

France

Olivier Hubert, De Pardieu Brocas Maffei



www.practicallaw.com/5-381-2353

MARKET AND LEGAL REGIME

1. Please give a brief overview of the securitisation market in your jurisdiction. In particular:

- How active and/or developed is the market and what notable transactions have taken place recently?
- Is securitisation particularly concentrated in certain industry sectors?

The start of 2007 was very good for securitisation. The second half of the year, however, was marked in France (as well as in all countries), by a fall in both the number and volume of transactions. The *sub-prime* (for a definition of terms in this chapter set out in bold and italics, see Glossary, in this Handbook) crisis leading to a worldwide cash and credit contraction resulted in a blockage on the French securitisation market, as it did elsewhere. But overall, in 2007 the French securitisation market saw growth of 25% (equivalent to EUR17.4 billion (about US\$25.6 billion), though quite a long way behind the UK market which is at EUR181 billion (about US\$267 billion)).

The securitisation market for small to medium-sized enterprises (SMEs) remains narrow, although several initiatives have been launched (such as the combined Natixis and GTI Group action) to provide a long term financing offer for SMEs.

In 2007, in the mid-term securitisation market, the top three banks were:

- Calyon, with US\$29 billion (about EUR19.7 billion) issued.
- BNP Paribas, with US\$24.6 billion (about EUR16.7 billion) issued.
- Société Générale, US\$24.3 billion (about EUR16.5 billion) issued.

The commercial mortgage-backed securities (CMBS) market was also active, although most paper was sold outside France.

For further information about the types of securitisations/receivables referred to here and throughout this chapter, see *Model Guide, table, Classes of receivables*.

2. Is there a specific legislative regime within which securitisations in your jurisdiction are carried out? In particular:

- What are the main laws governing securitisations?
- Is there a regulatory authority?

Legal regime

Securitisation became part of the French legal system 20 years ago with Law No 88-1201 of 23 December 1988 (Securitisation Law), now codified in Articles L214-5 and L214-43 to L214-49 of the Monetary and Financial Code (*Code monétaire et financier*) and an implementation decree. The Securitisation Law created a specific form of securitisation vehicle known as a *fonds commun de créances* (FCC), which is a collective debt investment fund or common pool of debts.

The Financial Security Law of 2003 has significantly changed and improved the securitisation regime in France by, for example, authorising FCCs to issue various types of debt securities and to enter into *credit derivatives* arrangements, and by creating dedicated receivables collection accounts.

Regulatory authority

The main regulatory authority relevant to securitisations is the Financial Markets Authority (*Autorité des Marchés Financiers* (AMF)).

REASONS FOR DOING A SECURITISATION

3. Which of the reasons for doing a securitisation, as set out in the Model Guide, usually apply in your jurisdiction? In particular, how are the reasons for doing a securitisation in your jurisdiction affected by:

- Accounting practices in your jurisdiction, such as application of the International Financial Reporting Standards (IFRS)?
- National or supra-national rules concerning capital adequacy (such as the Basel International Convergence of Capital Measurement and Capital Standards: a Revised Framework (Basel II Accord) or the Capital Requirements Directive)? What authority in your jurisdiction regulates capital adequacy requirements?

Usual reasons for securitisation

Cheaper borrowing

Cheaper borrowing is the most obvious incentive to securitise in France. This is particularly true for real estate financing and *leveraged buy out* (LBO) financing, where investors look to satisfy themselves with *yield* levels which are lower than those of banks.

Accounting practices and capital adequacy

The use of securitisation techniques is of interest for the banks in terms of balance sheet management.

The **Cooke ratio**, contained in Council Directive 89/647/EEC, was transposed into French law by the Banking and Financial Regulatory Committee (*Comité de la Réglementation Bancaire et Financière* (CRBF)) Regulation No 91-05 of 15 February 1991. (The CRBF is the body responsible for passing regulations governing credit institutions in France.)

The **McDonough ratio**, contained in the Capital Requirements Directive (see *Model Guide, Capital Adequacy*), was transposed by an ordinance of 19 April 2007 and by a decree of 20 February 2007.

Securitisation also allows banks to assist management of their rate risks.

