International Comparative Legal Guides

Securitisation 2020

A practical cross-border insight to securitisation work

13th Edition

Featuring contributions from:

Allen & Overy LLP
Brodies LLP
Cuatrecasas
Freshfields Bruckhaus Deringer LLP
GSK Stockmann
King & Wood Mallesons
Loyens & Loeff Luxembourg S.à r.l.
Macfarlanes LLP
Maples Group
Mayer Brown
McMillan LLP
Nishimura & Asahi
Oon & Bazul LLP
Orrick, Herrington & Sutcliffe (Europe) LLP
Roschier Advokatbyrå AB
Schulte Roth & Zabel LLP
Shearman & Sterling LLP
Sidley Austin LLP
VdA
Walder Wyss Ltd.
Waselius & Wist

afme/ Finance for Europe
ICLG.com

International Comparative Legal Guides

Securitisation 2020

13th Edition

Contributing Editor:

Rupert Wall
Sidley Austin LLP

ISBN 978-1-83918-046-0
ISSN 1745-7661

Published by

glg global legal group

59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
info@glgroup.co.uk
www.iclg.com

Group Publisher
Rory Smith

Editor
Jane Simmons

Senior Editor
Sam Friend

Head of Production
Suzie Levy

Chief Media Officer
Fraser Allan

CEO
Jason Byles

Printed by
Stephens & George Print Group

Cover image
www.istockphoto.com

Strategic Partners

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Cross-Border Trade Receivables Securitisation – Opportunity Awaits

Mayer Brown

Merryn Craske, François-Régis Gonon, Carol Hitselberger, Andreas Lange, Ariel Ramos, Linda E. Boss, Jeffrey R. Favitta, Cory R. Miggins & Jessica Solis

Trade receivables securitisation 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. While it may not be as simple or straightforward as a trade receivables securitisation in a single jurisdiction, the opportunity and potential for growth for a cross-border trade receivables securitisation can often outweigh the time and cost of structuring it. While the inclusion of each jurisdiction will mean that the parties will have to take additional considerations into account, by partnering with experienced deal counsel and local counsel, the parties can be flexible and creative in order to achieve their operational and financial goals.

This article presents an overview of key considerations when structuring a cross-border trade receivables securitisation, including insight from some of our leading partners in England, France, Germany, Mexico and the United States.

Structural Considerations

Choice of law

A typical trade receivables securitisation involves the sale by an originator or originators (each, an "**Originator**") of trade receivables (the "**Receivables**") owed by certain account debtors (each, an "**Obligor**") to a newly-formed, insolvency-remote, special purpose entity (the "**SPV**"), with the purchase of the Receivables by the SPV being financed by one or more banks or conduits (the "**Financing Parties**").

A cross-border trade receivables transaction will require an in-depth review of all relevant jurisdictions, including (a) the location of the SPV, (b) the location of the Originators and the governing law of the sale agreement between each Originator and the SPV (each, a "**Sale Agreement**"), (c) the location of the Obligors, (d) the governing law of the Receivables, and (e) the location of any bank accounts, particularly where a security interest will be granted in favour of the SPV or the Financing Parties in those bank accounts. Each additional jurisdiction will raise local law and choice of law questions, which will need to be analysed and considered in light of the objectives which the Originators and the Financing Parties wish to achieve in structuring the securitisation.

Key questions include:

- which law will apply to determine:
  - (a) whether there has been a "true sale" of the Receivables between each Originator and the SPV; and
  - (b) whether a Receivable is permitted to be assigned by the applicable Originator to the SPV in the event of a restriction on, or prohibition of, assignment in the underlying contract between such Originator and the Obligor (the "**Underlying Contract**");
- whether payment by an Obligor to the applicable Originator (rather than the SPV) will discharge such Obligor's payment obligation;
- whether the Financing Parties or the SPV can enforce against and sue an Obligor directly for its failure to pay the applicable Receivable; and
- whether a third-party creditor or insolvency trustee may assert its interest in or rights over the applicable Receivables.

