UNION INTERNATIONALE DES AVOCATS

INTERNATIONAL ASSOCIATION OF LAWYERS

SECURITIZATION

EDITORS

DAVID G. GLENNIE, EDUARD C. DE BOUTER,
AND RANDALL D. LUKE

UIA LAW LIBRARY

KLUWER LAW INTERNATIONAL

Securitization

Edited by
David G. Glennie, Eduard C. de Bouter,
Randall D. Luke

KLUWER LAW
INTERNATIONAL
THE HAGUE - LONDON - BOSTON

Published by
Kluwer Law International Ltd
Sterling House
66 Wilton Road
London SW1V 1DE
United Kingdom

Kluwer Law International incorporates
the publishing programmes of
Graham & Trotman Ltd,
Kluwer Law & Taxation Publishers
and Martinus Nijhoff Publishers

Sold and distributed in
the USA and Canada by
Kluwer Law International
675 Massachusetts Avenue
Cambridge MA 02139
USA

In all other countries, sold and distributed by
Kluwer Law International
P.O. Box 322
3300 AH Dordrecht
The Netherlands

ISBN 90–411–9687–0
Series ISBN 90-411-9712-5

First Published 1998

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Typeset in 10/11 pt Palatino by Photoprint Typesetters, Torquay, Devon
Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall

£19.33

Securitization

Edited by
David G. Glennie, Eduard C. de Bouter,
Randall D. Luke

UIA Law Library

Series Editor
Union Internationale des Avocats
International Association of Lawyers

Titles in the Series
1. Glennie, *Securitization*

Introduction

Although relatively new in European and other countries, asset securitization as a structured financing technique had its genesis in the United States in the late 1970s. Securitization evolved rapidly throughout the 1980s and 1990s to become one of the dominant means of capital formation in the United States. As of 1995, securitizations accounted for more than US$450 billion of financings per year and more than US$2 trillion in financings outstanding. The Country Reports of the Financial Services Commission of the Union International des Avocats explore the development, implementation and status of asset securitization in the reporting countries.

As opposed to traditional secured financings, securitization can be best described as a structured financing in which assets, having a stable and predictable stream of cash payments, can be monetized through a public offering or private placement of securities in the capital markets and which are secured by, and dependent in part upon, the assets securitized and their related cash flows. In effect, a securitization is a combination of a traditional secured financing and a securities offering, involving the issuance of asset-backed securities. Virtually every asset that has a predictable stream of cash payments can be securitized.

The core concept of securitization is the segregation, as a legal matter, of the assets to be securitized from the credit risk of entities involved in the financing except, in some instances, for financial institutions which provide credit enhancement for the securitized assets. Assets to be securitized are transferred by the asset owner (the originator or transferor) to a special purpose vehicle (SPV) as the asset purchaser. The SPV can be a corporation, trust or other independent legal entity. The SPV issues securities to public or private investors in the capital markets, which are "backed" (i.e. secured) by the cash payment streams generated by the assets securitized and by the assets themselves. The net proceeds received from the issuance of the securities are used to pay the transferor for the assets acquired by the SPV – thereby monetizing those assets.

The principal advantage of a securitization is the separation of the transferor's credit risk from that of the SPV. By segregating its credit risk in a securitization, a transferor can access the capital markets at a lower cost of financing (i) because of the significant differential between the stream of cash payments that can be generated by the assets segregated and the costs of securitization and (ii) because the credit analysis of the securitization is based primarily on the credit of the sources of the cash payment streams generated by the assets segregated and on any credit enhancement. In a securitization, investors focus primarily on the credit quality and liquidity of the assets securitized and on the structure of the financing – not on the transferor's credit risk.

Assets that have been securitized in structured financings in the United States include (among others): mortgages; automobile, aircraft, equipment and municipal leases; credit card receivables; hospital, retail and trade receivables; real estate; purchase contracts for natural resource assets such as oil, gas and timber and their future receivables; purchase contracts for aircraft; project financings and receivables, and mobile homes, boat, non-performing, student and home equity loans.

The principle disadvantage of securitizations are their complexity. Securitizations, typically being "transaction specific", are more costly to structure and implement than other more traditional forms of secured financing. Therefore, securitizations are an appropriate alternative to traditional secured financings only if the securitization costs are exceeded by the lower-cost of funds accessed in the public or private capital markets or if other material benefits are realized from the securitization.

In summary, securitization is the process of monetizing assets through the issuance of securities, which are "backed" (i.e. secured) by the cash payment stream generated by the assets securitized and by the assets themselves. The common characteristic of securitizations is that the assets monetized are cash generating, typically having a stable and predictable cash flow.