Initially developed for credit institutions, securitisation has since extended to the financing of debts held by commercial companies, which allows them to reduce their debt portfolio and shift the customer default risk to the securitisation vehicle. Securitisation allows an improvement of the balance sheet main equilibriums and the management of the **key ratios** of the assigning company.

THE SPECIAL PURPOSE VEHICLE (SPV)

Establishing the SPV

4. How is an SPV established in your jurisdiction? Please explain:

- What form does the SPV usually take and how is it set up?
- What is the legal status of the SPV?
- How is the SPV usually owned?
- Are there any particular regulatory requirements that apply to the SPVs?

Form and set up of the SPV

The only securitisation vehicle available under French law is the FCC, which is a collective debt investment fund created by the Securitisation Law and organised, like most French funds, by the joint action of a fund manager (*Société de gestion*) and fund custodian (*dépositaire*).

FCCs have no share capital, no shareholders, no board of directors and no employees.

Legal status and ownership

The legal status of an FCC is a co-ownership (*co-propriété*) without legal personality.

Regulatory requirements

FCCs are not supervised by a regulatory body. However, the management company of the FCC is supervised by the AMF.

The creation of a management company must be approved by the AMF. The FCC management company must meet certain criteria and follow certain rules of conduct, which are set out in AMF Regulations.

The custodian must be a French credit institution (or a French branch of a credit institution incorporated in the European Economic Area (EEA), or any institution approved by the Committee on credit institutions and investment firms (*Comité des établissements de crédit et des entreprises d'investissement*)) (*Article L214-48, Monetary and Financial Code*).

The only responsibility of FCCs in relation to the Bank of France (*Banque de France*) is to pass it certain information relating to monetary statistics.

When the management strategy of an FCC includes active asset management or the entry into credit derivatives transactions as **protection seller**, the management company must comply with certain additional specific requirements (*Article R214-92 et seq., Monetary and Financial Code*). In particular it must both:

- Obtain a specific licence from the AMF authorising it to carry out such activities.
- Put in place appropriate management and organisational procedures under AMF Regulation 94-01 and AMF instruction of 1 July 2004.

Units that are publicly sold by the FCC must be rated according to Article L214-44 of the Monetary and Financial Code. This provides that a document must be prepared by an approved institution containing:

- An appraisal of the characteristics of the units to be issued by the FCC.
- The debts which it proposes to acquire.
- An assessment of the risks inherent in these debts.

The document must be annexed to the information memorandum (*note d'information*) and sent to the potential subscribers in the fund.

For units that are privately placed and where no information memorandum is accordingly required, a rating is not required but may however be necessary to make the placing of the note or debt securities commercially easier.

5. Is the SPV usually established in your jurisdiction or offshore? If established offshore, in what jurisdiction are SPVs usually established and why? Are there any particular circumstances when it is advantageous to establish the SPV in your jurisdiction?

FCCs are established in France by the joint action of the FCC manager and the FCC custodian.

FCCs are not, strictly speaking, considered to be credit institutions. However, they do benefit from a specific exemption from the Banking Monopoly Law.

According to Article L313-1 of the Monetary and Financial Code, the acquisition of non-matured receivables from originators in France, on a regular basis, is a credit activity only licensed or "passport" credit institutions can carry out on a regular basis. Although FCC's are not credit institutions, Article L511-6 of the Monetary and Financial Code allows them to purchase non-matured receivables.

Ensuring the SPV is insolvency remote

6. Is it possible to make the SPV insolvency remote in your jurisdiction? If so, how is this usually achieved?

FCCs are generally considered to be bankruptcy-remote vehicles because:

- The French Bankruptcy Law does not apply to them.
- Their activities are limited to securitisation.
- They have no contractual liabilities unrelated to such securitisation.
- The investors' and creditors' recourse is limited to the securitisation assets.

Ensuring the SPV is treated separately from the originator

7. Is there a risk that the courts can treat the assets of the SPV as those of the originator if the originator becomes subject to insolvency proceedings? If so, can this be avoided/minimised?

Separateness

As FCCs are organised by French law as autonomous institutions, managed by an independent FCC manager, the risk of consolidation of its assets with those of the transferor is quite remote. Further, the consolidation of assets in a bankruptcy context is restricted to specific situations where there is commingling of assets of two corporations or de facto management.

The risk of an originator clawing back assets in its insolvency is also remote (see *Question 17*).

