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Cross-Border Trade Receivable Securitizations

Complexity Can Yield Opportunity When Taking Your Securitization Global

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Trade receivables securitization is one of the primary means through which middle market and investment grade companies alike are able to obtain more efficient and cost-effective financing, manage their balance sheets and diversify their financing sources.[1] As multinational companies continue to look to trade receivables securitization as an integral solution to their financing and balance sheet needs, this note draws upon these and other transactions to highlight some key distinctions between a typical trade receivables securitization in the United States and a trade receivables securitization involving foreign jurisdictions. Originators, lenders and purchasers of trade receivables will observe that cross-border trade receivables securitization adds complexity, and some comforts of home will not be available outside the United States.

Structure of a Typical Trade Receivables Securitization in the United States

A typical trade receivables securitization in the United States is structured as a two-step transaction: (1) an originator or originators (collectively, the "Originator") of trade receivables (the "Receivables") transfers the Receivables to a newly-formed, bankruptcy-remote, special-purpose entity (the "SPE"), which is a wholly-owned subsidiary of the Originator, and (2) the SPE obtains financing for the Receivables from one or more banks, asset-backed commercial paper conduits or other financial institutions (the "Financing Parties"), and such financing can take many forms. Many such transactions have been structured to achieve a sale for accounting purposes under US Generally Accepted Accounting Principles. The Originator transfers the Receivables to the SPE in a legal true sale or true contribution to the capital of the SPE (in each case, determined primarily based on the intent of the parties and whether the economic consequences of the transaction (such as credit recourse) are consistent with the intent of the parties). Given the characteristically short-term nature of most trade receivables (usually 30-90 days), the Originator transfers the Receivables to the SPE on a daily basis immediately upon origination until all obligations owing by the SPE to the Financing Parties have been paid in full. The daily transfer of the Receivables by the Originator to the SPE helps to offset the risk to the Financing Parties of losing all of their collateral as the Receivables turn over quickly. While sales of Receivables take place daily, the settlement of the purchase price for those Receivables may be on a less frequent basis (such as monthly) for the administrative convenience of the Originator.

Although the Receivables are legally isolated from the Originator's creditors following the true sale or true contribution of the Receivables by the Originator to the SPE, the Financing Parties nonetheless remain exposed to considerable credit risk of the Originator due to (i) the ability of the Originator to commingle collections on the Receivables with the Originator's general funds, which are then segregated and used for settlement on a monthly basis; (ii) the Originator's continued servicing of the Receivables and the management of its relationship with Obligors, including collection activities; and (iii) the presence of potentially significant dilution in the Receivables (such as a reduction or adjustment in the outstanding balance of a Receivable as a result of any defective, rejected, returned, repossessed or foreclosed goods or services, or any revision, cancellation, allowance, rebate, credit memo, discount or other adjustment made by the Originator), each of which are common features in a typical trade receivables securitization in the United States.

Certain provisions of the Uniform Commercial Code (the "UCC") also inform important aspects of a typical trade receivables securitization in the United States.

SECURITY INTEREST AND UCC FILINGS

Section 1-201(b)(35) of the UCC defines the term security interest to expressly include the interests of a buyer of accounts in addition to the interests of a lender secured by accounts. Section 9-109(a)(3) of the UCC also expressly states that Article 9 of the UCC (Secured Transactions) applies to the sale of accounts. As such, regardless of whether the Financing Parties are lenders secured by the Receivables or purchasers of the Receivables, the Financing Parties need to file a UCC financing statement to perfect their security interest (which includes an ownership interest) in the Receivables. While some may view the need to file a UCC-1 as unnecessarily conservative for a legal true sale, it actually provides US Financing Parties with protection against Originator fraud and mistake risk that is not otherwise mitigated without such an objective notice filing system. Furthermore, in the United States, a receivables purchase and sale agreement (a "Sale Agreement") will typically contain a back-up grant of a security interest in the Receivables to mitigate the potential risk of the transfer of the Receivables not being treated as an absolute sale, transfer and assignment of the Receivables notwithstanding the express intent of the parties. This is important and beneficial for the Financing Parties because, without a perfected security interest under the UCC, the Financing Parties would be unsecured creditors in the event the sale of Receivables was not deemed a true sale. While the inclusion of a back-up grant of a security interest in the Receivables under a Sale Agreement may seem contrary to the express intent of the parties, it does not typically cause stress on the true sale analysis for securitization transactions in the United States because US case law regarding true sale tends to hinge on commercial substance over form. Also, as discussed above, under the UCC a sale of accounts is a security interest and the filing of UCC financing statements is required to perfect the Financing Parties interests in the Receivables.

ENFORCEMENT AGAINST OBLIGORS

Section 9-406(a) of the UCC generally provides that an account debtor (i.e., the obligor under a Receivable (the "Obligor")) may discharge its obligation by paying the assignor (i.e., the Originator) until the Obligor receives notification that the amount due or to become due to the Originator has been assigned and that payment is to be made to the assignee (i.e., the Financing Parties). In the United States, the Financing Parties are typically prohibited under the securitization documents from notifying an Obligor, or requiring that an Obligor be notified, that a

Receivable has been assigned until after the occurrence and during the continuance of an event of default, event of termination or similar trigger event under the securitization documents. As a general rule, absent a servicer replacement, the Financing Parties generally do not expect to ever enforce a Receivable directly against the related Obligor and the related Obligor is never notified that the Receivable has been assigned.

RESTRICTIONS ON ASSIGNMENT

Section 9-406(d) of the UCC generally renders ineffective and overrides any express contractual provision in the underlying contract giving rise to a Receivable that prohibits or restricts the assignment of the Receivable or requires the consent of the related Obligor to assign the Receivable. It is important to note that Section 9-406(d) of the UCC overrides such contractual prohibitions, restrictions and consent requirements in favor of the Obligor and it does not override any contractual prohibitions, restrictions or consent requirements in favor of any third parties. Furthermore, Section 9-406(d) of the UCC only overrides express contractual prohibitions, restrictions and consent requirements and does not override any provisions requiring notice of the assignment of a Receivable or any provision which may have the practical effect of restricting the assignment of a Receivable (e.g., confidentiality obligations). While the Originator and the Financing Parties can legally rely on the broad override provided by Section 9-406(d) of the UCC, the Originator should consider whether the assignment of a Receivable will have any negative effects on its business relationship with the related Obligor should the related Obligor become aware of the assignment.

With the clear provisions of the UCC and a robust history of case law, the United States is a favorable jurisdiction for trade receivables securitizations. A cross-border trade receivables securitization may or may not be implemented with the same ease and convenience, depending on the jurisdiction and market practice therein. With each jurisdiction added to a securitization, whether at the Originator or the Obligor level, the parties will have to contend with layers of complexity, and common assumptions with respect to structural components of a domestic trade receivables securitization may not prove feasible or practical. This article presents an overview of key considerations when structuring a cross-border trade receivables securitization, including specific insight from our partners in England, Germany, France and Mexico, and the primary challenges of a cross-border trade receivables securitization when compared with a domestic securitization. Partnering with experienced deal counsel and local counsel, the Originator and the Financing Parties can be flexible and creative to achieve their operational and financial goals. While not as simple or straightforward as a domestic trade receivables securitization, the opportunity and potential for growth for clients can often outweigh the time and cost of structuring a more complex cross-border trade receivables securitization.