Determining the answers to these questions and the impact those answers have on the structure and implementation of a trade receivables securitisation are critical both for protecting the Financing Parties' rights in the Receivables and for achieving the Originators' balance sheet and liquidity management objectives. Once all applicable local laws have been determined, further analysis should be performed in each relevant jurisdiction, with the assistance of local counsel, to ensure that all jurisdiction-specific legal formalities are satisfied.

The Rome I Regulation

In securitisation transactions with Originators and/or Obligors located in European Union ("**EU**") countries (other than Denmark) and/or the United Kingdom (the "**UK**"), the Rome I Regulation (Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations) ("**Rome I**") will be relevant. Rome I provides that the relationship between the assignor (i.e., the applicable Originator) and the assignee (i.e., the SPV) 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 SPV and the Financing Parties, as assignees, 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 applicable Receivable (i.e., the law of the Underlying Contract).

In addition, there is a draft regulation (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) aimed at addressing the effectiveness of the transfer of Receivables as against third parties. This regulation is yet to be finalised but the effect of it could make this legal analysis more complicated. This is because, while the parties are generally free under Rome I 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).

The Securitisation Regulation

In transactions where the relevant entities are located in the EU or the UK, it will also be important to consider the requirements of Regulation (EU) 2017/2402 (the "**Securitisation Regulation**") and the related technical standards and guidance. The Securitisation Regulation sets out certain obligations with respect to originators, sponsors, securitisation special purpose entities and institutional investors (each as defined therein) with respect to securitisations (as defined therein) entered into from 1 January 2019 or which are no longer grandfathered. These obligations include the following:

- due diligence and ongoing monitoring obligations for institutional investors;
- risk retention requirements; and
- transparency requirements including the requirement to provide certain information using specified reporting templates.

The Securitisation Regulation also includes a set of requirements which will need to be met in order for a securitisation to be considered "simple, transparent and standardised" or "**STS**", which among other things, and provided any other relevant regulatory requirements are met, will allow the Financing Parties to benefit from favourable regulatory capital treatment.

During the Brexit "transition period" (which is expected to end on 31 December 2020, unless it is extended), UK entities will be treated as if they are located in an EU Member State and will therefore be subject to the applicable requirements under the Securitisation Regulation. Following the end of that period, UK entities are expected to be subject to a parallel regime under which a modified version of the Securitisation Regulation will apply as adopted in the UK.

SPV location

In the case of multi-jurisdictional securitisations that include EU and/or UK Originators, the SPV is typically located in a European jurisdiction, such as Ireland, Luxembourg or the Netherlands. The choice of jurisdiction for the SPV 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 SPV and the location of the parties and the Receivables. For securitisations with EU and/or UK Originators and no US Originators, the SPV is usually an orphan company, in order to enhance its insolvency remoteness and as a matter of market practice. For transactions with US Originators only, it is typical to establish the SPV as a Delaware limited liability company that is a wholly-owned subsidiary of one or more of the Originators. This enables the overcollateralisation in the transaction to be achieved through equity capital rather than a subordinated loan, which is preferable for US bankruptcy remoteness principles. Also, the tax issues that apply to cross-border distributions are generally not an issue for distributions by US SPVs to US parent entities. Regardless of where the SPV is organised, its liabilities are typically limited by way of certain provisions in its organisational documents and/or under the securitisation documents, such as restrictions on its activities to those required under or ancillary to the securitisation and requirements to keep separate books, records and accounts and to have 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 SPV may be deemed to be insolvency remote by virtue of compliance with a specific statutory securitisation regime.

Diligence in relation to the Receivables and restrictions on assignment

It is common for the Financing Parties or the Originator (in consultation with the relevant legal counsel) to review and perform diligence with respect to the Underlying Contracts. One important purpose of such diligence is to determine the extent to which there are any restrictions or prohibitions on assignment in the Underlying Contracts.