Future receivables

Assignments of future receivables to an FCC are permitted but may involve specific risks, as the amounts payable by the debtor after the start of insolvency proceedings of the originator could be held to form part of the insolvent originator's estate, despite the assignment. This would leave the FCC with an unsecured claim in the originator's insolvency for those amounts. This analysis is based on case law relating to analogous situations. However, the Law of 26 July 2005 has now clarified that the transfer of claims to an FCC arising from an ongoing performance contract (*contrats à execution successive*), the amount of which is determined, will not be impaired by insolvency proceedings affecting the transferor.

Avoidance of commingling risk

In many securitisations where the originator remains in charge of the collection of the debts (that is, servicing the receivables), there is a risk that the debts proceeds are commingled with the assets of the originator and then retained by the bankruptcy administrator after occurrence of a bankruptcy affecting the originator.

This risk can be mitigated by the creation of a special collection account under Article L214-46 of the Monetary and Financial Code. According to this, the management company and the entity responsible for servicing the receivables can agree to credit collected sums to a specially dedicated account of the FCC, from which the creditors of the entity responsible for servicing the receivables are not entitled to claim payment, even if such an entity becomes the subject of insolvency proceedings.

The main features of this special account are:

- The account is opened in the name of the originator but the FCC is the sole beneficiary of the amounts credited to the account.
- The management company is authorised to manage and dispose of the sums in this account, subject to and in accordance with the terms of the bank account agreement.
- If sums other than the sums generated by the transferred receivables are credited to this account, the entity responsible for servicing the receivables must prove that such other sums are not due and owing to the FCC.

THE SECURITIES

Issuing the securities

8. Are the securities issued by the SPV usually publicly or privately issued?

An FCC can issue either units or debt instruments like notes (*titres de créances négociables* or *obligations*). Both can be distributed in either public or private offerings. Under French Law a public offer of securities (*appel public à l'épargne*) is defined as either:

- The admission to trading of securities on a regulated market.
- The issue or sale of securities to the public by means of publicity or solicitation (*démarchage*), or through a bank or financial services provider.

However, the issue or sale of securities to qualified investors or to a limited circle of investors, in each case acting for their own account, does not amount to a public offer.

A qualified investor can be broadly defined as a corporate entity with the competence and means necessary to understand the risks inherent in transactions relating to financial instruments. French regulations define precisely who are qualified investors.

French law does not permit the solicitation of individual investors for FCC securities. Therefore public offering of FCC securities cannot be made by way of canvassing and solicitation of private individual investors (*démarchage*). This prohibition is backed by criminal sanctions.

9. If the securities are publicly issued:

- Are the securities usually listed on a regulated exchange in your jurisdiction or in another jurisdiction?
 - If in your jurisdiction, please briefly summarise the main documents required to make an application to list debt securities on the main regulated exchange in your jurisdiction. Are there any share capital requirements?
 - If a particular exchange (domestic or foreign) is usually chosen for listing the securities, please briefly summarise the main reasons for this.
-

Listing in France of FCC units or notes is possible but has not been very frequent for practical reasons, such as cost and timing. Listing in Dublin or Luxembourg is frequently preferred by issuers.

Listing in Paris of FCC units requires the preparation of an AMF-approved (*note d'information*) information memorandum or prospectus. This document takes the form of a reference document (*note de référence*) (describing the FCC structure) and an operation note (*note d'opération*) (describing the securities features). In the case of an FCC that makes only a single issue of units, the reference document and pricing supplement are in practice prepared and published as a single information memorandum or prospectus.

In addition, all advertisements relating to a public offering of FCC units must be provided to the AMF before their distribution.

Constituting the securities

10. If the trust concept is not recognised in your jurisdiction, what document are the securities issued by the SPV constituted by and how are the rights in them held?

The trust concept has been recently introduced to French law through the “*fiducie*” concept. However, securities can be issued under French law without creating of a trust or *fiducie*.

The Securitisation Law, as amended, contemplates the possibility of multiple issues of units by FCCs or by compartments of FCCs. The Decree of 1989, as amended, provides that the degree of security afforded to existing unit holders cannot be prejudiced by any purchase of further receivables or the issue of further units. If an FCC is to make multiple issues, the by-laws (*règlement*) of the FCC must contemplate this and spell out the relevant mechanics. FCC units are “treated as transferable securities” (*valeurs mobilières*). This places FCCs within the jurisdiction of the AMF. One of the AMF’s main roles is the protection of investors’ interests.