Initial Structural Considerations

CHOICE OF LAW

Unlike a domestic trade receivables securitization, a cross-border trade receivables transaction requires an in-depth review of all relevant jurisdictions, including (i) the location of the SPE, (ii) the location of the Originator and the governing law of the Sale Agreement between the Originator and the SPE, (iii) the location of the Obligors and the governing law of the Receivables and (iv) the location of any bank accounts, particularly to the extent a security interest will be granted in favor of the Financing Parties or the SPE in those bank accounts. Each additional jurisdiction raises

local law and choice-of-law questions, which need to be analyzed and considered in light of the objectives which the Originator and the Financing Parties wish to achieve in structuring the securitization. For example, key questions include what law will apply to determine whether:

- There has been a "true sale" of the Receivables between the Originator and the SPE;
- A Receivable is permitted to be assigned by the Originator to the SPE in the face of a contractual ban;
- Payment by the Obligor to the Originator (rather than the SPE) discharges the Obligor's payment obligation;
- The Financing Parties or the SPE can enforce and sue the Obligor directly for its failure to pay the applicable Receivable; or
- A third-party creditor or insolvency trustee may assert its interest in or rights over the Receivables.

Determining the answers to these questions, and the impact those answers have on the structure and implementation of a trade receivable securitization are critical for both protecting the Financing Parties' rights in the Receivables and achieving the Originator's balance sheet and liquidity management objectives. Once all applicable local laws are determined, further analysis should be performed in each such jurisdiction, with the assistance of local counsel, to ensure that all jurisdiction-specific legal formalities are satisfied for the particular legal questions noted above (among others).

ROME I REGULATION

In securitization transactions with the Originator or Obligors located in European Union ("EU") countries (other than Denmark), the Rome I Regulation[2] ("Rome I") will be relevant. Rome I provides that the relationship between the assignor and the assignee (i.e., the Originator and the SPE) is governed by the law of the contract between them (i.e., the Sale Agreement) (Article 14(1)). For matters concerning the assignability of any Receivable, the relationship between the SPE and the Financing Parties, as assignee, and the Obligor, enforceability against the Obligor and whether the Obligor's payment obligations have been discharged, it is necessary to look at the governing law of the Receivable (i.e., the law of the underlying contract under which the Receivable has been generated).

In addition, there is a draft regulation[3] aimed at addressing the effectiveness of the transfer of Receivables as against third parties. This regulation is yet to be finalized but the effect of it could make this legal analysis more complicated, since, while EU parties are generally free to choose the law of a contract, such as a Sale Agreement, the new regulation could make it necessary to comply with the law where the Originator has its habitual residence in assessing whether a valid transfer has been achieved as against third parties (including a liquidator or other insolvency official).

In transactions with EU entities, it is also important to consider the requirements of the Securitisation Regulation and the related technical standards and guidance[4] and, in the case of UK entities following Brexit, the equivalent requirements in the United Kingdom[5].

SPE LOCATION

In the case of securitizations that include European Originators, the SPE is typically located in a European jurisdiction, such as Ireland, Luxembourg or the Netherlands, although this is not always the case. The choice of jurisdiction for the SPE is often driven by the availability of preferential tax treatment, such as double taxation treaties and/or beneficial tax regimes, as well as other

factors such as the relevant legal system, the cost of establishing and maintaining the SPE and the location of the parties and the Receivables. For securitizations with European Originators, the SPE is usually an orphan company (meaning the SPE is owned by a third-party management company), in order to enhance its insolvency remoteness, which may be preferable in certain jurisdictions. Of course, use of an orphan SPE rather than an Originator wholly-owned subsidiary SPE means that overcollateralization cannot be achieved through capital contributions of Receivables. Similar to the United States, the SPE's liabilities are typically limited by way of certain provisions in its organizational documents and/or under the securitization documents, such as restrictions on its activities to those required under or ancillary to the securitization, requirements to keep separate books, records and accounts and having no employees, as well as the inclusion of limited recourse and non-petition clauses by which the other parties agree to be bound. In some cases, such as in Luxembourg, the SPE may be deemed to be insolvency remote by virtue of compliance with a specific statutory securitization regime.

RESTRICTIONS ON ASSIGNMENT AND CONTRACT DILIGENCE

Unlike in the United States, most jurisdictions will enforce a restriction or ban on assignment to the extent included in the Receivable or its related contract. If there is such a restriction with respect to certain Receivables and the Originator desires to sell those Receivables to the SPE, in most cases the Obligor's consent will be required. However, the Originator typically does not want to request that Obligors consent to the sale of the Originator's Receivables for fear of disruption of the business relationship (or providing leverage to Obligors for other concessions). It is common for the Financing Parties or the Originator (in consultation with its counsel) to review and perform diligence with respect to the contracts relating to the Receivables prior to closing a cross-border trade receivable securitization. The purpose of such diligence is to determine the extent to which there are any restrictions on assignment in the underlying contracts and whether such restrictions relate to particular Obligors or to all Obligors. This diligence will determine whether certain Obligors should be removed from the securitization or whether alternative structures need to be implemented or steps need to be taken in order to assign or transfer the benefit of any restricted Receivables to the SPE.

Keep in mind that no two jurisdictions are exactly alike. Each jurisdiction's legal system has its own nuances and complexities that need to be considered closely with local counsel and with deal counsel. It may not be practical to include some jurisdictions depending on the Originator's commercial or operational requirements. For example, certain jurisdictions require (i) notice to Obligors of the assignment of their Receivables, (ii) the execution of daily assignment or transfer agreements, (iii) the deposit by the Obligor of all collections into a bank account owned by the SPE or (iv) the replacement of the servicer of the Receivables (the Originator) without cause (including prior to a servicer default), in each case, in order to achieve a true sale. While these formalities fall on the cumbersome end of the "true sale spectrum," if they are required under local law, the Originator may determine that it is not in its best interest to include that jurisdiction or those Receivables in the securitization.

Note, however, that these are not common requirements, and most jurisdictions are able to be included in cross-border trade receivable securitizations with some modifications. Jurisdictions frequently included in cross-border trade receivable securitizations include England, Germany, France and Mexico. This article addresses

particular insights from Mayer Brown's leading partners in those jurisdictions for cross-border trade receivables securitizations.

England

ASSIGNMENT AND TRUE SALE

For cross-border trade receivables securitizations with multiple jurisdictions, English law is often used as the governing law for Sale Agreements (including, in some cases, with respect to Receivables governed by a different governing law or sold by an Originator located in a different jurisdiction). Under English law, there is a distinction between a legal assignment and an equitable assignment. In order to be a legal assignment, the assignment must be in writing and signed by the assignor, absolute and unconditional (and not by way of charge only), of the whole of the debt and notified in writing to the debtor.[6] Given that, in the majority of cases, the Obligors are not notified of the sale of the Receivables at the outset of the securitization, most English law sales of Receivables will be equitable assignments, which will be capable of becoming a legal assignment upon notice being given to the Obligor if the relevant trigger event occurs. Until notice is given to the Obligor, (a) the legal title will remain with the Originator, (b) the SPE or the Financing Parties may need to join the Originator in legal proceedings against the Obligor, (c) the Obligor can discharge its payment obligation by paying the Originator, (d) the Obligor can exercise set-off rights against the Originator and (e) a subsequent assignee who does not know of the prior sale and who gives notice to the Obligor may obtain priority over the SPE and the Financing Parties.[7] However, it is important to note that equitable assignments will still be capable of being a true sale under English law.

