to comply with any condition stipulated in the certificate of registration; or
- at any time fails to fulfil any of the conditions that the RBI has taken into account for the grant of registration;

or fails to:
- comply with any direction issued by the RBI;
- maintain accounts in accordance with the requirements of any law or any direction or order issued by the RBI;
- submit or offer for inspection its books of account or other relevant documents when so demanded by the RBI; or
- obtain prior approval of the RBI for any substantial change in its management or change in location of its registered office or change in its name.

7 What sanctions can the regulator impose?

If any person contravenes or attempts to contravene or abets the contravention of the provisions of the SARFAESI Act or any corresponding rules, then such person will be punished with imprisonment for a term which may extend up to one year, or with a fine or both. Separately, regarding the quantum of fine that may be imposed, the SARFAESI Act prescribes a fine of up to 10 million rupees or twice the amount involved in such contravention, whichever is more. Further, in case of continuing contraventions, an additional penalty which may extend up to 100,000 rupees per day for each day during which the contravention continues may also be imposed.

8 What are the public disclosure requirements for issuance of a securitisation?

The SARFAESI Act does not provide for any public disclosures to be made for issuance of a securitisation. However, if a debt security instrument has to be listed, provisions under regulation 22 and 26 of the SEBI Debt Listing Regulations must be adhered to.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

The SARFAESI Act does not provide for any ongoing public disclosures to be made for issuance of a securitisation.

Eligibility

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

Under the SARFAESI Act, an originator is defined as the owner of a financial asset which is acquired for the purpose of securitisation. However, for the purposes of the SARFAESI Act, an originator must necessarily be a bank or a prescribed financial institution. See question 5.

For the purposes of the Guidelines on Securitisation of Standard Assets, an originator must necessarily be a bank.

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

Any financial assets may be securitised under the provisions of the SARFAESI Act. This includes:
- a claim to any debt or receivables or part thereof, whether secured or unsecured;
- any debt or receivables secured by, mortgage of, or charge on, immoveable property;
- a mortgage, charge, hypothecation or pledge of moveable property;
- any right or interest in the security, whether full or part underlying such debt or receivables;
- any beneficial interest in property, whether moveable or immoveable, or in such debt or receivables, whether such interest is existing, future, accruing, conditional or contingent;
- any beneficial right, title or interest in any tangible property given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to acquire such tangible property;
- any right, title or interest on any intangible asset or license or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain license of the intangible asset; and
- any financial assistance such as loans or any advance granted.

The Bank Securitisation Guidelines, 2012 further state that credit facilities (such as cash credit accounts, credit card receivables, etc), assets purchased from other entities, securitisation exposures (eg, mortgage-backed and asset-backed securities) and loans with bullet repayment of both the principal and interest (save for such loans or trade receivables as specifically allowed by the RBI to be securitised) cannot be securitised.

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

The SARFAESI Act stipulates that securitisation companies can offer security receipts only to qualified institutional buyers for subscription.

A 'qualified institutional buyer' under the SARFAESI Act includes a financial institution, insurance company, bank, trustee or securitisation company which has been granted a certificate of registration under SARFAESI Act, any asset management company making investments on behalf of a mutual fund or a foreign institutional investor registered under the Securities and Exchange Board of India Act, 1992, any category of non-institutional investors as may be specified by the RBI or any other corporate body as specified by the SEBI.

Such an issuance to qualified institutional buyers would need to comply with the provisions of the Companies Act, 2013, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992.

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

There is no specific restriction under the SARFAESI Act with respect to entities that may act as custodian, account bank and portfolio administrator or servicer for securitised assets and securities. The provisions of the Securities and Exchange Board of India (Custodian of Securities) Regulations, 1996; Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992; and Securities and Exchange Board of India (Bankers to an Issue) Regulations, 1994 stipulate conditions applicable to custodian, account bank and portfolio or servicer for securitised assets and securities.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

The provisions of the SARFAESI Act apply to all banks and prescribed financial institutions. Financial institutions have been defined to include, inter alia, all public financial institutions as well. Institutions that qualify as public sector institutions are identified by the central government from time to time.

Transactional issues

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

The SARFAESI Act stipulates that an SPV for a securitisation transaction must be set up in the form of a trust. The securitisation company will act as the trustee to the SPV, and it will be the trust which holds it for the benefit of the investors from whom the funds are being raised.

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

Under the Indian Trusts Act, 1882, a 'trust' is defined as an obligation annexed to the ownership of property, arising out of the confidence reposed in and accepted by the owner; or declared and accepted by the owner for the benefit of another, or of another and the owner.

A trust in relation to immoveable property must be declared by a written trust deed by the author of the trust or trustees or by the will of the author of the trust or of a trustee. Such trust deed is only valid if it is registered under the Registration Act, 1908. A trust in relation to moveable property is only valid if declared by a registered non-testamentary instrument, or if the ownership of the properly is transferred to the trustee. The formation and registration of a trust takes approximately 15 days.

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

The law applicable to the assignment of receivables to the SPV must be Indian law.

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

Yes, the SPV may acquire new assets or transfer its assets after issuance of the security receipts. The SPV may use funds raised from the investors to acquire new assets. Such assets will have to be held in trust for the benefit of the investors.

19 What are the registration requirements for a securitisation?

The SARFAESI Act stipulates that every securitisation transaction is required to be filed with the Central Registry within a period of 30 days after the date of such transaction. This registration must be made in the form prescribed together with the payment of such fees, as may be prescribed.

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

The SARFAESI Act provides that the originator may, at its option, give notice to the obligor of acquisition of the financial assets by a securitisation company. If such a notification is given to the obligor, a notice also has to be given to the registry where the security interest created with respect to that financial asset has been registered.

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

Banks are under an obligation not to disclose any customer information. The obligor's secrecy and privacy must be protected even if there is no express confidentiality clause in the loan agreement. However, this is subject to the exceptions stipulated in paragraph 25 of the RBI Master Circular on Customer Service in Banks. These exceptions are as follows:

- where disclosure is under compulsion of law;
- where there is duty to the public to disclose;
- where interest of bank requires disclosure; and
- where the disclosure is made with the express or implied consent of the customer.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The RBI Guidelines on Declaration of Net Asset Value of Security Receipts issued by Securitisation Company/Reconstruction Company, dated 28 May 2007, regulate the rating of security receipts and stipulate that:

- securitisation companies must obtain a rating for security receipts from a rating agency registered with the SEBI;
- a rating for the security receipts must be obtained not less than once in the 12 months immediately following the deemed date of allotment of the security receipts issued pursuant to the offer document, and thereafter the rating must be reviewed at half-yearly intervals;
- the rating must be based on 'recovery risk' and reflect the present value of the anticipated recoverability of future cash flows. The rating must be assigned using the Recovery Rating Scale, which has an associated range of recovery expressed in terms of percentile; and
- the recovery rating must be decided after considering the extent of debt aggregation, collateral available, security and seniority of the debts, expected cash flows, uncertainty in realising expected cash flows, etc.

These guidelines also set out the procedure for carrying out these ratings, and the procedure for computing the net asset value of the security receipts.

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

Under the SARFAESI Act, the SPV should be managed by a securitisation company. As mentioned above, the SPV must be set up in the form of a trust, which is governed by the provisions of the Indian Trusts Act, 1882. The assets acquired or funds raised for acquiring the assets will be held by the securitisation company in a trust for the benefit of the qualified institutional buyers, also holding the security receipts from which the funds with respect to the SPV were raised.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Under the SARFAESI Act, banks and non-banking financial institutions must retain a part of the loan in order to ensure that they carry out proper due diligence of loans to be securitised. The minimum retention requirement ranges from 5 per cent to 10 per cent of the book value of the loans to be securitised, depending on the tenure of the loan.

In addition, securitisation companies must have a 5 per cent stake in the SPV.

Security

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

Under the SARFAESI Act, investors are granted a security receipt as security, which evidences the acquisition of an undivided right, title or interest in the financial assets involved in securitisation. This is in the nature of a debt instrument.

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

The SARFAESI Act stipulates that in the event that a borrower fails to discharge its liability, the trustee of the trust (ie, the SPV) may recover the interest in the underlying assets to the extent that it is a secured interest, by:

- taking possession of the secured assets of the borrower, including his or her right to transfer by way of lease, assignment or sale for realising the secured asset;
- taking over the management of the business of the borrower;
- appointing any person to manage the secured assets, the possession of which has been taken over by the secured creditor; and
- issuing a written notice to any person, who has acquired secured assets from the borrower and from whom money is due or may be due to the borrower, to pay the SPV so much as is sufficient to pay the secured debt.

In addition to the enforcement of security interest as above, every securitisation company is also required to formulate a plan for realisation of assets, which may include:

- rescheduling of payment of debts payable by the borrower;
- settlement of dues payable by the borrower;
- change in or takeover of the management, or sale or lease of the whole or part of the business of the borrower; and
- conversion of any portion of debt into shares of the borrower company.

27 How do investors enforce their security interest?

The SARFAESI Act stipulates that all qualified institutional investors, holding security receipts of at least 75 per cent of the total value of the security receipts issued by the trust, will be entitled to call a meeting of all the qualified institutional buyers. Every resolution passed in such meeting will be binding on the company. A qualified institutional buyer will only be entitled to invoke such right at the end of five years or eight years; in other words, at the end of the period of realisation applicable for the particular asset.

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

The SPV raising funds from qualified institutional buyers must formulate separate schemes for every financial asset acquired out of such investments. The following conditions must be kept in mind while formulating such schemes:

- the securitisation company must maintain separate and distinct accounts with respect to each scheme; and
- the securitisation company must ensure that the realisation of such financial assets is held and applied towards the redemption of investments and payment of returns assured on such investments under the relevant scheme.

Separately, under the provisions of the SARFAESI Act, a securitisation company may enforce secured assets without the intervention of courts, but a similar benefit does not extend to unsecured assets. However, enforcement of a security interest in the underlying assets which are secured in nature is not affected by the commingling of assets that are unsecured in nature.

Taxation

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

Under section 2(14) of the Income Tax Act, 1961 (Income Tax Act), the term 'capital asset' is defined as property of any kind held by a person who is being assessed, whether or not it is connected with his or her business or profession. This does not include any stock-in-trade, consumable stores or raw materials held for the purposes of his or her business or profession.

Accordingly, any sale of assets by the originator will be taxable as a 'business profit' or 'capital gain'. This categorisation will depend on facts, such as whether the assets sold by the originator are held as stock in trade or capital assets.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

The income from the activity of securitisation of such trusts regulated by the RBI is exempt from taxation in terms of section 10(23DA) of the Income Tax Act.

31 What are the primary tax considerations for investors?

Taxation of securitisation entities set up as a trust for the activity of securitisation up to 31 May 2016 is as follows:

- the securitisation trust must pay additional income tax at a rate of 25 per cent on the distribution made to investors who are individuals or members of a Hindu undivided family, and at a rate of 30 per cent in all other cases. In addition to the above, a surcharge of 10 per cent and education tax of 3 per cent will be levied;
- no such additional income tax is payable if the income distributed by the securitisation trust is received by a person who is tax exempt; and
- consequent to the levy of distribution tax, all the distributed income received by the investor from the securitisation trust will be exempt from tax in terms of section 10(35A) of the Income Tax Act.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

To ensure that SPVs are bankruptcy-remote, securitisation companies are required to raise funds by formulating separate schemes, maintain scheme-wise separate and distinct accounts and use the realisations in each scheme for the redemption and securing of that particular scheme. Further, Indian courts have held that at the time of the winding-up, trust money held by companies does not form part of the company's assets in the hands of a liquidator and is payable as a priority to the claims of the creditors.

33 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)?

The Bank Securitisation Guidelines, 2012 and the Guidelines on Securitisation of Standard Assets set out certain conditions that must be met in order to constitute a 'true sale' of assets. These conditions are illustrative and not exhaustive:

- the sale must result in the immediate legal separation of the originator from the assets which are sold to the new owner, namely, the SPV. The assets must be put beyond the originator's and their creditors' reach, even in the event of the bankruptcy of the originator;
- the originator must effectively transfer all risks, rewards, rights and obligations pertaining to the asset and must hold any beneficial interest in the asset after its sale to the SPV;
- the originator must not have any economic interest in the assets after its sale, and the SPV will have no recourse to the originator for any expenses or losses except those specifically permitted in

bharucha & partners
Advocates & Solicitors

Justin Bharucha **justin.bharucha@bharucha.in**

Hague Building
9, SS Ram Gulam Marg
Ballard Estate
Mumbai 400 001
India

Tel: +91 22 6132 3900
Fax: +91 22 6633 3900
www.bharucha.in

the Bank Securitisation Guidelines, 2012 and the Guidelines on Securitisation of Standard Assets;
- there will be no obligation on the originator to repurchase or fund the repayment of the asset or any part of it, or to substitute assets held by the SPV, or to provide additional assets to the SPV at any time except those arising out of breach of warranties or representations made at the time of sale. The originator must be able to demonstrate that a notice to this effect has been given to the SPV, and that the SPV has acknowledged the absence of such obligation;
- the originator must be able to demonstrate that it has taken all reasonable precautions to ensure that it is not obliged, nor will feel impelled, to support any losses suffered by the scheme or investors;
- the sale must be on a cash basis, and the consideration must be received no later than the time of transfer of assets to the SPV. The sale consideration must be market-based and arrived at in a transparent manner at an arm's-length basis; and
- the transfer of assets from originator must not contravene the terms and conditions of any underlying agreement governing the assets, and all necessary consents from obligors (including from third parties, where necessary) must have been obtained.

34 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?

It is unlikely that the bankruptcy court would consolidate the assets and liabilities of the originator and the SPV if the securitisation transaction has taken place in accordance with the provisions of the SARFAESI Act.

Japan

Motohiro Yanagawa, Takashi Tsukioka and Yushi Hegawa

Nagashima Ohno & Tsunematsu

General

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

There is no legislation that specifically governs securitisation in Japan.

Rather, securitisation in Japan is governed by laws and regulations applicable to specific types of transactions such as the Civil Code (Law No. 89, 1896), the Trust Act (Law No. 108, 2006) and the Financial Instruments and Exchange Law (Law No. 25, 1948) (FIEL). Having said that, there is a law specifically dedicated to facilitating asset securitisation, which is the Act on the Securitisation of Assets (Law No. 105, 1998) (the Securitisation Act). This Act authorises the use of two types of vehicle specifically designed for securitisation, namely the specific purpose company (TMK) and the specific purpose trust (TMS), and provides for relevant regulations applicable to them. TMKs are frequently used as issuer vehicles for Japanese asset securitisation transactions. However, the use of those vehicles is not required, and many securitisation transactions involve schemes that are not based on the Securitisation Act.

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

There is no law that specifically defines which types of transactions constitute securitisations in Japan. The Securitisation Act broadly defines asset securitisation as a series of acts wherein a TMK acquires assets with monies obtained through the issuance of securities or borrowings, or wherein a trustee holds assets in trust and issues trust beneficiary certificates representing interests in a TMS, and, with monies obtained through the administration and disposition of such assets, performs payment obligations in relation to such securities, borrowings or trust beneficiary certificates, as the case may be. Under the Securitisation Act, TMKs and TMSs are authorised to carry out transactions that are contemplated by the above definition.

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

According to a survey conducted jointly by the Japanese Bankers Association and the Japan Securities Dealers Association, there were 61 reported securitisation transactions with underlying assets located in Japan in the first half of 2016, and the aggregate issue price of the securities issued in relation to those transactions is approximately ¥2.3 trillion. As this number is based on information provided through voluntary reporting, the actual number of securitisation transactions that took place in that period might be much larger.

Regulation

4 Which body has responsibility for the regulation of securitisation?

As there is no Japanese legislation governing securitisation in general, there is no body with specific responsibility for the regulation of securitisation. Nevertheless, as securitisation typically involves securities and financial transactions, the Financial Services Agency of Japan (FSA) fulfils an important role in the context of securitisation regulation in general. Under the Securitisation Act, it is the prime minister who is primarily in charge of administrating a regulation framework for TMKs. However, this authority is delegated to the commissioner of the FSA who, in turn, has delegated this authority to the director generals of the local finance bureaus.

5 Must originators, servicers or issuers be licensed?

Even though many originators of securitisation transactions are licensed under regulations governing their specific businesses, to which the underlying assets relate (for example, an operator of a banking business is required to obtain a licence under the Banking Act (Law No. 59, 1981)), there is no licensing requirement specifically applicable to originators or issuers to conduct securitisation transactions in general. However, TMKs and trustees of TMSs are subject to a notification requirement under the Securitisation Act (see question 19). In general, servicers also are not subject to a licensing requirement. However, to engage in certain collection activities as a 'special servicer' will require a licence under the Servicer Act (see question 13).

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

As explained in question 5, there is no licensing requirement applicable to securitisation transactions in general. A local finance bureau will typically only check whether a filing document has been prepared in accordance with an appropriate format in relation to a notification submitted by a TMK.

7 What sanctions can the regulator impose?

As explained in question 5, there is no licensing requirement applicable to securitisation transactions in general. As for the notification requirement under the Securitisation Act, the failure to submit the required notification may result in imprisonment for up to three years, a fine of up to ¥3 million, or both.

8 What are the public disclosure requirements for issuance of a securitisation?

There is no public disclosure requirement applicable to issuance of securitisation instruments in general. Depending on the type of instrument issued for the transaction in question (ie, bonds, shares or trust beneficiary certificates) and the method of the offering (ie, public offering or private placement), the issuance may be subject to public disclosure requirements applicable to certain securities in accordance with the FIEL.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

There is no ongoing public disclosure requirement following a securitisation issuance in general. Depending on the type of instrument issued for the transaction in question (ie, bonds, shares or trust beneficiary certificates) and the method of the offering (ie, public offering or private placement), the issuer may be subject to ongoing public disclosure requirements applicable to certain securities in accordance with the FIEL.

Eligibility

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

In general, there are no restrictions on which entities can be originators as a matter of Japanese law. However, in practice, parties such as arrangers and rating agencies will closely scrutinise potential originator candidates to determine their qualifications in several respects including, among others, their ability to manage and service the underlying assets, the quality of the securitised assets and even their creditworthiness. Therefore, only entities that are deemed qualified by those parties may become originators for credit-rated transactions.

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

In terms of the types of assets that can be securitised, there is no restriction under Japanese law specifically applicable to securitisation.

This is also the case for TMKs under the Securitisation Act, with limited exceptions, such as partnership interests, silent partnership interests and beneficial interests in a trust whose trust asset is cash. Types of receivables that are commonly securitised in practice include receivables on loans secured by residential mortgages, credit card receivables, lease receivables, auto-loan receivables and account receivables, which include promissory notes. Real estate is another type of asset commonly securitised in Japan.

