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Why the Fruits of Capital Markets are Less Accessible in Civil Law Jurisdictions or How France and Germany Try to Benefit from Asset Securitization

Lina Aleknaitė*

I. INTRODUCTION

It is a fact of no major doubt that active capital markets provide a country's economy with the means for development. The ability to raise finance on the basis of the actual value of a business provides companies with means for further growth. When a business can sell parts of itself to investors, even before the company starts producing fruits, it is beneficial to both the business and the investors. Equipped with additional cash from investors, the business can expand further by creating new products. At the same time an investor exchanges his cash for a product that will yield returns on the investment in the future. This is what investors are looking for.

Asset securitization is one of the mechanisms that facilitate this exchange. The product that is created by the business for the purposes of asset securitization is a receivable – an intangible piece of property that turns into cash after the date of maturity. The business that has created this piece of property – the originator – has an interest in selling it before maturity so that it can gain cash in the meanwhile. Investors buy the receivable at a discount price and then gain when the debtor redeems the receivable at a higher price at maturity. This is the core essence of the asset securitization transaction.

The modern asset securitization transactions were devised in early 1970s by the governmental agencies of the United States (“U.S.”).¹ Pioneered by governmental agencies, this technique was later adopted

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by private companies. As volumes of asset securitization expanded and the calculations showed substantial benefits for companies involved, the businesses and legislators in other jurisdictions started searching for ways to implement asset securitization at home. Among them were the two most developed civil law countries: France and Germany.

In 1988 France was among the first European countries to provide the legal framework for asset securitization. This resulted in an immediate boost of securitizations, but later the development turned out to be less explosive than anticipated. Nevertheless, currently, major transactions are conducted and asset securitization is spreading to different kinds of businesses and embracing diverse kinds of receivables. As of May 31, 2002 France represented 22% of the European asset backed securitizations ("ABS") market, up from 11% in 2001. More increasingly different assets are being used for securitization including consumer credits and auto loans. Furthermore, "[t]he presence of repeat issuers . . . indicates that the market has now matured.”

Germany began conducting securitization in early 1990s. During this decade Germany boasted a significant part of European asset backed securities issuance. In 1999 it ranked second in Europe, after the UK, with a market share of 16.93%. In 2000 it was fourth, holding a market share of 9.61%. Later, the intensity of the transactions decreased slightly, rendering Germany fifth in both 2004 and 2005 in Europe (according to the amount of the collateral used for securitiza-

2. Shenker & Colletta, supra note 1, at 1385-88; Lore & Cowan, supra note 1, at 8-9.
3. See Lore & Cowan, supra note 1, at 45-46 (discussing how securitization from the U.S. has spread to other markets worldwide); Shenker and Colletta, supra note 1, at 1423 (providing France as an example, where the impetus for securitization was provided by government rather than market pressures; whereas Japan is presented as an example where there was strong market demand for securitizations).
5. Id.
7. Id.
8. Id.
9. Id.
13. Id. at 450.
This position improved in the third quarter of 2006, to a market share of 8.2% and lifting Germany into fourth place in the rankings according to the ESF Securitization Data Report.\textsuperscript{15}

Today, France and Germany are regarded among the most active and important civil law jurisdictions for asset securitization.\textsuperscript{17} Though their place among other European jurisdictions has varied over time, they have steadily stayed in the European top ten of asset securitizers.\textsuperscript{18} However, the volumes of asset securitization transactions in

\begin{figure}
\centering
\includegraphics[width=\textwidth]{securitization_in_europe}
\caption{Securitization in Europe by Country of Collateral by the 3rd Quarter of 2006\textsuperscript{16}}
\end{figure}
France and Germany still do not reach U.S. averages.\textsuperscript{19} This is interesting, since the U.S. was the main source of securitization knowledge and experience for these countries.\textsuperscript{20}

This article analyzes the main barriers that preclude France and Germany from employing asset securitization to a wider extent. The main concern examined here is that both countries are civil law jurisdictions trying to implement a technique developed in a common law jurisdiction. Because of several substantial differences between the law systems, not all concepts can be adopted fully. Some purely common law concepts have to be transformed and adopted to serve civil law asset securitization. In addition, there is a difference between how France and Germany approach securitization. While France adopted a special law for asset securitization, German businesses conduct the transaction on the basis of general commercial laws.\textsuperscript{21}

For these reasons, this article focuses on issues that are regulated differently in common and civil law jurisdictions: the replacement of a common law concept of trust, the ways available to deal with receivables, ensuing consequences on collateral, and remedies and obligations of a debtor. This article does not address tax issues and any preferences they may cause. The analysis is expected to reveal the strengths and weaknesses of different approaches to regulation of asset securitization in French and German jurisdictions. The conclusions reached here, can be useful not only for the regulators in France and Germany, but should illuminate the way for other civil law jurisdictions trying to implement asset securitization and looking for the most efficient ways to do so.

\textbf{II. THE CONCEPT OF ASSET SECURITIZATION. ESSENTIAL ISSUES FOR CIVIL LAW JURISDICTIONS}

Asset securitization relies on certain assets of the owner that are transferred for security purposes or sold to the financier, to raise funds. The difference in asset securitization is in the way that the financier is given interest in certain assets. This section examines the stages of asset securitization by introducing the main features of each.


\textsuperscript{20} DAVIDSON, SANDERS, WOLFF \& CHANG, supra note 4, at 450.

