

The International Comparative Legal Guide to: Securitisation 2007

A practical insight to cross-border Securitisation Law



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1 Receivables Contracts

- 1.1 Formalities. In order to create an enforceable debt obligation of the Debtor to the Seller, (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a receivable “contract” be deemed to exist as a result of historic relationships?

As a general principle of French law, it is not necessary that the seller and the debtor enter into a formal receivable contract to evidence the sale of goods or services. Therefore, invoices, a historic relationship or any other type of exchange of consent between the seller and the debtor, including by oral agreement, is sufficient to evidence a valid debt obligation.

Notwithstanding the foregoing, the enforceability of the debt obligation of the debtor to the seller is a question of evidence (*preuve*). Under French law, rules of evidence are different depending on the status of the parties and of their relationship.

In summary, evidence of a relationship between commercial parties (i.e. business entities) can be brought by any means. In this respect, invoices or durable business relationships can be regarded as perfectly relevant presumptions of the existence of a contract and therefore of a perfected debt obligation. Between non-commercial parties (i.e. individuals), a written document is necessary to prove the existence of a contract of an amount greater than EUR 800. Finally, if the relationship is entered into between a commercial party and a non-commercial party, the non-commercial party shall have the right to produce evidence of a contract and therefore of a perfected debt obligation by any means, whereas the commercial party may only use the rules of the French Civil Code.

- 1.2 Consumer Protections. Do your country’s laws (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; or (c) provide other noteworthy rights to consumers with respect to receivables owing by them?

Under the French Monetary and Financial Code, a loan granted to a consumer shall not carry an interest rate higher than a specified interest rate (*taux d’usure*). If the interest rate does exceed such a limit, the bank, having granted the loan, is liable to a penalty of up to two years’ imprisonment or a fine of up to EUR 45,000. Following recent changes in French law, such a limit does not apply to corporate loans or loans granted to professionals under certain conditions.

As regards interest on late payments, the French Civil Code

provides a statutory right to interest on late payment at a minimum interest rate fixed by governmental decree on an annual basis.

In France, a loan granted to a consumer involves certain risks for the lenders, in particular under the provisions of the French Consumer Code. Pursuant to those provisions (*procédures de surendettement et de rétablissement personnel*), a consumer may request and obtain, from a competent court, a moratorium and/or reduction of its debt and related interest. Moreover, under certain circumstances and conditions, the consumer having borrowed money from a credit institution may obtain the outright cancellation of its entire debts owed to such credit institution.

- 1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency are there different requirements and laws that apply to the sale of receivables?

French law authorises the sale of receivables to a Debtor which is a public body, including the government or a government agency.

A sale of receivables to a public entity is not subject to specific principles. However, it is worth noting that the provisions relating to the sale of receivables shall be combined with the specific rules applicable to such public entities.

As regards the validity of a sale of receivables itself, it must be notified to the public accountant (*comptable public*) of the public entity to which the receivable contract refers, and must be accompanied with the single original (*exemplaire unique*) of the receivable contract, where such a contract is a public procurement.

Furthermore, the French *Daily* Law expressly refers to public bodies. Under the French *Daily* Law, the Debtor may officially accept the sale of its debt to a third party. Such an acceptance creates a direct relationship between the debtor and the purchaser and must be duly authorised by the deliberative assembly where the debtor is a public body. In the specific context of public-private partnership agreements Article L. 313-29-1 of the Monetary and Financial Code provides that such an agreement may stipulate that the fraction of the receivable which relates to investment costs is to be irrevocably transferred to the Purchaser, after the public debtor has stated that such investments have been made. As a consequence, it is prohibited for the Debtor to set off the fraction of receivable which relates to the investment costs against any other debt.

It is a long-standing principle that enforcement procedures provided by the French Code of Civil Procedure cannot be implemented against any public entity. Therefore, the enforcement of a sale of receivables against any public debtors will be subject to specific administrative proceedings (the Purchaser shall ask Administrative Courts to order an injunction, a periodic penalty payment or a fine).

2 Choice of Law - Receivables Contracts

- 2.1 **No Law Specified.** If the seller and the debtor do not specify a choice of law in their receivables contract, what are the main principles in your country that will determine the governing law of the contract?

