Securitisation Roundtable

Baker McKenzie Zurich
26 January 2018

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PRIVATE AND CONFIDENTIAL

Agenda

1	New European Developments – the new Securitisation Regulation
2	Swiss Securitisation Market
3	The role of the Trustee
4	Q&A / Discussion
5	Speaker CVs

1 New European Developments – the new Securitisation Regulation

Jeremy Levy (London)
Philippe Steffens (Amsterdam)
Sandra Wittinghofer (Frankfurt)

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Overview

- **Legislative Source**
- **Regulation Amending CRR – Capital Treatment**
- **The Securitisation Regulation**
- **The Securitisation Regulation - ABCP Securitisation**
- **Miscellaneous Points of Interest**
- **Risk Retention Requirements**

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Legislative Sources

- **Regulation Amending CRR**

  REGULATION (EU) 2017/2401 amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms

  and

- **Securitisation Regulation**

  REGULATION (EU) 2017/2402 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2017

  Laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012

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Regulation Amending CRR – Capital Treatment

- Significant Risk Transfer (SRT) (article 24 and EBA Discussion Paper 19.9.17)
- No implicit support
- Risk Weighting: Hierarchy of Methods
  - SEC – IRBA
  - SEC – ERBA
  - SEC – SA
  - IAA (for ABCP)
- Revised Capital Treatment for STS

  10% Floor (STS) –v– 15% Floor (Non-STS)

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The Securitisation Regulation

Introduces the concept of “STS” Securitisations = Simple Transparent Standardised

Basic Requirements

- (Arts 5-9): Apply to **all** ‘securitisations’:
  - Due Diligence requirements (article 5 [+RTS])
  - Risk Retention requirements (article 6 [+RTS]) (**see later**)
  - Transparency/Disclosure requirements (article 7 [+RTS])

STS [Additional] Requirements (articles 19-28)

NB Different treatment for (i) non-ABCP securitisation and (ii) ABCP securitisation

- (i) non ABCP Securitisation
  - Simplicity Requirements (article 20 [+RTS]) (Homogeneous asset types)
  - Standardisation Requirements (article 21)
  - [Additional] Transparency Requirements (article 22 + 7)

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The Securitisation Regulation - ABCP Securitisations

- (ii) ABCP Securitisation
  - Transaction – level requirements (article 24)
  - Sponsor obligations (article 25)
  - Programme – level requirements (article 26)
- STS Notification Requirements (article 27 [+RTS])
- STS Verification (article 28 [+RTS])
- Sanctions

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Miscellaneous Points of Interest

- Securitisation Repositories (articles 10-17)
- ‘Resecuritisation’ is “BANNED”! (article 8) Limited exceptions…..
- Synthetic transactions not included – to be reviewed and reported in 2020 (article 45(2))
- European application: Originator, Sponsor and SSPE all must be established in the Union (article 18)
- What about BREXIT?

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STC (BCBS) v STS (EU) Criteria – Quick Comparison

Global – STC

- 14 (+2) Criteria plus Guidance (60+)
- Originator / Sponsor attests + separate investor determination
- No formal certification / list of deals
- ABCP NOT eligible
- Synthetics NOT eligible
- Risk-weight floor 10% (SENIOR) - 15% MEZZ
- Re-calibration of 3 approaches
- Risk-weight look-up tables differ
- Basel member countries may "opt-out" if costs outweigh benefits!
- Sanctions – Pillar 2 add-ons, denial of preferential treatment for that / all deals!
- Implementation 1 January 2018
- No provisions to grandfather existing deals

European – STS

- 50+ Criteria ("traditional" + "ABCP")
- Originator + Sponsor notify ESMA using template / investor relies + undertakes own due diligence (3rd party may check / assess)
- ESMA to publish list of STS notifications
- "Repositories" to store info / data disclosures
- ABCP eligible – separate Criteria
- EBA to develop "synthetic" STS Criteria
- R-w floor 10% (SENIOR) / 15% other
- Re-calibration of all 3 approaches
- Risk-weight look-up tables differ
- All 28 Member States must comply (subject to CRR – direct applicability)
- Sanctions – MS and CAs to set and oversee with fines, censure, criminal sanctions
- Implementation 1 January 2019, with some grandfathering