In our experience, most jurisdictions outside the US will enforce a restriction or prohibition on assignment which is included in the Underlying Contract. If there is such a restriction with respect to certain Receivables and the Originator desires to sell those Receivables to the SPV, 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). The Originators and the Financing Parties will need to determine whether certain Obligors should be excluded from the securitisation and consider whether their economic and commercial goals in entering into the transaction will still be achieved in the event of such exclusions, taking into account the aggregate amount of Obligors and Receivables that will be excluded.

In some cases, it may be possible to benefit from some structural alternatives (such as trusts in England, depending on the wording of the Underlying Contract and whether this is acceptable to the parties) or exceptions such as in Germany under 354a(1) of the German Commercial Code (*Handelsgesetzbuch*) that, as long as the requirements are met in order for such exception to apply, provides for the assignability of commercial receivables even if the parties to the underlying contract have agreed on a ban on assignment, but still leaving the Obligor certain defences or the possibility to pay the assignor with discharging effect. In Germany, assignability as an eligibility criterion usually includes assignability by way of 354a(1) of the German Commercial Code (*Handelsgesetzbuch*). However, banks are closely considering the potentially increased dilution risk because of the above-mentioned defences and the payment choice of the Obligor.

In transactions that are done in the US, the parties typically ignore any contractual restrictions on assignment in the Underlying Contracts. That is because the Uniform Commercial Code (the "**UCC**") renders such provisions unenforceable generally. However, as per Section 9-406(a) of the UCC, obligors may continue to discharge their Receivables by payment to the assignor until notified of the assignment. Obligors also will enjoy greater offset rights as to their assigned Receivables until such notice of assignment is received. Consequently, Financing Parties normally will require notice of assignment following certain performance triggers in the transaction.

In France, the French commercial code clearly stated that any outright ban on assignment was considered to be ineffective under French law. However, a recent reform in relation to commercial transparency (enacted in April 2019) repealed that provision. At this stage, given the uncertainties raised by this new legislation, in the presence of an outright ban on assignment clause in an Underlying Contract, the legal position of the Originator would therefore be less robust than under the previous regime and consequently the Financing Parties would be exposed to a higher risk of challenge to the extent the relevant parties to the Underlying Contract do not comply with such ban on assignment provisions of the Underlying Contract. Note that a further reform of the French commercial code is in the process of being prepared in order to clarify the position, revert back to the previous position and end the uncertainties raised by this new legislation.

True sale

One of the key aspects of structuring a securitisation transaction is considering whether the transfer of the Receivables from the Originator to the SPV will be construed as a "true sale", with the Receivables no longer considered to be part of the assets of the Originator, including during any insolvency proceedings of the Originator, or whether it could be recharacterised as a secured loan. Achieving a legal true sale is an essential component of the structure for the Financing Parties in a cross-border trade receivables transaction, and this will require careful review and discussion with the relevant local counsel.

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 discuss the true sale analysis and obtain and review legal opinions and memoranda 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 securitisation documents that would result in the removal of such Receivables from the securitisation. Legal opinion custom in local jurisdictions varies greatly, and what is typical or customary in one jurisdiction is often not the case in other jurisdictions. Working with local counsel and deal counsel together to reach a common ground is imperative for both the Financing Parties and the Originators in a cross-border trade receivables securitisation.

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, such as 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, which may include searches and a requirement for solvency certificates from the Originator.

It is worth keeping 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 transaction counsel and local counsel. It may not be practical to include some jurisdictions depending on the Originators' commercial or operational requirements. For example, in order to achieve a true sale certain jurisdictions require (a) notice to Obligors of the assignment of their Receivables, (b) the execution of daily assignment or transfer agreements, (c) the deposit by the Obligor of all collections into a bank account owned by the SPV or (d) the ability to replace the servicer of the Receivables without cause (including prior to a servicer default). While these formalities fall on the cumbersome end of the true sale spectrum, if they are required under local law, the Originator group may determine that it is not in its best interest to include that jurisdiction or those Receivables in the securitisation. Note, however, that these are not common requirements, and in our experience most jurisdictions are able to be included in cross-border trade receivable securitisations with some modifications.