France has ratified the Rome Convention dated 19 June 1980 on the law applicable to contractual obligations (the *Rome Convention*). According to the Rome Convention, when the parties do not specify a choice of law, the receivables contract shall be governed by the law of the country with which it is “most closely connected”. Except in the case of certain consumer contracts, it is presumed that the receivables contract is “most closely connected” with the country where the party effecting *the performance which is characteristic of the contract* has, at the time the contract is concluded, its central administration.

However, if the receivables contract is entered into in the course of that party’s trade or profession, that country is deemed to be the country in which the principal place of business is situated or, where under the terms of the receivables contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

- 2.2 **Base Case.** If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, and the seller and the debtor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your country would not give effect to their choice of law?

The Rome Convention applies to contractual obligations in any situation involving a choice between the laws of different countries, to the extent such countries have ratified the Rome Convention. In relation to the base case above, there would be no conflict of laws in the absence of relevant elements of foreign law. Under the provisions of the French Civil Code, the French law chosen by the seller and the debtors into the receivable contracts will become the mandatory law applying to their relations and such choice will be recognised as a valid choice of law by a French court.

- 2.3 **Freedom to Choose Other Law.** If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country’s law to govern the receivables contract and the receivables?

According to the Rome Convention, a contract shall be governed by the law chosen by the parties. Thus, the seller and the debtor are free to choose a law other than French law to govern the receivable contract and the receivables. However this is with the proviso that, where all the other elements relevant to the situation at the time of the choice are connected with France only, such choice of law will not prejudice the application of mandatory rules (*ordre public*) in France.

- 2.4 **Seller Resident.** If the seller is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Assuming that the debtor is not resident in France, the Rome Convention would apply to the potential conflict of laws between the law of the country where the debtor is situated and the French law, being the law of the country where the seller is situated and the law governing the receivables contract. According to the Rome Convention, the seller and the debtor are free to choose French law to govern the receivable contract. Therefore, the choice of French law to govern the receivables contract will be recognised as a valid choice of law by a French court.

- 2.5 **Debtor Resident.** If the debtor is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Assuming the seller is not resident in France, the Rome Convention would apply in the same terms as described in question 2.4. Therefore, the choice of French law to govern the receivables contract will be recognised as a valid choice of law by a French court.

3 Choice of Law - Receivables Purchase Agreement

- 3.1 **Freedom to Choose Other Law.** If your country’s law governs the receivables, and the seller sells the receivables to a purchaser in another country, and the seller and the purchaser choose the law of the purchaser’s country or a third country to govern their sale agreement, will a court in your country give effect to their choice of law?

The seller and the purchaser are free to choose the law governing the sale agreement. Depending on the circumstances, the parties may choose either French law (i.e. the law governing the receivables), the law of the purchaser’s country, the law of the debtor’s country or the law of a fourth country to govern the sale agreement, subject to the same limitations stated in question 2.3.

- 3.2 **Other Advantages.** Conversely, if another country’s law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

Assuming the seller is resident in France, the parties may choose French law to govern the sale agreement, thereby benefiting from recent changes to the French Securitisation Law and the French *Daily Law*, both codified in the French Monetary and Financial Code. Such changes in French law provide that the sale of receivables is valid between parties and is enforceable against third parties (including debtors) irrespective of the law governing the receivables and the law of the debtor’s country. However, the Purchaser must be either a *fonds commun de créance* (the French securitisation vehicle) or an EU-passported credit institution. It should also be noted that the application of such French law provisions is of limited effect given that the Rome Convention, or international private laws, may override or conflict with them as to the enforceability of the sale agreement against debtors (see question 3.3).

3.3 Effectiveness. In either of the cases described in questions 3.1 or 3.2, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; and/or (iii) whether the sale is effective and enforceable against the debtors?

Pursuant to Article 12 of the Rome Convention, the law governing the receivables shall govern the contractual relationship between the seller and the debtor, whereas the law governing the assignment agreement shall govern the contractual relationship between the purchaser and the seller. Accordingly, assuming that the seller is incorporated in France, French law will apply to determine (i) whether the sale of receivables is effective between the seller and the purchaser if French law governs the sale agreement; and (ii) whether the sale is perfected and enforceable against the debtors if French law governs the receivables. Whether the sale is a true sale will have to be determined under the law governing the sale agreement and the law of the country of incorporation of the seller.

4 Asset Sales

4.1 Sale Methods Generally. In your country what is (are) the customary method(s) for a seller to sell accounts receivables to a purchaser?