\textsuperscript{21} This difference is explored in Parts III.A and III.B of this article.
Several scholars have attempted to define the term "asset securitization", but no uniform, widely accepted definition exists.\textsuperscript{22} One definition, which "narrowly and precisely defined asset securitization"\textsuperscript{23} is that asset securitization is "the sale of equity or debt instruments, representing ownership interests in, or secured by, a segregated, income producing asset or pool of assets, in a transaction structured to reduce or reallocate certain risks inherent in owning or lending against the underlying asset and to ensure that such interests are more readily marketable and, thus, more liquid than ownership interests in and loans against the underlying assets."\textsuperscript{24} The structure of the transaction is depicted in Appendix I of this paper. Appendix II shows the flow of cash between the parties involved in asset securitization.

While the term could refer to just about any asset, only certain types of assets are used in securitization transactions. Generally, these are income producing assets\textsuperscript{25} or "rights to payments at future dates . . . usually referred to as 'receivables'."\textsuperscript{26} In other words these are assets that provide an influx of cash to the owner. The cash flow is usually distributed over time; however, the originator of an asset needs cash immediately, and he is ready to sell the asset and receive cash instead of waiting for all due payments and maturity. The most common receivables used in securitization are: mortgage receivables, credit card receivables and automobile loans,\textsuperscript{27} although other kinds of receivables can be used.\textsuperscript{28}

As the definition of asset securitization notes, either one asset or a pool of assets can be used. To build the whole transaction on one asset, the asset must be fairly large. Usually this is the case with commercial mortgages when finance is sought on the basis of major office


\textsuperscript{23} Klee & Butler, supra note 22, at 59.

\textsuperscript{24} Id. at 1376.

\textsuperscript{25} Schwarz, supra note 22, at 135.


\textsuperscript{27} These include: lease receivables, trade receivables, commercial loans, defaulting loans, health care receivables, airline ticket receivables, even receivables from sales of music albums and many others. For an even more expanded list see Shenker & Colletta, supra note 1, at 1380.
buildings.\textsuperscript{29} In other cases a number of receivables are collected into one pool.

Once the assets for securitization are selected, they are transferred to a special purpose vehicle ("SPV").\textsuperscript{30} The SPV can either be an entity created for a specific securitization transaction, or an existing entity used for multiple securitization transactions by different originators.\textsuperscript{31} In the latter case it is called the multiseller conduit. When the SPV is created for a specific transaction, it permits more flexibility in constructing the SPV, the transfer of receivables, and the terms and conditions of securities.\textsuperscript{32} However, it also costs more and has a greater uncertainty if the SPV is treated as a bankruptcy remote entity.\textsuperscript{33} At the same time, multiseller conduits are better separated from the originator and cheaper;\textsuperscript{34} however they are less flexible.\textsuperscript{35} As a matter of principle the SPV can be registered as a corporation, a partnership, a limited liability company, or a trust.\textsuperscript{36} Academic works, however, almost unanimously assert that a trust is the best choice because "a trust other than a "business trust" is ineligible to be a debtor under the [bankruptcy law]".\textsuperscript{37}

The transfer of receivables to an SPV is one of the most sensitive points in a securitization transaction. There are two possibilities: sale of receivables and creation of security interest in the receivables.\textsuperscript{38} Both of these options can be used. The preference for one or the other depends on the extent to which it is desirable to separate the SPV from the Originator. In the majority of instances, however, a sale of receivables is sought because it can provide greatest benefits of the transaction.\textsuperscript{39} In asset securitization transactions funding is raised on

\begin{itemize}
  \item \textsuperscript{29} For more on commercial mortgage securitization see David Alan Richards, "Gradable and Tradable": The Securitization of Commercial Real Estate Mortgages, 16 \textit{REAL EST. L.J.} 99 (1987).
  \item \textsuperscript{30} Schwarcz, supra note 22, at 135; Shenker & Colletta, \textit{supra} note 1, at 1377.
  \item \textsuperscript{31} Schwarcz, \textit{supra} note 22, at 138, 140.
  \item \textsuperscript{32} \textit{Id.} at 138.
  \item \textsuperscript{33} \textit{Id.} Bankruptcy remoteness means that the entity can escape being included in bankruptcy proceedings. In the context of securitization, such danger may arise from two situations: either when the originator goes bankrupt and improper separation permits the inclusion of the SPV in the estate of the originator, or when the SPV itself goes bankrupt.
  \item \textsuperscript{34} Note that the separation of the SPV is a delicate matter; therefore, the full separation of the originator and the SPV is never certain until the court has ruled on the matter. Nevertheless, lawyers have come up with certain rules, largely based on earlier decisions of the courts, to make the separation more likely.
  \item \textsuperscript{35} Schwarcz, \textit{supra} note 22, at 140-141.
  \item \textsuperscript{36} Klee & Butler, \textit{supra} note 22, at 72-83.
  \item \textsuperscript{37} \textit{Id.} at 80. This means that a trust cannot go bankrupt, which ensures the safety of transferred accounts.
  \item \textsuperscript{38} See Hill, \textit{supra} note 27, at 1078-1079 (explaining the subtle dividing line between the sale of receivables and the creation of security interests over receivables).
  \item \textsuperscript{39} Schwarcz, \textit{supra} note 22, at 135.
\end{itemize}
the basis of receivables and sale of the receivables permits their separation from the originator. Receivables, when properly separated from the other property of the company, are easier to appraise and credit rate, allowing a more precise determination of their market value.\textsuperscript{40} This benefits the borrower, who wants to raise finance on the basis of those receivables. This also benefits the lender because once properly separated, receivables are easier to enforce, thereby adding to the certainty of reimbursement for the funds advanced.