In Germany, a crucial point for true sale is risk retention by the seller as insolvency courts in Germany tend to draw the line between true sale and secured lending (i.e. separation and segregation) rather than from a commercial perspective. In the past, most law firms took the view that risk retention lower than 9% of the purchase price was a clear indication of a true sale because in a secured lending transaction the insolvency administrator would already deduct 9% for its fees and secured lending with only 9% overcollateralisation would be rather unusual. Based on this view, the 9% rule was only critical for direct risk retention such as, for example, deferred purchase price payments. It was generally not seen as an issue if the Originator participated in the credit risk of the transaction through participation in subordinated tranches of the refinancing side of the SPV. More recently, law firms have taken the view in their legal opinions that based on a court decision of the Federal Tax Court it cannot be excluded that insolvency courts will follow more of an accounting-based approach which could then easily conflict with risk retention requirements.

In order to mitigate eventual clawback risks, the sale of receivables is usually structured as a cash transaction in Germany. For a cash transaction an adequate purchase price needs to be paid immediately to the Originator. If the sale qualifies as a cash transaction, clawback risk is generally very remote.

In the US, legal true sale is determined primarily based on the intent of the parties and whether the economic consequences of the transaction are consistent with the intent of the parties. There is a significant amount of case law in the US that informs this analysis and lawyers will generally study the details of the economic relationship of the transaction in order to provide a strong legal true sale opinion. Such details will normally include an evaluation of the extent to which the risks (in particular credit risks) and rewards (in particular excess spread) associated with the sold Receivables have truly been conveyed to the purchaser. In order to provide the Financing Parties with the level of credit protection they desire while also providing the Originators with a fair purchase price for their Receivables, a typical US trade receivables securitisation is structured as a two-step transaction in which the Originator transfers the Receivables to the SPV, which is a wholly-owned subsidiary of the Originator, and the SPV obtains financing for the purchase from the Financing Parties. Many such transactions have been structured to achieve derecognition under US Generally Accepted Accounting Principles.

In the case of French securitisations, there is a legal "true sale" if (a) the sale to the SPV 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, and (b) the transfer cannot be challenged by a court in the event that the Originator becomes insolvent (the "bankruptcy remoteness" test).

Where a French Originator is subject to a bankruptcy or insolvency proceeding (such as safeguard (*sauvegarde*), judicial reorganisation (*redressement judiciaire*) or liquidation proceedings (*liquidation judiciaire*)), under French law, assignments of assets by the Originator which occurred between (a) the "payment stop date" (*date de cessation des paiements*), and (b) 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 backdate 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).

Please note that to mitigate such clawback issues for French securitisation transactions, French securitisation 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 securitisations and therefore offers a strong and legally effective protection to French securitisation vehicles for assignments of Receivables carried out in the context of a securitisation involving such French securitisation vehicles.

Cash management and servicing

In many transactions, the Financing Parties 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 actually to 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, it may not be possible to achieve a true sale in a certain jurisdiction unless the collections on the Receivables are deposited into the SPV'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 but 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 SPV'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 immediately or at least on the same day as the transfer of the Receivables. 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, especially if purchase price payments are netted against collections of the Originator. As a matter of German tax law the servicing should generally remain with the Originator and thus no direct payments to the account of the SPV will be made (except in the case of redirection).

Whether settlement occurs on a daily or less frequent basis, however, given the characteristically short-term nature of most trade receivables, the Financing Parties normally will require transfers by the Originators to the SPV on a daily basis immediately upon origination until all obligations owing by the SPV to the Financing Parties have been paid in full. The daily transfer of the Receivables by the Originator to the SPV helps to offset the risk to the Financing Parties of losing all of their collateral as the Receivables turn over quickly.