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

There are no limitations on the classes of investors that can participate in an offering in a securitisation transaction. However, practically speaking, the securitisation structure is too complicated and the face-value amounts of the securitisation instruments are too large for retail investors, and thus only institutional or relatively larger (and more sophisticated) investors are targeted for securitisation transactions.

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

There is no regulation specifically applicable to securitisation transactions that identifies or describes the qualifications to serve as custodian, account bank and portfolio administrator, though an entity serving in any such capacity may be subject to generally applicable regulations, for example, an accounting bank should have a banking licence under the Banking Act. As for servicers in receivable securitisation transactions, a common structure is for the originator to serve as the primary servicer until:

- a servicer termination event occurs, in which case a backup servicer will succeed the originator as the primary servicer; or
- a securitised receivable becomes delinquent, in which case a 'special servicer', which is often a servicer licensed under the Act on Special Measures Concerning Claim Management and Collection Businesses (Law No. 126, 1998) (the Servicer Act), will succeed the originator and commence collection proceedings in relation to the receivable in question.

The arrangement of the second point above is necessary owing to the Japanese Attorney Act (Law No. 205, 1949), which prohibits members of the general public who are not licensed attorneys from providing legal services (the collection of delinquent receivables would fall into this category). Under the Securitisation Act, a TMK must entrust the securitised assets that it holds to a licensed trustee, which essentially entails a transfer of title to the trustee, unless the relevant asset is real estate, receivables and some other assets, in which case the TMK may retain the originator, or some other person with sufficient financial soundness and personnel capable of administrating and disposing of the securitised assets appropriately, as the administrator that will administer and dispose of the securitised asset. In the latter case, the administrator will be subject to various obligations such as segregation of securitised asset from its own assets and cooperation with document inspection requests from the TMK.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

To date, it has been understood that securitisation of assets held by the public sector is difficult. However, it is viewed that this might be a promising new type of securitisation in the future after difficulties in relation to approvals, such as the Local Autonomy Act (Law No. 67, 1947) that requires an approval of local assembly for disposal of assets and any other procedures, are overcome. In fact, there is one financing transaction executed by a public-sector entity, which is wholly owned by a local government, that utilises such entity's receivables for securitisation. If similar transactions occur in the future, another asset class for investors may be realised.

Transactional issues

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

As explained above, TMKs are special purpose vehicles frequently used in securitisation transactions. In addition to TMKs, a trust is also a vehicle that is commonly used in securitisation transactions. Typically, the originator, as the settlor, will entrust its asset by conveying it to a trustee and, in return, acquire beneficial interests in the trust. Thereafter, the settlor will sell such beneficial interest to investors and thereby raise funds. Alternatively, the originator may be able to sell the beneficial interests in the trust to a TMK. In this case, the TMK will issue securities to its investors and the proceeds from such issuance are paid to the originator as payment of the purchase price for the beneficial interest in the trust. Also, pursuant to an amendment to the Trust Act made in 2006, the use of a declaration of trust is available in Japan.

For securitisation of real estate, limited liability companies (GKs) are also frequently utilised as special purpose vehicles. Usually each investor enters into a silent partnership contract (TK) with the GK, under which the investor makes a contribution to the GK and the GK distributes the profits arising from the asset (in this case, real estate) that it acquires using the funds contributed by the investor.

Further, a general incorporated association under the Act on General Incorporated Association and General Incorporated Foundations (Law No. 48, 2006) is typically used to create a bankruptcy-remote holding company of the SPVs.

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

In determining which type of SPV should be utilised, parties take into consideration various factors. Cost is one of the most important factors. Generally, a vehicle that will require the involvement of a financial institution, for example, a trust for which a trust bank will need to be appointed to serve as its trustee, may be costlier than vehicles that do not require such involvement – a GK, for example. The nature of the investment, whether it is debt or equity, will also influence the type of vehicle to be used. Trusts and TKs are usually used for equity investments, whereas both debt and equity instruments can be issued by a TMK.

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

Under Japanese conflict-of-law rules (the Act on General Rules for Application of Laws (Law No. 78, 2006)), the effect of an assignment of receivables, regarding the obligor and any third party, would be determined based on the law applicable to the assigned receivables. This means that even if the governing law of the receivables purchase agreement (RPA) is Japanese law, the effect of the assignment in relation to its obligor and any third party, such as matters related to perfection, under the RPA is determined based on the law governing the assigned receivables rather than the law governing the RPA.

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

Generally speaking, a Japanese SPV can acquire new assets or transfer its assets after issuance of its securities. The conditions for the acquisition of new assets or transfer of assets are reflected in the relevant contracts and are not stipulated by law. Usually such conditions are set forth in the contracts after taking into consideration their potential effect on:

- the rating of the existing securities;
- the loan-to-value ratio;
- the debt service coverage ratio;
- the limited recourse structure;
- true sale-related concerns; and
- other factors that may affect the securities.

Where a TMK is used as an SPV and acquires new assets or transfers its assets, unless such acquisition or transfer is anticipated under its asset securitisation plan (this plan is to be attached to the TMK's business commencement notification, which is to be filed with the local finance bureau; see question 19), a change of the asset securitisation plan will need to be filed. This change may require the consent of interested persons, including all of the investors. Further, acquisition of additional parcels of real estate by a TMK is currently limited to certain cases, such as acquisition of real estate that is affiliated with the real estate already held by the TMK.

19 What are the registration requirements for a securitisation?

Generally speaking, no registration is required for securitisation, except for securitisations using a TMK or a TMS under the Securitisation Act and which require the submission to the local finance bureau of a prior notification of the business commencement notification or TMS notification, as the case may be. Documents such as the TMK's asset securitisation plan (ie, a document which sets forth the basic particulars concerning the asset securitisation to be carried out by the TMK) are to be attached to this notification.

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

Obligors need not be notified in order to carry out a securitisation. Rather, it is performed for the purpose of perfection of the receivables that are to be acquired.

There are three ways to perfect an assignment of receivables:

(i) by sending a written notice with a notarised date to the third-party obligor;
(ii) by obtaining a written consent with a notarised date from the third-party obligor; and
(iii) by registering the assignment with the competent legal affairs bureau pursuant to the Act concerning Special Exceptions to the Civil Code with respect to the Perfection of Assignment of Moveables and Receivables (Law No. 104, 1998) (the Perfection Act).

In the case of method (iii) above, for an assignment to be able to be registered, the assignor must be a juridical person registered in Japan (ie, a Japanese corporation). No such limitation or restriction exists with respect to the assignee or obligor. Further, it should be noted that in Japan perfection of an assignment in relation to third parties other than the obligor is not sufficient to assert the assignment against the obligor. Methods (i) and (ii) above would satisfy both requirements, but completion of the registration in accordance with the Perfection Act through method (iii) above relates only to perfection in relation to third parties.

In order for the assignment to be perfected regarding the obligor, in addition to the registration provided in method (iii):

(a) the assignor or the assignee must send to the obligor a notice stating that the assignment has been made, and that such assignment has been registered, together with a certificate of registered matters issued by the competent legal affairs bureau; or
(b) the obligor must consent to the assignment, and acknowledge the registration of such assignment.

In cases where method (iii) above is used, which is often the case where receivable securitisation transactions are conducted on an undisclosed basis with regard to obligors, it is common that the procedures for perfection regarding the obligors in accordance with methods (a) and (b) above will not be taken until certain events such as a default of the originator occurs.

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

The Act on the Protection of Personal Information (Law No. 57, 2003) (the Personal Information Protection Act) is the Japanese law that was enacted to protect the rights and interests of individuals while taking into consideration the usefulness of personal information, especially in light of the remarkable increase in the use of personal information with the development of our advanced information and communications society. Pursuant to the Personal Information Protection Act, a business operator handling personal information may not provide personal data to any third party without the prior consent of the affected individual, except in the following instances:

- where such provision of personal data is done pursuant to applicable laws and regulations;
- where such provision of personal data is necessary for the protection of the life, body or property, and in situations where it is difficult to obtain the consent of the affected individual;
- where such provision of personal data is necessary for improving public health or promoting the sound growth of children and it is difficult to obtain the consent of the affected individual; and
- where such provision of personal data is necessary to cooperate with a state organ, a local government, or an individual or a business operator entrusted to execute certain affairs prescribed by laws and regulations in situations where obtaining the consent of the affected individual is likely to impede the execution of such affairs.

In conjunction with the transfer of receivables, some personal data may need to be provided to the SPV. From a practical point of view it may not be feasible to obtain the consent of the affected individual.

For credit card receivables, auto-loan receivables and lease receivables, in order to facilitate securitisation, the originator usually insists on the inclusion of a provision in the underlying contract with the obligors, which acknowledges the obligor's consent to the provision of personal data in the case of an assignment (including but not limited to securitisation) of those receivables.

However, for assignments of receivables where the obligors' express consent to the provision of personal data is not obtained, further analysis is necessary to consider whether the provision of personal data in that situation may contravene the restriction imposed by the Personal Information Protection Act. Regarding this point, the current practical interpretation of the relevant law suggests that since a receivable is assignable in principle, the consent of the person to the provision of personal data can be assumed in the case of an assignment of receivables to the extent it will be necessary for the management and collection of such receivables by the assignee. In this situation, the exception in bullet point two above may apply, and therefore securitisation of receivables should be feasible.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

Under the FIEL, credit rating agencies that satisfy certain conditions, such as the development of appropriate systems, can be registered. It is not mandatory for credit rating agencies to be registered in Japan. However, in cases where securities companies or other financial institutions conduct solicitations using a credit rating determined by an unregistered credit rating agency, they are required to explain to potential investors, among other things, that the 'rating is a rating by an unregistered credit rating agency'.

The independence of registered credit rating agencies is required under the FIEL. The FIEL also provides for regulations applicable to registered credit rating agencies covering, among other things, the following:

- quality control in the rating process, including measures to protect investors' interests in respect of the interests of the credit rating agency or other interested parties such as issuers and originators;
- prohibition of name lending;
- prohibition of the provision of ratings to closely related persons;
- prohibition of the concurrent provision of rating and consulting services;

- timely disclosure of information including rating determination policies; and
- periodic disclosure of information.

Therefore, a registered credit rating agency may be prohibited from providing a rating to a closely related issuer.

When rating securitised issuances, rating agencies mainly focus on cash flow analysis, bankruptcy-remoteness and operational risks of the transaction parties, taking into consideration quantitative and qualitative aspects of the structure and type of assets for each transaction.

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

In cases where a joint stock company or a GK is used as an SPV, the Companies Act (Law No. 86, 2005) will apply.

With regard to joint stock companies, the relationship between the company and its directors is regulated by the provisions of the Civil Code addressing entrustment. Accordingly, a director has a duty to the company, to use the due care of a good manager (duty of due care) when performing the director's duties. In addition to this duty of due care, the Companies Act provides that directors of a joint stock company must comply with all laws and regulations and the company's articles of incorporation, as well as all resolutions adopted at general meetings of the company's shareholders, and that directors must perform their duties faithfully for the benefit of the company. This duty is generally called the 'fiduciary duty' of directors. There are also special provisions restricting or expanding the responsibilities of directors in certain situations or under certain circumstances, including but not limited to where competitive transactions or conflict of interest transactions exist.

With regard to GKs, members who manage a GK owe a duty of due care and a fiduciary duty to that GK. Such members are jointly and severally liable to the GK for any damage incurred by the GK that is caused by the non-performance of duties of the managing members. Unlike a joint stock company, the Company Act does not specifically provide an exemption from such liability. However, it is generally understood that a GK can grant an exemption from such liability, either in advance or after the fact, and the method for obtaining such exemption or conditions for the grant of such exemption may be set out in the GK's articles of incorporation.

In cases where a TMK is used as an SPV, the Securitisation Act will apply. The directors of the TMK owe a duty of due care and a fiduciary duty to that TMK. There are also special provisions restricting or expanding the responsibilities of directors in certain situations or under certain circumstances, including but not limited to, where competitive transactions or conflict of interest transactions exist.

Further, if a third party sustains damages as a result of the wilful misconduct or gross negligence of directors of a joint stock corporation or a TMK or managing members of a GK in the performance of their duties, such directors or managing members will be jointly and severally liable to such third party for such damage.

There is no legal requirement for such directors or managing members to be independent of the originators or the owner of the SPV. However, it is usual practice for the SPV to appoint an independent director or managing member in order to secure the bankruptcy-remoteness of the SPV.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

There is no regulation under Japanese law requiring originators or arrangers to retain some exposure to risk in a securitisation.

However, the Supervisory Guidelines and policies announced by the FSA provide that, in cases where financial institutions invest in securitised products, it is recommended that such investments be made only by those to which the originator retains some exposure to risk.

Notwithstanding the foregoing, it is usual for rating agencies to require that the originator be exposed to some risk in order to acquire a higher credit rating for the securitised product.

Security

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

Most transactions in Japan involving the securitisation of receivables are done without granting any collateral to the investors. Such deals are based on the understanding that:

- the SPV is a single-purpose entity;
- the management of assets and cash flow of the SPV is structurally controlled;
- the SPV will not enter into any unrelated transactions with third parties; and
- the SPV will not incur any unrelated debt.

On the other hand, in the case of securitisation of real estate, if the investment method is an asset-backed loan, collateral is usually granted in favour of the lender to secure the payment of such loans. Mortgages and pledges of real estate beneficial interests are typical types of collateral granted.

Regarding other types of securities, a security interest over receivables may be created either by way of a pledge or a security assignment.

A security interest over bank accounts and trust beneficial interests may be typically created by way of a pledge, and a security interest over moveable assets is typically created by way of a security assignment.

If any collateral is created in order to secure payments of bonds, the Secured Bonds Trust Act (Law No. 52, 1905) will apply and a trust company will need to be appointed to manage such collateral for the benefit of bond holders. However, because the requirements and restrictions under the Secured Bonds Trust Act are stringent, inflexible and cumbersome, a grant of a security interest for bonds is rarely seen in the market.

On the other hand, bonds issued by a TMK can be secured by a general lien pursuant to the Securitisation Act. In such case, the appointment of a trust company is not required, although the rights and interests granted to the holders of a general lien are relatively weak.

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

The method for creating and perfecting a security interest depends on the type of security interest and the type of assets subject to the security interest.

Mortgage

To perfect a mortgage against third parties, the mortgage must be registered with the competent legal affairs bureau.

Pledge or security assignment of receivables

There are three ways to perfect a pledge or assignment, as explained in question 20:

- to send a written notice with a notarised date to the third-party debtor;
- to obtain a written consent with a notarised date from the third-party debtor; and
- to register the pledge or assignment with the competent legal affairs bureau pursuant to the Perfection Act.

Pledge over bank accounts

To perfect a pledge over a bank account, written consent with a notarised date is typically obtained from the bank at which the account is maintained.

Pledge over trust beneficial interests

To perfect a pledge over trust beneficial interests, a written consent with a notarised date is typically obtained from the trustee.

27 How do investors enforce their security interest?

In general, enforcement of a security interest can be made through a judicial proceeding or private sale. The actual methods of enforcement may vary depending on the type of security and the arrangements specific to each transaction.

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

In a Japanese securitisation deal, the originator is usually appointed by the SPV to serve as the servicer for continued collection and management of the receivables. Payments by obligors will continue to be made to the originator, and collections in respect of transferred receivables may be commingled with the originator's other funds such as collections in respect of non-transferred receivables. If the originator or any successor servicer appointed or provided for under the servicing agreement is declared bankrupt or is subject to corporate reorganisation or civil rehabilitation proceedings while holding collections in respect of the SPV's transferred receivables, it is likely that such collections would be treated as part of the originator's bankruptcy estate or the originator's estate subject to the corporate reorganisation or civil rehabilitation proceedings (or that of the relevant subsequent servicer), and not as funds owned by the SPV. In such a situation, it is likely that the SPV would not recover the full amount of such collections.

In order to mitigate such risk, one or more of the following tactics is usually used:

- reduction of the time period during which the originator or the subsequent servicer actually holds the SPV's funds in its accounts;
- inclusion of a provision in the servicing agreement, providing the SPV with the right to terminate the appointment of the originator or the subsequent servicer in certain circumstances, including the petition for commencement of bankruptcy or corporate reorganisation proceedings in relation to the originator or subsequent servicer;
- establishment of an obligation requiring the originator to post a cash reserve or provide cash collateral;
- establishment of an obligation requiring the originator as servicer to pay to the SPV the scheduled collection amount prior to actual collection from obligors;
- use of separate accounts for the management of collected funds; and
- use of bank guarantees to secure the payment obligations of the originator or subsequent servicer.

Taxation

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

Originators will, in general, recognise gains or losses arising from the transfer of the subject assets to the securitisation vehicle. There are no measures for deferral of recognition of gains or losses for originators that are practically feasible in typical securitisation deals.

If the securitisation vehicle is a trust, in general, the subject assets that are entrusted will be deemed sold, and the originators will recognise the gains or losses, when the trust beneficial interest representing the beneficial ownership of the subject assets is sold to third parties other than the originator. Accordingly, for example, if the trust beneficial interest is structured to have two-tier tranches of the preferred trust beneficial interest and the subordinated trust beneficial interest as a mechanism for credit enhancement, and if the originator retains the subordinated trust beneficial interest, then the subject assets represented by such subordinated trust beneficial interest are not deemed sold even if they were entrusted to the trust. It should be noted that, under Japanese tax laws, the tax consequences of such two-tier trust beneficial interest structure are not necessarily clear.

If the originators are Japanese corporations, such as Japanese banks, they are in general subject to Japanese corporate income taxation on the gains, at the effective rate, including national and local taxes, of 29–30per cent (for Japanese corporations having stated capital of more than ¥100 million).

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

The primary tax considerations for issuers are to avoid entity-level income taxation at the issuer because issuers are special purpose vehicles. In order to achieve this, there are many measures that are employed in practice so as to minimise the taxable net income of the issuer. If there is any taxable income, it is subject to Japanese corporate income taxation (see question 29).

Update and trends

A long-awaited bill substantially amending the Civil Code was submitted to the Diet in March 2015 and such bill is still under long deliberation at the House of Representatives as of January 2017.