Firstly, several conditions must be complied with in respect of the receivables that are intended to be sold by a seller to a purchaser:

- (a) the receivables must exist now or in the future;
- (b) the receivables must belong to the seller; and
- (c) the receivables must be identified and individualised or be capable of being identified and individualised.

Secondly, the status of the purchaser determines the method of sale and the conditions for the sale of the receivables. In this respect, the sale of the receivables must take the form of:

- (i) an assignment under the common regime of articles 1689 *et seq.* of the French Civil Code. The sale is valid between the seller and the purchaser but enforceable against third parties, subject to either the Debtors being notified of the sale by a court bailiff (*voie d'huissier*) or the acceptance of the sale by the debtors in a deed executed before a public notary (*acte authentique*). Assuming that the debtor is identified, there are no restrictions in respect of the type of receivables that can be assigned pursuant to the relevant provisions of the French Civil Code or in respect of the status of the purchaser. Given the costs related thereto (around EUR 250 per Debtor if a notification is served by court bailiff), this method of assignment is not often used in the context of securitisation transactions. It should be noted that the French government has already started discussions with a view to reforming such formalities;
- (ii) an assignment by way of subrogation pursuant to Articles 1249 *et seq.* of the French Civil Code. Under this method, a third party (the *subrogé*) pays the initial creditor (the *subrogeant*) and takes over the initial creditor's rights against the Debtor. The subrogation must be express and must occur at the time of the payment. As from the date of the subrogation, which shall coincide with the delivery of a formal receipt by the initial creditor to the third party (*quittance subrogative*), the transfer of the initial creditor's rights against the Debtor to the third party shall be effective and enforceable against the Debtor without any further formalities. Assuming that the

debtor is identified, there are no restrictions in respect of the type of receivables that can be assigned by way of subrogation or in respect of the status of the Purchaser. However, the initial creditor's rights against the Debtor shall be transferred to the new creditor only up to the amount paid by it. In the context of a securitisation transaction, the constraints of the date of the subrogation and of the amount paid at the time of the subrogation may raise issues in connection with the sale of receivables with a discount purchase price or a deferred purchase price;

- (iii) an assignment under the French *Dailly* Law pursuant to Articles L. 313-23 to L. 313-34 of the French Monetary and Financial Code. The assignment of the receivables is performed by way of a single transfer document (*acte de cession*) exchanged between the seller and the purchaser. The assignment is effective between the parties and enforceable against third parties as from the date affixed by the purchaser on such transfer document without any further formalities. The provisions of the French Monetary and Financial Code have been recently amended in connection with the *Dailly* Law to secure the sale of future receivables and to develop the sale of receivables in the context of international financing transactions. Despite these recent evolutions, there are still some restrictions as to the type of receivables that can be sold under this method and as to the status of the purchaser. The receivables must arise from a "professional" relationship between the seller and the debtor, and the purchaser must be a credit institution duly licensed in France or an EU-passported credit institution;

- (iv) an assignment under the French Securitisation Law pursuant to Articles L. 214-43 to L. 214-46 of the French Monetary and Financial Code. The assignment of the receivables is performed by way of a single transfer document (*bordereau*) exchanged between the Seller and the Purchaser. The assignment is effective between the parties and enforceable against third parties as from the date affixed by the Purchaser on such transfer document without any further formalities. As for the method of assignment referred to in (iii) above, the provisions of the French Monetary and Financial Code have recently been amended in connection with the Securitisation Law to allow the sale of future receivables and to develop the sale of receivables in the context of international securitisation transactions. There are no restrictions as to the type of receivables that can be sold under this method. However, the Purchaser must be a French *fonds commun de créances* or FCC, which is a co-ownership entity without legal personality jointly created by a management company and a custodian. There are many advantages in using this method, including the fact that all related security interests in connection with the purchased receivables are automatically transferred to the FCC without any further formalities, and that the FCC is the only French entity qualifying as a bankruptcy-remote vehicle for rating purposes. From experience, it seems that use of a FCC is the ideal tool for international securitisation transactions; or

- (v) in the case of mortgage loan receivables or receivables on public entities, it should be noted that another method of assignment is provided by Articles L. 515-13 *et seq.* of the French Monetary and Financial Code. Basically, the conditions and procedures of the assignment are the same as the assignment under the French *Dailly* Law or the French Securitisation Law. However, the Purchaser must be a mortgage company (*société de crédit foncier* or SCF), which is a French financial institution licensed by the French banking authorities with a limited purpose and structured as a bankruptcy-remote entity.

