

LEGAL NEWSLETTER



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REFORM OF FRENCH SECURITY AGENT LAW: A MECHANISM AS COMPETITIVE AS THE SECURITY TRUSTEE IN SYNDICATED LOANS AND SECURED BONDS ISSUES

Created in 2007 with a view to provide French law with a security agent regime in syndicated loans as competitive as the Anglo-saxon security trustee, the provisions of Article 2328-1 of the French Civil Code have been subject to criticism because of the legal uncertainty related to the nature of the security agent's powers and its too limited scope.

Its use in international financing was jeopardized since the *Belvédère* precedent dated September 2011¹, by which the French *Cour de cassation* recognized the effectiveness in France of the trust and parallel debt mechanisms.

The ordinance n° 2017-748 dated 4 May 2017 relative to security agent (« **Ordinance** »), adopted in furtherance of Article 117 2° of the statute n° 2016-1691 dated 9 December 2016 relative to transparency, fight against corruption and modernization of economic life (also referred to as Sapin II law) eliminates the ambiguities and constraints of the initial text which is replaced by clear and precise provisions establishing a regime of fiduciary nature.

¹ C.Cass., com, 13 september 2011, n°10-25.533, 10-25.731, 10-25.908, Bulletin 2011, IV, n° 131.



The new regime presents several points of interest regarding syndicated loans, and, in the context of desintermediation, regarding secured bond issues. The ordinance n° 2017-970 dated 10 May 2017 adopted in view to favor the development of bond issues in furtherance of Article 117 1° of Sapin II law provides that the representative of the bondholders' group may delegate its power to accomplish acts of management aiming to protect the common interests of the bondholders to a third party, including a security agent.

Articles 2488-6 to 2488-12 form the new title III relative to the security agent (*agent des sûretés*) within book IV of the French Civil code, thus consecrating the name that French practitioners gave to the institution.

THE SECURITY AGENT HOLDS SECURITY INTERESTS IN ITS OWN NAME

Article 2488-6 provides that the security agent acts for the creditors in its own name. This formulation removes the uncertainty of the original text regarding its essence of either agency or specific *fiducie* (French trust) in which case there would be no need for a power of attorney to take, register, manage or enforce the security interests securing the financing.

Therefore, a transfer of debt by a member of a syndicate does not entail any additional formality to render the new creditor's rights on the security interest enforceable against third parties.

Going further, Article 2488-9 allows the security agent to bring an action for the benefit of the creditors, in its sole name so as to protect the interests of the creditors of the secured claim. The security agent is now empowered to file proofs of claims in an insolvency proceeding and to judicially enforce security interests without power of attorney from the secured creditors. This flexibility guarantees efficacy where a syndicate of banks comprises numerous creditors or in emergency situations such as a risk that the debtor files for insolvency, where the security agent can not seek the opinion and obtain a power of attorney from each creditor.

EXTENSION TO PERSONAL GUARANTEES

The scope of the regime is no longer limited to *in rem* security interests. The security agent is also authorised to manage personal guarantees.

FREEDOM RELATIVE TO THE DOCUMENT IN WHICH THE SECURITY AGENT IS DESIGNATED

It is no longer required that the security agent be designated in the credit agreement or the bond issuance agreement itself. The new regime allows to follow the international practice in which the security agent is often designated in the inter creditor agreement, which may be entered into after the execution of credit agreement.



PROTECTION OF CREDITORS AGAINST THE INSOLVENCY OF THE SECURITY AGENT

The new regime provides for a new and effective protection of the creditors' rights against the security agent's insolvency.

Security interests and personal guarantees are transferred to a segregated patrimony, distinct from the security agent's own patrimony, which it is required to manage in the best interest of the secured creditors. The proceeds of enforcement of security interests and personal guarantees also fall into such segregated patrimony.

Article 2488-10 draws a series of legal consequences therefrom:

- only creditors whose claims result from the preservation or the management of assets and rights acquired by the security agent in the exercise of its mission may seize those ;
- the opening of an insolvency proceeding against the security agent shall have no effect on the segregated patrimony ;
- if the security agent is replaced, the segregated patrimony is automatically transferred to the new security agent.

The new French regime is more protective of creditors' rights than parallel debt which does not give rise to a segregated patrimony.

The reform will enter into force on the 1st of October 2017 in order to allow the institutions acting as security agents to modify their standard documentation and to take accounting measures required to organize the said segregated patrimony.

Last, without prejudice to the parties' contractual freedom to organize the replacement of a security agent, Article 2488-11 provides that a creditor may obtain a court order replacing the security agent if the latter breaches its contractual obligations or if an insolvency proceeding is opened against it. The receiver may not require the continuation of the security agent contract.

The new regime favors the choice of French law as the law governing the security agent in both domestic and international transactions. The generality of the terms « security interests » (*sûretés*) and « personal guarantees » (*garanties*) allows to consider that this regime may be used in respect of guarantees governed by other laws than French law as long as the relevant local law recognises a split between the title to the underlying claim and ownership of the security interest.

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