If the bill is passed, such amendment will be enforced within three years of the bill's promulgation. The amendment provides for various substantial reforms including the following:

- an assignment of receivables that is contractually prohibited might be valid (according to the court precedents and the interpretation of current Civil Code, any such assignment is void). Under the bill, the debtor of the underlying debt of such receivables may be protected by the rights of such debtor who may elect not to pay the underlying debt of such receivables or may claim that the underlying debt of such receivable has been extinguished due to repayment or otherwise, if the assignee or other third parties have acted in bad faith or with gross negligence;
- the acquisition of the debtor's consent (without reservation) to an assignment of claim as a method of perfecting such assignment of claim, which has the effect of a comprehensive waiver of the debtor's defences, will be abolished and thereafter the validity and effect of an alleged waiver of defence will be determined under general theories of expression of intention; and
- the validity of assignments of future receivables will be statutory confirmed (according to the court precedents and the interpretation of current Civil Code, assignments of future receivables are valid so long as the extent of receivables to be assigned are reasonably specified and such assignments will not be against the public order or policy).

If the issuer is a TMK or a listed real estate investment trust (J-REIT, which is technically not a trust but rather is an independent Japanese corporation):

- interest payable on the bonds or loans issued by the TMK or the J-REIT is deductible for its corporate income tax purposes; and
- dividends payable on the equity securities issued by the TMK or the J-REIT are also deductible for its corporate income tax purposes pursuant to certain special taxation measures if, in general, more than 90 per cent of the distributable profits are distributed as dividends to the investors.

If the issuer is a GK in the securitisation of real estate (see question 14):

- interest payable on the bonds or loans issued by the GK is deductible for its corporate income tax purposes; and
- profit distributions payable under a TK (ie, sort of an equity investment) are also deductible.

In addition, especially in the case of securitisation of real estate, minimising transactional taxes is important. Applicable major transactional taxes include real estate acquisition tax and registration and licence tax. These can be avoided or substantially reduced by the issuer acquiring the trust beneficial interest representing the beneficial ownership of the real estate, rather than acquiring the fee simple title to the real estate. Also, there are special taxation measures reducing the applicable transactional taxes if a TMK or a J-REIT acquires the fee simple title to the real estate for the purpose of securitisation.

31 What are the primary tax considerations for investors?

The primary tax considerations for investors are the Japanese withholding tax and the regular Japanese income taxation (on a net basis), to be imposed on the payment of the yields from the investment (eg, interest and dividends). The Japanese taxation on the investors substantially differs depending on the type of the instrument or securities issued, and the classification of the investors for Japanese tax purposes (ie, Japanese resident or not).

If the investor is a non-Japanese corporation having no permanent establishment in Japan for Japanese tax purposes, as a general rule, the investor will be subject to Japanese withholding tax:

- at the rate of 15.315 per cent on the interest payable on the bonds;
- at the rate of 15.315 per cent (if the shares are listed) or 20.42 per cent (if the shares are not listed) on the dividends payable on the shares or other equity securities;

- at the rate of 20.42 per cent on the profit distributions to be payable under the TK; and
- at the rate of 20.42 per cent on the interest payable on loans.

Japanese taxation on foreign investors is finalised by such withholding tax, and there is no need to file a Japanese tax return. Tax treaties entered into between Japan and the country of tax residence of the investor may provide for exemption or a reduced rate with respect to such Japanese withholding tax. In addition, in the case of bonds, if the bonds are issued within Japan using the Japanese book-entry system, or issued outside Japan as eurobonds, interest payable on such bonds may be exempt from Japanese withholding tax as special taxation measures, subject to compliance with certain procedural requirements.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

The following methods are typically used to ensure the SPV's bankruptcy-remoteness; that is, the isolation of the SPV and its assets from the originator, the owner of the SPV or other relevant transaction parties in the event of a bankruptcy of the originator, the owner of the SPV or such other parties:

- structuring the transfer of assets to be a true sale and not a security transaction;
- ensuring that the transfer of assets from the originator to the SPV will not prejudice the interests of the originator's creditors, thereby reducing the risk that any assets so transferred will become subject to avoidance or revocation in the event the transfer is deemed to have been a fraudulent transfer;
- minimising any commingling risk;
- appointing independent directors for the SPV;
- structuring the owner of the SPV to be an independent bankruptcy-remote vehicle;
- prohibiting the SPV from engaging in any business other than the contemplated securitisation transaction, based on restrictions set forth in its articles of incorporation and other organisational documents;
- prohibiting the SPV from engaging in certain conduct, such as a merger with another entity or the hiring of employees; and
- causing the SPV and its directors or shareholders to waive its right to commence a bankruptcy proceeding, a civil rehabilitation proceeding, a corporate reorganisation proceeding or any other insolvency proceeding.

33 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)?

From a Japanese law perspective, 'true sale' means that the transfer of assets from the originator to the SPV will be regarded as a transfer of ownership of the assets and will not be recharacterised as an assignment for security purpose or a granting of any other security interest in such assets, even if a bankruptcy proceeding, a corporate reorganisation proceeding or some other insolvency proceeding is commenced with respect to the originator. If such recharacterisation takes place, the SPV's assets might be subject to the insolvency procedure in question.

It is critically important that a transfer of assets constitute a true sale in a case where a corporate reorganisation proceeding is commenced with respect to the originator, because the rights of secured creditors will be subject to such proceeding and payments to secured creditors will not be made until the court approves the reorganisation plan. On the other hand, under a bankruptcy or civil rehabilitation proceeding, secured creditors may have rights of exclusive preference and, in principal, the rights of secured creditors will not be substantially affected in such proceedings.

Currently, no statutory provision or published court precedent identifies factors that determine whether an assignment of assets is a true sale. However, the following factors are generally considered when determining whether an assignment of assets constitutes a true sale:

- the intention of the parties as indicated by the relevant contracts;
- whether the originator will retain any rights in or control of the assigned assets;
- whether there is any right or obligation by the originator to repurchase the assigned assets;
- whether the originator has any rights or interests in the cash-flow payments derived from the assigned assets;
- whether the transfer of the assigned assets is perfected;
- whether the originator warrants the ability of the obligors to make payments under obligations that relate to the assigned assets;
- whether the SPV will incur all losses and damages arising from defaults by obligors whose indebtedness is related to the assigned assets, and whether the originator will indemnify the SPV or its investors against such loss or damages;
- whether the purchase prices of the assigned assets are appropriate and determined based on the reasonable and fair value of the assigned assets; and
- whether the assigned assets are treated as absolute transfers in the originator's financial records and accounting books.

34 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?

Currently, there is no such concept of consolidation in the Bankruptcy Law (Law No. 71, 1922), the Civil Rehabilitation Law (Law No. 225, 1999) or the Corporate Reorganisation Law (Law No. 154, 2002).

Therefore, if a bankruptcy, civil rehabilitation or corporate reorganisation proceeding is commenced with respect to the originator, the SPV and its assets should not be subject to such proceeding since there is no such concept of consolidation under the relevant laws. However, if the general theory of 'piercing the corporate veil' applies to the SPV, the SPV's status as a separate legal entity as distinguished from the originator is denied.

NAGASHIMA OHNO & TSUNEMATSU

Motohiro Yanagawa **motohiro_yanagawa@noandt.com**
Takashi Tsukioka **t_tsukioka@noandt.com**
Yushi Hegawa **yushi_hegawa@noandt.com**

JP Tower, 2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan

Tel: +81 3 6889 7000
Fax: +81 3 6889 8000
www.noandt.com

Portugal

Paula Gomes Freire and Mariana Padinha Ribeiro
VdA Vieira de Almeida

General

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

In the context of securitisation, a general legal framework applicable to securitisation transactions was approved by Decree-Law No. 453/99 of 5 November, as amended from time to time (the Securitisation Law).

The Securitisation Law has implemented a specific securitisation legal framework in Portugal, which contains a simplified process for the assignment of credits for securitisation purposes. In fact, the sale of credits for securitisation is effected by way of assignment of credits, such being the customary terminology, consisting in a true sale of receivables under the Securitisation Law as the purchaser is the new legal owner of the receivables. It corresponds to a perfected sale of receivables; although there are some specifics relating to exercise of means of defence and set-off rights against the securitisation vehicle, described below.

In particular, the Securitisation Law regulates, among other things:

- securitisation vehicles;
- receivables eligibility criteria;
- types of assignors;
- licensing and authorisation, and assignment requirements;
- notification of borrowers;
- servicing of the assigned credits; and
- segregation of assets and bankruptcy-remoteness.

Additionally, the Portuguese jurisdiction has several sets of rules governing the following subjects on securitisation transactions:

- the Securitisation Tax Law and general debt issuance tax legal framework, governing all tax matters on securitisation transactions (see question 29);
- offers and listing of securitisation bonds are governed by the Securities Code (approved by Decree-Law No. 486/99, as amended from time to time);
- specific regulation issued by the Portuguese Securities Commission CMVM, which is the Portuguese markets and securities regulatory body in charge of supervising the securities market and, in particular, of securitisation transactions and relevant players, establishing rules on accounting and own funds requirements of securitisation vehicles; and
- specific regulation issued by the Bank of Portugal applicable to originators assigning credits or loans for securitisation purposes to securitisation vehicles under the Securitisation Law.

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

Yes. An assignment of credits is deemed to be for securitisation purposes when the assignee is a securitisation vehicle (ie, a securitisation company (STC) or a securitisation fund (FTC)). This means that synthetic securitisations, as standard market transactions whereby a bank (originator) buys credit protection on a portfolio of loans from an investor by the execution of a derivative contract or hedging agreement, do not qualify as securitisation transactions under the Securitisation Law – even if these structures can be put in place in Portugal.

Consequently, the Securitisation Law regulates a simplified and tax-neutral process for securitisation transactions through a two-step approach:

- transfer of receivables to a securitisation vehicle; and
- subsequent issue of securities or units, subscribed for by one or more investors, using the proceeds to fund the purchase of the receivables.

Once transferred, the assigned portfolio is ring-fenced and fully allocated to the issue of the securities.

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

The securitisation market in Portugal has been very active in the past few years and securitisation transactions involving receivables originating from several industries have been successfully put together. The banking and finance industry has been, and still is, the most significant, originating both performing or non-performing loans, and secured or unsecured portfolios. Most securitisation transactions have used residential mortgages and corporate and small and medium-sized enterprise (SME) loans, and leasing receivables. Other asset classes have also often been securitised in the Portuguese market, namely tax and social security credits, regulatory credits arising from the tariff-deficit in the electricity sector, non-performing loans, highway toll receivables and future receivables.

Throughout the financial crisis, securitisation mechanics and features continued to be used as an important financing tool, allowing access to European Central Bank (ECB) liquidity lines by using eligible collateral such as rated asset-backed securities in the Eurosystem monetary policy transactions. This trend only really slowed due to the Bank of Portugal's programme, whereby loans could be directly posted with the Bank of Portugal as collateral against liquidity, even though the Eurosystem operations were still an open option.

The figures in Table I indicate the total amount of securitisation transactions in the Portuguese market between the last quarter of 2014 and the first quarter of 2016:

Table I

1. Last quarter 2014	€1,221,002,000
2. Year 2015	€5,530,198,000
3. Year 2016	€1,430,586,950.87
Total	€8,181,786,950.87

In addition, Table II shows securitisation figures for industry or sector type within the same period:

Table II

1. Mortgage loans	€1,192,200,000
2. Tariff deficit (electricity)	€1,350,421,000
3. Consumer loans (including leases and auto loans)	€1,900,395,000
4. Non-performing loans	€116,800,001
5. SME loans	€3,621,970,949.87
Total	€8,181,786,950.87

Regulation

4 Which body has responsibility for the regulation of securitisation?

The CMVM regulates and supervises securitisations in Portugal (see www.cmvm.pt). The CMVM:

- analyses the relevant securitisation documents and regulatory requirements;
- analyses and signs off on the receivables pool of assets to be collateralised by way of the assignment for securitisation purposes;
- approves the assignment of receivables and incorporation of the securitisation fund (where an FTC is used as the securitisation vehicle), or the granting of an identification asset-code to the bulk of receivables in the asset securitised portfolio (where an STC is used as the securitisation vehicle); and
- approves the prospectuses for admission to trading of securitisation notes issued by STCs in Portugal.

Also, the Bank of Portugal, the Portuguese central bank, must be notified by the originators of the securitisation transactions being executed and approved by the CMVM (see www.bportugal.pt).

5 Must originators, servicers or issuers be licensed?

Securitisation vehicles (STCs and FTCs) as issuers of securitisation securities are subject to registration with the CMVM and subject to supervision of both the CMVM and the Bank of Portugal.

The Securitisation Law defines which entities may qualify as originators of receivables to be assigned for securitisation purposes, although no specific licence is required for this specific purpose. Under the Securitisation Law, the Portuguese state and other public legal persons, as well as credit institutions, financial companies, insurance firms, pension funds and pension fund management companies, are allowed to assign loans for securitisation purposes, as well as other legal persons that had their accounts legally certified by an auditor registered with the CMVM for the previous three years. In duly justified cases (such as an originator subject to foreign law), the CMVM may authorise the substitution of the account certification with an equivalent document, provided that the interests of the investors are protected.

As to servicing of the securitised assets, the mere purchase and management of a certain portfolio of receivables does not, in itself, qualify as a banking or financial activity – unless it is to be carried out on a professional and regular basis or includes any form of credit granting – and should therefore not give rise to the need for any kind of authorisation or licence being obtained.

Even when the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables, as, in fact, it is foreseen in the Securitisation Law, for example, when the seller is a bank, credit institution or other financial company, no licence or authorisation is required for the seller to continue to enforce and collect receivables, including to appear before a court, assuming the debtors are not aware of the assignment. However, should the assignment of the receivables have been notified to the debtors, then the servicer will need to show good and sufficient title to appear in court (such as power of attorney) in the event its legitimacy is challenged by the relevant debtor. Only a qualified creditor has the relevant legitimacy to claim credit in court.

If another entity is chosen to perform the role of servicer, a third-party replacement servicer is appointed to replace the seller as the original servicer, or a back-up servicer needs to be put in place, the CMVM's prior approval to this effect is required under article 5 of the Securitisation Law.

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

See question 4.

7 What sanctions can the regulator impose?

The Securitisation Law does not impose specific sanctions for the purposes of the breach of securitisation transactions requirements.

In fact, the CMVM may impose the general sanctions foreseen in the Portuguese Securities Code by acting as supervisor of the securities market and, in particular, within the context of securitisation, of securitisation vehicles (STCs and FTCs), for the breach of specific rules applicable to securitisation and financial intermediation activities, and market transparency.

8 What are the public disclosure requirements for issuance of a securitisation?

There are no specific public disclosure requirements for issuance of securitisation instruments. In fact, several elements need to be submitted to the CMVM for appreciation and analysis prior to the relevant securitisation transaction approval (in the case of FTCs) or granting of the asset-identification code to the asset pool (in the case of STCs) by the CMVM, such as the securitisation vehicle board approval, own funds statement or due diligence statement confirming asset eligibility for securitisation purposes in accordance with the requirements of the Securitisation Law. However, public disclosure requirements being applicable within the context of securitisation are those applicable to private or public offers, or the admission to trading of the relevant securitisation instruments being issued, to which the general rules of the Portuguese Securities Code (generically corresponding to the implementation of the Prospectus Directive (Directive 2003/71/EC), as amended and currently in force) are applicable.

In addition, other information is required to be disclosed by the relevant securitisation vehicles, namely annual and biannual financial accounts and information regarding securities admitted to trading. Alternatively, the general AML requirements under Decree-Law No. 25/2008 of 5 June, such as the communication and the reporting requirements in relation to transactions deemed suspicious, may be applicable not only to securitisation vehicles but also in relation to several entities involved in securitisation transactions, such as paying agents and banks holding the relevant transaction accounts being credit institutions which are bound to comply with such requirements. This information, however, is not a specific requirement of the Securitisation Law and its disclosure corresponds to general disclosure obligations applicable to credit institutions and financial intermediaries.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

See question 8.

Eligibility

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

Yes; see question 5, in particular the second paragraph.

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

Under article 4(1) of the Securitisation Law, only the assets or loans meeting the following requirements may be assigned for securitisation purposes:

- their transfer is not subject to legal or conventional restrictions;
- they must be of a pecuniary nature;
- they are not subject to any condition; and
- they are not subject to litigation, and are not given as a guarantee or judicially pledged or seized.

Altogether, these are the so-called eligibility criteria under the Securitisation Law.

Under article 4(3) of the Securitisation Law, securitisation of future receivables is expressly allowed, provided they both:

- arise from existing relationships; and
- are quantifiable (the originator confirms the quantum of the future receivables).

For the purpose of assigning future receivables, the originator or assignor assigns to the SPV certain rights over future assets, equivalent to an amount exceeding the debt service due (over-collateralisation).

The originator or assignor of the receivables will then confirm that the future receivables generated during each collection period will be sufficient to cover the agreed debt service. For each interest period, the originator or assignor will transfer to the buyer an amount equivalent to 100 per cent of the debt service in respect of the interest period. Furthermore, if the originator or assignor is unable to originate

sufficient future receivables to meet their obligations for a given interest period, they will pay to the buyer an amount equal to the shortfall of future receivables, to ensure all the relevant debt service.

Subject to these limitations, continuous sales are possible under the Securitisation Law, subject to certain restrictions.

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

There are no specific limitations on the classes of investors that can participate in a securitisation offer, the general rules on offering being applicable in this situation. However, we may say that professional and institutional investors usually have interest and invest in securitisation securities issued in Portugal under the Securitisation Law general framework, and offers of securitisation securities are not directed to retail investors in the Portuguese market.

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

The entities that may act as custodian for the securitisation units or securitisation notes depend on the transaction structure and securitisation vehicle used in each relevant securitisation transaction (STC or FTC). In this respect, see question 15.

Under the Securitisation Law, there are no specific requirements applicable to the accounts bank of a given securitisation transaction, and any bank duly authorised, licensed and registered with the bank of Portugal may act as an accounts bank on behalf of the issuer, upon mandate agreement (usually the 'accounts agreement') executed between the issuer and the relevant bank on which the transaction amounts shall remain deposited. It is nevertheless common that the relevant transaction documents, namely the accounts agreement, foresee minimum rating requirements applicable to the accounts bank (and a replacement procedure upon the occurrence of a rating downgrade), as other securitisation transactions in place in the EU market.

As to servicing of the securitised assets (in the case both of STCs or FTCs), the mere purchase and management of a certain portfolio of receivables does not, in itself, qualify as a banking or financial activity – unless it is to be carried out on a professional and regular basis or includes any form of credit granting – and should therefore not give rise to the need for any kind of authorisation or licence being obtained.

Even when the assignor or seller of the securitised pool of assets remains in charge of the collection of receivables – as, in fact, it is foreseen in the Securitisation Law, for example, when the seller is a bank, credit institution or other financial company – no licence or authorisation is required for the seller to continue to enforce and collect receivables, including to appear before a court, assuming the debtors are not aware of the assignment. However, should the assignment of the receivables have been notified to the debtors, then the servicer will need to show good and sufficient title to appear in court, (such as power of attorney) in the event its legitimacy is challenged by the relevant debtor. Only a qualified creditor has the relevant legitimacy to claim credit in court.