4.2 Perfection Generally. What formalities are required generally for the sale of accounts receivable to be perfected? Are there any additional or other formalities required for the sale of accounts receivable to be perfected against any subsequent good faith purchasers for value of the same accounts receivable from the seller?

In order for the sale of receivables to be perfected against third parties, including any later purchaser, the formalities required under the various methods of assignment described in question 4.1 must be complied with. In this respect, the only method of assignment that will require the performance of formalities is the assignment under the general regime of the French Civil Code (i.e. Debtors being notified by way of a court bailiff or acceptance of the assignment by the Debtors in a deed executed before a public notary).

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

Generally speaking, the requirements for sale and perfection of mortgage loans, consumer loans, promissory notes or debt securities are the following:

- (i) promissory notes are transferred by way of endorsement for the benefit of a credit institution; the endorsement transfers the underlying debt to the new holder of such promissory notes;
- (ii) marketable debt securities are transferred by way of a transfer order (*ordre de mouvement*); and
- (iii) mortgage loans and consumer loans are transferred in accordance with question 4.1 without the debtor's consent depending on the method of assignment, and the transfer of the mortgage securing the loans must be registered in the name of the purchaser (except under certain circumstances if the mortgage loans are materialised by specific instruments such as *copie exécutoire à ordre*).

However, if the sale of the instruments referred to in (iii) above is performed under the provisions of the French *Daily* Law, the French SCF Law or the French Securitisation Law to a credit institution, a SCF or a FCC, then no formalities are required in order to transfer the mortgage or other security interests securing the loans.

4.4 Debtor Notification. Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be an effective sale against the debtors?

Whether or not the notification and/or the consent of the Debtors is required for the sale to be enforceable against the Debtors will depend on the method of the assignment. Under the common regime of the French Civil Code, the sale will be enforceable against the Debtors upon a notification being served on them by a court bailiff. Under the French *Daily* Law or the French Securitisation Law, the sale will be enforceable against the Debtors as from the date of the sale without any requirement to notify them.

4.5 Debtor Consent. Must the seller or the purchaser obtain the debtors' consent to the sale of receivables in order for the sale to be an effective sale against the debtors? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment?

Under French law, in the absence of any provision of the

receivables contract expressly prohibiting assignment, the receivables may be freely assigned even without the consent of the debtors, except in respect of the receivables for which French law prohibits the assignment (e.g. receivables relating to alimony).

In addition, French Commercial Code (Article L. 442-II-c) provides that any clause of the receivables contract prohibiting the assignment to any third party of the receivables arising from such contract is null and void if such receivables contract is entered into between commercial parties (which exclude receivables contract entered with consumers).

However, the parties may still contractually limit the assignability of the receivables arising from the receivables contract, for instance by stating that a party will only be allowed to assign the said receivables after having obtained the consent of the other party as to the identity of the assignee. Such provisions are valid but will not be enforceable against the purchaser, if it cannot be proven that the latter was aware of the existence of such a restriction.

4.6 Liability to Debtor. If the seller sells receivables to the purchaser even though the receivables contract expressly prohibits assignment, will the seller be liable to the debtor for breach of contract?

Subject to question 4.5, if (i) the receivables contract is entered into between the seller and a non-commercial party (i.e. customer) or if the receivables contract contains provisions limiting the assignability of the receivables, for instance by stating that a party will only be allowed to assign the said receivables after having obtained the consent of the other party as to the identity of the assignee and (ii) the purchaser is aware, as at the date it purchased the receivables, of the existing restrictions as to the assignment of the receivables, it might, pursuant to the provisions of the French Civil Code and according to certain French court decisions, be liable for any damage caused to the debtors for having knowingly contributed to the violation of the provisions agreed between the seller and debtors.

Moreover, in such case, the fact of having assigned the receivables without prior consent of the debtors would constitute a breach of contract by the seller. Such contractual breach could give rise to a claim for damages of the debtors against the seller pursuant to the provisions of the French Civil Code. The debtors having a claim against the seller, together with any consequent set-off right, may cause the debtors to be or become non-eligible for the assignment.