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Risk Retention Requirements - Background

Obligations Imposed on Institutional Investors

As under existing rules, the SR prohibits an “institutional investor” from becoming exposed to a securitisation position unless (article 5):

- The originator, original lender or sponsor retains on an ongoing basis a material net economic interest of not less than 5% and discloses the risk retention to investors;
- The originator, original lender, or sponsor makes information about the securitisation available to investors; and
- The institutional investor has carried out due diligence enabling it to assess the risk characteristics of the specific securitisation position.

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Risk Retention Requirements - Background

The five risk retention options (article 6(3)) are:

- **Vertical slice** – retention of at least 5% of the nominal value of each of the tranches sold or transferred to investors.
- **Originator's interest (revolving exposures)** – retention of an interest in revolving assets equal to at least 5% of the nominal value of the securitised portfolio.
- **On- balance sheet** – retention of randomly selected assets that would otherwise have been included in the portfolio, equal to at least 5% of the nominal value of the securitised portfolio, provided selection is made from a pool of not less than 100 assets.
- **First loss (tranche)** – retention of the most subordinated tranche(s) equal to at least 5% of the nominal value of the securitised portfolio.
- **First loss (exposure)** – retention of at least 5% of the nominal value of each securitised asset.

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Risk Retention Requirements

General overview changes

- Despite EP lobbying no change to the 5% retention level;
- New “direct approach” in addition to existing “indirect” obligation;
- The “sole purpose” prohibition;
- Prohibition on “adverse selection” of assets to be securitised; and
- Development of new RTS to replace the existing RTS.

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Risk Retention Requirements

Obligations Imposed on Originators, Original Lenders and Sponsors

- New ‘direct approach’: an originator, original lender or sponsor shall retain a material economic interest of not less than 5% in each securitisation transaction (article 6(1)).
  - the required retention interest is measured at origination and is determined by the notional value for off-balance sheet items;
  - there can be no multiple applications of the retention requirements for any given securitisation; and
  - the required retention interest may not be split among different types of retainers and may not be subject to any credit risk mitigation or hedging.
  - new transactions with exclusively non-EU investors will now also be required to meet the 5% risk retention.

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Risk Retention Requirements

Key (new) points to note

1. Sole purpose prohibition

- An entity established or operating for the sole purpose of securitising exposures will not be considered an originator
- Impact on non-bank originator entities (particularly relevant for CLO and loan portfolio transactions).

2. No adverse selection

- Prohibition on originators from selecting assets to be securitised with the aim of transfering losses on such assets.
- If performance of securitised assets is significantly lower than that of comparable assets held by the originator as a consequence of the intent of the originator, a sanction is imposed pursuant to Articles 32 and 33 (article 6(2)).

Guidance required on above point in RTS.

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Risk Retention Requirements

Sponsor Definition Broadened

- The Securitisation Regulation defines “sponsor” by reference to both the CRR and MiFID II in order to permit entities located outside the EU (but with the permission required under MiFID II) to qualify as sponsors for purposes of the CRR.
- Particularly relevant for CLO transactions.

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Risk Retention Requirements

Draft Regulatory Technical Standards – Key Issues

- Guidance needed around the “sole purpose” test;
- Clearer guidance needed around “adverse selection”;
- Change of retainer (article 17 Draft RTS).