If another entity is chosen to perform the role of servicer, a third-party replacement servicer is appointed to replace the seller as the original servicer, or a back-up servicer needs to be put in place. The CMVM's prior approval to this effect is required under article 5(4) of the Securitisation Law.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

As mentioned in question 5, the Portuguese state and other public legal persons are expressly included in the group of entities authorised to assign loans for securitisation purposes. The Securitisation Law also permits that, subject to the legal requirements applicable to tax credits securitisation, the Portuguese state and the Portuguese social security may assign loans for securitisation purposes even where they are conditional or subject to litigation; in which case, such public entities as the originator may not represent and warrant in the relevant assignment agreement that the assigned credits exist or are enforceable.

Transactional issues

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

The Securitisation Law regulates two different types of securitisation vehicles for the Portuguese market:

- FTCs; and
- STCs.

FTC

An FTC is a separate portfolio of receivables with no separate legal personality. An undivided ownership interest in the FTC is held jointly by the holders (individuals or corporate) of securitisation units in the FTC, with no liability regarding losses of the FTC.

An FTC structure consists of:

- the fund itself (FTC);
- a management company or fund manager, which manages the FTC under the terms of its fund regulation; and
- a custodian, qualifying as a credit institution, holding the assets on behalf of the FTC.

The fund manager must:

- be a limited liability financial company;
- be an entity approved by the Bank of Portugal;
- have its registered office in Portugal;
- have a minimum share capital of €250,000, represented by nominative or registered bearer shares;
- be exclusively allocated to the management of one or more funds on behalf of the unit holders; and
- include in its name 'SGFTC'.

Fund managers are subject to specific capital requirements and must have own funds that are equal to, or higher than:

- if they have up to €75 million of assets under management: 0.5 per cent net value of all funds managed; and
- if they have over €75 million of assets under management: 0.1 per cent of the amount exceeding €75 million.

Fund managers can have a number of different FTCs under management. They are responsible for obtaining approval of the incorporation of each new FTC from the CMVM. The incorporation of a fund is deemed to occur on payment of the subscription price of the relevant securitisation units, upon CMVM's approval being obtained.

Additionally, a servicer must be appointed under the fund regulation to collect and manage the portfolio assigned to the FTC.

STC

An STC must:

- be a public limited liability company;
- be an entity approved by the CMVM;
- have a minimum share capital of €250,000, represented by nominative shares;
- include in its name 'STC'; and
- engage exclusively in the carrying out of securitisations, by acquiring, managing and transferring receivables, and issuing securities to fund these acquisitions.

The incorporation of STCs is subject to an approval process with the CMVM and, although they do not qualify as financial companies, this process imposes compliance with a number of requirements that are similar to those arising under all relevant Banking Law requirements.

These requirements may be said to have an impact in terms of the shareholding structure of STCs to the extent that full disclosure of both direct and indirect ownership is required for the purposes of allowing the CMVM to assess the reliability and soundness of the relevant shareholding structure. The same applies in respect of the members of corporate bodies, namely directors, who must be persons whose reliability and availability must ensure the capacity to run the STC business in a sound and prudent manner.

The shares in STCs can be held by one or more shareholders, although ownership is subject to certain requirements. To establish an STC, prospective shareholders must obtain approval from the CMVM,

which will only be granted when it is shown that it is capable of providing sound and prudent management.

STCs are also subject to capital requirements and must have own funds that are equal to:

- when it issues securities up to €75 million: 0.5 per cent of the issued amount; and
- when it issues securities worth over €75 million: 0.1 per cent of the excess amount.

In terms of legal attributes and benefits, we believe it is fair to say that both vehicles are quite similar as they both allow for a full segregation of the relevant portfolios and their full dedication to the issued securities. While in a fund structure, this is achieved through the structure itself, as the assets of each fund are only available to meet the liabilities of such fund. In a company structure, certain relevant legal provisions establish a full segregation principle and a creditor's privileged entitlement over the assets that are so segregated, and that collateralise a certain issue of notes.

This segregation principle means that the receivables and other related assets and amounts existing at a given moment for the benefit of an STC, and that are related to a certain issuance of notes, constitute an autonomous and ring-fenced pool of assets, which is exclusively allocated to such issuance of notes. It is not, however, available to creditors of the STC, other than the noteholders and to the services providers existing specifically in the context of such issuance of notes until all the amounts due in respect of the notes have been repaid in full. To this effect, the assets integrated in each autonomous and ring-fenced pool of assets are listed and filed with the CMVM and subject to an asset identification code that is also granted by the CMVM.

In addition to the above, and in order to render this segregation principle effective, the noteholders and the other creditors relating to each series of securitisation notes issued by the STC are further entitled to a legal creditor's privilege (equivalent to a security interest) over all of the assets allocated to the relevant issuance of securitisation notes, including assets located outside Portugal. In fact, according to article 63 of the Securitisation Law, this legal special creditor's privilege exists in respect of all assets forming part of the portfolio allocated to each transaction related to an issuance of notes. This has effect over those assets existing at any given time for the benefit of the STC that are allocated to the relevant issuance of securitisation notes.

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

The Securitisation Law establishes two types of securitisation vehicle that are subject to different forms of incorporation, but are similar in legal attributes and benefits as they both allow for a full segregation of the relevant portfolios and their full dedication to the issued securities.

While in a fund structure this is achieved through the structure itself, as the assets of each fund are only available to meet the liabilities of such fund (see question 15), in a company structure, certain relevant legal provisions establish a full segregation principle and a creditor's privileged entitlement over the assets that are so segregated and that collateralise a certain issue of notes. Also, costs, timing and transaction documents to put together a securitisation transaction under the Securitisation Law are very similar (see question 15).

The choice of using an FTC or an STC structure in a given securitisation transaction is essentially left to investors, who will be more familiar with the pool separation concept provided by a fund, rather than a legal creditor's privilege (see question 25). Therefore, historically, securitisations in Portugal used FTCs because of market perception and the indirect link to a foreign jurisdiction being more usual for securitisation purposes.

Initially, in securitisations transactions in the Portuguese market:

- the FTC acquired the assets and issued securities (securitisation units);
- an SPV (generally in Ireland or Luxembourg) subscribed for the securitisation units and issued notes, which were purchased by the final investors.

This was essentially investor-driven, as it was felt that it would be difficult to place units with investors (as they are not pure debt instruments but quasi-capital instruments).

Since the first Portuguese securitisation with an STC in 2004 under which tax claims and social security claims' credits were assigned by the Portuguese state to Sagres, STC, SA, the STC has spread in the market and has been generally accepted by institutional investors. In recent years, securitisations have essentially adopted the STC, with a direct issuance out of Portugal where the assignment of loans are fully governed by Portuguese law and subject to full supervision of the CMVM.

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

When an assignment of credits for securitisation purposes is executed under the Securitisation Law, the securitisation vehicle is incorporated in Portugal under the Securitisation Law and the legal requirements and licences are requested to the CMVM – namely the attribution of the asset-identification code, which enables the full segregation of the asset pool – such assignment of credits shall be governed by Portuguese law. However, there is nothing preventing the remaining transaction documents of a given securitisation transaction from being governed by other laws, and it is usual that, for instance, the accounts agreement and the paying agency agreement of a given securitisation transaction are governed by the law of incorporation of the relevant bank being mandated by the issuer to perform the roles of accounts bank and paying agent.

Portuguese law does not generally require that an assignment of receivables is governed by the same law that governs the assigned receivables. However, our experience (and that of the Portuguese authorities) is that assignment agreements for Portuguese-originated receivables have usually been governed by Portuguese law.

In any case, given article 14 of EC Regulation No. 593/2008 (the Rome I Regulation) and, when the Rome I Regulation does not apply, the risk that a Portuguese court would attempt to enforce a solution similar to that which is set out therein, the parties to an assignment of Portuguese-originated receivables for securitisation purposes should comply with the obligor notification procedures or exemption of notification procedures set out in the Securitisation Law.

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

As to the purchase of new assets by the issuer of the securitisation securities, and without prejudice to what is above mentioned as to the assignment of future receivables (see question 11), continuous sales would be possible under the Securitisation Law provided they are in compliance with the eligibility criteria required under the Securitisation Law and the original receivables agreement does not foresee any restrictions on the assignment. However, sellers have rather opted to carry out securitisation transactions with revolving periods for assignment of additional receivables on a periodic basis, against payment out of collections and additional funding by issuance of further notes, rather than continuous sales.

Also, the Securitisation Law imposes a restriction on the transfer of securitisation transaction assets, whereby the issuer may only assign receivables to FTCs or STCs pursuant to article 45(1) of the Securitisation Law. The issuer may further assign securitised receivables in accordance with article 45(2) of the Securitisation Law in the following cases:

- non-compliance with the obligations arising from the securitised receivables;
- retransfer to the assignor and acquisition of new loans in replacement, if there are changes to the receivables features when renegotiating the respective conditions between the relevant borrower and the assignor;
- reassignment to the originator whenever there are latent defects on the securitised receivables; and
- when the transfer is envisaged to all receivables in the segregated pool of assets of an issuance of securitisation notes being subject to redemption, to the extent that the principal outstanding balance of the relevant receivables is equal to or less than 10 per cent of their initial principal outstanding balance, as of the date of the assignment for securitisation purposes.

The Securitisation Law further requires that the receivables assigned by the Portuguese state and the Portuguese social security for securitisation purposes may be transferred by the relevant securitisation vehicle to STCs and FTCs only, subject to the relevant assignor's prior consent.

19 What are the registration requirements for a securitisation?

See the answer to question 5 on registration of STCs and FTCs.

There are no specific formality requirements for an assignment of credits under the Securitisation Law. A written private agreement between the parties is sufficient for a valid assignment to occur (including an assignment of loans with underlying mortgages or other guarantees subject to registration under Portuguese law). Transfer by means of a notarial deed is not required. In the case of an assignment of mortgage loans, the signatures to the assignment contract must be certified by a notary public, lawyer or the company secretary of each party under the terms of the Securitisation Law, such certification being required for the registration of the assignment at the relevant Portuguese Real Estate Registry Office.

Additionally, the assignment of any security over real estate or of an asset subject to registration in Portugal is only effective against third parties acting in good faith further to registration of such assignment with the competent registry by, or on behalf of, the assignee. The assignee is entitled under the Securitisation Law to effect such registration.

As mentioned above, in order to perfect an assignment of mortgage loans and ancillary mortgage rights, which are capable of registration at a public registry against third parties, the assignment must be followed by the corresponding registration of the transfer of such mortgage loans and ancillary mortgage rights in the relevant Real Estate Registry Office.

The Portuguese real estate registration provisions allow for the registration of the assignment of any mortgage loan at any Portuguese Real Estate Registry Office, even if the said Portuguese Real Estate Registry Office is not the office where such mortgage loan is registered.

The registration of the transfer of the mortgage loans requires the payment of a fee for each such mortgage loan.

Concerning promissory notes, the usual practice is for these to be blank promissory notes in relation to which the originator has obtained from a borrower a completion pact that grants the originator the power to complete the promissory note. In order to perfect the assignment of such promissory notes to the assignee, the assignor will have to endorse and deliver these instruments to the assignee.

The assignment of marketable debt instruments is perfected by the update of the corresponding registration entries in the relevant securities accounts, in accordance with the Portuguese Securities Code.

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

Article 6(1) of the Securitisation Law establishes a general rule pursuant to which the assignment of the receivables becomes effective towards the obligors upon notification of the sale of the receivables. However, a relevant exception applies under article 6(4) of the Securitisation Law: the assignment of receivables becomes immediately valid and effective between the parties and towards the obligors upon the execution of the relevant assignment agreement, irrespective of the obligor's consent, notification or awareness, when the assignor is, inter alia, a credit institution or a financial company.

Note that notification to the obligors is generally required, even in the case of article 6(4) of the Securitisation Law (as described above), when the servicer of the receivables is not the assignor of the receivables. Also, in the case the relevant receivables contract expressly requires the consent or notification of the obligors, then such consent or notice is required in order for the assignment to be effective against such obligors.

Under article 6(6) of the Securitisation Law, any set-off rights or other means of defence exercisable by the obligors against the assignee are crystallised or cut off on the relevant date the assignment becomes effective:

- regardless of notification when such notice is dispensed as above; or
- upon notification or awareness of the debtor when such is required.

Under the Securitisation Law, when applicable as per the procedure described above, notification to the debtor is required to be made by means of a registered letter (to be sent to the debtor's address included in the relevant receivables contract), and such notification will be deemed to have occurred on the third business day following the date of posting of the registered letter.

There is no applicable time limit to the delivery of notice to the obligors, taking into account in any case that, if no exception applies, the assignment shall only be effective towards the obligors upon delivery of the relevant notice. The notice can be delivered after commencement of any insolvency proceedings against the obligor or against the seller, and the contractual documents for securitisation transactions usually include provisions to allow the assignee to be able to notify all the obligors in the event the seller or assignor does not do so. From our past experience, we may say that the CMVM usually requires that the notice of assignment to the borrowers is delivered within a period of three business days as from the relevant assignment, although there is no formal deadline required under the Securitisation Law.

When required, notice of assignment of credits must be given to each obligor, even though notice may be given for future credits.

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

Law 67/98, as amended (the Data Protection Law) protects consumer obligors (not enterprises) regarding the processing and transfer of personal data. The processing of personal data, and the transfer or assignment of personal data, requires express consent from the data subject under the Data Protection Law.

Before processing, the entity collecting and processing the personal data must obtain prior authorisation from the Data Protection Authority (CNPD).

Transfer of personal data to an entity in an EU member state does not require authorisation by the CNPD, but must be notified to the relevant data subjects.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The Securitisation Law does not contain any specific provisions governing the relationship between credit rating agencies and issuers of securitisation securities.

Although no specific provisions exist within the context of securitisation transactions, we may say that rating of securitisation issues in Portugal has been severely affected by the banking sector crisis and the economic instability of the past four years in that country; in particular, the financial adjustment programme outlined and controlled by the International Monetary Fund, the ECB and the EU, as well as recent developments in the Portuguese banking sector. The rating of securitisation issues in Portugal is still affected by related caps on Portugal's national debt.

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

See question 15 as to board, administration and independence of FTCs and STCs.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Although the Securitisation Law does not foresee specific requirements as to retention obligations for securitisation transactions, Portugal, as an EU member state, is subject to the Basel III framework, through Directive 2013/36/EU (CRD IV) and Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (the Capital Requirements Regulation), and therefore the originator, sponsor or original lender have a retention obligation, on an ongoing basis, on the material net economic interest in the securitisation of not less than 5 per cent of the nominal amount of the securitised exposures.

Security

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

As the Securitisation Law establishes itself a ring-fenced structure, whereby the assigned pool of assets is effectively segregated from the estates of the originator, the issuer and the servicer (as well as of any other transaction parties), it is not usual in Portuguese securitisation transactions to grant security or collateral to investors in securitisation securities. As mentioned above, while in a fund structure this segregation is achieved through the structure itself, as the assets of each fund

Update and trends

Taking into consideration the current low interest rate environment in Europe and the reduced appetite for investment in the banking sector (due to legal uncertainty resulting from the application of EU bail-in tools), we believe that securitisation transactions will continue to be seen as a viable and attractive source of liquidity and funding. This applies both for companies (including banks), seeking to 'clean' their relevant balance sheets by assigning to a securitisation vehicle credit portfolios that they originated and for investors seeking to subscribe securities with attractive profitability and high yield with the benefit of the segregation and bankruptcy-remoteness features of the Securitisation Law.

Finally, we would just add that we expect to see an increase throughout 2017 of securitisation transactions backed by non-performing loan portfolios (NPLs), bearing in mind the level of exposure to NPLs of the Portuguese and European banking systems.

are only available to meet the liabilities of such fund, in a company structure certain relevant legal provisions establish a full segregation principle and a creditor's privileged entitlement over the assets that are so segregated and that collateralise a certain issue of notes.

This segregation principle means that the receivables and other related assets and amounts existing at a given moment for the benefit of an STC, and which are related to a certain issuance of notes, constitute an autonomous and ring-fenced pool of assets that is exclusively allocated to such issuance of notes and that is not, therefore, available to creditors of the STC other than the noteholders, and to the service providers existing specifically in the context of such issuance of notes until all the amounts due in respect of the notes have been repaid in full. To this effect, the assets integrated in each pool are listed and filed with the CMVM and subject to an asset identification code that is also granted by the CMVM.

In addition to the above, and in order to render this segregation principle effective, the noteholders and the other creditors relating to each series of securitisation notes issued by the STC are further entitled to a legal creditor's privilege (equivalent to a security interest) over all of the assets allocated to the relevant issuance of securitisation notes, including assets located outside Portugal. In fact, according to article 63 of the Securitisation Law, this legal special creditor's privilege exists in respect of all assets forming part of the portfolio allocated to each transaction related to an issuance of notes and therefore has effect over those assets existing at any given moment in time for the benefit of the STC that are allocated to the relevant issuance of securitisation notes.

Also, the provisions of article 60 et seq of the Securitisation Law specifically provides for limited recourse provisions that are valid and binding on the noteholders. Insofar as limited recourse arrangements are concerned, we would furthermore take the view that they correspond to an application in a specific context (that of securitisation) of a possibility of having a contractual limitation on the assets that are liable for certain obligations or debts, which is provided for by Portuguese law on general terms (namely article 602 of the Portuguese Civil Code). Once they result from the quoted provisions of the law, limited recourse shall not be affected by the issuer's insolvency, however remote, such event may be in the context of the Portuguese securitisation vehicles.

Therefore, other than obtaining the relevant approval for incorporation of the fund or asset digit code approval from the CMVM confirming the applicability of the legal creditor's privilege in respect of a given portfolio of receivables pertaining to certain notes issued, no additional formalities are required in order to perfect such legal creditor's privilege, given that it is not subject to registration, in accordance with the Securitisation Law. Additionally, in some transactions, namely those using a securitisation fund, it is usual to create security over the foreign bank accounts of the vehicle, such as escrow accounts or pledge over accounts as being qualified as financial pledge under Decree-Law No. 105/2004 of 8 May 2004 (as amended), in line with the financial collateral arrangements directive. The important characteristic of such financial pledges is that the collateral taker may have the possibility to use and dispose of financial collateral provided as the owner of it.

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

See question 25.

27 How do investors enforce their security interest?

See question 25.