This book is based on papers originally prepared for the working session on securitization of the Financial Services Commission of the Union Internationale des Avocats at the 1996 Madrid Conference. Each country reporter was issued with the following questionnaire:

1. Have securitization programs taken place in your jurisdiction? If little or no securitization has taken place in your jurisdiction until the present time, what are the reasons (legal, economic, financial) thereof?
2. If securitization has taken place, what kinds of assets have been securitized in your jurisdiction until the present time? What kinds of assets can, or are most likely to, be securitized in your jurisdiction?
3. Identify and discuss legal aspects of the structures that can be used to implement asset securitization in your jurisdiction, including for example such entities as special purpose vehicle (SPV) corporations and trusts, discussing whether such entities (i) are or are not necessary to effect asset securitization objectives in your jurisdiction; (ii) can or cannot be formed in, or conduct business in, your jurisdiction; and (iii) can or cannot be affiliated with the transferor of the assets securitized.
4. Identify and discuss the credit enhancement techniques that have been or could be used to support, in whole or in part, asset securitizations in your jurisdictions, distinguishing between internal (transferor) and external (third party) credit enhancement.

5. If ample securitization transactions have taken place in your jurisdiction, what are the perceived benefits of asset securitization in your jurisdiction?
6. Identify and discuss any existing and/or proposed legislation or regulations especially drafted or promulgated with respect to asset securitization in your jurisdiction.
7. Identify and discuss any transactional law problems associated with asset securitization in your jurisdiction, including for example (i) asset transferability, set-off rights, true sale bankruptcy, fraudulent conveyance or security interest perfection problems and in particular (ii) any SPV bankruptcy remoteness, SPV capitalization, SPV credit enhancement or SPV and transferor affiliation or consolidation problems.
8. Identify and discuss private international law aspects in the event a securitization program covers several jurisdictions (e.g. if the assets such as receivables are located in various jurisdictions, the SPV is formed in another jurisdiction and the securities are issued in yet another jurisdiction), particularly with respect to the law applicable to questions of transferability and form or method of transfer/assignment.
9. Identify and discuss any securities law problems specifically associated with the issuance of asset-backed securities in your jurisdiction in (i) the public capital market; and (ii) the private placement market, including for example registration and/or disclosure requirements.
10. Identify and discuss regulatory problems associated with securitization transactions such as required central bank, rating agency, consumer credit, tax or accounting authority consents or approvals.
11. Identify and discuss generally the documentary form and documentation of asset securitization in your jurisdiction, including any legal opinion requirements.
12. Identify and discuss any important cases affecting securitization in your jurisdiction.

The questions have been used as headings in the following abbreviated forms:

1. Securitization programs
2. Types of assets securitized
3. Legal aspects of vehicles for securitization
4. Credit enhancement techniques
5. Benefits
6. Legislation/Regulations
7. Transactional law problems
8. Private international law aspects
9. Securities law problems
10. Regulatory problems
11. Documentation
12. Cases

List of Contributors

Australia
Bruce Whittaker
Blake Dawson Waldron
Melbourne, Australia

Austria
Werner Huber
Heller, Löber, Bahn & Partners
Vienna, Austria

Belgium
Wilfred Goris and Annick De Kimpe
De Bandt, Van Hecke & Lagae
Antwerp, Belgium

Canada
Steve Ashbourne, Martin Fingerhut and David Glennie
Blake, Cassels & Graydon
Toronto, Canada and London, England

France
Philippe Sarrailhé and Alexandre Vuchot
Jeantet & Associés
Paris, France

Germany
Stephen König and Eva Reudelhuber
Oppenhoff & Rädler
Cologne, Germany

Italy
Cesare Vecchio
Freshfields
Milan, Italy

Luxembourg
Jean Brucher
Brucher & Seimetz
Luxembourg

The Netherlands
Eduard C. de Bouter
De Brauw Blackstone Westbroek
Amsterdam, The Netherlands

Russia
Kersten von Schenk
Plünder, Volhard, Weber & Axster
Frankfurt, Germany

Spain
Jorge Adell
Befete Mulleratt Roca
Barcelona, Spain

Rafael Truan
Diaz-Bastien & Truan
London, UK

Sweden
Bengt Kärde
Hammarskiöld & Co
Stockholm, Sweden

Peter Högstram
Lagerlöf & Leman
Stockholm, Sweden

Switzerland
Dr. Peter J. Kienast
Bär & Karrer
Zurich, Switzerland

Thailand
Dej-Udom Krairit
Dej-Udom & Associates Ltd.
Bangkok, Thailand

UK
Simon Gleeson
Richards Butler
London, UK

US
Randall D. Luke
Hahn Loeser & Parks
Cleveland, US

Louis F. Burke P.C.
New York, US

Contents