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2 Swiss Securitisation Market

Frédéric Bétrisey (Geneva)
Marcel Giger (Zurich)
Ansgar Schott (Zurich)
Philip Spoerlé (Zurich)

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Requirement of written form in digitization

- The assignment of receivables must be in writing (article 165 CO)
- An agreement required to be in writing must be signed by all persons on whom it imposes obligations (article 13 CO)
- Does a PDF file as a declaration of intent comply with the requirement of written form in accordance with article 13 CO?
  - Key criterion:
    - Detection of changes after the signature (integrity)
    - Verification of the issuer's identity (authenticity)
- Declaration medium is not a paper document:
  - Inserting an electronically saved signature into a word document -> DOES NOT COMPLY
  - Sending the signed original document by fax -> DOES COMPLY (significant risk of falsification)
  - Scanning the signed original document, saving and sending the scan by e-mail -> DOES COMPLY
    - Change-resistant (PDF, but not Word)
    - Permanent
- Contract conclusion when last signed page is received by the recipient

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Waiver of set-off rights

- Set-off under Swiss law
  - Requirements: Reciprocal claims for cash payment / both claims are due (article 120 CO)
  - Assignment: Debtor can discharge its liabilities by setting-off claims it had against original creditor at the time of transfer; set-off right may also be exercised if debtor's claims were not yet due at time of transfer, provided that debtor's claims become due before assigned claims (article 169 CO)
  - ➢ Ideally, underlying agreements contain waiver of set-off; in case where an obligor may have an independent claim against the originator (e.g. a bank depositor in the case of a mortgage loan), such waiver is even more relevant

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Waiver of set-off rights (cont'd)

- Validity of waiver of set-off rights
  - Set-off rights of debtor may be waived (article 126 CO)
  - Inclusion of waiver of set-off rights in general terms and conditions is valid according to Swiss case law, provided the waiver of set-off is clearly stated
  - Validity of waiver of set-off in case of bankruptcy?
    - Effect of a waiver of set-off rights against bankruptcy estate has never been tested before Swiss courts
    - According to older legal writing waiver of set-off is per se not valid
    - Change in more recent legal writing: assumption that waiver is not valid absent other agreement b/w parties
    - ➢ If a specific wording is included into underlying agreement, Swiss courts would in our opinion give effect to a waiver of set-off rights even in a bankruptcy scenario
    - ➢ If no specific language is included, risk of set-off remains

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Obligations under Financial Market Infrastructure Act (FMIA)

- FMIA obligations apply to OTC derivatives of financial and non-financial counterparties
- Originators/SPVs entering into interest rate and/or cross-currency swaps are subject to FMIA, generally as NFC- (small non-financial counterparties)
- Non financial counterparty: any enterprise established in Switzerland which is not a financial counterparty (article 93(3) FMIA)
- NFC-: counterparty with an aggregate gross average position on OTC derivatives, calculated on a rolling basis over 30 business days, that is below applicable threshold
  - applicable threshold is determined according to transaction type: CHF 3.3 billion for interest rate, forex and other derivatives (article 88(1) FMIO)
  - hedging transactions are not counted (article 98(3) FMIA)

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FMIA Reporting Requirement

- Reporting to trade repository at the latest on the next following business day (article 104 FMIA)
- Only one of the parties makes the reporting
- Reporting will generally be required from (financial) counterparty of the originator/SPV (article 104(2)(a) FMIA)
- Effective date of obligation for NFC-: 1 January 2019 (1 January 2018 for NFC+) (see FINMA Aufsichtsmitteilung 05/17 of 18 October 2017)
- May apply to outstanding transactions (e.g. amendment or termination of any derivative transaction)

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FMIA Risk Mitigation Obligations

- Obligation to mitigate risks inherent in transactions not subject to mandatory clearing (article 107 et seq. FMIA)
  - general requirement to register, observe and mitigate operational and counterparty risks inherent in derivatives
  - timely confirmation of all OTC derivatives
  - implementation of portfolio reconciliation procedures/management of associated risks and portfolio compression measures
  - implementation of dispute resolution process
  - daily valuation/margin exchange requirements not applicable to NFC-
- Came into force on 1 July 2017 (article 131(1)(b) FMIO)

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3 The role of the Trustee

Simon Porter (London)
Frédéric Bétrisey (Zurich)

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Trusts under English law

- The key characteristic of an English law trust is the separation of legal ownership and beneficial interest.
- The English law Trustee:
  - owns the trust property as far as third parties are concerned.
  - holds the trust property for the benefit of the beneficiaries.
- A Trustee can hold legal title to an asset for the benefit of third parties