One important feature of the most often used assets is that they represent a right to receive payment, which is secured by certain collateral. Mortgage loans are secured by the real estate for which they are taken. Credit card payments are secured by money in other accounts of the credit card owner. The collateral for automobile loan is the automobile itself. Collateral that secures the payment of receivables is very valuable to the creditors, and thus increases the value of receivables because even if for one reason or another the debtor fails to make the payment, the creditor may resort to the collateral and have his claims satisfied.\textsuperscript{41} If upon transfer of receivables, the rights to collateral did not pass to the new creditor, the value of receivables would deteriorate. Therefore, to successfully conduct asset securitization, it is important that the rights to collateral are transferred to the SPV together with receivables.\textsuperscript{42}

An additional difficulty that may arise in some jurisdictions during the transfer of receivables is the requirement to notify the debtor

\textsuperscript{40} When receivables are sold, they are separated from the rest of the property of the originator; in other words, the receivables cease to be the property of the seller and become the property of the buyer – the SPV. Once receivables are so separated, it is easier to determine their value, as opposed to the value of all the assets of originator. This is because, normally, the originator may have various kinds of assets – real estate, diverse movable assets, as well as other intangibles, such as intellectual property rights. The valuation is easier when only one kind of asset – the receivables – is involved. The process of credit rating means that credit rating agencies (the two most well-known are Standard & Poor’s and Moody’s) give a certain grade to securities, issued on the basis of receivables. This grade shows the amount of risks involved. The higher the grade, the less likely it is that investors may lose their money. This grade is called a credit rating.

\textsuperscript{41} Receivables secured by certain collateral are of higher value to the creditor than receivables the payment of which rests merely on the contractual obligation of the debtor. The main difference is that, if the debtor becomes bankrupt, a secured creditor has priority rights in the collateral and can use the collateral to satisfy his claims. The unsecured creditor does not have such priority rights and therefore has to share with all other creditors in the estate of the debtor, after the secured creditors have satisfied their claims (this is a general simplified picture, as it is usually subject to much more detail). In this way, the receivables secured by collateral are of higher quality, as they provide the creditor with priority rights in case the debtor defaults.

\textsuperscript{42} Dvorak, supra note 22, at 559 (underlining the importance of collateral for investors).
about the transfer of his debt.\textsuperscript{43} This requirement is meant to protect the debtor from unknown creditors – this way the debtor is always aware to whom he is obligated.\textsuperscript{44} However, for asset securitization such a requirement would have a prohibitive effect. There are usually large numbers of assets pooled together – tens or hundreds of thousands. This means that there would be high numbers of debtors involved. If each of these debtors would have to be individually contacted, the transaction would have to absorb enormous additional costs and would require extra time.\textsuperscript{45} Therefore various jurisdictions adopt various mechanisms to protect the debtor without hindering asset securitization.

After receivables are transferred to an SPV, the SPV “issues securities to capital market investors and uses the proceeds to pay for the financial assets.”\textsuperscript{46} Securities are tied to the receivables of the SPV. This is where the great miracle of asset securitization is most apparent. Various receivables, which may have been big or small and originated in one or another part of the world get pooled together, sliced into clear cut pieces, and are represented by securities. There are various ways in which securities can be constructed. In a simple transaction, “the instruments sold . . . may be either debt or equity.”\textsuperscript{47} In more sophisticated transactions, there might be a combination of both se-

\textsuperscript{43} E.g., such a requirement exists in France. \textit{See Eleanor Cashin-Ritaine, Les Cessions Contractuelles de Créances de Sommes d’Argent dans les Relations Civiles et Commerciales Franco-Allemandes} 408 (L.G.D.J, Paris 2001).

\textsuperscript{44} \textit{Id.} at 408-409.

\textsuperscript{45} \textit{See Frédéric Dannenberger, Cession de créances professionnelles. Opposabilité des exceptions au cessionnaire de créances cédées par Bordereau Dailly, JCP/ La Semaine Juridique, Édition Générale, N 49, 7 décembre 2005, at 2272 (explaining a separate kind of assignment that was created in France to ease the transfer of debts by escaping the requirement of notification). Compare Shengzhe Wang, True Sale Securitization in Germany and China 36-37 (Dec. 2004) (L.L.M. thesis, J. W. Goethe University, Frankfurt am Main, Germany), on file with author, also can be purchased at http://www.diplom.de/db_netskill/diplomarbeiten8719.html (last visited Mar. 2007) (stating that a requirement to reregister every mortgage is too cumbersome for asset securitization).

\textsuperscript{46} Dvorak, \textit{supra} note 22, at 545-546.

\textsuperscript{47} Shenker & Colletta, \textit{supra} note 1, at 1378-1379.
The preferences of investors have strong influence on the choice of a particular structure.\textsuperscript{49} Once securities are issued, there may be a number of institutions involved in raising or evaluating their credit rating including insurance companies,\textsuperscript{50} rating agencies,\textsuperscript{51} and credit enhancers.\textsuperscript{52} The cumulative effect of these institutions is that investors have more safeguards against problems on returns from their investment and are therefore willing to buy securities at a lower price.\textsuperscript{53} Thus, securities can either be privately placed to institutional investors or publicly traded in selected capital markets.