True sale under English law, based on an analysis of the relevant case law, is generally achievable. The case of *Re George Inglefield Limited* set out three essential differences between a transaction of sale and a transaction with a mortgage or charge. In summary, these are that (a) the seller is not entitled to get back the property that it has sold by repaying the debt, in contrast to a security grantor; (b) if the secured property is sold for more than the value of the debt then the security grantor is entitled to the surplus, in contrast to a sale where the purchaser is not required to account to the seller for any profit; and (c) if the secured property is sold for an amount which is less than the debt, then the security provider remains liable for the balance, in contrast to a sale where the seller is not liable for any loss.

However, in the case *of Welsh Development Agency v Export Finance Co Limited*, the use of these three criteria was implicitly rejected by the court as the sole test, which instead indicated that it is necessary to look at the provisions of the relevant document as a whole to decide whether it amounts to an agreement for the sale of the relevant assets or only a mortgage or charge. A similar approach, focusing on the terms of the documents rather than the economic effect of them, was taken in *Orion Finance Ltd v Crown Financial Management Ltd*.

In *Agnew v Commissioner of Inland Revenue*, a two-stage process was favored with respect to a question of legal characterization, relating to whether a security interest was "fixed" or "floating." This approach required first looking at the intentions of the parties, in order to ascertain the nature of the rights and obligations which the parties intended to grant each other and then a second stage, where the transaction would be categorized as a matter of law. This approach was supported and adopted by the House of Lords in *In Re Spectrum Plus Ltd*, although both these cases relate to the distinction between fixed and floating charges, and it is not clear to what

extent the two-stage categorization process should now be applied to the question of whether a purported sale transaction should be re-characterized as a secured loan.

Consequently, when considering true sale issues, we typically first look at the categorization of the transaction expressed by the parties, and then examine the rights and obligations set out in the Sale Agreement and consider their appropriate characterization to determine if the transaction is a sale or a secured loan.

It is worth noting that an English law governed Sale Agreement would not include a back-up security interest, unlike in the United States. In practice, if the transaction is appropriately structured, the risk of re-characterization as a secured loan under English law is relatively low and provisions such as repurchase obligations in the event of a breach of an asset warranty (such as with respect to the eligibility criteria), deferred purchase price obligations and clean-up calls should be acceptable, provided that care is taken not to include general repurchase provisions.

It is also important to consider whether there are any grounds under which the sale could be "clawed back" in the event of an insolvency of the Originator, for example, whether there is a transaction at an undervalue, a preference or a transaction defrauding creditors, depending on the local insolvency laws. Steps should be taken to confirm that the Originator is solvent, such as searches and a requirement that solvency certificates of the Originator be provided.

RESTRICTIONS ON ASSIGNMENT

Unlike the United States, England does not have a "legal override" provision equivalent to Section 9-406(d) of the UCC. However, in England it may be possible to use a trust mechanism as an alternative solution when dealing with prohibitions and restrictions on assignment, although the wording of the underlying contract will need to be considered carefully. There also is a limited exception under the Business Contract Terms (Assignment of Receivables) Regulations 2018 for contracts entered into with small-and medium-sized enterprises (as defined therein) on or after December 31, 2018. If there is no such legal override and no alternative solution such as the use of a trust mechanism, then the consent of the Obligor may need to be obtained or the Receivables relating to that contract may need to be excluded from the securitization.

Germany

Trade receivables securitizations with large multinational Originators tend to involve a large number of jurisdictions. For German Originators, the above-described US structure offers advantages to the Originators compared to a classic German structure in which Receivables are sold on a weekly or monthly basis and collections swept shortly after they arrive in the Originator's account. The implementation of such a structure, however, does raise some legal questions from a German perspective.

DETERMINATION AND IDENTIFICATION OF RECEIVABLES

German Receivables need to be determined or identified for a valid transfer. This is usually done via a list that contains details about the Receivables. These details must make the Receivables distinguishable from one another (e.g., name of Obligor, invoice number, date of invoice, invoiced amount). The concept of daily transfers does not usually allow such a list for practical or operational reasons. The idea of daily transfer is to transfer any and all Receivables coming into existence on each day and as soon as each Receivable comes into existence; not only when these Receivables are set forth on a list, sent to the SPE and accepted by the SPE. Conceptually,

such a daily transfer mechanism is known under German law as a global assignment. Under a global assignment agreement, the assigned Receivables are generically described in a manner which makes them distinguishable from one another (e.g., all trade receivables against a certain Obligor or all trade receivables against a certain Obligor arising from a certain contract).

LEGAL TRUE SALE

There are different types of true sale under German law (as for other jurisdictions): (1) accounting true sale, (2) tax true sale and (3) insolvency true sale. From the SPE's and the Financing Parties' perspective, the insolvency true sale is decisive, as the asset analysis of the Financing Parties is usually based on full enforcement of the Receivables, whereby the SPE or the Financing Parties can control the enforcement process. If any sale and transfer of Receivables were to be re-characterized as a secured lending under German law, the insolvency administrator could not only charge 9 percent of the enforcement proceeds for determination of the assets and enforcement, but could also decide on the timing and procedure of the enforcement. In Germany, a legal valid transfer of Receivables is always required for obtaining a true sale. Apart from this, the distinction between true sale and secured lending is discussed only in legal literature. It is a common understanding that the Originator shall not retain credit risk (e.g., via deferred purchase price) in connection with the sale of Receivables in excess of 9 percent. The argument behind this number is that a secured lender paying a purchase price of the nominal value would usually request the security grantor assume more than 9-percent risk retention given that the insolvency administrator would already charge 9 percent.

However, most trade receivables securitizations necessarily require a large portion of the securitization to be in the form of subordinated debt or equity, because all Receivables are automatically sold to the SPE, but the Financing Parties will only fund against certain eligible Receivables net of required reserves (or overcollateralization). To the extent such subordinated debt is held by the Originator or its affiliate, this may cause issues for the accounting true sale, especially if such subordinated debt is disproportionally over-measured in relation to the historical losses of the Receivables portfolio.

It is discussed in legal literature whether it is necessary for achieving an insolvency true sale also to have an accounting true sale. Such discussion is based on a decision of the German Federal Fiscal Court (*Bundesfinanzhof*), which related to a transaction which was intended by the parties to be a securitization ("true sale") transaction. The German Federal Fiscal Court considered the relevant transaction as a secured loan transaction on the basis of the credit-related discounts exceeding the historical loss rate. However, following this argument for the insolvency true sale classification would change the securitization market substantially, because the European Central Bank (ECB) is only allowed to accept true sale transactions as collateral for Eurosystem credit operations and has in the past purchased so-called "retained transactions" (i.e., transactions in which issued notes were purchased by the Originator at closing). If these transactions would not qualify as a true sale, they could not qualify as ECB collateral. In addition, risk retention options would be restricted (i.e., regulatory compliance could no longer be achieved through the Originator holding a first loss risk (unless historical losses are unusually high)). In practice, the market has not yet followed this extreme interpretation and is still comfortable with the Originator holding risk retention or the Originator investing in subordinated notes or debt in these transactions. In accordance with the

current market practice, the funding of the large piece of subordinated debt or equity by the Originator (or an affiliated entity of the Originator) should therefore still be an option in Germany.

CASH TRANSACTIONS

Besides the qualification of a true sale, each sale of Receivables should also qualify as a "cash transaction" in accordance with section 140 of the German Insolvency Code (*Insolvenzordnung*). Cash transactions have the advantage of excluding most insolvency rescission risk. Insolvency administrators can only challenge such transactions in very exceptional circumstances (fraud or intent). Cash transactions are privileged because they should allow a nearly insolvent company to continue its business and potentially support the recovery process. It is in the interest of all parties to allow the financially distressed company to continue its business (to the extent that such business is not reducing the liquidity of the company) and give business partners legal certainty, otherwise these partners would be reluctant to continue their business with high risk of entering into transactions that are potentially voidable. Hence, cash transactions are defined as those transactions where the seller gets "immediate" and "equivalent" consideration.