Financial instruments or securities issued in France are generally “dematerialised” and accordingly do not take the form of paper securities, but of book-entries in securities accounts. FCC units and notes can be evidenced by entries in securities accounts kept with a bank or directly by the management company. The prohibition against limited liability companies (*sociétés anonymes* (SAs)) issuing unlisted bearer shares (*au porteur*) does not apply to FCCs. Like all transferable securities (*valeurs mobilières*), FCC units are freely negotiable.

The minimum denomination of an FCC unit is EUR150 (about US\$220) or its equivalent in the currency of the issue. This expressly contemplates FCC units being denominated in currencies other than euros.

TRANSFERRING THE RECEIVABLES

Classes of receivables

11. What classes of receivables are usually securitised in your jurisdiction? Please explain any particular reasons (for example, the strength of the origination market) why such receivables are usually securitised and the progress of the market in securitising new classes of receivables.

Any type of debt receivable, such as mortgage loans, commercial or consumer loans, hire-purchase receivables, trade receivables or credit card receivables, regardless of the currency of the debt, can be securitised through an FCC.

One of the major restrictions which formerly affected FCCs was that they could only acquire receivables from credit institutions, insurance companies or the Caisse des Dépôts et Consignations (a public financial institution in France). This restriction was removed by the Law of 2 July 1998. FCCs can now acquire receivables from any person.

Such receivables can result from an existing or future agreement, and the amount and payment date of the debts need not be determined. In other words, an FCC can acquire existing or future debts. Article 8 of the Decree of 1989, as amended, also expressly contemplates that an FCC can acquire receivables arising under hire purchase (*crédit-bail*) agreements.

Receivables that are *delinquent* or doubtful, or subject to litigation, can also be acquired by an FCC. However, the units of an FCC acquiring these types of receivables can only be held or subscribed by “qualified investors” and non-resident investors. Therefore, FCCs holding non-performing receivables cannot offer their units to the public.

Receivables assigned to a particular FCC can be sold by different originators. Accordingly, multi-seller FCCs are a practical possibility and have been created many times in the past.

The transfer of the receivables from the originator to the SPV

12. How are the receivables usually transferred from the originator to the SPV (for example, assignment, novation, sub-participation, declaration of trust)? How is the transfer perfected? Are there any rules, requirements or exemptions that apply specifically to transferring receivables in a securitisation transaction?

There are several ways to transfer receivables to a purchaser under French law. These are:

- By way of assignment, under Articles 1689 et seq. of the Civil Code.

- A delegation (*délégation*), under Articles 1275 et seq. of the Civil Code.
- A *subrogation* under Articles 1249 et seq. of the Civil Code.
- *Daily* assignment, under Articles L313-23 to L313-34 of the Monetary and Financial Code.

In addition, the Securitisation Law provides for a specific and simplified method to assign receivables to FCCs. Such assignment of receivables is made using a special document, called a *bordereau*, which is delivered by the originator to the management company. It is a much simpler mechanism than the ordinary methods of assignment required by French law, both in terms of efficiency and cost.

The *bordereau* must comply with a certain number of formal conditions. The remittance of such *bordereau* encompasses the simultaneous transfer of all security interests securing the assigned debt.

13. Are there any types of receivables that it is not possible or not practical to securitise in your jurisdiction (for example, future receivables)?

Any type of debt including mortgage loans, debts of public entities, commercial or consumer loans of all kinds, hire-purchase receivables, trade receivables or credit card receivables, regardless of the currency of the debt, can be securitised through an FCC.

Receivables can arise from an existing agreement (*acte déjà intervenu*) or a future agreement (*acte à intervenir*). Such receivables may be governed by French law or any foreign law, and can be:

- Non-matured receivables.
- Future receivables (the amount and maturity of which are not determined on the relevant transfer date).
- Defaulted receivables (*créances immobilisées*).
- Doubtful receivables (*créances douteuses*).
- Receivables subject to litigation (*créances litigieuses*).
- Debt securities (governed by French law or foreign law) representing a monetary claim against the relevant issuer.