The greatest advantage of asset securitization is that transforming receivables into sellable securities permits the owner to raise funds from capital markets that often offer the lowest cost of financing, rather than financial markets.\textsuperscript{54} Additionally, credit institutions use asset securitization as a way to improve their balance sheet.\textsuperscript{55} Reduction of the amount of outstanding receivables frees more liquid assets, which can be used to make new investments. Furthermore, securitization can be used to improve a company's solvency.\textsuperscript{56}

The scheme of asset securitization as described in this section shows that the mechanism involves several stages, each of which has its peculiarities. Accordingly, it is only possible to use this mechanism if governmental regulation allows them. In civil law jurisdictions this may

\textsuperscript{48} Schwarcz, supra note 22, at 143. The senior/subordinate structure is a transaction structure where one part of securities is defined as senior and other securities are made subordinate. The claims of investors in senior securities are given priority over the claims of other investors. In this way, investment in senior securities is subject to lower risks. Investors in subordinate securities run higher risks, risking that there will not be enough money to pay them after the claims of senior securities investors are satisfied. At the same time, the higher risk of investment in subordinate securities is rewarded with higher rates of returns. There may also be several classes of subordinate investors. In such a structure, the claims of the next class cannot be paid until the preceding classes get their returns. This increases the base of available investors, as securities with differing degrees of risk and rewards can be offered. For more advantages of such structures, see Schwarcz, supra note 22, at 143-144.

\textsuperscript{49} Hill, supra note 27, at 1068.

\textsuperscript{50} Lore & Cowan, supra note 1, at 4; id. at 423 (specifying the risks that can be insured).

\textsuperscript{51} Hill, supra note 27, at 1070-1072.

\textsuperscript{52} Id. at 1072.

\textsuperscript{53} See id. at 1073 (stating that investors are usually passive in appraising the securities and usually rely on the judgment of rating agencies and credit enhancers); Dvorak, supra note 22, at 560 (stating that credit enhancement contributes to lower costs of financing).

\textsuperscript{54} Hill, supra note 27, at 1073-1074. See also Schwarcz, supra note 22, at 148 ("A securitization, however, provides a new source of financing – the capital markets, whose rates are systematically lower than the rates at which small or medium size firms commonly borrow.").

\textsuperscript{55} Shenker & Colletta, supra note 1, at 1395-1396 and 1413-1421.

\textsuperscript{56} See Hill, supra note 27, at 1084-1106 (explaining how securitization permits firms of lower quality to increase their cash flow).
cause several challenges. First, it must be possible to create an entity which would escape bankruptcy proceedings; that is, an entity remote from bankruptcy, which could serve as an SPV. Second, flexibility in structuring a securitization transaction is required. Simplicity in transferring the receivables is a sine qua non for asset securitization. Third, it must be ensured that the security interests in the collateral securing the payment are transferred together with the receivable, so that the quality of the receivable would not deteriorate. Finally, a requirement to notify each and every one of a multitude of debtors must not create an unnecessary burden for the transaction. What follows is the analysis of these issues in the framework of asset securitizations in France and Germany.

III. THE GENERAL LEGAL FRAMEWORK FOR ASSET SECURITIZATION IN FRANCE AND GERMANY

A. France

A special law was passed in 1988 that introduced asset securitization to the French market and regulated all the aspects of the transactions. The main provisions were embodied in the Monetary and Financial Code ("MFC") with more detailed provisions encompassed in a special decree. As initially introduced, the securitization transaction was not very flexible. For example, only the receivables of credit institutions could be acquired by the SPV; the SPV could only issue securities once; the securities had to be equity securities and not debt, and so on. However, the regulation was continually developing and major reforms were implemented almost every couple of years—the regulation was improving.

By now the law seems to have reached high standards, keeping the necessary safeguards and at the same time acquiring flexibility to provide many alternatives in a transaction. Authors claim that "[t]he law [on asset securitization] has created a sound and stable legal frame-

60. The changes to the MFC were made in 1993, 1996, 1998, 1999 and 2004.
work, which provides originators and arrangers with a high level of certainty when they seek to structure an FCC-based transaction."

Commentators have recognized that in Europe "France . . . has one of the most advanced legislative frameworks when it comes to securitization." However, the constant change in the law has not allowed transactors to acquire enough practical experience to apply the whole set of rules as it exists now because this set of rules has only been in existence a few years. Therefore this analysis will be based on the historical development and application of securitization provisions that have been in force for a longer period of time, while the newer provisions will be examined theoretically. In this way a larger picture can be formed.

B. Germany

Modern asset securitization transactions only became known by German credit institutions in the 1990s when the first such transaction was carried out. It took five years until the second transaction. This was because of the negative approach of the German banking supervisory authority, which frowned on asset securitization and claimed that it may have detrimental effects for German credit institutions. Its position changed only in 1997, when it issued a circular letter and enumerated the criteria with which a transaction must comply to be acceptable and permissible. The commercial companies in Germany did start to securitize their receivables a few years earlier. However, the turnover of those securitization transactions was much more modest than the transactions that were conducted by German banks after the permission was granted to them.