In the context of trade receivables securitizations this means the following: although the sale of Receivables is generally an instrument to enhance the liquidity of the Originator, in order to qualify as a cash transaction, (a) the purchase price of the Receivables must reflect the Receivables' values (i.e., the nominal value of such Receivables discounted to reflect the financing component, potential dilutions and credit risk) and (b) such purchase price must be paid immediately to the Originator which means at least on the same day, ideally simultaneously with the transfer of Receivables. The above-described concept of daily (global) transfers of Receivables imposes certain procedural challenges for the parties as the respective purchase price for each Receivable needs to be calculated on a daily basis and made available to the Originator whereby the SPE or the Financing Parties need to find sources of funding for such purchases on a daily basis. In order to avoid daily draw-down on the financing side, the SPE may also use set-off, i.e., using its claim for transfer of the collections and set-off against the purchase price claim. If, and to the extent there are less collections available than purchase price obligations, the SPE may decide to fund such gap, not on a daily, but on a less frequent basis, by allotting the daily purchases. For such allotment the parties have to agree on a procedure to select the allotted Receivables in a generic way. For example, if there are more Receivables than collections available, the purchased and transferred Receivables could be generically selected by taking invoice numbers or prioritizing those Receivables where invoices are booked at an earlier time.

RETENTION OF TITLE

Receivables in a supply chain are often subject to retention of title. There are different forms of retention of title securing the supplier. A retention of title means that the supplier transfers ownership of the delivered goods under the condition of full purchase price payment. Because the supplier's ownership in these goods can cease to exist before the purchase price is fully paid, either by the buyer using the goods in a production process (i.e., producing new and substantially more valuable goods with some of the supplied components) or by the buyer selling the goods (the supplier would usually allow such on-sale), the supplier often extends the retention of title to (a) newly produced products or (b) trade receivables arising from such on-sale (so-called extended retention of title). The supplier's security right over the trade receivables from such on-sale may

potentially conflict with a trade receivables securitization of the buyer.

Where such extended retention of title exists, the securitization parties have to get comfortable that such extended retention of title agreement allows the sale of Receivables as contemplated by the securitization documents and, in particular, does not prevent the valid assignment of Receivables free of any adverse claims from the Originator to the SPE. This can be done by obtaining explicit consent from the supplier. However, there is also an argument that under an extended retention of title agreement the buyer is authorized to sell the Receivables if such buyer is authorized (a) to sell the underlying goods which are the subject of the retention of title arrangement, and (b) to collect the relevant Receivable arising from such sale (*Einziehungsermächtigung*), provided that the sale of Receivables is comparable to the collection of such Receivables. This requires, inter alia, that (i) the sale of the relevant goods is made on a basis which is covered by the contractual arrangements with the relevant supplier and (ii) that as a result of the sale and assignment of the Receivable arising from such sale the seller is, from a legal and economic point of view, in the same position as if it had not sold the Receivable but had itself collected the Receivable from the relevant debtor, i.e., if (i) the seller definitively and irrevocably receives the purchase price on the sale of the Receivable, (ii) the purchase price payable for each Receivable sold and assigned from the seller to the purchaser is materially higher than the portion belonging to and to be paid to the relevant supplier by the relevant debtor and (iii) the purchase price is available to the seller, i.e., the seller is not obliged to transfer the purchase price to a third party or to a pledged account.

In the case of a conflict between a global assignment of Receivables to the SPE and a retention of title (*Eigentumsvorbehalt*) applied by suppliers of goods, the global assignment only takes priority if (i) the global assignment of Receivables qualifies as a genuine factoring (*echtes Factoring*), (ii) the Originator acts in its ordinary course of business, (iii) the authorization of the Originator to collect the Receivables is not withdrawn by the supplier of goods, (iv) the selling price for the sale of goods (*Verkaufspreis*) is not lower than the purchase price (*Einkaufspreis*) and the financing entity does not act to the detriment of the suppliers of the goods.

RESTRICTIONS ON ASSIGNMENT

German Receivables are sometimes subject to restrictions on assignment explicitly agreed between the Originator and the Obligor. A Receivable that is subject to such restriction cannot generally be validly assigned under German law. However, under an exception contained in Section 354a(1) of the German Commercial Code (*Handelsgesetzbuch*), the assignment of monetary claims (i.e., claims for the payment of money) governed by German law is valid despite a prohibition on assignment if the underlying agreement between the contracting parties constitutes a commercial transaction (*Handelsgeschäft*) provided that the Obligor under such claim is a merchant (*Kaufmann*). However, that same Section allows the Obligor of an assigned claim to pay and/or otherwise discharge its obligations (including by way of set-off against claims owing by a particular Obligor to the SPE at the time of such set-off) to the Originator, even if it is notified of the assignment of its payment obligation.

However, this sounds more dramatic than it actually is, because under an assignment without any restriction, the Obligor and the Originator often agree on a so-called “silent assignment” (i.e., where the assignment is not disclosed to the Obligor) and until notification of the assignment to the Obligor, the Obligor may use the same set-off or discharge rights

as described above. After the disclosure of the assignment the situation is different: the Obligor under such Receivable without restriction is restricted in using set-off or discharge rights (depending on when the counterclaim existed or matured) whereas the Obligor under the Receivable with the restriction and exception under Section 354a of the German Commercial Code has no restriction to use discharge or set-off rights. This risk can be mitigated by a pledge over the account in which the Obligor is instructed to make payments. Where this issue becomes problematic are those situations where the Obligor (i) makes payment into a non-pledged account, (ii) makes payment into a pledged account but at a point of time when the pledgor is not allowed to dispose over its assets (i.e., insolvency proceedings have been opened) or (iii) uses set-off rights.

France

BANKING MONOPOLY

France has banking monopoly rules which, in principle, disallow the performance of credit transactions (i.e., lending or on-going purchase of French unmatured Receivables) in France by anyone other than a French-licensed or EU-passported financial institution, or any French investment fund specifically authorized to lend.

For cross-border securitization transactions involving French Originators, this implies that the SPE will not be authorized to purchase Receivables directly from such French Originators. Depending on the terms and conditions of the envisaged securitization, the French Originators will only be able to sell their Receivables either (i) to a French securitization vehicle (such as a *fonds commun de titrisation* or FCT), which will then issue units or notes to be subscribed by the SPE; (ii) to an intermediate banking purchaser located outside of France and benefitting from a EU passport to trade in France, which in turn will on-sell them to the SPE; or (iii) on the basis of an exemption under the French banking monopoly rules, to a foreign group affiliate thereof (which affiliate will then on-sell those Receivables to the SPE).