As mentioned above, the local law true sale analysis may in some cases require the ability to replace the servicer of the Receivables (typically the Originator or its parent company) without cause. For the relevant 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 securitisation 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 securitisation portfolio as a whole, or if such requirement is limited only to that jurisdiction, the parties will need to determine whether the relevant Receivables should be included in the securitisation.

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 SPV could confuse the Obligors or tarnish the Originator's relationship with them. From the Financing Parties' perspective, provided that the Originator has not defaulted and the Originator is complying with the securitisation documents, it is in the Financing Parties' best interest for the Originator to maintain these relationships. In many cases, the Financing Parties are 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 defences 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, some jurisdictions may require notice to or consent from Obligors not only for the SPV to exercise rights or remedies *vis-à-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 the sale of each Receivable, which could easily annoy the Obligor and strain its relationship with the Originator. 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 feasible for the cross-border transaction.

Certain formalities may be required for the notice. For example, in Mexico, although notice is not required to achieve a true sale, the effect of the notice is to cut off the Obligor's right to discharge its debt to the Originator as well as other defences and set-off rights. Depending on the type of transfer agreement, notice may be made in one of the following ways: (a) notice to the Obligor made by a public broker or notary public (in this case, the written acknowledgment of receipt by the Obligor is not necessary); or (b) two witnesses. Further, pursuant to Mexican law, factoring agreements (*contrato de factoraje*) allow for notice to be made in the following additional ways: (a) delivery of the Receivable with a legend of the sale and an acknowledgment of receipt by the Obligor; (b) communication by certified mail with an acknowledgment of receipt, including telegram, telex or fax, with a password, along with evidence of the receipt by the Obligor; or (c) 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.). 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, electronic communications have started to become more popular where Receivables are purchased through the use of technology-managed platforms.

It is common 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, by courier, with an acknowledgment of receipt or by using any methods established in accordance with the provisions of treaties or international agreements signed by Mexico which relate to the Obligor's jurisdiction.

However, where the parties to the Sale Agreement agree that the Originator will remain as servicer of the Receivables *vis-à-vis* the Obligors, then the question arises whether the notice of assignment discussed above is necessary. A conservative approach suggests that the Obligor should be notified of the existence of the Sale Agreement and provided with payment instructions (which usually state that payments shall continue to be made as usual unless otherwise instructed). In this case, identification of the SPV in the notification would not be necessary. Where the Originator remains as servicer of the Receivables, it will be deemed to hold the collections from the Receivables in trust (*depositario*) on behalf of the SPV. To mitigate the risk that collections could be diverted, 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*). 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 SPV acts as beneficiary. In addition, it is common to obtain and perfect a pledge (*prenda sin transmisión de posesión*) in favour of the SPV or Financing Parties over all of the Originator's rights related to the collection account, in order for the SPV or the Financing Parties to have a registered security interest in the event of a bankruptcy scenario (which would be enforceable *vis-à-vis* other creditors of the Originator). Such pledge would need to be formalised by a public broker or notary and filed with the RUG.

As discussed above, in many jurisdictions the consent of the Obligor may also be required to the extent that there are restrictions or prohibitions on assignment in the Underlying Contracts.

Operation of transfers

For cross-border trade receivables securitisations with multiple jurisdictions, English law is often used as the governing law for the 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). However, in some cases it will be preferable to use the law of the Originator's jurisdiction as the governing law of the Sale Agreement with respect to the transfer of that Originator's Receivables.

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. Given that, in the majority of cases, the Obligors are not notified of the sale of the Receivables at the outset of the securitisation, 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 SPV 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 SPV and the Financing Parties. However, it is important to note that equitable assignments will still be capable of being a true sale under English law.