The peculiarity of German approach is that even though the banking supervisory authority permitted asset securitization, there is no

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61. Rentmeesters & Tallot, supra note 6, at 72. The FCC (le fonds commun de créances) is the French SPV.
62. DAVIDSON, SANDERS, WOLFF & CHING, supra note 4, at 495.
63. It is important to note that Germany has known the concept of mortgage backed securities (Pfandbriefe) since the 18th century. However, that is different from the modern asset securitization and therefore will not be dealt with in this paper. The Pfandbriefe are issued by mortgage banks, which are the institutions specifically constructed for that purpose. Their sole business is to provide standardized, no-prepayment loans, which are secured by mortgages, and then to raise finance by issuing securities backed by those mortgages. The essential difference is that issuance of Pfandbriefe does not entail transfer of receivables from the originator. Instead the originator himself issues securities. Investors into securities may have recourse to other assets of the mortgage bank in case of default. HAL S. SCOTT, INTERNATIONAL FINANCE - TRANSACTIONS, POLICY, AND REGULATION 521 (Foundation Press, 13th ed. 2006).
64. Wang, supra note 45, at 28.
specific statutory regulation for it. Namely, no law prescribes any requirements on how the transaction is to be conducted. Instead, securitizers have to rely on general provisions of commercial debt law, the provisions of company law for establishing an SPV, and securities laws and regulations for issuing securities. The only specialized source of regulation for banks is the circular letters of the supervisory authority. The main one is the circular letter of 1997, which enumerates the criteria that have to be followed by banks in securitizing assets. The criteria are meant to guard the financial health of German credit institutions, so that through securitization of assets the reliability of banks is not weakened. Since 1997, the banking supervisory authority has issued more circular letters, specifying various elements of the transaction, such as the use of revolving receivables and derivative instruments.

IV. SPECIAL PURPOSE VEHICLE (SPV)

A special purpose vehicle is the central entity for asset securitization. It buys or acquires interest in the receivables and restructures the receivables by issuing securities. Thus, it works as a pipe into which receivables enter and from which transformed marketable securities exit. The structure of this entity must be both flexible and secure. Flexibility permits a restructuring of the receivables into securities acceptable for investors. Security means that investors can look to the receivables as the collateral for their investment and do not have to fear that they will be deprived of priority rights.

A. France

French law on asset securitization created a new kind of entity to serve as a special purpose vehicle. The nature of the entity is different from any other entities that were known before in either French cor-

68. Klee & Butler, supra note 22, at 60-63; Schwarcz, supra note 22, at 136-141 (describing the functions that the SPV can perform).
69. Id.
70. Hill, supra note 27, at 1068 (stating that the structure of securities is heavily influenced by the preferences of investors).
71. Schwarcz, supra note 22, at 136 (explaining the importance of collateral for securitization investors).
porate law or French general commercial law. It is called a securitization fund (le fonds commun de créances) ("FCC"). According to the law, the FCC's objective is "the acquisition of receivables and the issuing of units which represent those receivables." Thus the entity is designed specifically and solely for asset securitization.

The law defines the nature of an FCC as co-ownership. However at the same time it underlines that "[t]he unitholders are liable for the fund's . . . debts only within the limits of the fund's assets and in proportion to their own share." Furthermore, unitholders are granted some of the rights of shareholders of public limited companies—namely, a right to request withdrawal of the auditors, a right to address questions to the management, and in case of unsatisfactory answers request appointment of the experts. With these features it may seem that a SPV entity has a legal personality.

However, the law clearly states that "[t]he fund does not have [a] legal personality." It further adds that neither the provisions of the Civil Code on jointly held property, nor those on undisclosed partnerships apply to the FCC. Therefore, the FCC may, eventually, neither be labeled a legal person nor fall within any of the categories of traditional commercial enterprises without a legal personality. Such a choice of legislation also means that the rules applied to other commercial enterprises will not be automatically applied to the FCC. Instead, only rules made explicitly applicable to the FCC will apply. An advantage of such an approach is that the development of FCC starts from tabula rasa and escapes prejudices and stereotypes.

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72. See Agboyibor, supra note 59, at 245 (stating that this vehicle was created specifically for securitization transactions). See also Davidson, Sanders, Wolff & Ching, supra note 4, at 492 (explaining the nature of this entity).
73. Agboyibor, supra note 59, at 245.
74. CODE MONETAIRE ET FINANCIER [C. MON. ET FIN.] art. L214-43 (Fr.). The term "units" is used to refer to equity securities. However, the law specifies that the FCC may also issue debt securities.
75. C. MON. ET FIN. art. L214-43 (Fr.).
76. C. MON. ET FIN. art. L214-48(3) (Fr.). Here the word "unitholder" refers to the investor, who buys the units of FCC. See supra note 74.
78. C. MON. ET FIN. art. L214-43 (Fr.).
79. Id.
80. The legal provisions of the FCC do not contain any references to the legal provisions regulating other forms of entities, except for selected rights of public company shareholders. See supra note 77 and accompanying text.
that became attached to the other forms of entities through legislation and jurisprudence over time.

| FCC          | • Sole object: acquisition of receivables and issue of securities  
|             | • Co-ownership, but unitholders liable only within the limits of their share  
|             | • Some rights of public company shareholders to unitholders  
|             | • NO LEGAL PERSONALITY  

**Table No. 1. The Main Features of *Fonds Commun de Créances***

The law, as it was initially passed, allowed FCC to issue securities only once and the securities had to be of the equity type.\(^8\)\(^1\) This position evolved over time. According to the current state of regulation, the FCC may issue both equity and debt instruments and more than once.\(^8\)\(^2\) Furthermore, the fund may be divided into several compartments, where each compartment holds its own receivables, issues separate securities and uses only the cash flow from its receivables to pay the securities it has issued.\(^8\)\(^3\) Through this mechanism different cash flow structures may be offered to investors without needing to establish a number of different funds, yet still within the framework of the same fund. Finally, the law permits separating cash flows from principal and interest by giving different rights over the two.\(^8\)\(^4\) This contributes to an even wider array of possible securities' structures.