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

In accordance with the Securitisation Law, in the event of the servicer becoming insolvent, all the amounts that the servicer may then hold in respect of the loans assigned by the originator to the issuer will not form part of the servicer's insolvency estate, and the replacement of servicer provisions in the agreement for the servicing of the receivables executed between the issuer and the servicer shall then apply. Such procedure separating the relevant estates of the servicer and the securitisation vehicles are a natural consequence of the segregation principle provided in the Securitisation Law, as described in question 25.

Taxation

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

The Securitisation Tax Law has established the tax regime applicable to the securitisation transactions carried out under the Securitisation Law. Its main goal was to ensure a tax-neutral treatment to the securitisation transactions set up by each one of the securitisation vehicles provided for in the Securitisation Law. Therefore, under articles 2(5) and 3(4) of the Securitisation Tax Law, there is no withholding tax on:

- the payments made by the purchaser (an STC and FTC) to the seller in respect of the purchase of the receivables;
- the payments by the obligors under the loans; and
- the payments of collections by the servicer (who usually is also the seller) to the purchaser.

The nature or the characteristics of the receivables and the location of the seller have no influence on the tax regime referred to above.

However, the purchaser must be an STC or FTC resident in Portugal for tax purposes in order to benefit from the special tax regime. There is no recharacterisation risk of the deferred purchase price as payments of collections are not subject to withholding tax.

Alternatively, under article 4(1) of Securitisation Tax Law, income generated by the holding (distributions) or transfer (capital gains) of the notes and units is generally subject to the Portuguese tax regime established for debt securities.

According to Circular No. 4/2014 issued by the Portuguese Tax Authorities and to the Order issued by the Secretary of State for Tax Affairs, dated 14 July 2014, in connection with tax ruling No. 7949/2014 disclosed by the tax authorities, the general tax regime on debt securities (as established in Decree-Law No. 193/2005, of 7 November, as amended) also applies on income generated by the holding or the transfer of securitisation notes issued by STCs under securitisation transactions.

Decree-Law No. 193/2005, as amended, is therefore applicable to securitisation notes, notably regarding the requirements on registration of securitisation notes in the relevant clearing systems and on the exemption applicable to income obtained by non-resident holders of such securitisation notes. In this regard, payment of interest and principal on securitisation notes are exempt from Portuguese income tax, including withholding tax, provided the relevant noteholder qualifies as a non-Portuguese resident having no permanent establishment in Portugal. Such exemption does not apply to non-resident individuals or companies if the individual's or company's country of residence is any jurisdiction listed as a tax haven in Ministerial Order No. 150/2004, of 13 February 2004 (as amended from time to time) and with which Portugal does not have in force a double tax treaty or a tax information exchange agreement provided the requirements and procedures for evidencing the non-residence status are complied with. To qualify for the exemption, noteholders will be required to provide the direct registry entity with adequate evidence of non-residence status prior to the relevant interest payment date, according to procedures required under Decree-Law No. 193/2005.

No specific tax accounting requirements need to be complied with by the seller under the securitisation tax regime. However, CMVM Regulation No. 1/2002, of 5 February 2002, sets forth the specific accountancy regime for FTCs, and CMVM Regulation No. 12/2002, of 18 July 2002, establishes specific accountancy rules for STCs (although

the accounting procedure of this type of corporate entity follows the general Portuguese Accountancy Standards).

Pursuant to the Securitisation Tax Regime, no stamp duty is due on the sale of receivables being securitised or the fees and commissions that fall under article 5 (ie, referring to required acts to ensure good management of the receivables and, if applicable, of the respective guarantees, and to ensure collection services, the administrative services relating to the receivables, all relations with the debtors and also maintaining, modifying and extinguishing acts related to guarantees, if any), and under article 24 (ie, as to any of the described attributions of the depositary), both of the Securitisation Law, that may be charged by the servicer to the purchaser. In addition, no documentary taxes are due in Portugal.

The sale of receivables is VAT-exempt under article 9(27)(a) and (c) of the Portuguese VAT Code, which are in line with article 135(a) and (c) of the VAT Directive (EC Directive 2006/112/EC). Pursuant to the Securitisation Tax Regime, no value added tax is due on the administration or management of securitisation funds and also on the fees and commissions regarding management services falling under article 5 and transactions undertaken by depositary entities pursuant to article 24 of the Securitisation Law, as described above.

Considering the above, it is important to highlight that the purchase of the receivables is qualified as a true sale transaction under the Securitisation Law; the purchaser being the legal owner of the receivables and therefore the purchaser is subject to tax in Portugal (namely in respect of income arising from the receivables). However, despite being viewed as an ordinary taxpayer, in order to ensure a tax-neutral treatment on the securitisation transactions, the taxable income of the purchaser tends to be equivalent to zero for tax purposes since the income payments made to the noteholders are tax-deductible (STCs are not subject to the Portuguese interest barrier rule).

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

See question 29.

31 What are the primary tax considerations for investors?

See question 29.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

In Portugal, as mentioned above, full portfolio separation and insolvency remoteness is established under the Securitisation Law. This is partly achieved by FTCs and STCs being exclusively engaged in carrying out securitisations.

Generally, every receivable allocated to the SPV is locked into an autonomous ring-fenced pool of receivables. The receivables are exclusively allocated to the relevant issue of units or securities, and only available to holders of the units or securities, until all amounts due are fully repaid. Recourse is limited to the pool of receivables. The securities' holders cannot claim against the SPV's own funds or, in an STC, assets backing other securities issued by the STC. The pool of receivables is listed and filed with the CMVM, which grants an asset identification code to the pool.

In addition, the securities' holders and other creditors of each series of securities issued by an STC have a special creditor's privilege over the pool of receivables (granted by article 63 of the Securitisation Law). Therefore, the risk of insolvency of the pool of receivables can be said to correspond to the risk in the underlying assets.

Similarly, an FTC is only required to pay amounts to the extent it receives the corresponding cash flow as part of collection on the pool of receivables (under article 32(4) of the Securitisation Law). The FTC's recourse is limited to the receivables in the pool. Therefore, from a practical perspective, creditors cannot initiate insolvency proceedings against the FTC.

The FTC is also independent from the fund manager (see question 11), and is not consolidated with the fund manager if the fund manager becomes bankrupt. The FTC's assets are not available to the fund manager's creditors.

The application of the Securitisation Law by the courts and government or regulatory authorities is limited to a few cases. These relate to the effectiveness of the assignment of banking receivables against obligors. No specific decision regarding insolvency remoteness of an SPV has yet been issued by the courts or a governmental or regulatory authority.

33 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)?

We would say the court would consider the legal requirements and structure (ie, true sale of receivables effective upon assignment between the seller and the issuer and segregation procedure), arm's-length and good faith of negotiations.

34 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?

Apart from legal requirements and structure (ie, true sale of receivables effective on assignment between the seller and the issuer and segregation procedure), we believe that the court would carefully take into consideration the relevant pool of assets as segregated and identified in the assignment agreement, as well as the monies described in the relevant transaction reports and evidenced to be included in the transaction accounts.

We draw attention to the fact that no specific decision regarding insolvency remoteness of a securitisation vehicle has yet been issued by the courts or a governmental or regulatory authority.

VIEIRA DE ALMEIDA

Paula Gomes Freire **pgf@vda.pt**
Mariana Padinha Ribeiro **mpr@vda.pt**

Avenida Engenheiro Duarte Pacheco 26
Lisbon
Portugal

Tel: +351 21 311 3400
Fax: +351 21 311 3406
www.vda.pt

Switzerland

Lukas Wyss, Johannes Bürgi and Maurus Winzap
Walder Wyss Ltd

General

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

Securitisation has developed in Switzerland without specific supporting legislation, and there is no regulatory authority for securitisation transactions. Accordingly, the general legal framework is relevant as for any other financing transaction, such as the Swiss Code of Obligations, in particular in relation to matters relating to the formation of the special purpose vehicle (SPV) and the transfer of the receivables and the asset as such, as well as general capital markets regulations.

Also, no specific listing rules apply to asset back securities and the SIX Swiss Exchange generally applies the same listing rules as for issuance of bonds. However, issuing SPVs benefit from certain relaxed standards in the approval process.

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

This question is not relevant (see question 1).

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

Given that the market for securitisations in Switzerland is still developing, there is no reliable data available that would provide for a comprehensive overview.

However, the number and volume of public securitisation transactions placed and listed in Switzerland has massively increased in the auto lease and credit card sectors in the past four years. In 2015, Cembra Money Bank (200 million Swiss franc Class A Notes), Swisscard (three-year soft bullet, 190 million Swiss franc Class A Notes, 6 million Swiss franc Class B Notes, 4 million Swiss franc Class C Notes; and five-year soft bullet 190 million Swiss franc Class A Notes, 6 million Swiss franc Class B Notes, and 4 million Swiss franc Class C Notes) and AMAG Leasing (310.4 million Swiss franc Class A Notes) issued transactions.

In 2016, Cembra Money Bank (200 million Swiss franc Class A Notes and 14.6 million Swiss franc Class B Notes), Swisscard (190 million Swiss franc Class A Notes, 6 million Swiss franc Class B Notes and 4 million Swiss franc Class C Notes) and AMAG Leasing (two-year soft bullet 200 million Swiss franc Class A Notes and 15 million Swiss franc Class B Notes, and four-year soft bullet 300 million Swiss franc Class A Notes) tapped the capital markets again. There is a remarkable pipeline for further deals to come to market in 2017.

While it has been rather silent on the commercial mortgage-backed securities and residential mortgage-backed security (RMBS) side, it can be expected that players will continue to consider securitisation transactions in the real-estate sector, given that regulators around the world will increase the pressure on players from a regulatory capital perspective (in particular with a view to Basel IV).

In addition, there is a larger number of privately placed deals in various asset categories, such as trade receivables, auto leases and loans, commodities receivables and similar asset categories. Many of these Swiss securitisation transactions are refinanced through conduit platforms, rather than through the direct issuance of debt instruments to the private market.

Finally, banks, in particular, regularly look at and pursue synthetic securitisation transactions in various asset categories.

Regulation

4 Which body has responsibility for the regulation of securitisation?

There is no specific regulatory authority for securitisation transactions. However, various regulatory authorities are relevant in the context of Swiss securitisation transactions, such as the SIX Exchange Regulation of the SIX Swiss Exchange for listing-related matters, the Swiss Financial Market Supervisory Authority (FINMA) for certain regulatory matters (ie, confirmation of non-licensing requirements, non-consolidation in bankruptcy, non-application of anti-money laundering considerations (depending on the structure of the transaction and the underlying asset category), in each case as relevant) and cantonal regulators for consumer credit licensing, if relevant. In addition, transactions are typically presented and signed off by relevant tax authorities by way of tax ruling.

5 Must originators, servicers or issuers be licensed?

No, given that there is no specific securitisation legislation, there is no licensing requirement for originators, servicers and issuers as such.

It is, however, important to carefully analyse each securitisation structure on a case-by-case basis, particularly in light of the specific underlying assets and the business conducted by the originator.

As an example, originators active in the consumer loan business must be licenced under the Swiss Consumer Credit Act unless certain exemptions apply, such as exemptions for captive service providers. Accordingly, it is important to structure the transaction so that the issuer does not require a respective licence.

Typically, issuers do not require a licence as a bank under the Swiss Federal Banking Act, provided they are refinanced through the issuance of publicly placed (listed) bonds or privately placed notes. Also, issuers typically do not qualify as collective investment schemes under the Swiss Federal Act on Collective Investment Schemes given the focus on the refinancing through the issuance of public of private capital market instruments. Of course, this needs to be carefully analysed and structured on a case-by-case basis.

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

This question is not relevant (see question 5).

7 What sanctions can the regulator impose?

This question is not relevant (see question 5).

8 What are the public disclosure requirements for issuance of a securitisation?

As there is no specific securitisation legislation in Switzerland, there are no public disclosure requirements that relate, as such, to issuances in the framework of securitisation transactions. Accordingly, when issuing securities to the public capital market in Switzerland, the general prospectus and listing requirements will have to be considered, depending on where and to what investor base the securities will be marketed.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

As there is no specific securitisation legislation in Switzerland, there are no ongoing public disclosure requirements that relate, as such, to issuances in the framework of securitisation transactions. As any other issuer, issuing SPVs listed on the SIX Swiss Exchange will have to comply with general Swiss capital market regulations, such as the ad-hoc publicity as per the listing rules of the SIX Swiss Exchange.

Like any other jurisdiction, it is market standard that servicer reports and investors' reports are provided on a monthly basis.

Eligibility

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

No, there are no restrictions, other than licensing requirements relating to the underlying business.

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

Swiss securitisation transactions have been based on trade receivables, commodity warehouse receipts, auto leases and loans, credit card receivables, residential mortgage loans, commercial real estate loans and loans to small and medium-sized businesses. There is no class of receivables that is more likely to be the subject of a securitisation in Switzerland, even though the market has recently seen many public transactions involving auto leasing and credit cards.

Accordingly, any type of asset can be securitised, but general considerations around suitability of assets for securitisations transactions apply in Switzerland as well.

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

No. Transactions that are offered to the Swiss public capital market can be offered to any investor, including retail investors. However, it might be that certain lead managers apply considerations around investor suitability and might apply (internal) guidelines in the distribution process.

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

As a matter of SIX Swiss Exchange's listing rules, the principal paying agent must qualify as a Swiss bank or a Swiss broker, dealer licenced by the FINMA. As a matter of Swiss law and on the basis that securitisation transactions typically do not qualify as collective investment schemes, there is no other mandatory requirement in relation to the custodian, the trustee or the portfolio administrator or servicer.

Having said this, the various roles are of course subject to rating agency requirements (in the case of rated deals) or subject to considerations and requests from investors.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

Other than in relation to the enforceability of the receivables as such, no special considerations apply for public-sector receivables. In the due diligence process, parties should focus in particular (as for any other securitisation transaction) on transferability and enforceability of the receivables as well as immunity considerations of the respective public institution.

Transactional issues

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

The first question is whether to use a Swiss vehicle or a foreign vehicle. Various considerations should be made, depending on the underlying asset.

Generally, it will be very difficult to use non-Swiss SPVs where the underlying asset relates to real estate located in Switzerland, given that cantonal withholding taxes may be incurred on any interest payment secured by Swiss real estate.

Also, it might be the case that the transfer of a receivable or an asset abroad is not desirable for other reasons, such as data protection considerations, in particular where the underlying documentation does not provide for a proper waiver of data protection.

On the other hand, it should be noted that interest payments on debt instruments issued by a Swiss vehicle directly to multiple investors attract Swiss withholding tax at a rate of 35 per cent. While Swiss withholding tax is generally recoverable, the process for doing so might be burdensome for non-Swiss investors and even a Swiss investor would suffer a delay in recovering the withholding tax. In the case an investor is located in a jurisdiction that does not benefit from favourable double tax treaties or does not otherwise benefit from treaty protection (typically such as tax-transparent funds), Swiss withholding tax might not be fully recoverable or not be recoverable at all. Swiss withholding tax can be structured away if a non-Swiss vehicle is used. However, this adds a lot of complexity to the structuring process given that there will also be a strong focus on the true sale analysis from a tax perspective.

Finally, Swiss originators that do not form a presence abroad normally have the inclination to go with a Swiss SPV for cost-efficiency and organisational purposes.

In Switzerland, a SPV may take the form of a limited liability stock corporation AG or a limited liability company GmbH.

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

The formation of an AG or a GmbH is relatively straightforward and takes between two and four weeks, depending on the relevant cantonal commercial register involved. Minimum capitalisation for the AG is 100,000 Swiss francs and for the GmbH 20,000 Swiss francs. This is, however, most often irrelevant, given that originators quite often hold equity pieces in any event. Formation costs are minimal and would not exceed a couple of thousand Swiss francs.

Most often, Swiss SPVs are held by the respective originator (given that availability of charitable trust structures or similar structures is limited in Switzerland as such), but some rating agencies request the implementation of golden shareholder structures that provide the (independent) golden shareholder or shareholders with some control (veto rights) at the level of the shareholders' meeting. However, accounting considerations may require the SPV to be held by fully independent shareholders. Essentially, all transactions involving Swiss SPVs provide for an independent director structure giving the independent director some control (veto rights) at board level.

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

Yes, under Swiss conflict of law rules, the transfer and assignment of a right or a receivable can generally be governed by the law chosen by the parties concerned. However, according to article 145 of the Swiss Private International Law Act, a choice of a law in favour of a law other than the law governing the underlying right or receivable may not be asserted against the underlying obligor under the assigned receivable, unless such obligor agreed to such choice of law. Hence, absent such consent, the general approach is to have the assignment and transfer governed by the law of the underlying right or receivable.

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

Yes, revolving securitisation transactions involving the ongoing acquisition of new assets to the SPV to replenish the asset pool held by the SPV are quite common in Switzerland. There are no specific conditions, other than conditions that are inherent to the transaction as such, like compliance with eligibility criteria, compliance with concentration limits, absence of performance-trigger events or absence of other early-amortisation events.

While the ongoing acquisition of assets is often seen in Swiss transactions, the transfer of assets by the SPV after the issuance of its securities is generally limited by standard no-disposal undertakings. Such no-disposal undertakings allow the SPV to dispose of assets held by it in compliance with the relevant collections' policies only or in compliance with the transaction documents (eg, mandatory repurchases). In addition, the corporate purpose of SPVs is typically limited so that the SPV may only contract within the scope of the transaction documents. Accordingly, the limited corporate purpose does limit the

risk that the asset SPV will dispose of its assets in breach of the no-disposal undertakings.

19 What are the registration requirements for a securitisation?

There are no registration requirements as such, but the SPV (as any other legal entity) must be registered with the competent commercial register. Also, if the originator is a regulated entity (such as a licensed bank), further approval requirements may apply.

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

Provided that the underlying agreements between the obligors and the originator allow for the free assignment and transfer of the receivable or relevant asset, the obligors do not need to be informed of the assignment and transfer and the securitisation accordingly. However, prior to notification, the obligors may validly discharge their obligations by paying to the originator (acting on an undisclosed basis as servicer) and in the event of bankruptcy of the originator, such payments would form part of the bankrupt estate of the originator, until the obligors are notified (see question 28 on commingling). Also, a valid and unconditional assignment and transfer to the SPV requires that the SPV may notify the obligors at any point in time, even when it is the general understanding of the parties that obligors shall only be notified on occurrence of a specific notification event. To be on the safe side, it is recommended that names and addresses of obligors are provided to the SPV. Also, the SPV must be granted the contractual right to notify obligors prior to the occurrence of a notification event.

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

Generally, a waiver of confidentiality and data protection is valid under Swiss law, even though the special requirements of the Swiss Data Protection Act and other relevant legislation must be followed.