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Uses of Trusts in securitisation

- Holding an “orphan” SPV Issuer on charitable trusts
- Transfer of asset without transfer of legal title – but nevertheless effective for “true sale” analysis e.g. originator declares trust over receivables for the benefit of an SPV.
- Creation of security over securitisation assets
- Master trust
  - a trust which itself issues multiple issues of securities, with each series having the benefit of the entire asset pool.
  - Originator can introduce new assets into the pool and issue new securities over time.
- Constituting the securities – benefit of covenants and rights contined in the securities held on trust for the Noteholders

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Uses of Trusts in securitisation

- **Note issuance (constitution of securities)**
- Issuer issues notes - Trustee holds benefit of covenants on trust for the beneficiaries - the Noteholders.
- Trustee acts as *fiduciary* for the Noteholders, but has certain discretions.
- Trustee does not have an equivalent fiduciary duty to the Issuer/Borrower/Originator.
- Trustee does not have an agency relationship with either Issuer or Noteholders.
- In contrast, Fiscal Agent performs a similar role to that of Trustee, but is agent of the Issuer

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Uses of Trusts in securitisation

- **Security Trustee**
- Trustee holds security on trust for beneficiaries - e.g. Lender, Note Trustee and/or Noteholders.
- The Trustee holds legal title to the security but holds the benefit of the security according to the terms of the trust relationship.
- Trustee acts as *fiduciary* for the beneficiaries
- Trustee does not have an agency relationship with the beneficiaries.
- Allows for “easy” enforcement – though security trustee can delegate enforcement to agent/receiver

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Trustee discretion

- One of the major benefits of an English law trust structure is that a trustee has a wide discretion.
- Grounds for exercise of discretion include manifest error or that there is no material prejudice to Noteholders.
- Often complex facts and decisions, particularly in a default, but equally can be used to prevent a default, waive a non-material breach or facilitate a restructuring.
- In unclear cases, Trustee can make an application to Court for determination of a particular issue.
- Not always an easy decision for the Trustee – potential laibility if the Trustee gets it wrong and always a danger of “nuisance” claims.
- Market is well developed so there is to a large extent standardisation of documentation.

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The standard of care

- A trustee discharges his duty if, when managing trust affairs, he takes all those precautions which a prudent man of business would take in managing similar affairs of his own.
- Provided the duty of care has been satisfied, the Trustee's actual decision can only be challenged on grounds of 'Wednesbury unreasonableness' e.g. perversity or capriciousness.
- In other words, the Trustee can only be challenged if the Trustee has taken a decision that no reasonable Trustee could make.
- Statutory duty of care can be and typically is excluded.

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Noteholder meetings

- Hard-wired into English law bond documents
- Allows a binding determination to be made by Bondholders where Trustee either unwilling or unable to exercise discretion – e.g. a “basic terms modification”.
- Risk that the meeting is inquorate.
- Risk that Noteholders vote against a proposal.
- Communications with Noteholders are not always easy – issuer cannot see a register of Noteholders and because of the chain of custody, underlying Noteholders may not always receive the relevant notice.

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Default and enforcement

- Default does not mean that enforcement is inevitable
  - Relatively few examples of securitisation transactions that have gone to enforcement.
  - A number of examples of default.
- Trustee has a key role on default
  - Issuer and Noteholders should engage at the earliest opportunity before default and enforcement becomes inevitable.
  - Trustee has a valuable role to play in:
    - protecting Issuer from spurious Noteholder claims;
    - disseminating information to Noteholders; and
    - agreeing revised terms and in implementing any compromise needed, including standstill.

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Default and enforcement

- On the occurrence of a default
  - Trustee will contact issuer (and any guarantor).
  - Trustee will notify Noteholders.
  - Trustee needs to fund costs of enforcement so will always ask for:
    - indemnity; prefunding and/or security; and
    - instructions.
- Trustee sometimes required to act quickly to preserve assets.
- Enforcement and sale of assets always considered to be the most extreme action: often leads to losses (e.g. fire sale).