The life and activities of the FCC are organized by two entities. A management company and a legal entity acting as a custodian of the fund’s assets jointly set up a securitization fund.\(^8\)\(^5\) The management company organizes the transaction, gets the receivables, structures securities, and markets them.\(^8\)\(^6\) This can be any commercial company,

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82. C. MON. ET FIN. art. L214-43 (Fr.).  
83. Id.  
84. Id.  
85. C. MON. ET FIN. art. L214-47 (Fr.).  
86. Some authors note that, though the FCC was initially created as a passive entity, after several amendments it is turning into a more active one. One good example is the requirement that the FCC create its management strategy. Pascal K. Agboyibor & Thierry Granier, *Un nouveau décret pour les opérations de titrisation* (decret no 2004-1255 du 24 novembre 2004), RECUEIL DALLOZ, 24 février 2005, no 8/7193, at 571. These activities have to be performed by the management company because the custodian is only responsible for holding the funds.
but it has to receive an authorization from the Financial Markets Authority. Moreover, the management of securitization funds must be the sole business of this company, it cannot engage in any other activity. Accordingly, it must earn all its income from the management of funds, which encourages the company to reach for maximum efficacy. The law does not restrict the number of funds that can be managed by one company. Therefore the management company does not have to be a one time establishment for the lifetime of one FCC. Instead it may gain expertise and specialize in the activity by managing different funds. Such requirements ensure specialization and efficiency in the industry of asset securitization.

The second entity involved in the life of the FCC is the custodian. The custodian has to open an account for the FCC in which it will keep the FCC's assets. The law prescribes that the custodian may be either a credit institution approved in France, a French branch of a credit institution having its registered office in a European Economic Area Member State, or any other institution approved by the Minister for the Economy. Each of these alternatives falls under tight supervision of competent authorities (such as determined by the law). Credit institutions are usually subjected to strict requirements and scrutiny of supervisory authorities. Additionally, if any non credit institution wishes to get involved in this activity, it will be supervised by the Ministry of the Economy.

Separating an FCC's activities between two entities is expected to provide better control of the mechanism. The management company has to do the active part. The passive part is left to the custodian. The custodian does not merely hold the assets but it is also empowered to follow the actions of the management company and make sure these are in accordance with the rules laid down by the competent authorities. For that purpose, the custodian is also permitted to require dismissal of managers of the management company. Such regulation creates several layers of control over the mechanism. First, both the management company and the custodian must undergo scrutiny and

87. C. MON. ET FIN. art. L214-47 (Fr.); C. MON. ET FIN. art. L214-48(I) (Fr.).
88. C. MON. ET FIN. art. L214-48(I) (Fr.).
89. C. MON. ET FIN. art. L214-47 (Fr.).
90. C. MON. ET FIN. art. L214-48(II) (Fr.).
91. Id.
92. Id.
93. Id.
receive permission for their activities. Additionally, they supervise each other. This function is heavily allotted to the custodian because the management company takes many more decisions and performs the FCC's various transactions.

The question which arises at this point is whether such a system is not too cumbersome. The efficiency of several control systems can be justified only if they do not overlap each other. However, so long as authorization of the management company tackles the company's structural issues (e.g., capital and experience) and then its activity is under scrutiny by the custodian, the system should work well. As for the control of the custodian, the management company is not allocated much power. Rather the nature of the custodian allows monitoring because the custodian is a credit institution and is anyway subjected to higher standards imposed on all credit institutions. Adherence to these standards should ensure financial health of the custodian.

The major issue that usually arises in respect to a special purpose vehicle in asset securitization is its ability to be remote from bankruptcy. Bankruptcy remoteness is the feature that also contributes to higher rating of issued securities. There are several provisions in

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95. As mentioned earlier, the management company is subject to the scrutiny of the Financial Markets Authority and the custodian is subject either to the bank supervisory authorities or the Ministry of the Economy.

96. C. MON. ET FIN. art. L214-48(II) (Fr.) specifies the obligation of the custodian to verify how the management company complies with the terms and conditions created by the Financial Markets Authority. Though such obligation of the management company is not expressly stated in the law, the management company regularly has to deal with the custodian as the latter is holding the cash for the FCC; thus, it makes sure that the money is held properly.

97. See explanation infra note 102.

98. See explanation of bankruptcy remoteness supra note 33.

99. Hill, supra note 27, at 1072 (noting that rating agencies find bankruptcy law issues important in evaluating the structure and providing securities with a higher credit rating. Higher credit rating attracts financing at a lower cost).
French law, which seek to attain bankruptcy remoteness for the FCC. First, because the FCC is not a legal entity bankruptcy rules do not apply to it. This means that in no circumstances can a procedure be started against an FCC, which would freeze its assets, line up its creditors in prescribed groups of priority, and accordingly distribute the assets. Such a procedure would jeopardize the situation of the investors, as they may be left behind some other creditors. Therefore a possibility to escape bankruptcy contributes to better rating of securities.