4.7 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

Assuming that the sale of the receivables is performed in accordance with the provisions of the French *Daily* Law, the French SCF Law or the French Securitisation Law to a credit institution, a SCF or a FCC, the sale document (*acte de cession*) must contain the following mandatory information:

- (a) references to the relevant provisions of the law that governs the sale document;
- (b) identification of the Purchaser; and
- (c) identification of each receivable subject to the sale document; each receivable must be sufficiently identified and individualised in precise detail, for instance the designation of the Debtor, the amount or the maturity of the

receivable (this list being given as an example by the law). When the sale is made by a computerised process (*procédé informatique*) that allows the identification of receivables, then the sale document shall only mention the means by which the receivables are transferred, identified and individualised and an estimate of their number and total amount.

4.8 Economic Effects on Sale. What economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and (c) control of collections of receivables without jeopardising perfection?

Under French law, the sale of receivables is perfected under the various methods of assignment described in question 4.1, subject to the completion of the relevant formalities. Upon such formalities (e.g. execution of the transfer document under the French *Dailly* law, the French SCF or the French Securitisation Law), the receivables cease to belong to the seller and are legally transferred to the purchaser. The fact that the seller retains certain risks (credit, interest rate, dilutions, ...) and may, to a certain extent control the collections received in its capacity as servicer on behalf of the purchaser has no impact on the perfection of the sale.

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables?

French securitisation transactions are generally structured to provide a commitment from the seller to assign over a certain period of time (revolving period) all or part of the receivables it owns. Such commitment is enforceable against the seller until its insolvency. Upon insolvency of the seller, the insolvency official will have the option either to continue or to terminate such commitment depending on the circumstances. The option of the insolvency official is however subject to a formal procedure set out by the French Commercial Code.

4.10 Future Receivables. Can the seller commit in an enforceable manner (both prior to and after its insolvency) to sell receivables to the purchaser that come into existence after the date of the sale contract (as in a "future flow" securitisation)?

The French Securitisation Law as amended in 2005 specifically provides that the sale of the receivables that come into existence after the date of the sale contract is not affected by the commencement of insolvency proceedings against the Seller, provided that the receivables do not arise from a milestone agreement (*contrat à exécution successive*) or that they are determined. According to the French Securitisation Law, the sale is perfected on the date of execution of the transfer document irrespective of the date on which the receivables come into existence (*date de naissance*), the date on which they become due (*date d'échéance*) or the date on which they become due and payable (*date d'exigibilité*), including upon an insolvency proceeding of the seller.

However, the insolvency official will have the right to terminate the sale agreement that provides for the sale of receivables after the insolvency proceeding of the seller. See question 4.9.

4.11 Related Security. What additional formalities must be fulfilled for the concurrent transfer of related security to be enforceable? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Assuming that the sale of receivables is performed under the French *Dailly* law, the French Securitisation Law or the French SCF Law, all related security and ancillary rights will be automatically and without formality (*de plein droit*) transferred to the purchaser, including in respect of mortgages or other registered security interest. Such transfer will be enforceable as from the date of the sale of the receivables.

5 Security Interests

5.1 Back-up Security. Is it customary in your country to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

It is not customary in France to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security. To our knowledge, no securitisation transaction implemented in France has used such mechanism to secure the risk that a sale of receivables is deemed by a court not to have been perfected.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

Assuming the purchaser is a FCC, it is not permitted under French law to pledge or grant a security interest in the receivables which it owns.

The situation may be different if the receivables are sold to a credit institution, a SCF or any other non-regulated entity in which case, as legal owner of the receivables, the purchaser is free to grant any security interest in the receivables. The form and the validity of, as well as the perfection formalities related to, such security interest will be governed by the law of the relevant receivables. Under French law, the regime of security interests has been recently modified in order to simplify the granting and enforcement of French law security interests. As far as receivables are concerned, a notification of the debtors by court bailiff (*huissier*) is no longer required for the pledge to be valid. However, the enforcement of the pledge remains subject to prior notification of the debtors.

5.3 Purchaser Security. What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

Assuming the purchaser is a FCC, it is not permitted under French law to pledge or grant a security interest in the accounts receivables which it owns.

The situation may be different if the accounts receivables are sold to a credit institution, a SCF or any other non-regulated entity in which case, as legal owner of the accounts receivables, the purchaser is free to grant any security interest in the accounts receivables. The form and the validity of, as well as the perfection

formalities related to, such security interest will be governed by the law of the relevant accounts receivables. Under French law, the regime of security interests has been recently modified in order to simplify the granting and enforcement of French law security interests. As far as accounts receivables are concerned, a notification of the debtor by court bailiff (*huissier*) is no longer required for the pledge to be valid. However, the enforcement of the pledge remains subject to prior notification of the debtor.