14. How is any security attached to the receivables transferred to the SPV? What are the perfection requirements?

The Securitisation Law expressly provides that the assignment of receivables to an FCC takes effect and becomes enforceable against third parties as of the date of the *bordereau* (see *Question 12*). It also states explicitly that the transfer is enforceable against third parties without further formality and entails the transfer of any security interest securing the transferred debt. This makes the *bordereau* method of transfer particularly attractive in cases involving mortgage loans. The transfer of mortgage loans using alternative methods of transfer can involve very significant costs, such as registration and notarial fees.

Prohibitions on transfer

15. Are there any prohibitions on transferring the receivables or other issues restricting the transfer? For example, is a negative pledge enforceable, or are there any legislative provisions that affect the transfer of receivables (such as consumer or data protection rules)?

Contractual restrictions

Contracts underlying the securitised receivables should be reviewed in advance to identify any provisions requiring other parties' prior consent or contractual prohibitions to transferring such receivables. If such provisions are present, it may be necessary to obtain the debtor's consent before the securitisation.

Legislative restrictions

Legislative provisions relating to data protection or disclosure of information may create an obstacle to the transfer of debts to third parties. However, when the servicing of the assigned receivables is undertaken by the originator/assignor under an agreement entered into with the FCC's management company, those provisions may not apply.

French provisions on data protection and banking secrecy seek to prevent any communication abuse of personal data. Law No 78-17 on data protection, (*loi informatique et liberté*) created a supervisory body responsible for ensuring that such data is adequately stored and treated. In addition, where the assignor of the receivables is a credit institution, the provisions of the law relating to banking secrecy apply; such rules prohibit banks from transferring any information to third parties without the prior consent of the underlying obligor.

The Securitisation Law does not contain any specific provision that would allow an originator to transfer personal data to any other entity acting as service provider under a securitisation transaction, despite the fact that such entity would be governed by a similar level of secrecy or data protection.

Avoiding the transfer being re-characterised

16. Is there a risk that a transfer of title to the receivables will be re-characterised as a loan with security? If so, can this risk be avoided and/or minimised?

The authors are not aware of any precedent or case law where a transfer of title to receivables has been re-characterised as a secured loan. This is not a major concern under French Law.

Ensuring the transfer cannot be unwound if the originator becomes insolvent

17. Can the originator (or a liquidator or other insolvency officer of the originator) unwind the transaction at a later date? If yes, on what grounds can this be done and what is the time-scale for doing so? Can this risk be avoided or minimised?

In normal circumstances, the risk of clawback, whereby the transfer of the debts by the originator to the FCC becomes void after the transferor's bankruptcy, is remote.

French Insolvency Law provides for transactions entered into on “preferential” terms to be set aside in certain circumstances:

- Article 107-2 of the Insolvency Law provides for the automatic avoidance of any contract in which the insolvent party’s obligations are manifestly greater than those of the other party to the contract.
- Article 108 gives a court the power to set aside any transaction entered into for value if, at the time of entering into the contract, one party knew of the other party’s insolvency.

The provisions of these two articles apply to transactions entered into during the “suspect period” (*période suspecte*), which is fixed by the court at a maximum of 18 months before the judgment marking the start of the insolvency proceedings.

Under these provisions, an assignment of the receivables to an FCC could in theory be annulled in the case of the insolvency of the originator, if the assignment occurs within a period of up to 18 months before the start of the insolvency proceedings. However, the risk is extremely unlikely to materialise if the assignments are made on arm’s-length terms.

In cases involving over-collateralisation (*see Question 21*), there is a view that Article 107 of the Insolvency Law does not apply because the originator usually retains the right to the FCC’s liquidation surplus. The right to this surplus is regarded as compensating for the undervalue created by the over-collateralisation.

Establishing the applicable law

18. Are choice of law clauses in contracts usually recognised and enforced in your jurisdiction? If yes, is a particular law usually chosen to govern the transaction documents? Are there any circumstances when local law will override a choice of law?