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Trustees in Swiss Securitisations

- Switzerland is a member of the Hague Convention on the Law Applicable to Trust and its Recognition and amended its bankruptcy law accordingly in 2007 (see article 284a-284b Debt Enforcement and Bankruptcy Act, SchKG)
  - Segregation of trust assets recognised
  - Transfer of trust assets to new trustee in case of bankruptcy of trustee

➔ Notes can be created by way of trust deed (meets international standards)

➔ Swiss security arrangements may benefit from trust concept, where trustee acts as security trustee

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Trustees and Swiss Law Security

- Security may be accessory or non-accessory
  - Accessory security (e.g. bank account pledge) is intrinsically linked to secured obligation, i.e. if secured obligation is repaid or invalidated, the security expires
  - Non-accessory security (e.g. assignment of claims) is independent from secured obligation

- Holding of security depends on its type
  - Accessory security must be held by the creditor of the secured obligation or a direct representative (article 32(1) CO)
  - Non-accessory security may be held by an indirect representative (fiduciary, article 32(3) CO) or by a trustee

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Trustees and Swiss Law Security (cont'd)

- In case of bankruptcy of security trustee:
  - Accessory security remains held by secured creditors
  - Non-accessory security held as indirect representative is segregated in favour of secured creditors and transferred to these (article 401 CO)
  - Non-accessory security is transferred to new trustee

- Language to be inserted in the trust deed and each security document to ascertain trustee's position and grant necessary powers according to type of security

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Trustees in RMBS

- Mortgage interest granted (generally) through security assignment of mortgage certificates (Schuldbriefe), on paper or dematerialised (certificates of registry)
  - Mortgage claims are distinct from credit claims (secured obligations)
  - Mortgage claims may be held by agent (e.g. servicer/collateral agent) on behalf of creditor (as indirect representative/fiduciary agent), provided that this is agreed by mortgagor
  - If credit claims are assigned to an SPV, the lender may also assign to the SPV claims against the collateral agent
  - SPV may create security over (1) credit claims and (2) claims against collateral agent

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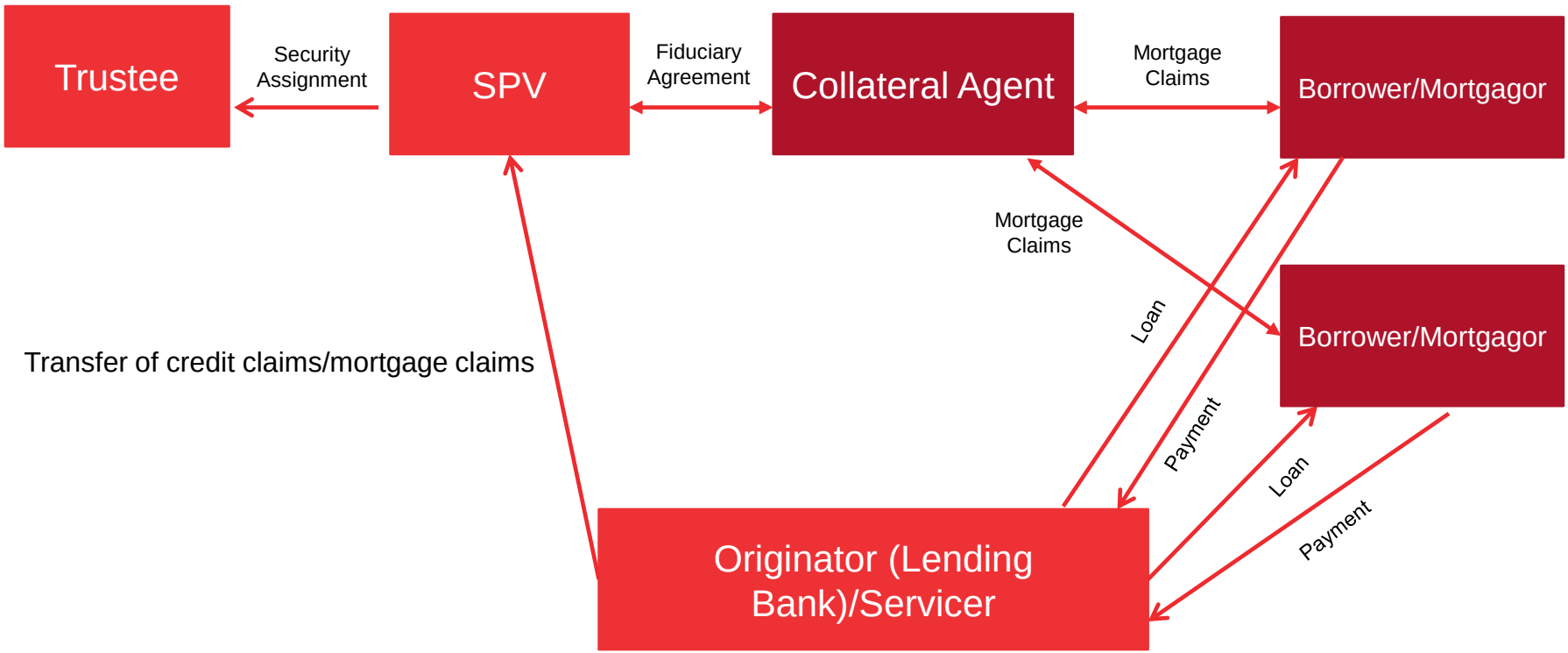
Trustees in RMBS (cont'd)