Special considerations must apply in the case the originator is subject to special confidentiality obligations, such as Swiss banking secrecy. Even though a waiver is generally valid, some originators apply a more severe standard as a matter of policy by using data trustee structures in particular, where information would otherwise be transferred abroad.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

In Switzerland, the relationship between rating agencies and issuer is generally governed by the underlying engagement. It appears that the focus of rating agencies is not really different from the focus they apply in other jurisdictions. Accordingly, rating agencies focus on the performance of the underlying assets, such as default ratios, delinquency ratios and the underlying security. Another focus of rating agencies is generally the solvency of the servicer and the ability of the servicer to service the portfolio for the SPV (including due diligence on systems and processes). Of course, the focus may shift depending on the underlying asset. In addition, rating agencies focus on legal structure and any legal pitfalls, such as the true sale analysis in true sale transactions and the bankruptcy-remoteness of the SPV.

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

The board members (or directors) of the AG or the directors of a Swiss GmbH are ultimately responsible for the overall management and supervision of the company, a responsibility that cannot be withdrawn from and for which each individual director is ultimately liable according to article 754 et seq of the Swiss Code of Obligations.

This duty includes:

- the overall direction of the company and issuing the necessary directives;
- determining the organisational structure of the company;
- appointing and dismissing the persons entrusted with management and representation, and determining the method of signature;
- ultimate supervision of the persons entrusted with company management;
- organisation of accounting, financial control and financial planning, to the extent that the latter is necessary for management of the company;
- drawing up the annual report and the remuneration report;
- preparing for the general meeting and executing its decisions; and
- notifying the judiciary should the company become over-indebted.

More generally, pursuant to Swiss corporate law directors have the duty to act in the company's best interest. The best interest of a company is measured, inter alia, against a company's business purpose which, in the context of a securitisation transaction, is typically limited to the entering into and the performance of its obligations under the transaction documents. Hence, any action outside of that scope might expose a director to liability. These duties are owed to the company. Directors may be held liable not only towards the company but also towards shareholders and creditors of the company for any damage caused by an intentional or negligent breach of duties. Negligence covers all forms of negligence including simple negligence in complying with a director's duties.

There is no Swiss legislation that would suggest that directors need to be independent, but it should be noted that the duty of care is always owed to the company, rather than to the shareholder or the originator.

Also, as mentioned above, it is generally a requirement of rating agencies and investors that at least one board member is independent from the originator. Further independence requirements may be imposed, depending on the target accounting structure.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

There are no risk retention rules in Switzerland. In particular, Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (CRR) (amending Regulation (EU) No. 648/2012)), including Part 5 has not yet been adopted by Switzerland and transposed into Swiss law.

However, for the purposes of not negatively affecting distribution, a number of transactions impose covenants on the originator to retain, on an ongoing basis, a material net economic interest in the transaction in an amount equal to at least 5 per cent (or such higher percentage as may be required from time to time in accordance with the applicable Risk Retention Rules) of the nominal value of the assets as required pursuant to article 405(1)(d) of the CRR and article 51 of the Commission Delegated Regulation No. 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision as though the respective legal framework had been implemented in Switzerland.

Security

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

Typically, investors ask for a comprehensive security package over the assets held by the SPV, even though an investor should be able to rely on its (exclusive) indirect access to the assets held by the SPV on the basis of the bankruptcy remoteness analysis that applies to an SPV.

Thus, security packages often include the underlying receivables, bank accounts and claims under transaction agreements. However, it should be noted that some transactions have been structured without a security package in order to overcome a negative tax treatment or other obstacles. In those transactions, the bankruptcy-remoteness analysis was considered to be robust enough for investors and rating agencies to rely on an unsecured structure.

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

In relation to receivables and bank accounts, the execution of a security assignment agreement by the parties is sufficient to perfect the security interest in the receivables and the bank accounts. No notification is required, even though it is standard to notify the account bank, which is normally involved in the transaction in any event. However, prior to notification of the obligors, the obligors may validly discharge their obligations by paying the originator or the SPV, and in case of

bankruptcy over the SPV, such payments would form part of the bankrupt estate of the SPV, until the obligors are notified.

For the purposes of avoiding insolvency risks in relation to the security agent or trustee and given that the concept of a security trust is not known under Swiss law, security is typically provided for the benefit of a security trustee that holds the security under an English law-governed trust for the benefit of the secured parties, even when the security agreement itself is governed by Swiss law.

27 How do investors enforce their security interest?

Given that security interest is normally held by a security trustee, enforcement steps are to be initiated by the security trustee and vary depending on the nature of the security interest. Enforcement in a receivable that is assigned for security purposes may be pursued by simply collecting the receivable from the obligor or selling a portfolio of receivables to a third-party investor.

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

Yes, commingling is generally considered to be a risk in Swiss securitisation transactions as collections held in the originator's or servicer's account would form part of the bankrupt estate in a bankruptcy scenario, unless previously swept to the SPV.

Commingling risk is typically addressed by imposing relatively short time periods to sweep collections to the SPV's collection account. Some transactions provide for shortened time periods to sweep the collections on and after the occurrence of certain commingling risk triggers.

As the commingling risk would fall away as soon as obligors pay directly into a collection account held by the SPV, notification events are typically structured to occur at a relatively early stage in the process so that obligors may be notified well ahead of a potential bankruptcy of the originator.

Commingling risk is further mitigated by setting up servicing facilitator or even (warm or cold) back-up servicer structures, which aim at keeping the redirection period (ie, the time period that it would take to make obligors paying directly to a collection account held by the SPV) as short as possible.

Finally, rating agencies and investors sometimes ask for commingling reserves. The size of the reserves depends on the expected average amount of collections held in the collection account (calculated on the basis of the cash-flow model) of the originator and the expected redirection period.

Taxation

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

From an originator's overall tax perspective, it is, among other things, absolutely imperative that:

- the respective assets or receivables can be transferred to the issuer without accelerating and triggering any income taxes; and
- the profit potential associated with the underlying business remains with the originator.

For lack of specific tax legislation or tax guidelines, or both, securitisation transactions need to be presented and signed off by the relevant tax authorities by way of advance tax rulings. Typically, a (separate) VAT ruling will cover the following topics: VAT (non-)taxation of the transfer of assets or receivables, tax point acceleration with respect to VAT due on supplies with respect to transferred assets or receivables and bad debt relief.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

If the transaction involves a Swiss issuer, it is, among other things, absolutely imperative that the additional entity-level corporate income and net equity taxes, which cannot be structured away completely, are kept at a (negligible) minimum. In practice, the effective tax burden can be reduced to a few thousand Swiss francs per year, subject to proper tax structuring. For lack of specific tax legislation or tax guidelines, or both, securitisation transactions need to be presented and signed off by the relevant tax authorities by way of advance tax rulings. Typically, a (separate) VAT ruling will cover the following topics: mitigation of VAT costs or leakage on VAT-loaded bought-in services, or both, including servicing, and mitigation of joint and several liability issues relating to VAT unpaid by the originator with respect to transferred assets or receivables.

31 What are the primary tax considerations for investors?

Interest payments on debt instruments (such as bonds) issued by a Swiss (securitisation) vehicle directly to widely spread investors attract Swiss withholding tax at a rate of 35 per cent. While Swiss withholding tax is generally recoverable, the process for doing so might be burdensome for non-Swiss investors, and even a Swiss investor would suffer a delay in recovering the withholding tax. In the event an investor is located in a jurisdiction that does not benefit from a favourable double tax treaty with Switzerland or does not otherwise benefit from treaty protection (typically such as tax-transparent funds), Swiss withholding tax might not be fully recoverable, or not be recoverable at all.

Swiss withholding tax can be structured away in the event a non-Swiss vehicle is used. However, this adds a lot of complexity to the structuring process given that there will also be a strong focus on the true sale analysis from a tax perspective.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

Bankruptcy-remoteness is generally achieved by the limited corporate purpose of the SPV and limited recourse and non-petition provisions to which counterparties to the SPV are asked to sign up to. In addition, all parties contracting with the SPV are asked to sign up to waiver of set-off provisions.

walderwyss

Lukas Wyss **lukas.wyss@walderwyss.com**
Johannes Bürgi **johannes.buergi@walderwyss.com**
Maurus Winzap **maurus.winzap@walderwyss.com**

Seefeldstrasse 123
8034 Zürich
Switzerland

Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
www.walderwyss.com

In addition, it should be noted that as a matter of Swiss corporate law, the bankruptcy of a shareholder of the SPV will not lead to the bankruptcy or liquidation of the SPV itself. Rather, the bankruptcy of the shareholder would result in the shares in the SPV falling into the bankruptcy estate of the shareholder and would be sold in the course of such liquidation or bankruptcy. Any such transfer of shares in the SPV would not legally affect the contractual obligations of the SPV under the transaction documents. Also, there is no concept of substantive consolidation under Swiss law (subject to extraordinary cases, such as fraud and abuse of rights), and a bankruptcy of a shareholder of the SPV would, as a matter of Swiss law, not result in a consolidation of its assets and liabilities with those of the SPV.

33 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)?

Ultimately, a court would consider the actual mutual will of the parties to a specific agreement. Accordingly, the analysis is highly factual, but one of the important factors that will be considered by a court is the effective transfer of the collection risk relating to a receivable.

Accordingly, any repurchase obligations that would go beyond the repurchase of receivables that have been ineligible on the transfer to the SPV can be critical. However, repurchase options are generally less problematic, but should be considered on a case-by-case basis. Finally, the 'at arm's length' nature of the transfer as such will also be considered.

34 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?

As mentioned above, there is no concept of substantive consolidation under Swiss law, unless there are very extraordinary cases, such as fraud and abuse of rights.

Turkey

Hakan Yazıcı and Pınar Başdan

YazıcıLegal

General

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

Under Turkish law, there is neither a specific legislation that governs securitisation transactions involving an offshore special purpose vehicle (SPV) nor a restriction for such securitisations involving foreign SPVs. However, Capital Markets Law No. 6362, the Capital Markets Board of Turkey's (CMB) Communiqué on Debt Instruments II-31 (the Communiqué on Debt Instruments), the CMB's Communiqué on Asset-Backed and Mortgage-Backed Securities No. III-58.1 (the Communiqué) and the CMB's Communiqué on Principles Regarding Establishment of Mortgage Finance Institutions No. III-60.1 (together with Capital Markets Law No. 6362, the Communiqué on Debt Instruments and the Communiqué: the AMBS legislation) provide a legal framework under which asset-backed securities (ABS) and mortgage-backed securities (ABS together with MBS: AMBS) may be issued in Turkey by using an onshore SPV (ie, fund) established in accordance with the said legislation.

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

As noted in question 1, there is no specific legislation governing all types of securitisations including offshore transactions; whereas domestic securitisations are governed by AMBS legislation, which provides two types of securitisations, namely ABS and MBS.

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

There is no publicly available database that provides a reliable estimate of the size of the Turkish securitisations market. However, Turkish banks have been involved in securitisation transactions since the mid-1990s, and they have heavily used diversified payment rights (DPRs) as a product to assign to offshore SPVs since the early 2000s. Apart from a few attempts to use other trade receivables, a variety of receivable types have not been used in securitisations.

Regulation

4 Which body has responsibility for the regulation of securitisation?

The CMB is the official authority regulating onshore securitisation transactions in Turkey. It is worth noting that Turkish banks are subject to regulation by the Banking Regulation and Supervision Agency (BRSA), the Central Bank of Turkey and the Ministry of Custom and Trade, who do not require any approval or filing for offshore transactions; however, there are certain filing requirements by the tax authority in respect of offshore issuances.

5 Must originators, servicers or issuers be licensed?

There is no requirement for a licence covering all issuers, servicers or originators involved in offshore or onshore transactions apart from the relevant activity licenses foreseen, depending on the field of activity of issuer. For domestic securitisations, an AMBS can only be issued by establishing a fund solely for the purpose of AMBS issuances: an asset finance fund (AFF) in the case of ABS issuances and housing finance funds (HFF) in the case of MBS issuances. Funds can be established by banks, financial leasing companies, financing companies, mortgage finance institutions (MFIs) and certain intermediary institutions.

Furthermore, each type of AMBS issuance can also be made by establishing an MFI solely for the purpose of AMBS issuances, without the need for establishing a fund. MFIs are special types of joint stock companies that can be established by banks, financial leasing companies, factoring companies, financing companies, the Housing Development Administration of Turkey (TOKİ), real estate investment companies, joint stock companies that have been established solely for the purpose of sukuk issuances, MFIs, etc. All issuers (funds and MFIs) must be licensed by the CMB.

Under the AMBS legislation, receivables originated by banks, finance companies, financial leasing companies, TOKİ or other originators as may be deemed appropriate by the CMB, can be transferred to the issuer for the purpose of AMBS issuances. On the other hand, receivables of joint stock companies that provide goods or services may be transferred to the issuer only for ABS issuances. Banks, finance companies and financial leasing companies must be licensed by the BRSA and the Ministry of Custom and Trade. As for licensing requirements for joint stock companies, some companies must be licensed by the Ministry of Custom and Trade, other authorities or both depending on the activities they are engaged in.

In terms of the servicers, the AMBS legislation sets forth which entities are entitled to act as servicer (ie, founder, MFIs, entities that are permitted to establish Funds under the Communiqué and originators), but does not envisage any separate licence for acting as servicer other than those obtained from the relevant authority under the applicable legislation (for instance, the bank acting as servicer has already been licensed by the BRSA).

Under Turkish law, there is no provision that requires originators, servicers or issuers under offshore securitisations to have a licence.

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

For the purpose of the AMBS legislation, the CMB will focus on as to whether the issuer and the originator meet the necessary conditions set out thereunder. As per the Communiqué, where a bank, financial leasing company or finance company applies to establish a fund or MFI, the CMB will require the opinion of the BRSA.

See question 4 for offshore securitisations.

7 What sanctions can the regulator impose?

Pursuant to the AMBS legislation, in the event that an issuer suffers from repayment difficulties as a consequence of a failure of its board to duly perform its duties under the Communiqué, the CMB may require the board to be changed. If repayment difficulties continue even after such change, the CMB may determine transfer of the issuer to another bank, MFI or intermediary institution. On the other hand, there are restrictive measures provided under the banking legislation, which can be imposed by the BRSA.

See question 4 for offshore securitisations.

8 What are the public disclosure requirements for issuance of a securitisation?

Disclosure requirements applicable to publicly traded companies, and non-public companies that offer their non-share securities to the public domestically, are regulated in the Communiqué on Material Events Disclosure No-II-15.1 (the Disclosure Communiqué). Pursuant to the Disclosure Communiqué, any information that may possibly affect the value and price of the capital market instrument and the investment decision regarding such instrument, is considered to be material information and must be disclosed on the public disclosure platform (PDP). In practice, the banks (ie, founders) disclose information in relation to the DPR transactions (including their maturities, amounts and purposes) before and after the issuances, even though, there is no specific requirement regarding the issuance of securitisation under the Disclosure Communiqué.

In addition to the foregoing, again for the public offerings in Turkey, pursuant to the Communiqué on Prospectus and Issuance Certificate No. II-5.1, the prospectus and the issuance certificate approved by the CMB regarding the AMBS issuances must be disclosed on the PDP within 15 business days starting from the receipt of such approved prospectus and issuance certificate. Furthermore, the founder or MFI must publish the approved prospectus on its website simultaneously with publication of such on the PDP.

As for the ongoing public disclosure requirements for the securitisation issuance under the AMBS legislation, the information relating to the following must be disclosed on the PDP and on the website of the founder or MFI:

- by-laws of the issuers and amendments thereto;
- resignation or termination of the contract of a board member, operation manager, auditor, servicer or independent audit company for any reason whatsoever, or loss by such parties of the qualities required for their services under the Communiqué;
- quarterly investor report in relation to the principal payments, the amount of accumulated principal payment and outstanding principal payment;
- cancellation of the activity licence of founders or MFIs;
- activities of the servicer;
- independent audit company reports on activities of the servicer and existence of the assets in the portfolio; and
- ratings of AMBS and updates thereto.

In the case of a private placement or sale to qualified investors, disclosure must be made through electronic transmission to the Central Registry Agency (CRA), and information must be made available to the investors on the website of the founder or MFI.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

See question 8.

Eligibility

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

Under the AMBS legislation, for MBS issuances only banks, finance companies, financial leasing companies, TOKİ or other originators as deemed appropriate by the CMB may be originator. For ABS issuances, in addition to the aforementioned originators, receivables of joint stock companies that provide goods or services may also be originators. Furthermore, funds established by financial leasing companies and finance companies can only include assets of themselves to the portfolio of funds or MFIs that they establish.

There is no provision under Turkish law as to which entities can be originators in offshore securitisations.

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

The following assets may be included in a portfolio for ABS issuances:

- consumer loan receivables of banks and finance companies;
- commercial loan receivables of banks and finance companies;
- financial leasing receivables of participation banks, development and investment banks, and financial leasing companies;
- real estate instalment sale receivables of TOKİ;
- billed commercial receivables of companies engaged in provision of goods or services (except from financial institutions), which receivables are collateralised or attached to negotiable instruments;
- deposits with a maturity of less than three months, participation accounts, reverse repurchase transactions, money market funds, short-term debt instrument funds and Takasbank (a central clearing and settlement institution in Turkey) Money Market transactions;
- assets in the reserve accounts (applicable if assets in excess of liabilities arising from ABS are kept in reserve accounts); and
- other assets (excluding capital markets instruments) as may be deemed appropriate by the CMB.

The following assets may be included in a portfolio for MBS issuances:

- housing finance receivables of banks and finance companies secured by mortgages or another collateral as may be deemed appropriate by the CMB;
- financial leasing receivables of participation banks, development and investment banks, and financial leasing companies, within the context of housing finance;
- commercial loans and receivables of banks, financial leasing companies and finance companies secured by mortgages;
- receivables of TOKİ arising from the instalment of house sales;
- deposits with maturity of less than three months, participation accounts, reverse repurchase transactions, money market funds, short-term debt instrument funds and Takasbank Money Market transactions;
- assets in the reserve accounts (applicable if assets in excess of liabilities arising from ABS and, if any, derivative instruments included in the portfolio are kept in reserve accounts);
- rights and obligations arising from derivative instruments; and
- other assets (excluding capital markets instruments) as may be deemed appropriate by the CMB.

Furthermore, assets must meet certain requirements relating to the quality of the receivables, mortgaged real estate, insurance liabilities, derivative instruments, etc. Also, the portfolio must be established so that the value of the assets is not lower than that of the liabilities arising from the AMBS and, if any, derivative transactions in the portfolio.