Depending on the above structural features, several means can be used under French law by the French Originators to transfer such Receivables to the relevant assignee (FCT, banking institution, affiliate, etc.):

- Civil law assignment of Receivables under Article 1321 et seq. of the French Civil Code (*Code civil*), which assignment is valid between the parties (seller and purchaser) and enforceable against third parties as of the date of execution of the assignment agreement, and enforceable against the debtors subject to such debtors consenting to the assignment, receiving notification thereof or acknowledging it;
- Assignment by way of subrogation under Article 1346-1 et seq. of the French Civil Code – subrogation occurs and is valid when a creditor (the seller) receives payment for a debt from a third party and simultaneously expressly subrogates the third party's rights against the debtor/buyer by delivering a subrogation deed (*quittance subrogative*);
- Simplified "Dailly" assignment of Receivables under Articles L. 313-23 et seq. of the French Monetary and Financial Code (*Code monétaire et financier*). Identified or identifiable Receivables can be assigned to specific parties only (see below) by a signed and dated simplified assignment form (*acte de cession*) which is delivered to the assignee. The assignment occurs (and is valid between the parties and enforceable against third parties) as from the date indicated by the assignee on the assignment form. No separate document per Receivable is required. The Receivables

must arise from a "professional" relationship between the seller and the debtor, and the purchaser must be either an EU-passported or French-licensed credit institution, a financing company (*société de financement*) or certain French investment funds having in either case extended credit to the relevant seller. Note that French law imposes very strict formal requirements for the assignment form (*acte de cession*) and failure to comply with such requirements will result in no assignment taking place pursuant to Article L. 313-23 of the French Monetary and Financial Code. The assignment form (*acte de cession*) can be in an electronic format; and

- Assignment of Receivables to French securitization vehicles (such as FCTs) under Article L. 214-169 et seq. of the French Monetary and Financial Code and notably under the form of an assignment by way of a simplified transfer deed (*acte de cession*) exchanged between the Originator and the FCT pursuant to Article L. 214-169-V-1° of the French Monetary and Financial Code.

To the extent any simplified transfer deed (*acte de cession*) is used for the purposes of Dailly or securitization assignments, transfer of Receivables made through this means becomes valid between the parties and enforceable against third parties as from the date indicated on the simplified transfer deed without any further formalities, irrespective of the law applicable to the Receivables, the law of the state of residence of the Obligors or the fact that a bankruptcy (whether under French or foreign law) has been initiated against the Originator after the transfer. In addition, the delivery of the simplified transfer deed entails the automatic and immediate transfer to the SPE of all related security and ancillary rights attached to the Receivables at the date of the assignment deed, without any further formalities. Thus, this approach can provide unique protections for the SPE and the Financing Parties, particularly when facing difficult choice-of-law questions.

RESTRICTIONS ON ASSIGNMENT

Former Article L. 442-6, II-(c) of the French Commercial Code (*Code de commerce*) provided that "clauses or contracts allowing a producer, trader, manufacturer or a person listed in the trade register to carry out the following actions are null and void: (…) (c) prohibit the co-contracting party from transferring the receivables held against it to a third party;" (the "Ban on Assignment Prohibition"). Pursuant to the terms of such provision, any outright ban on assignment was considered to be ineffective under French law.

In order to "reorganize, define, clarify and simplify" the existing French rules on commercial transparency and commercial prohibited practices, ordinance (*ordonnance*) No. 2019-359 was enacted on April 24, 2019 (the "Ordinance") and entered into force on April 26, 2019 (for new agreements entered into as at that date), with the exception of certain provisions whose effectiveness has been deferred later in time.

The Ordinance reduced the list mentioned in former Article L. 442-6 II of the French Commercial Code of prohibited provisions or contracts that are to be automatically void, which list included the Ban on Assignment Prohibition. New Article L. 442-3 of the French Commercial Code includes now only two prohibitions that provide for the possibility for one party to benefit: (i) retroactively from discounts, rebates or commercial cooperation agreements; and (ii) automatically from more favorable conditions granted to competing companies by the contracting partner.

At this stage, no detailed legal literature, legal comments or even case law or position from competition authorities (DGCCRF) discussing this reform and the impact of the deletion of

the Ban on Assignment Prohibition from the French Commercial Code is available. In the absence of any further French law reform reinstating the Ban on Assignment Prohibition, it will be for the competent French courts or DGCCRF to confirm the above considerations.

In that respect, given the uncertainties raised by this new legislation, it cannot be excluded that a competent French court or the DGCCRF will decide that a practice amounting to an outright ban on assignment can constitute an authorized practice. In the presence of an outright ban on assignment clause, the legal position of the assignor/assignee of receivables would therefore be less robust than under the previous regime and the assignor/assignee would therefore be exposed to a higher risk of challenge to the extent the assignor/assignee do not comply with such provisions.

TRUE SALE

In the French securitization practice, "true sale" has at least three different meanings:

1. Legally speaking, a sale is a "true sale" if:

- The sale to the SPE is unconditionally and immediately valid, final and enforceable against local and/or foreign third parties (including, where applicable, the Obligors), whether or not such third parties or the Originator's creditors are formally notified of the sale. In the context of a Dailly or a securitization assignment, such transfer of title is made by operation of law (see above);
- The transfer cannot be challenged by a court in the event that the Originator becomes insolvent (the "bankruptcy remote" test): in the context of an insolvency affecting the Originator, the transferred assets must be segregated from such the Originator and remain beyond the reach of its creditors, even in the event of bankruptcy or other receivership (see below); and
- The transfer of assets can be characterized as a sale rather than a secured loan.

2. From an accounting point of view, there will be a "true sale" if the conditions required to remove the assets from the Originator's balance sheet under the applicable generally accepted accounting principles (IFRS or US GAAP) are met.

3. For regulatory purposes, and most particularly in the case of the Originator which is a licensed financial institution, there will be a "true sale" if the relevant assets sold are removed from the Originator's balance sheet for banking and prudential purposes.

Where a French Originator is subject to a bankruptcy or insolvency proceeding (such as safeguard (*sauvegarde*), judicial reorganization (*redressement judiciaire*) or liquidation proceedings (*liquidation judiciaire*)), under French law, assignments of assets by the Originator which occurred between (i) the "payment stop date" (*date de cessation des paiements*) and (ii) the judgment opening the insolvency proceeding may be challenged by the appointed bankruptcy administrator. In most cases, the payment stop date coincides with the date of the opening judgment, but the insolvency court may back-date the payment stop date by up to 18 months prior to this date. The period between the payment stop date and the date of the opening judgment is called the "hardening period" (*période suspecte*).

Article L. 632-1 of the French Commercial Code enumerates the transactions which are void per se (*nullités de droit*) if they occurred during the hardening period. These include, notably, gratuitous transfers, transactions entered into unreasonably below market value, payments of debts not yet due, security/guarantee granted for previous debts; or transfers of assets into a French *fiducie*

(trust). In addition, payments of debts which are due or transactions for consideration which occur after the payment stop date may potentially be voided (*nullités relatives*) if the counterparty of the insolvent party was aware of the insolvency at the time of the transaction (Article L. 632-2 of the French Commercial Code).

However, to mitigate such claw-back issues for French securitization transactions, French securitization law (as codified in Articles L. 214-169 to L. 214-190 and Articles D. 214-216-1 to D. 214-240 of the French Monetary and Financial Code) provides for specific exemptions to applicable bankruptcy laws applying to securitizations and therefore offers a strong and legally effective protection to French securitization vehicles for the assignment of Receivables carried out in the context of a securitization involving such French securitization vehicles:

- Pursuant to Article L. 214-175-III of the French Monetary and Financial Code, French bankruptcy laws are not applicable to French securitization vehicles;
- Pursuant to Article L. 214-169-V-4° of the French Monetary and Financial Code, assignments of Receivables or the granting of a security interest or guarantee in favor of a French securitization vehicle remains effective notwithstanding: (i) a payment stop date of the Originator occurring at the time of such an acquisition, assignment or creation; or (ii) the subsequent opening of a French bankruptcy or insolvency proceeding or any equivalent foreign insolvency proceeding opened against the Originator following such an acquisition, assignment or creation of security interest or guarantee;
- Pursuant to Article L. 214-169-VI of the French Monetary and Financial Code, (i) to the extent Receivables sold to a French securitization vehicle relate to ongoing (leasing or other) agreements, the assignment of such receivables (or creation of security) to a French securitization vehicle remains effective notwithstanding a bankruptcy affecting the Originator; and (ii) the optional avoidance under Article L. 632-2 of the French Commercial Code does not apply to (a) payments made by a French securitization vehicle, or (b) deeds or acts for consideration made by or for the benefit of a French securitization vehicle, where these were made in the context of a securitization transaction under Article L. 214-168 et. seq. of the French Monetary and Financial Code.