In some jurisdictions/transactions, including the US, it is typical to sell all Receivables of the Originator automatically upon origination, other than specific Receivables designated in the securitisation documents as excluded Receivables (which usually relate to certain Obligors). 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, with such Receivables being specified in a list in order to identify which Receivables are being sold. Providing such a list can mean an additional administrative or operational burden for the Originator. For example, even in Germany, when a global assignment is used, the assignment needs to meet the criteria of determining exactly which claims are being assigned and should also ensure the immediate and adequate payment of purchase price, which is why some transactions provide for a list of Obligors, to be updated from time to time (each time a new Obligor is added or removed from the list), to ensure a certain process of determining assigned receivables and corresponding purchase prices. If the purchase price is not determined on a daily basis but netted against collections, the transaction must provide for a mechanism to determine which receivables are being assigned in which order against available collections (e.g., by date). Furthermore, certain jurisdictions may require specific details for the identification of the Receivables, such as invoice numbers, descriptions of the Underlying Contract, Obligor addresses and other 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) for the relevant jurisdiction. Alternatively, the Financing Parties may require daily transfers nonetheless with the additional steps necessary to perfect such transfers occurring on a less frequent basis. In such case, the Financing Parties may take some additional risk that the transfers are not perfected prior to completion of all the requisite steps but may be in a better position by being able to control those additional perfection steps in the event of enforcement against the Originators.

While a simple transfer of Receivables between the Originator and the SPV is ideal, in some jurisdictions a new structure needs to be set up for that jurisdiction to ensure the Receivables can be included in the securitisation. When including these jurisdictions, structural changes may need to be made not only in the Sale Agreement, but also to the securitisation 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 securitisation programme with additional flexibility for the inclusion of future jurisdictions.

For example, in France, there are banking monopoly rules which, in principle, disallow the performance of credit transactions (i.e., lending or ongoing purchases of French unmatured Receivables) in France by anyone other than a French-licensed or EU-passported financial institution, or any French investment fund specifically authorised to lend.

For cross-border securitisation transactions involving French Originators, this implies that the SPV will not be authorised to purchase Receivables directly from such French Originators. Depending on the terms and conditions of the envisaged securitisation, the French Originators will only be able to sell their Receivables either: (a) to a French securitisation vehicle (such as a *fonds commun de titrisation* or "**FCT**"), which will then issue units or notes to be subscribed by the SPV; (b) 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 SPV; or (c) 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 SPV). Note that, for each of the sale options mentioned above, there are sale mechanics available under French law which provide for strong protections in terms of legal true sale and enforceability.

Filings and registrations

In some jurisdictions it may be necessary to make a filing or registration with respect to the sale. For example, in the US, the UCC requires the filing of a financing statement to provide notice of a sale of accounts receivable. That is because 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. 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, the 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 securitisation transactions in the United States because US case law regarding true sale tends to hinge on commercial substance over form.

In Mexico, the granting of a back-up security interest is generally viewed as inconsistent and potentially harmful to the expressly stated intention of a sale. However, in order to ensure that the sale will be effective against third parties, particularly against creditors of the Originator if it becomes subject to an insolvency proceeding, a filing under the Sole Registry of Security Interests in Movable Assets (*Registro Único de Garantías Mobiliarias* or "**RUG**") is required. Recording in the RUG serves as a notice to third parties that the sale took place and, accordingly, gives the SPV priority over (a) any future creditors of or purchasers from the Originator, and (b) prior creditors that have not filed their security interest or assignment of rights with the RUG. RUG filings should be made for each sale on each sale date in order to protect the SPV from the Originator's creditors who could challenge a specific unregistered assignment of Receivables. 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, in order to balance the Financing Parties' risk of third-party claims against the administrative burden on and expense for the Originator. Furthermore, when filing with the RUG, it is highly advisable to (a) 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 transferred in favour of a third party, and (b) request the public broker or notary to describe, in as much detail as possible, the purchased Receivables, including, for example, the relevant invoice numbers.