As noted above, there is no provision under Turkish law as regards to the assets that can be securitised in offshore securitisations. However, so far, DPRs have been used by Turkish banks as an asset class to transfer to offshore SPVs.

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

As a general principle, there is no restriction on the classes of investors that can participate in an offering. The AMBS legislation allows for offering of AMBS to the public in Turkey. However, the CMB may request that the offering is made solely to qualified investors based on the application of the originator.

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

Pursuant to the AMBS legislation:

- banks or intermediary institutions that are permitted to establish funds may act as portfolio manager;
- the founder (ie, the entity which established the fund), MFIs, entities that are permitted to establish funds under the Communiqué, and originators may act as servicer; and
- intermediary institutions may act as custodians.

On the other hand, there is not any provision as to which banks may act as account bank.

So far, the originators themselves have been acting as servicer in offshore issuances under a servicer agreement.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

No.

Transactional issues

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

Under the AMBS legislation, SPVs can either be established as a fund or an MFI, which is a joint stock company.

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

Pursuant to the AMBS legislation, AFFs can only issue ABS and HFF can only issue MBS, as opposed to MFIs, which can issue them both.

The AMBS legislation provides two alternative procedures for the establishment of a fund. Either application for the establishment of a fund and AMBS issuance can be made simultaneously, or the application for the establishment of a fund can be made in advance of the application for issuance.

As for the establishment of an MFI, first an application should be made to the CMB for the establishment of the MFI. Once the CMB grants its approval for establishment, an application should be made to the Ministry of Custom and Trade. Subsequently, another application for activity licence must be made to the CMB. AMBS issuances that involve a public offering in Turkey should be made at once. On the other hand, AMBS issuances that are to be made outside Turkey, or in Turkey a non-public offering, can be made in tranches within a definite time period foreseen granted by the CMB issuance certificate.

Before each AMBS issuance outside Turkey, or in Turkey without a public offering, an additional application has to be made to the tranche issuance certificate by the CMB. However, issuance of an additional tranche can be made either after the redemption of all outstanding AMBS under the existing tranche and modification of the by-law for the new tranche, or by establishing another fund or MFI. We would like to note that CMB published a draft regulation regarding the issuance certificate almost one-and-half year ago, however, there is no further update on this following publicity of the draft regulation and there are no adopted rules as yet.

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

Under Turkish law, it is possible to stipulate which jurisdiction's law applies to the assignment of receivables. However, if a receivable arises from a Turkish law-governed contract, choosing a foreign law as the governing law under the assignment agreement of such receivable may potentially be challenged, since in such case this would conflict with international civil and procedure law of Turkey, and Turkish courts may challenge the existence of the assignment.

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

Assets cannot be added to or removed from the portfolio of the issuer after the issuance, except that:

- if it is realised that assets that have been transferred to the issuer do not comply with the criteria set out under the Communiqué, circular or issuance certificate, the originator must replace such assets with compliant assets; or
- if the issuer has provided its guarantee in favour of the investors of the AMBS, assets may be removed from the portfolio or replaced within the principles stated in the circular or issuance certificate.

19 What are the registration requirements for a securitisation?

Pursuant to the AMBS legislation, by-laws of the issuers must be registered with the relevant trade registry. As to the registration of the AMBS, pursuant to the Communiqué, provisions of the Communiqué on Debt Instruments apply mutatis mutandis to AMBSs. Under the provisions thereof, the AMBS must be issued in electronic form to the Central Registry Agency (CRA). For the AMBS that will be issued abroad, the CMB may grant an exemption regarding such requirement on request. If such exemption is granted, information regarding the issuance amount, issuance date, ISIN code, maturity commencement date, maturity, interest rate, custody institution, currency and the place of issuance with respect to AMBS shall be notified to the CRA within three business days following the issuance. Changes in relation to this information (including early redemption notifications) shall be notified to the CRA within three business days following the change.

If a Turkish bank raises financing through offshore securitisation, the bank must notify the relevant tax office in writing of the issuer's incorporation capital, shareholder structure, directors, number of the issued securities, names of those who have purchased the securities and amount of the securities, within one month of the issuance.

Once the securities are repaid in full, the bank must provide another notification in writing of such repayment and to whom the securities have been returned, within one month of repayment and return.

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

Under Turkish law, notification to the obligor is not necessary for the validity of assignment of receivables. However, unless obligors are notified of the assignment, they can be discharged from their liabilities if they make payment to the originator (assignor) rather than the issuer (assignee) in good faith. For the purpose of certification, notifications to obligors are effected via the notary public in practice, especially by the banks. However, the AMBS legislation provides that collections from the portfolio are assets of the fund or MFI, and those shall be transferred to a separate bank account opened in the name of the fund or MFI promptly after the collection. That said, this structure has been contemplated in a manner that does not require notification to the borrowers on the day that the transfer to the fund or MFI occurs.

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

Under Turkish law, banks are prohibited from disclosing documents and information relating to their clients to third parties, other than to official authorities specifically authorised to demand confidential information from banks pursuant to applicable legislation. Therefore, it is advisable to include provisions relating to confidentiality and limitations regarding use of data into contracts entered into for the purpose of securitisations, where counterparties of such contracts have access to confidential information and data of the obligors. There is no rule restricting the waiver of confidentiality, therefore such waivers are normally provided by the banks in advance when executing the account opening or loan documents with the borrowers.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The relationship between the credit rating agencies and issuers is regulated by the CMB's Communiqué on Principles Regarding Rating Activity in Capital Markets and Rating Agencies (Series VIII, No. 51) (the Communiqué on Rating). Pursuant to the Communiqué on Rating, credit rating agencies should pursue an honest and impartial relationship with issuers. Furthermore, credit rating agencies should ensure confidentiality and independence, and avoid all activities that may cause a conflict of interest.

Based on offshore securitisation issuances so far, credit rating agencies focus on the true sale, bankruptcy-remoteness, recourse or non-recourse characteristic, set-off and status of underlying securities when assessing the rating of the transactions.

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

AFFs and HFFs must have a fund board consisting of three members while MFIs must have a board of directors consisting of at least five members. At least one member of the board of a fund and MFI must be independent. The board is responsible for the following:

- preparation, registration and announcement of amendments to the by-law and documents in relation to issuance;
- formation, valuation, protection, custody and registration of portfolio assets, and keeping records, documents and information in relation to portfolio assets;
- representation, management, audit and supervision of the issuer in accordance with the principles and methods under legislation,

by-law, circular, issuance certificate and other documents in relation to issuance in a manner protecting the interests of the investors;
- opening bank accounts in the name of the issuer, making payments to investors accurately and ensuring compliance of other payments to be made by the issuer in accordance with the Communiqué;
- preparation and presentation of investor reports to investors in accordance with the Communiqué;
- ensuring that the servicer duly provides its services and changing the servicer if the servicer fails to do so; and
- other responsibilities arising from the law or as may be required by the CMB.

The board may appoint a bank or intermediary institution that meets the requirements for founders as operation manager for the fulfilment of its duties other than those relating to the supervision of the servicer, without prejudice to its responsibilities under the Communiqué.

Furthermore, the board should appoint an internal auditor that does not engage in operations of the issuer.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Pursuant to the Communiqué, the originator or founder or MFI, must purchase 5 per cent of the nominal value of the AMBS and hold them until the maturity. The originator and founder or MFI can comply with this requirement splitting the amount between each other. The CMB may change this ratio depending on the type of asset. Furthermore, the CMB may increase such ratio up to 10 per cent on the basis of originator or founder or MFI. If there is more than one tranche of AMBS, which having been rated the same or not having been rated at all, the founder or MFI should distribute its holding equally or pro rata between the tranches. On the other hand, if tranches have different ratings, the founder or MFI should hold the tranche with lowest rating.

Security

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

Pursuant to the AMBS legislation, assets of a fund or MFI are segregated from assets of their founder, servicer and originators, and cannot be disposed of for any purpose whatsoever, even if the management or audit of their founder, servicer or the originators are transferred to public authorities. They cannot be subject to attachment, made subject to interim injunction or included in the bankruptcy estate even for the collection of public receivables until the AMBS are redeemed in full.

Neither can assets of the fund or MFI be pledged or otherwise designated as collateral except for the purpose of taking loans, entering into derivative transactions or similar transactions on behalf of the fund or MFI. Furthermore, pursuant to the AMBS legislation, the founder or MFI, or legal entities that are permitted to be founders, can partially or fully guarantee the payments. Payments can also be partially or fully insured by insurance companies.

There are certain requirements related to securities. For example, where the asset is an auto loan or mortgage, the related registry records should show that the pledgee is the fund or MFI based on the transfer from the originator.

For offshore securitisation transactions, DPRs have been the typical asset used so far. The ownership right of the SPV is secured through the acknowledgements executed between the correspondent banks of the originator, which provide direction of the collections to the SPV's account, which are typically pledged in the name of the indenture trustee.

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

See question 25.

27 How do investors enforce their security interest?

Since the fund or MFI owns the assets that are exclusively to be used to repay the notes, the investors can always make recourse to such assets in case any default occurs on the notes. On the other hand, there are also certain regulatory protections. Pursuant to the AMBS legislation, in the event that an issuer suffers from repayment difficulties as a consequence of the failure of its board to duly perform its duties under the Communiqué, the CMB may require the board to be changed.

If repayment difficulties continue even after such change, the CMB may determine transfer of the issuer to another bank, MFI or intermediary institution. However, if the founder has provided a guarantee, the obligation of the founder to pay the portion of the repayments fully and in a timely manner shall continue. In other words, investors can make recourse to the founder for the repayments that cannot be met from the proceeds of the portfolio assets.

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

As per the AMBS legislation, collections from the portfolio are assets of the fund or MFI and shall be transferred to a separate bank account opened in the name of the fund or MFI, promptly after collection.

Therefore, in theory there is no commingling risk since the collections directly pass to the fund or MFI.

Taxation

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

Local issuances under the AMBS legislation bring stamp tax concerns in terms of the assignment agreements executed between the originator and the fund or MFI. Since there is no specific stamp tax exemption applicable to the transfer agreements, this gives rise to a stamp tax liability over the amounts declared on the assignment agreement.

On the other hand, where there is any benefit received by the originator bank as the servicer (or performing another role in the issuance), then the banking insurance and transaction tax may also be applicable over such amounts taken as a fee or other benefit. For originators other than banks, it is worth seeking VAT analysis in case those originators have certain roles and there is a fee element in consideration for such services or roles.

For offshore issuances, there have not been any tax concerns on the originator side other than for withholding tax that is applicable on interest at the rate of 1 per cent. For local AMBS issuances, there is a withholding exemption where the issuance is made through an intermediary institution or a bank in Turkey. Where the fund or MFI directly issues the notes offshore, then withholding analysis will depend on the maturity of the notes, which will be up to 10 per cent interest for notes with a maturity of less than five years. In any case, a detailed tax analysis should be performed for different investor types.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

See question 29. The notes themselves are exempt from stamp tax, so issuance of the notes by the fund or MFI does not raise any stamp tax concerns. However, the VAT and income of the fund or MFI (if any) should separately be considered.

31 What are the primary tax considerations for investors?

See question 29 regarding the withholding regime. It is the liability of Turkish issuers and originators to withhold such amounts; therefore, Turkish tax authorities will revert to the issuers and originators in Turkey if the required deduction is lacking.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

With respect to the AMBS legislation, see question 25. For offshore issuances, although SPVs are formed as a separate legal body, their accounting regime is subject to the general accounting requirements applicable to the originators. Nevertheless, from a legal perspective, consolidation of an SPV does not affect the true sale analysis as long as there is a valid assignment of receivables between the SPV and the originator.

33 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)?

With respect to the AMBS legislation, see question 25.

With respect to offshore securitisations, as noted earlier there is no specific set of rules regarding the transfer of assets and bankruptcy-remoteness. Therefore we rely on the general provisions of Turkish law as well as Turkish execution and bankruptcy law principles.

Accordingly, as voidable preference analysis, in the event that the originator becomes insolvent or bankrupt, or an attachment is obtained against the originator, the originator's creditors may apply to a Turkish court to invalidate certain transactions entered into by the originator.

Any transaction that is not made on an arm's-length basis, or is not in accordance with market practice, or made without any consideration or with a consideration that the value received by the originator is significantly less than the value provided by the originator, may be construed as a preferential or fraudulent transaction and, as such, may be invalidated. In order for the court to declare such transactions invalid, such transaction must have taken place within two years before an attachment obtained against, or the insolvency or bankruptcy of, the originator.

On the other hand, a fraudulent conveyance concept with disposals made by the originator not acting in good faith, or that would not be made by a prudent person and that reduce the originator's assets, may be subject to challenge by the creditors of the originator. In order for such a challenge to succeed, the creditors must prove that the SPV, at the time it entered into the transaction, was aware or should have been aware of the originator's financial condition and of the fact that the originator was not acting in good faith or as a prudent person.

The creditors who are entitled to apply to the court for the invalidation of such disposals are those who have instituted either attachment or bankruptcy proceedings against the originator within five years after the date of any such disposals.

However, if the originator acts deliberately to jeopardise the creditors' interest and the SPV was aware of such deliberate act, the above-mentioned two-year requirement does not apply. In any case, a creditor's application to a court to attempt to invalidate a transaction as a fraudulent conveyance must be made within five years of the occurrence of the transaction.

34 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?

With respect to the AMBS legislation, see question 25.

As regards offshore securitisations, see question 32.

YAZICILEGAL
LAW OFFICE

Hakan Yazıcı **hyazici@yazicilegal.com**
Pınar Başdan **pbasdan@yazicilegal.com**

Levent Mahallesi Yasemin Sokak
No 13 34340 Levent – Beşiktaş
Istanbul
Turkey

Tel: +90 212 269 02 27
Fax: +90 212 269 02 28
www.yazicilegal.com

United States

Patrick D Dolan Norton Rose Fulbright US LLP
Devin Swaney and Andrew Bloom Dechert LLP

General

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

Asset-backed securities transactions are primarily governed by two federal statutory regimes:

- the Securities Act of 1933, as amended (the Securities Act); and
- the Securities Exchange Act of 1934, as amended (the Exchange Act).

In addition, various other statutes and regulations may apply, including state specific 'blue-sky laws', although blue-sky laws have largely been pre-empted by the National Securities Markets Improvement Act of 1996, as amended.

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

While neither the Securities Act nor the Exchange Act specifically defines securitisation transactions, under Item 1101 of Regulation AB, the regulation regarding asset-backed securities, an asset-backed security is generally defined (subject to certain enumerated limitations set forth therein) as:

> *a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to the security holders; provided that in the case of financial assets that are leases, those assets may convert to cash proceeds from the disposition of physical property underlying such leases.*
> [17 CFR 229.1101; Asset-Backed Securities (Regulation AB)]

The current definition of 'asset backed security' is the result of modifications that were made through the enactment of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2011 (PubL 111–203, HR 4173).

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

According to *Asset-Backed Alert*, issuances in the US bond markets of asset-backed securities (including mortgage-backed securities) totalled $381.4 billion in 2016.

Regulation

4 Which body has responsibility for the regulation of securitisation?

The Securities and Exchange Commission (SEC) is the primary regulatory authority charged with administering the Securities Act, the Exchange Act and the other federal securities laws. In addition to enforcing these statutes, the SEC is charged with promulgating and enforcing rules and regulations under such statutes.

5 Must originators, servicers or issuers be licensed?

In order to make the filings required in connection with the public offering of securities, the registrant (which is sometimes the originator as sponsor) and the issuer of such securities must apply for a Central Index Key. The Central Index Key is issued by the SEC and is used to identify the filings of a company, person, or entity in several online databases, including its web-based Electronic Data Gathering and Retrieval (EDGAR) system. In addition, the originator, the servicer and the issuer may be required to be licensed (including on a state-specific basis) for purposes of engaging in the origination, servicing or ownership of the assets backing the securities to be issued.

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

In making a determination as to whether a registration statement relating to the public offering of securities should be granted, refused or withdrawn, the SEC selectively reviews filings with the aim of monitoring and enhancing compliance with the applicable disclosure and accounting requirements of the Securities Act. In its filing reviews, the SEC has indicated that it typically concentrates on critical disclosures that appear to conflict with SEC rules or the applicable accounting standards, and on disclosure that appears to be materially deficient in explanation or clarity. The SEC has also indicated that the scope of its review may include:

- a full cover-to-cover review in which the SEC will examine the entire filing for compliance with the applicable requirements of the federal securities laws and regulations;
- a financial review for examination of compliance with the applicable accounting standards and the disclosure requirements of the federal securities laws and regulations; or
- a targeted issue review in which the SEC will examine the filing for one or more specific items of disclosure for compliance with the applicable accounting standards or the disclosure requirements of the federal securities laws and regulations.

When the SEC identifies instances where it believes a company can improve its disclosure or enhance its compliance with the applicable disclosure requirements, it provides the proposed registrant with comments to its filings. In turn, the registrant would make the applicable corrections and file amendments to its filings. When a proposed registrant has resolved all SEC comments to its filings, the proposed registrant may request that the SEC declare the registration statement effective so that it can proceed with the securities offering. The SEC would then give public notice on EDGAR that the registration statement is effective.

7 What sanctions can the regulator impose?

The SEC may impose civil fines and penalties, including barring violators from the securities industry, forfeiture of illegally gotten gains, civil monetary penalties or injunctive relief. Criminal enforcement proceedings based on federal securities laws may be instituted only by the US Department of Justice. Defendants subject to such criminal actions may face substantial fines and, in the case of individuals, imprisonment.

8 What are the public disclosure requirements for issuance of a securitisation?

The Securities Act requires that every offer and sale of an asset-backed security in the US be registered with the SEC, unless an exemption or other exclusion from registration is available. In the absence of an

exemption, securities that are offered must be registered with the SEC by filing a registration statement on an appropriate form (eg, Form SF-1 (for registrations for one time offerings) or SF-3 (for shelf registrations permitting multiple offerings)), attaching the prospectus that will be used to market the offering and exhibits containing certain material agreements and documents. The registration statement must be declared effective by the SEC prior to the offer and sale of the related asset-backed securities.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

The Exchange Act requires entities making public offerings of securities to register such securities with the SEC, and, in most cases, to file annual, quarterly and monthly reports, and current reports when a material event occurs, with the SEC on its EDGAR system. In limited circumstances, an issuer of exempt securities will also be required to file reports regarding certain specified events and will sometimes agree to voluntarily file these reports to facilitate high-quality information flow to investors.