5.4 Recognition. If the purchaser grants a security interest in the receivables under the laws of the purchaser's country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

See question 5.3.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to promissory notes, mortgage loans, consumer loans or marketable debt securities?

See question 5.3.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your country's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables ("automatic stay")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected?

The commencement of French insolvency proceedings (i.e. safeguard, reorganisation or liquidation proceedings) against the seller after the sale of receivables should not prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the receivables, provided that the sale is performed under the French *Dailly* Law, the French SCF Law or the French Securitisation Law to a credit institution, a SCF or a FCC. From an insolvency law point of view, the sale is valid and enforceable against third parties (including an insolvency official) as from the date of the sale document, and qualifies as a true sale by virtue of law.

However, the situation may be different if the sale relates to future receivables (i.e. receivables that arise after the seller becomes subject to an insolvency proceeding). The sale of receivables by way of a *Dailly* or SCF sale document (*acte de cession*) should not be affected by the commencement of French insolvency proceedings against the seller. This results from two recent judgments of the Commercial Chamber of the French Supreme Court (*Cour de Cassation*) of December 2004 and November 2005. As regards to the sale of receivables to a FCC, the French Securitisation Law as amended in 2005 specifically provides that such a sale is not affected by the commencement of insolvency proceedings against the seller, provided that the receivables do not arise from a milestone agreement (*contrat à execution successive*) or that they are determined.

6.2 Insolvency Official's Powers. If there is no automatic stay, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (by means of injunction, stay order or other action)?

The insolvency official could not prohibit the exercise of rights by the purchaser of the receivables by means of injunction, stay order or other action (but see question 6.1).

6.3 Suspect Period. Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding?

In the framework of reorganisation or liquidation proceedings (but not safeguard proceedings), a sale of receivables may be challenged by the receiver during a so-called "suspect" period (*période suspecte*) of up to 18 months prior to the opening of insolvency proceedings if the insolvency official can establish that the sale was made for inadequate value, or if the purchaser was aware of the seller's insolvency at the time of the purchase.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?

Generally, the insolvency official of the seller cannot request the court to order consolidation of the assets and liabilities of the purchaser with those of the seller or its affiliates unless the court finds that there is abnormal commingling of assets between the purchaser and the seller (*confusion de patrimoines*) or the purchaser is considered to be a sham or a mere fiction (*fictivité*). In these circumstances, the insolvency proceedings would be extended to the purchaser and would affect its assets, in that the assets of the seller and that of the purchaser would be consolidated.

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) sales of receivables that have not yet come into existence?

See question 6.1.

7 Special Rules

7.1 Securitisation Law. Does your country have laws specifically providing for securitisation transactions? If so, what are the basics?

The French Securitisation Law dated 23 December 1988 (now codified in Articles L. 214-43 to L. 214-49 of the French Monetary and Financial Code) implemented a legal framework for securitisation transactions in France.

See basics in question 7.2.

7.2 Securitisation Entities. Does your country have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to (a) requirements for establishment of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

The French Securitisation Law created the *fonds communs de créances* (literally, a ‘common pool of debt receivables’, although a better translation would be ‘mutual debt fund’). The FCC is a co-ownership vehicle whose sole purpose is the acquisition of debt receivables. The FCC does not have separate legal personality. It may consist of several ring-fenced ‘compartments’.

The FCC must be constituted jointly by a management company and a custodian. The management company is a commercial company duly licensed by the *French Autorité des Marchés Financiers* to manage exclusively FCCs. The custodian is a French credit institution, a French branch of a credit institution incorporated in the European Economic Area or any institution approved by the French government. The management company and the custodian play an important role in the creation and the life of the FCC, the former as manager of its business and the latter as custodian of the FCC’s assets and as supervisor of the management company.

The Securitisation Law (as recently amended) provides that the FCC is entitled to acquire all type of debts, including existing or future receivables, non-performing receivables or any type of debt instrument governed by French law or any foreign law. The law also provides for the possibility of multiple issues by the FCC of units or any type of debt instruments, including bonds, governed by French law or by any foreign law. Finally, the FCC is entitled to enter into synthetic transactions either as a protection buyer or protection provider, and is the only French entity qualifying as a bankruptcy-remote vehicle for rating purposes. From past experience, it seems that use of a FCC is the ideal tool for international securitisation transactions (see question 4.1).