Legal opinions

A discussion of cross-border trade receivables securitisations would be incomplete without mentioning legal opinions, which provide both the Financing Parties and the Originator with legal comfort regarding enforceability, true sale, choice of law and tax matters (among other things). 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 no conflict opinions and tax opinions. An opinion from the SPV's jurisdiction is likewise customary. Opinions will also be required in relation to security. While these opinion practices are typical, each transaction should be discussed and reviewed carefully among the parties to determine the appropriate opinion coverage for the relevant transaction.

When looking at issues such as enforcement against Obligors and set-off rights and defences, 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 defences and rights (such as providing notice to the Obligors). A legal memorandum 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 the following: (a) memoranda are usually less expensive than legal opinions; and (b) 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.

Conclusion

A multi-jurisdictional trade receivables transaction will involve a detailed consideration of legal and tax issues in a range of countries. Selecting a law firm that is very familiar with analysing 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.

Merryn Craske is a partner in Mayer Brown's London office, focusing on securitisation and structured finance transactions. She has extensive experience of advising banks, originators and others on securitisation and structured finance transactions in a range of asset classes including trade receivables, dealer floorplan, auto loans and leases, residential mortgages, commercial mortgages, consumer loans and insurance premium loans. She regularly assists clients with structuring and documenting multi-jurisdictional securitisations, working closely with local counsel to provide solution-focused advice with respect to transactions in the United Kingdom and across Europe, the United States, Canada, Asia and elsewhere. She frequently advises on the Securitisation Regulation.

Mayer Brown International LLP
201 Bishopsgate
London EC2M 3AF
United Kingdom

Tel: +44 20 3130 3029
Email: mcraske@mayerbrown.com
URL: www.mayerbrown.com

François-Régis Gonon is admitted to the Paris Bar and is a partner in the Banking & Finance practice of the Paris office. His experience includes structured finance, securitisation, acquisition finance, general banking transactions and banking & finance regulatory matters. François-Régis has recently been involved in the structuring or restructuring of several pan-European or French securitisation or factoring programmes, asset-based lending transactions, either representing sponsors, arrangers or originators. He has also advised financial institutions and sponsors on several other structured or leveraged finance or fund finance matters involving a wide variety of assets and industries.

Mayer Brown
10 avenue Hoche
Paris 75008
France

Tel: +33 1 53 53 43 43
Email: fgonon@mayerbrown.com
URL: www.mayerbrown.com

Carol Hitselberger is co-leader of Mayer Brown's Banking & Finance practice, and focuses her practice in the structured finance area. She spends significant time on accounting and regulatory developments that impact the structured finance industry. Carol is a member of the Structured Finance Association, the structured finance industry's leading trade organisation, and in 2019 was appointed to the Structured Finance Association's Executive Committee. In addition, she is a Committee Chair of the Association's Significant Risk Transfer committee. Carol often works with investors and issuers in structured finance products of most types, including trade receivables, credit card receivables, consumer loans, auto loans, aircraft, leases, franchise portfolios, government contracts, trademark licences, and various other financial assets.

Mayer Brown LLP
214 North Tryon Street, Suite 3800
Charlotte, NC 28202
USA

Tel: +1 704 444 3522
Email: chitselberger@mayerbrown.com
URL: www.mayerbrown.com

Andreas Lange is a partner in the Frankfurt office of Mayer Brown's Banking & Finance practice. He focuses on securitisation, regulatory banking law, derivatives and debt financing. Andreas has done securitisations (with a focus on consumer securitisation) since 2004. Since 2007 he has been involved in a number of regulatory projects in connection with bad banks, derivative regulation and funds law. He also gained substantial experience on CRR questions and restructuring. In 2006, he was seconded to the Chicago office and worked on structured products.