Mexico

In the past years, Mexico has established a legal framework that adds greater clarity and certainty to domestic and international Receivables purchases and financings. In particular, reforms that took place in the year 2009[8], whereby the Sole Registry of Security Interests in Movable Assets (*Registro Único de Garantías Mobiliarias* or "RUG") was created, and in 2014[9], known as the "Financial Reform," whereby several laws and regulations of the entire financial sector were improved to grant and induce more financial transactions in Mexico. These changes have made selling and purchasing (including discount factoring) of Mexican Receivables a much more viable and attractive option and have, as a result, significantly increased investors' interest.

EFFECTIVENESS OF SALE BETWEEN THE ORIGINATOR AND THE SPE

Under Mexican law, each sale of Receivables in accordance with a Sale Agreement is effective following the acceptance of the offer of sale by the Originator and payment of the purchase price by the SPE.[10] Mexico will also recognize and uphold the choice of law chosen by the Originator and the SPE to govern the sale of Receivables. Thus, if a sale

of Receivables is effective as a "true sale" pursuant to the law that governs the relevant Sale Agreement, then Mexican courts will recognize such sale as a "true sale."[11]

EFFECTIVENESS OF SALE BETWEEN THE OBLIGORS AND THE SPE

As long as the Obligor has not been notified of the transfer, its payment obligation will be considered discharged if paid to the original creditor (i.e., to the Originator).[12] By contrast, once the Obligor has been notified of the transfer, its payment obligation will only be considered discharged if paid to the SPE. Thus, if after being notified of the transfer, the Obligor pays to the Originator, instead of paying to the SPE, then the Obligor would not be released from its payment obligation. Identification of the SPE in the notification is necessary to achieve the foregoing. Notice of assignment also cuts off the right of the Obligor to set-off payments owing by it on the Receivables against amounts payable to it by the Originator. In order to require the Obligor to pay directly to the SPE, it is customary to include payment instructions (usually irrevocable) providing details of the bank account where payment is expected to be deposited, which may be an Originator account, in the notification of assignment delivered to the relevant Obligor.

Pursuant to Mexican law, this notice may be made in one of the following ways: (i) delivery of the Receivable with a legend of the sale and an acknowledgement of receipt by the Obligor; (ii) communication by certified mail with an acknowledgement of receipt, including telegram, telex or fax, with a password, along with evidence of the receipt by the Obligor; (iii) notice to the Obligor made by a public broker or notary public (in this case, the written acknowledgement of receipt by the Obligor is not necessary); or (iv) through "data message" sent pursuant to the Mexican Commercial Code (*Código de Comercio*), which requires the prior designation by the receiver (i.e., the Obligor) of a "system" or "means" to receive data messages (e.g., the prior written designation of a certain email address by the Obligor to receive notifications of assignment via email, or pdf email, encrypted email, data room or electronic member website, etc.).[13]

It is not uncommon for the Obligor to be located outside of Mexico, in which case, the notification of assignment may be done by any of the aforementioned means or by courier with acknowledgment of receipt or by the means established in accordance with the provisions of the treaties or international agreements signed by Mexico.

Given the lack of precedent for electronic communications, the market standard has been for notice to be made through a public broker or notary in order to limit the potential for challenges that notice had not been properly provided. Nevertheless, as discussed below, electronic communications have started to become more popular where Receivables are purchased through the use of technology-managed platforms.

In cases where not all Receivables will be purchased by the SPE, the question arises if notification of the assignment of each purchased Receivable (or batch of purchased Receivables) must be provided to the Obligor or if a single initial notification may suffice. A conservative approach suggests that the Obligor should be notified of the sale on each sale date. Alternatives include monthly notices containing the batch of all Receivables purchased on a specific period of time, or a single initial notification of assignment stating that a legend will be added on each invoice that evidences a purchased Receivable so that the Obligor may know that such Receivable has been assigned to the SPE under the Sale Agreement.

When the parties to the Sale Agreement agree that the Originator will remain as servicer of

the Receivables vis-a-vis the Obligors, then the question arises if the notice of assignment discussed above is necessary.[14] A conservative approach suggests that the Obligor should be notified of the existence of the Sale Agreement and provided with payment instructions (usually mentioning that payments shall continue to be made as usual unless otherwise instructed). In this specific case, identification of the SPE in the notification would not be necessary. In these cases, where the Originator remains as servicer of the Receivables, the Originator will be deemed to hold the collection proceeds in trust (*depositario*) on behalf of the SPE. To mitigate any risks of diversion of the collection proceeds, it is highly advisable to implement an account control agreement over the account into which such proceeds are deposited.

The first option for an account control agreement under Mexican law is to create a Mexican trust (*contrato de fideicomiso*): the Originator enters into a trust agreement as settlor with a trustee institution (*fiduciario*). The trustee then opens the collection account and transfers periodically the proceeds from the collection pursuant to the trust's purpose set forth in the relevant trust agreement. The beneficiary of the trust (*fideicomisario*) is the SPE, who receives the collection proceeds after the trustee has paid any applicable costs and expenses.[15]

A second option is the use of an irrevocable mandate agreement whereby the Originator opens a bank account and acts as principal providing instructions to the bank who acts as attorney-in-fact, and the SPE acts as beneficiary.[16] Not all banks offer this service, known to some as "cuenta mandatada" (mandated account). In addition, it is common to perfect a pledge (*prenda sin transmisión de posesión*) over all of the Originator's rights related to the collection account in favor of the SPE or Financing Parties, in order for the SPE or the Financing Parties to have a registered security interest in case of a bankruptcy scenario (opposable vis-à-vis other creditors of the Originator). Such pledge would need to be formalized by a public broker or notary and filed with the RUG.[17]

EFFECTIVENESS OF SALE BETWEEN THIRD PARTIES AND THE SPE

In Mexico, the granting of a backup security interest is generally viewed as inconsistent and potentially harmful to the expressly stated intention of a sale. However, it is important to perform a filing under the RUG system (as described below) in order to ensure that the sale will be effective against third parties, particularly against creditors of the Originator when it becomes subject to an insolvency proceeding.[18]

The RUG is an online electronic central registry used throughout Mexico since 2010, to facilitate the registration of security interests over personal property. It uses a single national database under the custody of the Ministry of Economy (*Secretaría de Economía*) where all registrable security interests can be filed. In 2014, amendments to the RUG mandated that the assignment of rights, including Receivables (and factoring transactions) must also be recorded in the RUG in order for the sales to be effective against third-party creditors of the Originator.[19] Recording in the RUG serves as a notice to third parties that the sale took place and, accordingly, gives the SPE priority over (i) any future creditors of or purchasers from the Originator, and (ii) prior creditors that omitted filing with the RUG their security interest or assignment of rights.