It should be noted that the French government is still currently examining the possibility of extending the scope of the FCC in order to securitise insurance risks.

As far as tax is concerned, the FCC is tax-transparent.

7.3 Non-Recourse Clause. Will a court in your country give effect to a contractual provision (even if the contract’s governing law is the law of another country) limiting the recourse of parties to available funds?

The question as to whether contractual limitations on the *droit de gage général* (commonly referred as to “limited recourse clause”) are valid has given rise to differing doctrinal views and is the subject of very little jurisprudence. However, it is now generally admitted that a court will give effect to a limited recourse clause provided that (i) the limited recourse clause has been freely and knowingly agreed to by the creditor for the benefit of its debtors (and has not been imposed on the creditor by the debtors) and (ii) is the fair consideration for the obligations set out in the agreement such as those pursuant to which the debtors agree to do or not to do certain specific things or to allocate to the creditor certain cash flows in accordance with a specific priority of payment.

7.4 Non-Petition Clause. Will a court in your country give effect to a contractual provision (even if the contract’s governing law is the law of another country) prohibiting the parties from (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

The validity of non-petition provision has been highly discussed under French law as such provision is part of other standard provisions contained in the legal documentation of securitisation transactions. However, it is generally admitted under French law that a court will not give effect to such provision.

7.5 Independent Director. Will a court in your country give effect to a contractual provision (even if the contract’s governing law is the law of another country) or a provision in a party’s organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

Under French law, organisational documents and/or any other contract may prohibit directors to take certain specified actions without the vote or consultation of another director appointed as independent director. However, depending on the legal form of the company (e.g. *société par actions simplifiée*) and the title of the person acting on behalf of the company, such provisions may not be enforceable against third parties.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your country, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any license or its being subject to regulation as a financial institution in your country? Does the answer to the preceding question change if the purchaser does business with other sellers in your country?

Any purchaser other than a FCC must be licensed in France as a credit institution in order to purchase non-matured receivables on a regular basis for consideration. In addition to criminal sanctions, the transaction may be void if the purchaser does not comply with French banking regulations.

The fact that the purchaser operates business in France with other sellers has no impact on the above requirement which relates to the nature of the contemplated operation (i.e. the purchase of non-matured receivables).

Servicing and collection activities for the benefit of third parties are also regulated activities in France unless the purchaser is a credit institution or a FCC. In practice, when the seller acts as servicer or collection agent of its own receivables for the account of the purchaser, it is not required to comply with French regulation applying to servicing activities. It should be noted that under the French Securitisation Law the transfer of servicing from the seller to any third party must be notified to the debtors and can only be made to a credit institution or the *Caisse des Dépôts*.

8.2 Data Protection. Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors or also to enterprises?

French law regulates the transfer of personal data. The aim of such regulation is to protect the rights of individuals, including consumer Debtors. However, it does not apply to Debtors that are incorporated as enterprises.

The applicable regulation is known as the “*Loi Informatique et Liberté*” dated 6 January 1978 and most recently amended on 6 August 2004. Under such regulation, the transferor of personal data must, except under certain circumstances, inform each individual of any data transfer that directly identifies such individual or could allow his identification. The application of such regulation is placed under the control of the *Commission National Informatique et Liberté (CNIL)*.

In practice, there have been a number of solutions implemented in order to accommodate the application of the relevant regulation within the context of securitisation transactions, such as transferring only partial information or codified information.

In addition, there are restrictions on the transfer of information (not limited to personal data and not limited to individuals) from a credit institution to any third party. Credit institutions are subject to French banking rules on confidentiality, and the credit institutions’ clients are the only persons entitled to release them from such confidentiality requirement. Any use or transfer of information by credit institutions on their clients without their prior consent is a criminal offence (*délit*) for which credit institutions can be liable.

8.3 Consumer Protection. If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? Briefly, what is required?

The Purchaser will not be required to comply with any additional consumer protection law except as stated in question 8.2. Consumer protection law, such as enforcement rules against consumer Debtors, will continue to apply to the extent that the seller acts as servicer.

8.4 Currency Restrictions. Does your country have laws restricting the exchange of your country’s currency for other currencies or the making of payments in your country’s currency to persons outside the country?