Here it must be remembered that there are also other actors involved with access to the cash and receivables of the FCC: the servicer of receivables and the custodian. The law provides, that the servicing of assigned receivables continues to be undertaken by the assignor, though some or all of the servicing may be entrusted to a credit institution. This means that the payments from the debtors, before reaching the account of the FCC, pass the account of the servicer. A danger may arise here if the bankruptcy procedure against the servicer is started. This is because the payments that were advanced by the debtors, and at that moment were in the account of the servicer, are frozen and are later included in the estate, to be distributed to all creditors. To prevent such a possibility, the law enables the management company and the servicer to agree to open a special account, which is dedicated to the fund and can escape judicial reorganization or liquidation procedures of the servicer. This way, even if the servicer goes bankrupt, the special account does not belong to its estate, but is passed onto the FCC.

Furthermore, by restricting the choice of possible servicers the legislature was trying to evade more actors, and thus additional risks, in the transaction. If the servicer is a credit institution, the money is channeled to the FCC within the framework of credit institutions. This ensures, in several ways, that the money will reach investors. First, being under close supervision of competent authorities, a credit institution is less likely to face bankruptcy. Second, a credit institution
can open a special account that, even in case of bankruptcy, will escape from being included in the estate of that credit institution.

The only other accepted kind of servicer is the assignor. Here it is interesting to note that the FCC, as it was originally created, could only acquire receivables from credit institutions. This meant that an assignor was also a credit institution. Luckily, the legislature understood that such a restriction precluded other companies from benefiting from asset securitization. Therefore, later changes were made which allowed the FCC to acquire receivables from commercial companies. These changes significantly expanded the variety of originators; however, the provisions on servicing remained the same. A possible rationale is that the original creditor may be in a better position to collect the payments from the debtors. Thus, the law left the decision to the organizers of the transaction whether servicing of receivables by the assignor creates unnecessary risks or whether this function should be entrusted to a credit institution.

Once passed on by the servicers, the payments end up in the account of the FCC, held by the custodian. Another issue here is what happens if the custodian is stricken with financial difficulties. The term 'custody' itself indicates that the funds are held in custody and neither belong to nor form the property of the custodian. Therefore, if the bankruptcy procedure of the custodian is started, the funds in custody do not fall within the estate, but are instead passed in whole to those to whom they belong.

It can be seen that the structure of the FCC is both flexible and secure. It is permitted to structure securities in any demanded way and at the same time its activities are supervised at several levels. Furthermore, the FCC can be used as a bankruptcy remote vehicle—devoid of a legal personality, it is not subject to bankruptcy rules. Additionally, the legislature has taken special care to make sure that none of the actors involved in the transaction exercise too much power over the cash flow from the receivables. Namely, this cash flow cannot be included in their bankruptcy estates and therefore should successfully reach the investors.

106. Id.
107. Agboyibor, supra note 59, at 246.
108. Id.
109. C. MON. ET FIN. art. L214-48(II) (Fr.) requires the custodian to hold the cash and receivables of the FCC.
110. Black's Law Dictionary defines custody as "the care and control of a thing or person for inspection, preservation or security." BLACK'S LAW DICTIONARY 412 (8th ed. 2004).
B. Germany

Since the German legislature has not created any specific framework for asset securitization transactions these transactions have to be conducted on the basis of general laws. Germany is a civil law country and the concept of a trust is not endorsed in German law. Thus, arrangers of securitization have to choose from entities designed for other commercial purposes or look to foreign common law jurisdictions and use foreign trusts. It also appears that some originators are more capable than others in making use of alternatives to the non-existent trust vehicle. This distinction is particularly clear between banks and corporate originators.

Banks are more capable using existing alternatives to conduct asset securitization. The very first bank securitization transactions, for example, were conducted almost invariably by resorting to foreign jurisdictions, mostly of common law. One option is the use of a foreign SPV where, the assets of German originator are transferred directly to a trust in a common law jurisdiction. Another option is to employ foreign branches and subsidiaries, first assigning the receivables to a branch or a subsidiary. Thereafter, asset securitization is conducted as a domestic transaction in that jurisdiction. In both cases, a German originator could benefit from a common law trust as a bankruptcy remote vehicle. At the same time one has to realize that such a construction also requires knowledge and application of the laws of another jurisdiction. Nevertheless, it seems that Germany found it easier and more reliable to study foreign jurisdictions and then use those concepts, instead of reconstructing traditional German companies.


112. The following text will substantiate this proposition.

113. SCOTT, supra note 63, at 522 (describing that the first such transaction was carried via an SPV in the Cayman Islands); Monthly Report, Deutsche Bundesbank, supra note 10, at 57.

114. Id. See also Rüdiger Litten & Frank Herring, Collateralised Debt Obligations: German Legal and Regulatory Issues, 18 J. Int'l Banking L. & Reg. 428 (2003).

115. Germany Sees First True-Sale Deal Since Trade Tax Reversed, Int'l Fin. L. Rev., Jan. 2004, at 16 (describing the transaction where the German commercial mortgage is securitized through a British SPV.) See SCOTT, supra note 63, at 522 (giving examples of transactions where foreign subsidiaries of German companies securitized their assets); See also Wang, supra note 45, at 29 (indicating that British subsidiaries of German banks were securitizing their receivables in the UK).