Choice of law clauses in contracts are usually recognised and enforced on the basis of the Rome Convention on the law applicable to contractual obligations (*1980/934/EEC*) (Rome Convention), which was ratified by France on 21 June 1992. This convention embodies the principles of French private international law applicable to the governing law of contracts, including those entered into with non-EU persons. The Rome Convention allows the parties to a contract to choose any foreign law to govern their contract, provided that the contract can be qualified as an “international contract” (that is, the contract involves non-French elements) and that the law is not chosen to avoid French public policy considerations.

Under French conflict of laws rules, subject to any treaty provisions to the contrary, the assignment of the receivables must be perfected under the laws of the debtor’s own jurisdiction. Therefore, notice of the assignment must be given according to the law governing the assignment agreement.

Sometimes the parties to an offshore securitisation of French receivables are willing to document the transfer of receivables under the law of another jurisdiction, such as English law.

In principle, an assignment agreement of French receivables can be governed by foreign law, provided that this choice of law is not made with a view to avoiding mandatory provisions of French law. However, it may be desirable that French law receivables owed by French debtors are assigned under French law (whether or not the originator is French) since this will facilitate recognition of the transfer by French courts if the matter is disputed before a French court.

Amendments to the Securitisation Law in 2003 tried to minimise doubts about efficiency of assignments in a multi-jurisdictional context by providing that the assignment to the FCC by way of the *bordereau* is effective regardless of the law applicable to the assigned receivables or the geographical location of the underlying debtors. The practical effect of this amendment is actually disputed, since French law is not competent to regulate enforcement situations in foreign countries.

SECURITY AND RISK

Creating security

19. Please briefly list the main types of security that can be taken over the various assets of the SPV in your jurisdiction, and the requirements to perfect such security.

Under the current French Securitisation Law, no security can be taken over an FCC’s assets. However, in economic terms, the FCC’s assets are generally considered as being held for the economic benefit of investors.

20. How is the security granted by the SPV held for the investors? If the trust concept is recognised, are there any particular requirements for setting up the trust (for example, the security trustee providing some form of consideration)? Are foreign trusts recognised in your jurisdiction?

This issue does not arise under French Law since FCCs are not allowed to grant security over their assets (*see Question 19*).

Credit enhancement

21. What methods of credit enhancement are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the credit enhancement techniques set out in the Model Guide?

The following list of credit enhancement techniques are set out in Article 9 of the Decree of 1989 and are commonly used by FCCs.

- Guarantees provided by the originator, an affiliate of the originator, a credit establishment, an insurance company or the *Caisse des Dépôts et Consignations*.
- Issuance of specific units (that is, subordinated units redeemable after full redemption of the notes and senior units).

- Subordinated loans made available by the originator, an affiliate of the originator, a credit establishment or the *Caisse des Dépôts et Consignations*.
- Over-collateralisation.
- Pre-existing guarantees or security attached to the debts acquired by an FCC.

This list is not exhaustive, allowing for other credit enhancement techniques such as cash reserve funds. Any of these credit enhancement techniques can be structured to support either all of the compartments of an umbrella FCC, or any individual compartment.

The FCC regulation must spell out the terms and mechanics of any credit enhancement.

For further information on this, see *Model Guide, Credit enhancement*.

Risk management and liquidity support

22. What methods of liquidity support are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the provision of liquidity support as set out in the Model Guide?

Liquidity support is generally provided to an FCC through subordinated credits lines and cash reserves (see *Model Guide, Risk management and liquidity support*).

Under French law, credit facilities can only be provided by credit institutions and other institutions defined by the law. Commercial companies are generally not allowed to extend credit.

CASH FLOW IN THE STRUCTURE

Distribution of funds

23. Please explain any variations to the Cash flow index accompanying Diagram 9 of the Model Guide that apply in your jurisdiction.

The Cash flow index accompanying Diagram 9 is accurate overall (see *Model Guide, Diagram 9 and box, Cash flow index*), subject to the following variations:

- The Paying Agent is in charge of all payments to unit holders and note holders, but does not handle allocation of funds to other parties according to the waterfall. The FCC's management company does this.
- Extraction of surplus amounts held by the FCC is generally made by way of specific FCC units combined with an adapted waterfall.

Profit extraction

24. What methods of profit extraction are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the profit extraction techniques set out in the Model Guide?

The most common form of profit extraction techniques is the issuance of specific categories of units or notes, the rights of which are defined in the FCC regulations.