Under French law, it is a general principle that international payments are free of any administrative or governmental control. However, recent anti-money laundering rules impose an obligation on credit institutions to declare any suspect payments or transactions.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the debtors to the seller or the purchaser be subject to withholding taxes in your country? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located?

No French withholding tax is imposed in respect of any payments made under the receivables to a French tax-resident seller or purchaser. If the purchaser is incorporated outside of France,

interest-bearing receivables should in principle be subject to French withholding tax at the rate of 16% unless a tax treaty reduces or eliminates the withholding tax. In addition, the French Tax Code (FTC) provides for a withholding tax exemption in respect of certain types of receivable.

In particular, interest on bonds paid to non-French tax residents is exempt from French withholding tax provided that the non-French tax residence of the bond-holders can be evidenced. In addition, under domestic law, interest paid by French Debtors to a foreign Purchaser is exempt from French withholding tax where it is paid pursuant to a loan “contracted outside of France” (FTC §131 *quater*). A loan qualifies as “contracted outside of France” where the following conditions are met: (i) the borrower is a French legal entity; (ii) the initial lender is established (i.e. it has his head office or tax residence) outside of France; (iii) interest arises under a debt instrument that qualifies as a loan (i.e. there is a stated principal amount and a repayment date, and interest computation rules are provided); (iv) the loan agreement is made in writing and is executed prior to funding; and (v) the funds are made available from outside of France. The application of this exemption may raise some difficulties where the loan is syndicated, in particular where the initial lenders are French entities and they assign (all or part of) their share in the loan to a foreign entity. In that case, the French tax authorities take the view that since the initial lender was established in France, its share in the loan originally fell outside the scope of FTC §131 *quater* exemption so that the new lender can no longer rely on this exemption. In addition, according to the French tax authorities, the exemption does not apply to interest paid further to current accounts arrangements (including cash pooling arrangements). This restriction is questionable.

No withholding tax is levied by a FCC in relation to the payments it makes on units or bonds to the extent that the non-French residence of the unit-holders or bond-holders may be evidenced. However, liquidation surplus paid to non-French tax-resident unit-holders is subject to a 16% withholding tax, subject to tax treaties relief.

9.2 Seller Tax Accounting. Does your country require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

This question is not applicable to France.

9.3 Stamp Duty, etc. Does your country impose stamp duty or other documentary taxes on sales of receivables?

There is no transfer tax, stamp duty or other documentary tax on the assignment of receivables unless the assignment is registered with the French tax authorities, in which case a nominal stamp duty of EUR 125 is payable.

9.4 Value Added Taxes. Does your country impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

The assignment of receivables qualifies as a VAT-exempt financial transaction.

The assignment of receivables should not reduce the general VAT recovery ratio (VAT pro-rate) of a French seller to the extent that the sale price of the receivables is not higher than their book value.

The assignment of receivables should not accelerate the payment of VAT. The French tax authorities have indicated that transfers of receivables to a factoring company, a financial institution or a FCC

do not accelerate the transferor's VAT liability, if any.

The servicing fee paid to a French seller qualifies as a VAT-exempt financial transaction except as regards collection services. There is a risk that fees related to the collection (recovery of defaulted receivables) be subject to French VAT on the grounds of Article 261 C-1° c) of the FTC.

In the case of defaulted receivables relating to the sale of goods, VAT paid at the time of the delivery of the goods may be recovered provided the corresponding defaulted receivables are returned to the French seller and provided the requirements of Article 272-1 of the FTC are met (which include (i) the issuance by the French seller of an amended invoice to the defaulting debtor; and (ii) evidence by the French seller that the receivable will not be paid). However, this procedure must not be followed if receivables are sold to a FCC.

9.5 Purchaser Liability. If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims against the purchaser or on the receivables or collections for the unpaid tax?

No, the tax authorities cannot make such claims.



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9.6 Doing Business. Assuming that the purchaser conducts no other business in your country, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the debtors, make it liable to tax in your country?

The servicing could result in a corporate income tax liability in France for the Purchaser if the French tax authorities can successfully argue that the place of effective management of the Purchaser is in France and therefore a permanent establishment is given due to the fact that collection of the receivables is always carried out by the French seller. In order to reduce that risk, the seller should have very limited authority to bind the purchaser, and the servicing agreement shall be carefully drafted.



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