Eligibility

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

While generally neither the Securities Act nor the Exchange Act limits the type of entity that may be an originator in a securitisation transaction, the securitisation issuer may be disqualified from the use of certain exemptions from registration if the issuer, any of its affiliates or one or more of its principals could be defined as a 'bad actor' (ie, persons who are restricted from conducting transactions before the SEC because of certain specified disqualifying events such as convictions or suspensions as a result of fraudulent activity or wilful misconduct), pursuant to Rule 506 of Regulation D of the Securities Act.

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

Any assets that generate relatively predictable cash flow may be securitised. The most common asset types include auto loans and auto leases, credit card receivables, commercial and residential mortgages, student loans, equipment loans and leases and trade receivables.

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

While public offerings of securities do not restrict classes of investors, transactions by an issuer not involving any public offering often limit the classes of investors that can participate in such transactions.

Rule 144A is one resale safe harbour that issuers commonly use to issue securities solely to qualified institutional buyers (QIBs). Subject to certain conditions, Rule 144A exempts from registration any resale of securities to QIBs by a person that is not the issuer. In a typical Rule 144A transaction, the underwriters purchase the securities from the issuer in an exempt private offering, and resell these securities to QIBs. Securities sold pursuant to Rule 144A are subject to certain resale restrictions.

Yet another safe harbour from registration that restricts the classes of investors who may participate in an offering is Regulation S. Regulation S allows securities to be offered and sold outside the US in an offshore transaction in order to avoid having to register with the SEC. An exempt offering under Regulation S generally must not be made to a person resident or an entity organised in the US, and there can be no directed selling efforts in the US to such persons or entities. Securities sold pursuant to Regulation S may be subject to restrictions on their distribution in the US during the 40-day period following the offering of the related securities.

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

Under the Securities Act, there are no restrictions on who may perform the services of a custodian, account bank, portfolio administrator or servicer in a securitisation transaction. However, the ratings requirements of many securitisation transactions limit the type of service providers that may be used for such purposes. This is because the rating of such entities is taken into account in determining the rating of the classes of securities to be offered.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

When the securitisation assets are of a type that may be heavily regulated or subject to the jurisdiction of any federal regulatory authority with oversight of the operation of the related assets (such as the Federal Aviation Administration or the Surface Transportation Board), additional approvals or procedures may be necessary in order to initiate or consummate the transaction.

Transactional issues

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

Special purpose vehicles (SPVs) can take many forms, and determination as to the form of SPV to be used in a securitisation transaction is typically dependent on the desired tax treatment for the entity and the nature and identity of the originators of the securitised assets and the investors in the transaction. The most common forms of SPV used are trusts and limited liability companies. The SPV can either be owned by the originator or its subsidiary in the securitisation transaction; or if the SPV is an orphan, its equity (typically nominal in amount) is owned by an entity or charitable foundation or organisation unrelated to the originator. The owner of an orphan SPV has little or no economic involvement in the securitisation.

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

SPV formation, timing and costs largely depend on the jurisdiction in which the SPV is formed. The costs of forming a SPV in the US are typically less than $300. In order to form the SPV, one would typically file a certificate of formation, partnership or trust, as applicable, with the related jurisdiction's division of corporations. Most jurisdictions are able to process formation documents and register the entity within 48 hours.

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

The purchase and sale document relating to the assignment of the receivables to the SPV can and usually does stipulate the governing law of the assignment of the receivables. Perfection of the assignment cannot be stipulated, however, and is usually governed by the statutory regime governing the perfection of the related assets, such as a jurisdiction's uniform commercial code, motor vehicle titling statutes or statutes governing the transfer and encumbrance of real property.

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

While asset-backed securities (as defined under Regulation AB) generally must be backed by a discrete pool of assets, transactions with prefunding and revolving periods and involving master trusts are permissible exceptions to this requirement.

Transactions with prefunding periods

A prefunding period allows an issuer of a securitisation to close on a transaction with only part of the collateral that will back the securities issued in connection with the transaction. The balance of the collateral would typically be purchased by the issuer with proceeds of the securities offering that were deposited into a prefunding account at closing.

Under Regulation AB, the prefunding periods may not exceed one year and the amount of proceeds that may be used for prefunding may not exceed 25 per cent of the offering proceeds or, for master trusts, 25 per cent of the aggregate principal balance of the total asset pool whose cash flows support the securities.

Transactions with revolving periods

In a transaction with a revolving period, a limited amount of cash flow from the asset pool may be used for a specified period to acquire new assets instead of being applied to make payments on the asset-backed securities. This is provided that:

- such securities are not backed by receivables or other financial assets that arise under revolving accounts;
- the revolving period does not extend for more than three years from the date of issuance of the securities; and
- the additional pool assets are of the same general character as the original pool assets.

Transactions involving master trusts

In transactions involving master trusts, the transaction may contemplate:

- adding additional assets when future issuances of asset-backed securities are made by the master trust; and
- adding additional assets to maintain minimum pool balances prescribed by the transaction documentation for master trusts with revolving periods, or receivables or other financial assets that arise under revolving accounts.

19 What are the registration requirements for a securitisation?

In a public offering, a registration statement containing a prospectus must be filed with the SEC and declared effective by the SEC subject to limited exceptions before any offers and sales can be made.

As discussed in questions 6 and 8, the SEC may review the registration statement before declaring it to be effective. Before commencing marketing efforts relating to the public offering, the issuer generally clears all SEC comments to avoid any risk of having to amend the preliminary prospectus after it has been sent to potential investors. Prospectuses and other material agreements, documents and opinions relating to the securities offering are also filed on EDGAR after the registration statement has been declared effective.

For a public offering of securities pursuant to an effective shelf registration statement, the offering process is largely the same, except that there is no need to file a registration statement and wait for SEC comments, as that already has been done. The issuer and the underwriters use a preliminary prospectus to launch the offering. A final prospectus and other material agreements, documents and opinions relating to the securities offering are also filed on EDGAR in connection with a takedown from the shelf.

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

As a general matter, obligor notification is not required in connection with asset ownership transfers made in connection with a securitisation. However, the general rule under the Uniform Commercial Code is that only once the obligor receives notice that the receivable has been sold:

- can the purchaser enforce the payment obligation directly against the obligor; and
- must the obligor pay the purchaser in order to be relieved of its payment obligation.

If, alternatively, the receivables are evidenced by a 'negotiable instrument', a purchaser who becomes a holder in due course may enforce directly against the obligor and takes free and clear of defences arising from the seller's conduct, subject to a few exceptions under consumer protection laws. Similar rights are available to protected purchasers of securities. Generally, a seller or obligor insolvency will not limit the ability of the purchaser of receivables to give notice to the obligors of the assignment of those receivables because the main purpose of the notification requirement is to avoid the obligor being required to pay twice. If notice is given, the notice is typically delivered by the originator or servicer of the related asset in accordance with terms of the underlying documentation relating to the origination of such asset.

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

Confidential consumer information that can identify a consumer cannot generally be disclosed to third parties and can only be used for the purposes for which such information was provided, and as such is generally excluded from disclosure materials. Identifying information is generally removed from all materials provided to investors, and entities possessing consumer information are generally obligated to safeguard such information from unauthorised access and disclosure.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The SEC has promulgated rules under the Securities Act and the Exchange Act that govern the relationship between nationally recognised statistical ratings organisations (NRSROs) and securitisation issuers. Rules governing this relationship primarily relate to issues of conflict of interest arising out of the NRSROs being paid service providers to the securitisation sponsor and issuer. The ratings methodology employed in connection with rating a transaction varies between rating agencies and the underlying assets backing the securities to be rated. As a general matter, however, rating agencies will review:

- the quality of the management and financial condition of the sponsoring entity;
- originations and underwriting practices;
- the quality of the transaction servicers' capabilities;
- collateral credit quality and the historical performance of the issuer or originator's portfolio; and
- the creditworthiness of credit enhancement providers, the transaction capital structure and credit enhancement.

They will also conduct a cash flow analysis and review the legal structure and opinions to be issued in making ratings determinations.

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

Given that the SPV is a limited purpose entity, which is often formed for the sole purpose of serving as the issuer in relation to the securitisation, the chief duties of the directors and officers of the SPV are to operate the SPV in accordance with its organisational documents (including the related bankruptcy-remoteness provisions) and to perform its obligations under the securitisation transaction documents (to the extent not delegated to an agent of the SPV, such as an administrator or a servicer). The duties of the directors and officers of the SPV, and more generally the activities of the originator and the owner of the SPV, should be carried out independently of the SPV in order to maximise the treatment of the SPV as a bankruptcy-remote entity (see questions 32–34).

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

The SEC, the Federal Deposit Insurance Corporation, the Federal Reserve System, the Department of Housing and Urban Development, the Department of the Treasury and the Federal Housing Finance Authority jointly released a rule on 24 December 2014 that requires credit risk retention for asset-backed securities. Asset-backed securities collateralised by residential mortgages were required to comply as of 24 December 2015, and all other classes of asset-backed securities were required to comply starting from 24 December 2016. Subject to some exceptions, the credit risk retention rules generally require a securitiser to retain not less than 5 per cent of the credit risk of any asset that the securitiser, through the issuance of an asset-backed security, transfers, sells or conveys to a third party, and prohibit the securitiser from directly or indirectly hedging or otherwise transferring the credit risk that the securitiser is required to retain.

Security

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

As a general matter, all assets and property of a SPV are typically granted as security in a securitisation transaction. This security grant usually includes all receivables to which the securitisation issuer is entitled based upon its asset or property ownership, all rights under agreements relating to such receivables and all accounts held in the name of the SPV.

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

Perfection of the security interest of the investors (or the trustee on behalf of the investors) generally depends on the underlying asset.

A security interest in the personal property owned on behalf of investors can, in most cases, be perfected by the filing of a Uniform

Commercial Code in the jurisdiction in which the SPV is formed. In other cases, perfection of personal property may be acquired via possession of, or control over, investment property, notes, chattel paper, instruments or other possessory collateral pledged as part of the collateral or security in the securitisation. Lastly, if the security interest relates to an account of the SPV, then the security interest is perfected via entry into a control agreement, which is used to establish perfection in cash on deposit in accounts, securities and other investment property. Perfecting liens on other types of collateral may require compliance with state laws governing such collateral, such as the filing of mortgages or deeds of trust in the jurisdiction in which the real property is located, or notation of the lien on a motor vehicle's certificate of title.

27 How do investors enforce their security interest?

Enforcement mechanisms and procedures are typically outlined in the indenture or pooling and servicing agreement describing the terms of the securities. The trustee is usually charged with gathering sufficient votes from investors to enforce investors' rights and remedies following events of default in the related securitisation transaction. Common remedies in the case of an event of default include acceleration of the debt, collateral sale and trustee control over issuer accounts (for the benefit of the investors).

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

Commingling risk is an issue in the US. This risk is typically mitigated by either strictly prohibiting commingling of cash collections in accounts, or controlling the length of time that funds belonging to the securitisation issuer may be held in a commingled account. In some circumstances, funds held in a commingled account are the subject of an inter-creditor agreement pursuant to which the creditors entitled to funds deposited in the commingled account make an agreement as to their relative rights and obligations in respect of funds on deposit in the commingled account.

Taxation

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

Tax consequences for various asset classes and structures vary significantly. However, the most significant tax generally is the federal income tax. The primary tax consideration for originators in a securitisation, typically, is whether the transfer of financial assets is treated as a sale because this characterisation determines whether the originator must recognise income upon the transfer and therefore incurs the related federal income tax liability. If treated as a sale, the seller immediately recognises income on the excess of the purchase price for the securitised assets over its tax basis in those assets. If the transfer is not characterised as a sale, the seller generally does not recognise gain on the receipt of proceeds from the securitised assets. Instead, the seller recognises gain as and to the extent it receives payments or accrues income on the securitised assets.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

The primary tax consideration for an issuer, typically, is whether an issuer will be subject to federal entity level taxation on a net-income basis. Entities that are chosen to serve as securitisation issuers often are grantor trusts (ie, entities where the equity holders are treated as directly owning the underlying assets) so that entity level federal income tax can be avoided. As grantor trusts are limited in the securities that they can issue and the assets they can own, an SPV might alternatively be formed as an entity that is treated as partnership or an entity whose separate existence is disregarded from that of its sole owner for federal income tax purposes. Even if pass-through treatment is achieved, however, if persons treated as the equity owners of the SPV for tax purposes are non-US persons, those non-US persons may themselves be subject to net income tax in the US if the SPV is 'engaged in a trade or business' within the US. Being so engaged does not result from mere investment or trading in securities, but generally will result from origination (of loans, for example). To avoid non-US investors from being so engaged and to ensure that the pass-through nature of the SPV is respected, secured notes issued by the SPV often benefit from an opinion that the secured notes 'will' be treated as debt for tax purposes.

In transactions primarily involving mortgage loans, the SPV often takes the form of a real estate mortgage investment conduit (REMIC). REMICs receive beneficial statutory treatment that ensures that the REMIC will not, and foreign investors in the REMIC generally will not, be subject to tax. If multiple classes of mortgage-backed debt are to be issued, use of a REMIC generally is the most common way to avoid income tax at the SPV level. Transfers of mortgages to a REMIC in return for interests therein do not result in the recognition of gain or loss for tax purposes (although the sale of those interests generally will).

31 What are the primary tax considerations for investors?

A primary concern for investors is whether their investment is treated as debt or equity for tax purposes. If securities are treated as debt, investors will be taxed, at ordinary income rates, on stated interest that is paid or accrued. Frequently, the debt will also be issued with original issue discount (OID) either because it is issued at a discount from face value or because the stated interest is not deemed unconditionally payable at least annually (generally including, for example, if the interest payments on that debt may be deferred). OID is taxable as ordinary income and accrued in income based on its economic yield over the life of the instrument, regardless of the investor's method of accounting for tax purposes. Similarly, if debt is acquired in the secondary market at a discount, the 'market discount' rules generally treat the excess of the acquisition price over the adjusted issue price in a manner similar to interest and taxable as ordinary income, either during the investor's holding period or upon sale or other disposition of the obligation. Conversely, if debt is issued or acquired at a premium, such premium generally may offset OID or interest income. Except as discussed below in the context of the Foreign Account Tax Compliance Act (FATCA), principal repayments on securities treated as debt (except to the extent of accrued interest or OID), market discount or acquisition discount are tax-free to the extent of an investor's tax basis in the debt (generally its purchase price, adjusted for any discount or premium taken into account in income). If an amount smaller than the tax basis is recouped, a tax loss may be claimed.

If investor interests are not treated as debt but, rather as ownership interests in underlying collateral or as equity of an SPV, the income tax consequences differ in a number of respects. Timing of income inclusion is a key difference. For example, if the SPV is a flow-through entity, each equity owner will take into account its share of items of interest, OID, market discount and acquisition discount with respect to the collateral. Except as discussed below in the context of FATCA, principal repayments on the underlying collateral are tax-free, with loss (or gain) resulting upon prepayment or final payment of each receivable to the extent proceeds are less than (or exceed) the SPV's allocable basis in that receivable.

If, however, the SPV is a domestic corporation (or a publicly traded partnership, taxable as such) then investors treated as equity owners thereof generally will be taxable only on returns on their investments when paid, as dividends. If the SPV is a foreign corporation, US equity owners of the SPV generally will be subject to certain anti-deferral rules. To avoid the adverse consequences of these rules, US equity owners typically will make certain election to recognise income of the foreign corporation currently, rather than being taxable only upon the payments of dividends.

An additional consideration for investors who are non-US persons is ensuring that their investment is held in a manner such that it complies with the portfolio interest exemption. Subject to limited exceptions, US federal withholding tax generally does not apply to interest on debt issued in registered form. If an investor's instrument is viewed as debt issued by an SPV, typically no withholding tax arises. Instruments treated as equity for tax purposes may result in withholding tax (for example, if the underlying assets are not registered form debt or if owners of the SPV are non-US persons and the SPV is engaged in a trade or business within the US).

Provisions commonly known as FATCA may require non-US entity investors to enter into an agreement with the Internal Revenue Service or comply with local jurisdiction laws that require it to provide information about the SPV's equity and debt investors who are US persons (including certain indirect US owners) and other information as a condition to receiving certain US-connected payments. This includes

US-source dividends and interest, as well as the principal proceeds of an instrument that generates US-source interest and dividends. A US SPV may have to withhold tax at a rate of 30 per cent on certain payments to a debt or equity holder that is a non-US entity that is not compliant with FATCA.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

It is possible to reduce (but not eliminate) the risk that an SPV becomes subject to bankruptcy proceedings by limiting the scope of future potential creditors of the SPV, and by reducing the likelihood of the SPV's insolvency. In order to mitigate the risk of an SPV becoming consolidated with an originator in the event of a bankruptcy of such originator, transactions will typically:

- ensure that the SPV's organisational documents limit its powers (by including restrictions on debt, liens and mergers) and activities (including prohibition on becoming an operating company) and require the vote of independent directors to file a voluntary petition (although such directors are subject to fiduciary duties and may not act solely in the interests of creditors);
- require non-petition agreements from transaction parties as a contractual impediment to an involuntary petition; and
- require limited recourse agreements from parties to limit their recourse to the SPV's assets (to prevent the SPV from meeting legal definitions of insolvency).

In addition, as an added protective measure, some transactions will use an orphan SPV as an issuer.

33 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)?

Factors typically reviewed by a court to determine whether a transfer of assets from an originator to an issuer constitute a true sale include whether:

- the originator maintains a right to control the transferred assets;
- the sale was conducted on an arm's-length basis;
- the SPV has a right to seek payment with respect to deficiencies on payments in respect of the transferred assets from the originator; and
- whether the originator has the right to redeem the transferred property.

34 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?

Factors that a court considers in making a determination as to whether to consolidate the assets and liabilities of the originator with a SPV include:

- the presence or absence of consolidated financial statements;
- the unity of interests and ownership between various corporate entities;
- the existence of parent and inter-corporate guarantees on loans;
- the degree of difficulty in segregating and ascertaining individual assets and liabilities;
- the transfer of assets without observance of corporate formalities;
- the commingling of assets and business functions; and
- the profitability of consolidation at a single physical location.

NORTON ROSE FULBRIGHT

Patrick D Dolan **patrick.dolan@nortonrosefulbright.com**

1301 Avenue of the Americas
New York 10019
United States

Tel: +1 212 318 3399
Fax: +1 212 318 3400
www.nortonrosefulbright.com

Dechert LLP

Devin Swaney **devin.swaney@dechert.com**
Andrew Bloom **andrew.bloom@dechert.com**

1095 Avenue of the Americas
New York
New York 10036
United States

Tel: +1 212 698 3500
Fax: +1 212 698 3599
www.dechert.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Structured Finance & Securitisation
ISSN 2058-5594

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law