Mayer Brown LLP
Friedrich-Ebert-Anlage 35-37
60327 Frankfurt am Main
Germany

Tel: +49 69 7941 1941
Email: alange@mayerbrown.com
URL: www.mayerbrown.com

Ariel Ramos is a partner in Mayer Brown's Oil & Gas and Infrastructure Investment groups and Banking & Finance practice and is based in the firm's Mexico City office. Ariel primarily focuses on transactions related to power, oil and gas, finance, energy-related infrastructure, EPC, and Mexican energy reform, including Round One and procurement matters.

Mayer Brown Mexico, S.C.
Goldsmith 53, Piso 3
Pollanco III Sección
Miguel Hidalgo
Mexico City 11560
Mexico

Tel: +52 55 9171 1733
Email: aramos@mayerbrown.com
URL: www.mayerbrown.com

Linda E. Boss is a Banking & Finance associate in Mayer Brown's Charlotte office, representing banks, issuers, borrowers and other entities in structured finance transactions, warehouse securitisation facilities, purchases and sales of financial assets, asset-backed commercial paper conduit programs and related matters. Linda regularly represents clients in connection with securitisations and other structured financings involving trade receivables, commercial loans, student loans and a variety of other financial assets, including those with cross-border and cross-currency features, credit insurance support and off-balance sheet structures. Linda is a *magna cum laude* graduate from Wake Forest University School of Law, where she earned membership in Order of the Coif and was Symposium Editor of the *Wake Forest Law Review*.

Mayer Brown LLP
214 North Tryon Street, Suite 3800
Charlotte, NC 28202
USA

Tel: +1 704 444 3519
Email: lboss@mayerbrown.com
URL: www.mayerbrown.com

Jeffrey R. Favitta is a Banking & Finance associate in Mayer Brown's Charlotte office representing banks, funds, issuers, borrowers and other entities in structured finance and asset-backed transactions and related matters. Jeff regularly represents clients in connection with securitisations and asset-backed lending transactions using securitisation-style structures of trade receivables (including cross-border trade receivables), peer-to-peer marketplace loans and other unsecured consumer credit and a variety of other financial assets.
Jeff joined the firm in 2015 and serves on Mayer Brown's Recruiting Committee.

Mayer Brown LLP
214 North Tryon Street, Suite 3800
Charlotte, NC 28202
USA

Tel: +1 704 444 3619
Email: jfavitta@mayerbrown.com
URL: www.mayerbrown.com

Cory R. Miggins is a Banking & Finance associate in Mayer Brown's Chicago office. He joined the firm in 2012.

Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
USA

Tel: +1 312 701 8102
Email: cmiggins@mayerbrown.com
URL: www.mayerbrown.com

Jessica Solis is an associate in Mayer Brown's Mexico City office and a member of the global Energy group and the Banking & Finance practice. Jessica concentrates her practice on various financing matters in Mexico, including corporate financing, project financing and restructuring transactions, representing lenders and issuers. She is a Mexican-licensed lawyer and has advised international companies in relation to energy-related transactions, securities offerings, the regulation of upstream and midstream oil activities, and general corporate matters in Mexico. Her experience includes representing financial institutions and borrowers in connection with a wider variety of secured and unsecured financing. In addition, her transaction work includes domestic and cross-border joint ventures, stock acquisition, mergers and similar transactions. She is fluent in English and Spanish (native).

Mayer Brown Mexico, S.C.
Goldsmith 53, Piso 3
Pollanco III Sección
Miguel Hidalgo
Mexico City 11560
Mexico

Tel: +1 312 701 7895
Email: jsolis@mayerbrown.com
URL: www.mayerbrown.com

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centres – New York, London and Hong Kong – the backbone of the global economy. We have a premier trade receivables securitisation practice with extensive experience around the world in both well-established and emerging markets. Our diverse teams of lawyers are recognised by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture – seamless and integrated across all practices and regions – ensures that our clients receive the best of our knowledge and experience.

www.mayerbrown.com

MAYER | BROWN

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms
Workplace Pensions

@ICLG_GLG

The International Comparative Legal Guides are published by: glg global legal group