Recordings in the RUG are fast, easy and economical. No fees are charged for the filing. However, public brokers and notaries will charge for the service of filing on behalf of the SPE, which is essential since foreign entities are not able to file directly in the RUG unless

such person first registers before the Ministry of Economy (*Secretaría de Economía*) in Mexico. As a result, it is customary in cross-border transactions that a Mexican public broker or notary performs the filing using its own electronic signature provided by the Ministry of Economy on behalf of the filing party.[20]

Similar to the considerations regarding a notification of the assignment of each purchased Receivable on each sale date mentioned above, RUG filings should be made for each sale on each sale date in order to protect the SPE from the Originator's creditors who could challenge a specific unregistered assignment of Receivables. Furthermore, when filing with the RUG, it is highly advisable to (i) perform a previous search for the Receivables that are intended to be purchased to confirm that they are free and clear of any security interests and that they have not been factored in favor of a third party, and (ii) request the public broker or notary to describe, in as much detail as possible, the purchased Receivables, including, for example, the relevant invoice numbers.

While frequent RUG filing requirements may seem cumbersome or impractical, it is worth re-iterating that these requirements are only required to protect the Financing Parties from claims of third- party creditors. While the filing protects Financing Parties from fraud or mistake risk similar to the UCC, it is not required in order to achieve a true sale of the Receivables under Mexican law. Thus, the parties may wish to structure the transaction such that RUG filings are made on a less-frequent basis, rather than daily, to balance the Financing Parties' risk of third-party claims with the administrative burden and expense on the Originator.

OTHER BANKRUPTCY ISSUES

Common legal opinion points regarding bankruptcy issues include that the transfer of Receivables to the SPE is, as a matter of Mexican law, properly characterized as a sale by way of assignment (*cession de derechos*), factoring (*factoraje*), or other transfer and, therefore, (i) such Receivable should not be considered as property of the Originator's bankruptcy estate (*masa concursal*), as defined in Article 4, paragraph V, of the Mexican Bankruptcy Law (*Ley de Concursos Mercantiles*, the "Mexican Bankruptcy Law"), and (ii) Article 43, paragraph VIII, of the Mexican Bankruptcy Law would not operate to stay payments by the Originator of collections made after the bankruptcy (*concurso mercantil*) declaration of the Originator with respect to the Receivables sold or assigned in accordance with the Sale Agreement; provided, that, for purposes of being enforceable before third parties, the sale or assignment of the Receivables is filed with the RUG; provided, further, that the following conditions are complied with: (y) the transfer of the Receivables does not constitute a per se fraudulent transaction, according to Articles 113 and 114 of the Mexican Bankruptcy Law, and (z) the transfer of the Receivables does not constitute a case of constructive fraud or cannot be presumed to be fraudulent according to Article 115 and 117 of the Mexican Bankruptcy Law.

RESTRICTIONS ON ASSIGNMENT

As a general rule, the Obligor's consent is not required for the sale, assignment or factoring of a Receivable in Mexico. However, if the contract with the Obligor includes a restriction on assignment, such restriction will be enforced in Mexico and the Obligor's consent will need to be obtained in order to assign its Receivables.

PRACTICAL APPLICATION OF CROSS-BORDER COMPLEXITIES

As illustrated above, the features of a cross-border trade receivables securitization may look different from a standard US structure. Both creativity and flexibility from the

Financing Parties and the Originator are essential to structuring a transaction that meets the objectives of all parties involved. This section focuses on a few US-style features mentioned above and the challenges parties face when attempting to incorporate these same features into a cross-border trade receivables securitization.

LOCATION AND OWNERSHIP OF THE SPE

In the United States, it is common for the SPE to be a wholly-owned subsidiary of the Originator. This provides significant flexibility with respect to the securitization documents, because capital contributions and true contributions of Receivables can be utilized. However, in cross-border securitizations, the SPE is usually an orphan SPE. This eliminates the possibility of contributing Receivables to the SPE, or providing capital contributions to the SPE for liquidity purposes. Furthermore, an orphan SPE may be wholly-owned by a management company, who will need to be involved in the review of the securitization documents, as well as the execution and delivery of the SPE's signature pages at the initial closing and for any maintenance such as amendments or waivers. The management company will also charge certain fees and expenses associated with managing and owning the SPE or a corporate services provider may need to be appointed. While orphan SPEs are typically not difficult to implement and structure, they do add a layer of complexity to cross-border securitizations that are not found in their domestic counterparts.

CASH MANAGEMENT AND SERVICING

As noted above, a typical US structure will allow the Originators to commingle collections on the Receivables for a specific period of time (typically intra-month), with settlement occurring on a monthly basis. While the purchase price for Receivables is due and payable on a daily basis, and Receivables are in fact sold on a daily basis, it is customary for settlement of the purchase price to actually occur periodically (such as once a month) for administrative ease. Furthermore, the Servicer will continue to service the Receivables and manage the relationship with its Obligors, including collection activities.

In a cross-border transaction, however, you may not be able to achieve a true sale in an applicable jurisdiction unless the collections on the Receivables are deposited into the SPE's account. This adds a layer of complexity, as new accounts will need to be established, and the Obligors will need to be notified of the change in their payment instructions. This often can be included in the Obligor's invoice; however, that is not always an option for every jurisdiction. The Financing Parties may also want to consider whether account control agreements should be in place over the SPE's accounts.

While it may be feasible for settlement to occur on a monthly basis, in jurisdictions such as Germany, the payment of the purchase price cannot be delayed and ideally should be made on a daily basis at least on the same day as the Receivables transfer. These daily cash flows could create an administrative and operational burden for the Originator or, at a minimum, a restructure of the Originator's operations.

Perhaps the most surprising requirement in at least one jurisdiction is the unilateral replacement of the servicer of the Receivables (typically the Originator or its parent company) without cause. For the Originator, this may be a "deal-breaker" as it would effectively result in the Financing Parties having the ability to take control of the Originator's relationship with its Obligors, even when the servicer has not defaulted and no events of default or other trigger events under the securitization documents have occurred. Of course, it is in the Financing

Parties' best interest if the Originator continues to maintain its own relationships with its Obligors, but the Originator's concern with such a replacement requirement nonetheless is understandable. If a jurisdiction with this requirement represents a small portion of the securitization portfolio as a whole, or if such requirement is limited only to that jurisdiction, oftentimes the Originator will determine this requirement does not prevent the inclusion of the jurisdiction or the related Receivables in the securitization.

OBLIGOR NOTICE AND CONSENT

Obligor notice and consent is perhaps one of the most sensitive and negotiated points in a trade receivables transaction. Understandably, the Originator does not want to disturb or change its sometimes long-standing relationship with its Obligors. Sending notices or obtaining consents from Obligors regarding the transfer of their Receivables to the SPE could confuse the Obligors or tarnish the Originator's relationship with them. From a Financing Party's perspective, provided that the Originator has not defaulted and the Originator is complying with the securitization documents, it is in the Financing Party's best interest for the Originator to maintain these relationships. As mentioned, in the United States the Financing Parties are usually only able to notify Obligors of the assignment of Receivables after certain trigger events, usually events of default or servicer defaults. While Obligor notice would cut off the Obligor's right to discharge its debt to the Originator as well as other defenses and set-off rights, the Financing Parties are typically comfortable taking this risk until such trigger events occur, at which time notices may be sent.

However, a local jurisdiction may require notice to or consent from Obligors not only for the SPE to exercise rights or remedies vis-a-vis the Obligor, but in order to achieve a true sale. Furthermore, notice may be required only once to the Obligor, but in some cases, it must be provided for each sale of each Receivable, which could easily annoy the Obligor and strain its relationship with the Originator. For a Financing Party in a cross-border trade receivables transaction, a legal true sale is an essential component of the structure. If the Originator is uncomfortable providing notice to its Obligors, which is particularly understandable if such notices are happening frequently, the applicable jurisdiction may not be tenable for the cross-border transaction.