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Trustees in RMBS (cont'd)

- Lex Koller restricts acquisition/lending by foreigners
  - Trustee is often a foreign person
  - But Lex Koller determination primarily depends on whether securitised mortgages are Lex Koller compliant
- Interest on loans secured by way of mortgage may be subject to source income tax
  - Trustee (as opposed to secured parties) considered as holding the security on securitised receivables from tax perspective
  - Position may differ if trustee acquires security as indirect representative (due to article 401 CO and practice of Swiss tax authorities on fiduciary arrangements)

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Trustee or Fiduciary Agent

- Alternative through fiduciary agent?
  - Fiduciary agent (article 32(3) CO) acts in its own name and for the account, benefit and risks of represented parties
  - Using fiduciary concept would avoid need for English law advice on trust deed
  - Consistency with international standards?
  - Might be detrimental for RMBS

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4 Q&A

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5 Speaker CVs

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Speaker CVs

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Frédéric Bétrisey is a partner in the Firm's Corporate and Banking practice and leads the securitisation practice in Geneva. Before joining Baker & McKenzie Frédéric worked as an in-house lawyer within the Legal Department of the Swiss Federal Banking Commission.

Practice Focus

Frédéric advises several Geneva and international banks and financial institutions on the regulatory aspects of the banking and finance industry. He also provides assistance to financial intermediaries in connection with their securities lending and derivative transactions, with a particular focus on the legal issues and documentation relating to netting arrangements, as well as the documentation used for the issuance of structured products. Frédéric also acts for banks and borrowers in various types of banking and finance transactions, including trade and commodity finance, acquisition finance, equipment financing and syndicated lending. His recent notable assignments include the assistance to the Canton of Geneva in the first issuance of green bonds by a Swiss public institution and to Crédit Agricole Corporate and Investment Bank as arranger of a residential mortgage backed securitisation in Switzerland.

Marcel Giger
Partner, Zurich

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Dr. Marcel Giger is a graduate of University of St. Gallen (HSG) and earned an M.C.J. at the New York University, School of Law. Prior to joining Baker & McKenzie, he worked as in-house counsel for a major Swiss bank.

Practice Focus

Marcel co-chairs the Capital Markets Practice Group in the Zurich office. He focuses on all legal aspects of capital market transactions, banking and financing matters, regulatory issues as well as M&A transactions.

He advises financial institutions as well as corporate clients in transactions within the practice areas. He also regularly advises financial institutions on regulatory issues and listed corporate clients on compliance with the relevant stock exchange laws.

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Speaker CVs

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Dr. Ansgar Schott is a partner in Baker McKenzie's Zurich office. He has been recognized as a leading banking and finance lawyer by publications such as Legal 500 and Who's Who Legal. In 2016, Ansgar and his team received the European Banking and Finance Deal of the Year from The Lawyer for their work on a structured finance transaction.