THE ROLE OF THE RATING AGENCIES

25. Are there any specific factors in your jurisdiction that affect the rating of the securities issued by the SPV (for example, legal certainty or political issues)? How are such risks usually managed?

The rating of FCC securities can be affected by certain defects or weakness affecting the underlying securitised receivables. The authors are not aware of any major problems or defects to the FCC legal framework that would be detrimental to an FCC rating.

TAX ISSUES

26. What tax issues arise in securitisations in your jurisdiction? In particular:

- **What transfer taxes may apply to the transfer of the receivables? Please give the applicable tax rates and explain how transfer taxes are usually dealt with.**
- **Is withholding tax payable in certain circumstances? Please give the applicable tax rates and explain how withholding taxes are usually dealt with.**
- **Are there any other tax issues that apply to securitisations in your jurisdiction?**

Transfer and documentary taxes

There is no transfer tax, stamp duty or other documentary tax on the assignment of receivables to an FCC, unless the assignment is registered with the French tax authorities, in which case a nominal EUR125 (about US\$184) is payable.

Withholding tax

Usually, no withholding tax is applicable to payments in respect of trade receivables. However, specific attention should be paid to lease receivables where there is a risk that the French tax authorities could seek to apply Article 182B of the French Tax Code (*Code Général des Impôts*) to domestic lease and hire purchase (*crédit bail*) receivables. Article 182B imposes a withholding tax on payments made by a debtor carrying on business in France to a beneficiary who does not have a permanent professional establishment in France in consideration for any services supplied or used in France.

In relation to loan interest, no withholding tax applies in France on domestic interest payments. Where a French debtor makes interest payments to a foreign beneficiary, withholding tax applies in principle at the rate of 15%. However, exemptions are available under domestic tax law. In particular, Article 131 *quater* of the French Tax Code provides that interest paid abroad on loans entered into abroad and granted to French legal entities is exempt from withholding tax. However it is not clear whether this exemption is applicable in the case of loans first granted by a French lender.

The rules set above in relation to withholding tax are, as already noted, all subject to applicable relieving provisions contained in any double tax agreement between France and the offshore vehicle home jurisdiction.

Other tax issues

FCCs benefit from a specific tax treatment as they are specifically designed to be tax neutral. For the tax regime applicable to unit holders, income on units or debt securities held by French tax resident individuals is subject to income tax at a progressive rate.

SYNTHETIC SECURITISATIONS

27. Are synthetic securitisations possible in your jurisdiction? If so, please briefly explain any particularly common structures used. Are there any particular reasons for doing a synthetic securitisation in your jurisdiction?

Synthetic securitisations are achievable under French Law. The most common form is implementation through credit derivatives.

OTHER SECURITISATION STRUCTURES

28. Which of the various structures, set out in the Model Guide or otherwise, are commonly used in your jurisdiction?

A number of possible structures allow French originators to transfer receivables. Two of these are outlined below:

- **Sub-participations.** It is possible to have French receivables purchased by an EU bank (that is, a bank licensed in the EU) located outside France. The bank then sub-participates (see *Model Guide, Sub-participation*) to the securitisation vehicle the whole of its exposure on the receivables. If properly documented, the arrangement should not generate any capital adequacy cost for the bank, although the final determination of this question will be a matter for the bank's own regulatory authority. This structure also has the advantages of enabling the simplified *Loi Dailly* assignment mechanism to be used in appropriate cases.
- **Two-tier structure.** Another possibility is for the receivables to be assigned to an FCC through a bank or an insurance company. An offshore securitisation vehicle would then purchase all or part of the FCC units. The particular advantage of this structure is that it combines certain advantages of FCCs (in particular, the simplicity of the assignment mechanism and the certainty that all security is transferred without further cost or formality by that mechanism) with the flexibility of an offshore vehicle.

REFORM

29. Please summarise any reform proposals and state whether they are likely to come into force and, if so, when.

Extensive discussions have taken place about adapting French securitisation to the transfer of insurance risk. This should result in further amendments to the Securitisation Law.

PRACTICAL LAW COMPANY



PLC Which lawyer?

An online resource based on independent and objective research among in-house counsel and private practitioners. It identifies the leading lawyers and law firms practising in the core areas of business law in over 100 jurisdictions around the world.

www.practicallaw.com/whichlawyer