Furthermore, as stressed throughout this article, outside the United States, consent of the Obligor is typically required to the extent there are restrictions on assignment in the underlying contracts. While there are some structural alternatives (such as trusts in England or Australia) or exceptions (such as in Germany), it is important to note that in many jurisdictions, the only solution is obtaining the Obligor's consent. If the Originator does not agree to this approach, those Receivables may need to be excluded from the securitization. Fortunately, this is achievable through minor changes to the securitization documents. However, the Originator and the Financing Parties should consider the aggregate amount of Obligors and Receivables that will be excluded, to determine whether their economic and commercial goals in entering into the transaction are still achieved in light of such exclusions.

OPERATION OF TRANSFERS

In the United States, it is typical to sell all Receivables of the Originator automatically upon origination, other than specific Receivables designated in the securitization documents as excluded Receivables (usually relating to certain Obligors as noted above). This is an important feature to ensure that the Financing Parties continue having replenishing collateral as collections on prior Receivables are held and commingled by the Originator

pending settlement. However, in other jurisdictions, automatic sales are unusual, and it is more common to sell Receivables periodically, which are identified on a particular list (akin to a factoring transaction in the United States). Providing such a list can result in additional administrative or operational burden for the Originator. For example, even in Germany, when a global assignment is used, it is still customary to provide a list of Obligors, which needs to be updated each time a new Obligor is added or removed from the list. Furthermore, certain jurisdictions may require additional details for the "identification" of Receivables than in the United States, such as invoice numbers, descriptions of the underlying contract, Obligor addresses and other detailed information. Other jurisdictions (such as Mexico) may require the filing of frequent registrations or the execution and delivery of assignment agreements for each sale of Receivables. To the extent it is not possible for the Originator to perform these daily administrative tasks, the parties may want to consider a structure that involves less frequent transfers of Receivables (such as weekly or monthly), particularly for the relevant jurisdiction.

While a simple transfer of Receivables between the Originator and the SPE is ideal, in jurisdictions such as France and other bank monopoly jurisdictions, it is unfortunately not possible and a new structure needs to be set up for that jurisdiction to ensure the Receivables can be included in the securitization. When including these jurisdictions, structural changes may need to be made not only in the Sale Agreement, but also to the securitization documents generally, which may not contemplate an "intermediate sale" or a subrogation structure. If the Receivables in that jurisdiction represent a meaningful portion of the Receivables portfolio as a whole, such structural changes are usually worth the time and expense and will provide the securitization program with additional flexibility for the inclusion of future jurisdictions.

LEGAL OPINIONS AND MEMORANDA

A discussion of cross-border trade receivables securitizations would be incomplete without mention of legal opinions, which provide both the Originator and the Financing Parties with legal comfort regarding enforceability, true sale, choice of law and tax matters (among others). For the law governing the applicable Sale Agreement, it is customary to receive a true sale and enforceability opinion from counsel in that jurisdiction, particularly if the Originator wishes to receive off-balance sheet treatment. For each Originator jurisdiction, customary corporate opinions are typically provided, as well as tax and no-conflict opinions. An opinion from the SPE's jurisdiction is likewise customary. While these opinion practices are typical, each transaction should be discussed and reviewed carefully among the parties to determine the appropriate opinion and memoranda coverage for the relevant transaction.

When looking at issues such as enforcement against Obligors and eliminating set-off rights and defenses, a minority approach is to obtain opinions from each Obligor jurisdiction, as well as the jurisdiction that governs the law of the applicable Receivable. This request may be limited to all such jurisdictions, or only those that make up a sizeable portion of the pool of Receivables. A more common approach is to obtain a legal memorandum from local counsel detailing the practical steps that need to be taken in such jurisdiction to remove such defenses and rights (such as providing notice to the Obligors). A legal memo may also briefly discuss tax questions and enforcement mechanics for bringing foreign judgments into a local court in the relevant jurisdiction. Benefits of legal memoranda, particularly in Obligor jurisdictions, include (i)

memoranda are usually less expensive than legal opinions and (ii) memoranda will address factual matters that may not be included in a legal opinion, such as the detailed process of enforcement and bringing judgments into local legal systems.

It is worth noting that not all jurisdictions have years of case law or history surrounding what constitutes a "true sale". Indeed, in many jurisdictions, the concept does not even exist. Therefore, it is important to obtain and review legal opinions and memos early in the process of structuring the transaction, to obtain a full understanding of the legal framework in the applicable jurisdiction. In some jurisdictions, there is such limited case law, that the legal opinion may simply assume "economic risk has been transferred" (in other words, the legal standard for a true sale). This is not particularly helpful from a legal perspective, as the opinion has been essentially assumed; however, the parties may be comfortable with such coverage to the extent the applicable local law Receivables do not represent a large portion of the Receivables portfolio, or if there are certain trigger events incorporated into the securitization documents that would result in the removal of such Receivables from the securitization. Legal opinion custom in local jurisdictions varies greatly, and what is typical or customary in the United States is often not the case in other jurisdictions. Working with local counsel and deal counsel together to reach a common ground, with respect to legal opinions or otherwise, is imperative for both the Financing Parties and the Originator in a cross-border trade receivables securitization.

CONCLUSION

Undoubtedly, a multi-jurisdictional trade receivables transaction involves detailed consideration of legal and tax issues in a range of countries. Selecting a law firm that is very familiar with analyzing such issues and has helped implement and structure transactions that include jurisdictions across the globe is a valuable initial step for navigating through complex multi-jurisdictional legal questions and finding the best solutions for the particular transaction.

Endnotes

[1] Mayer Brown has a premier trade receivables securitization practice with extensive experience around the world in both well-established and emerging markets. For more information regarding Mayer Brown's trade receivables and supply chain finance practice, please see https://www.mayerbrown.com/en/capabilities/practices/banking--finance/receivables-supply-chain-finance?tab=overview.

[2] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[3] Proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims.

[4] For further information, please see our Legal Update, "The EU Securitisation Regulation – Where are we now?" available at https://www.mayerbrown.com/en/perspectives-events/publications/2019/06/the-eu-securitisation-regulation-where-are-we-now.

[5] For further information, please see our Legal Update, "Onshoring the EU Securitisation Regulation – How will it apply in the UK in the event of a no-deal Brexit," available at https://www.mayerbrown.com/en/perspectives-events/publications/2019/08/onshoring-the-eu-securitisation-regulation-how-will-it-apply-in-the-uk-in-the-event-of-a-no-deal-brexit.

[6] Section 136 Law of Property Act 1925.

[7] It is worth mentioning that all these limitations (other than (a) and (e)) are applicable to US Receivables sales prior to Obligor notice as well.

[8] Published in the Federal Official Gazette ("DOF") on August 27, 2009.

[9] Published in the DOF on January 10, 2014.

[10] Article 2029 of the Federal Civil Code ("CCF"), Article 389 of the Commercial Code (the "Commercial Code"), and Article 425 of the General Law of Credit Securities and Operations ("LGTOC").

[11] Article 13, paragraph I, of the CCF provides that legal situations validly created in the states of the Republic or in a foreign State, in accordance with their law, must be recognized.

[12] Article 428 of the LGTOC.

[13] Article 427 of the LGTOC.

[14] Article 427, first paragraph, of the LGTOC.

[15] Articles 381 to 399 of the LGTOC.

[16] Article 273 of the Commercial Code.

[17] Articles 346 to 380 of the LGTOC.

[18] Article 426 of the LGTOC.

[19] Articles 32 bis 1 to 32 bis 9 of the Commercial Code.

[20] Articles 18 to 32 bis of the Commercial Code.

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