Practice Focus

Ansgar advises Swiss and international financial institutions and corporations on all aspects of banking, investment and financial markets law. He is also experienced in financial regulatory matters.

Philip Spoerlé
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Dr. Philip Spoerlé is an associate in Baker & McKenzie's Zurich office. He studied law and economics at the University of St. Gallen (M.A. HSG in Law & Economics 2011) and Osgoode Hall Law School of York University, Toronto (2009). After his admission to the Zurich bar, Philip Spoerlé obtained his PhD from the University of St. Gallen in 2015 with a doctoral thesis in the area of corporate law.

Prior to joining Baker & McKenzie in February 2015, Philip Spoerlé worked for a global investment bank in the area of fixed income securities trading (2012–2013). He also worked as a teaching assistant at the University of St. Gallen and as a law clerk at Baker & McKenzie Zurich (2010–2012).

Practice Focus

His practice mainly focuses on the areas of equity and debt capital markets, derivatives, structured products, loans and credit facilities, mergers & acquisitions, corporate restructurings as well as general corporate and commercial matters.

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Speaker CVs

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Philippe Steffens is co-chair of Baker McKenzie's Global Securitisation Practice and head of Baker McKenzie's Amsterdam Banking & Finance practice. He has been consistently recognized as a leading lawyer for securitization and structured finance in Chambers Global, Chambers Europe, the Legal 500 and IFLR. Philippe joined the Amsterdam office as a partner in 2006. His clients are mainly investment banks, financial institutions, asset managers and investment firms.

Practice Focus

Philippe specialises in securitisation, structured credit products and whole loan transactions including CLO and repackaging transactions, involving a wide variety of asset classes. He also advises on debt capital markets transactions.

Sandra Wittinghofer
Partner, Frankfurt

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Sandra Wittinghofer advises national and international banks, trustees and corporations on matters of banking and finance law, particularly on structured finance and relating banking regulatory matters. She studied law in Bayreuth and Paris (Assas) and is admitted as a German Rechtsanwalt and as Solicitor (England and Wales).

Practice Focus

Sandra advises national and international banks and corporations in matters of finance and regulatory law. She has extensive experience in ABCP securitization transactions as well in term transactions, covering a range of asset classes.

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Speaker CVs

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Jeremy Levy is a Senior Associate in Baker McKenzie's Structured Capital Markets Team in London, working in the areas of securitisation, structured finance and derivatives & financial products. Jeremy joined Baker McKenzie as a trainee in 2005 and qualified into the Structured Capital Markets Team in 2007. Jeremy has been named a Next Generation Lawyer in the Legal 500 2017 edition.

Practice Focus

Jeremy regularly acts for sponsors, originators, arrangers and trustees on securitisation and other structured finance transactions across multiple jurisdictions and involving various asset classes (including trade receivables, residential mortgages, auto loans, consumer loans and equipment leases). Jeremy also regularly advises buyers, suppliers and platform providers on all types of supply chain finance transactions and advises companies listing bonds on the Channel Islands and Cayman Islands Stock Exchanges.

Jeremy has considerable experience in establishing new structures and vehicles, and advised PrimeRevenue in establishing a new supply chain finance platform, named a Standout Deal at the FT Innovative Lawyers Awards 2016.

Simon Porter
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Simon Porter is a member of the Firm's Structured Capital Markets Group in the London office, where he works on a wide range of capital markets and structured finance transactions. His practice includes specialist advice to corporate trustees in capital markets transactions.

Practice Focus

Simon acts on a wide range of capital markets transactions, including debt, equity, equity linked and structured products. He advises issuers, trustees and arrangers on a wide range of matters relating to securities and finance, and is often involved in transactions involving Middle Eastern debt capital markets. Simon has worked on a number of technically demanding transactions, including the first ever pre-IPO convertible bond for a Ukrainian company, as well as a number of secured convertible bonds for AIM listed companies.

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