116. Id.
Trying to avoid foreign jurisdictions, some banks sought to conduct asset securitization domestically. In the absence of an entity that could be truly bankruptcy-proof by nature, banks had to choose from what was available to attain the same goal.\textsuperscript{117} The German private company (GmbH) was chosen as a special purpose vehicle.\textsuperscript{118} To modify the construction of the private company and to distance it from bankruptcy, various measures must be taken. First, the charter must state asset securitization as the sole purpose of the company.\textsuperscript{119} This should prevent the company from indulging into other transactions and incurring debts to creditors other than the securities investors. Second, provisions must be included to deprive the company of the possibility to file for voluntary bankruptcy.\textsuperscript{120} This ensures that the management of the SPV cannot simply decide to start bankruptcy procedures for the SPV. Such a restriction saves investors from imprudent steps of the management.

Nevertheless, the use of a private company as an SPV, as compared to a trust, has several major shortcomings. First, there are minimum capital requirements attached to the incorporation of a private company.\textsuperscript{121} German law prescribes that the minimum start-up capital must be 25,000 euros.\textsuperscript{122} This is no small amount, but such a requirement is strange in the context of asset securitization. The originator is seeking to sell his receivables for cash to increase its cash flows and convert into cash as many illiquid assets as possible. Locking up 25,000 euros as the capital of the company runs counter to this goal. While it is possible to view the 25,000 amount as an investment, it seems more like an increased cost of the transaction.

Second, the structure created through restrictions in the charter of the private company is not very reliable. Specifically, the restrictions

\begin{footnotes}
\item[117] Davidson, Sanders, Wolff & Ching, supra note 4, at 493 (stating that the concept of trust does not exist in Europe).
\item[118] Id.
\item[119] Id. (stating that the SPV is generally "subject to normal company law, but restricted in activity . . . ").
\item[120] See supra note 33 and accompanying text (discussing the bankruptcy remoteness of the SPV). One of the factors is to preclude the SPV from filing for voluntary bankruptcy.
\item[122] Davidson, Sanders, Wolff & Ching, supra note 4, at 493. It is interesting to note that Germany is considering abandoning the requirement of minimum capital for private companies. If adopted, it will have positive effects also for asset securitization. See Ulrich Seibert, The Company Law Reform Projects of the German Ministry of Justice, 69 Rabels Zeitschrift für ausländisches und internationals Privatrecht 712, 719 (2005).
\item[123] Davidson, Sanders, Wolff & Ching, supra note 4, at 493 (noting that if the company intends to do multiple deals per year, these amounts may add up).
\end{footnotes}
may be unknown to persons with whom the company enters into various transactions. The contracting party is not normally obliged to know the charter of the company. Even the form of a commercial private company does not caution that there may be stringent restrictions on its activity. A different effect could be expected from dealing with a trust or another form of entity specifically created for securitization. Thus the investors are exposed to greater risks on this point.

The third downside of using a German private company as a special purpose vehicle in securitization transactions is that there are uncertainties whether it can be truly bankruptcy remote. In the context of bank securitizations, the implications of this uncertainty significantly decrease because German banks rarely go bankrupt. This is ensured by close supervision of the Financial Supervisory Authority (BaFin). This Authority has extensive powers and scrutinizes every step of German financial institutions to ensure that German banks meet their payment obligations.

Additionally, only receivables having a good credit history (e.g., no default, timely payments) have been used thus far. Moreover, asset securitization transactions tend to be conducted in a very orderly manner. They usually involve multiple highly qualified actors (i.e. the originator, arrangers, insurers, rating agencies) and each of those actors tends to scrutinize the transaction with great care. Because of all of the above listed factors, to this date none of the banks involved in German securitization transactions have gone bankrupt or encountered big problems. Therefore, the private company vehicle is re-

124. A special type of entity may be created specifically for securitization transactions. When economic actors confront this entity, they know that its activities are restricted to asset securitization without needing to examine its charter.

125. Norbert Horn, Introduction to German Banking Law and Practice in International Perspective 1 (Walter de Gruyter ed., 1999) (stating that Germany has a highly developed and well functioning banking system).

126. Additional information about this institution is available at http://www.bafin.de/cgi-bin/bafin.pl (last visited Dec. 2006).

127. The objectives of BaFin are outlined at http://www.bafin.de/cgi-bin/bafin.pl?verz=0100000000&sprache=1&filter=&ntick=0 (last visited Dec. 2006).


130. The author of this article, while conducting extensive research and consulting practitioners, did not come across any information about German banks encountering financial difficulties due to securitization.
131. TSI seeks to encourage the usage of asset securitization in Germany and lobby the legislature to pass more favorable legislation for this purpose. The group comprises a number of German banks. Andreas A. Jobst, Asset Securitisation as a Risk Management and Funding Tool: What Small Firms Need to Know, 32 MANAGERIAL FIN. 731, 748 n.9 (2006); Wang, supra note 45, at 33.

132. Jobst, supra note 131, at 748.

133. Id.

134. Wang, supra note 45, at 34.

135. Though initiated by the biggest banks, the group is open for and can be joined by small and regional banks. Wang, supra note 45, at 34.

136. Id. at 29; Scott, supra note 63, at 522.
Commercial companies have also searched for domestic alternatives; they found the only feasible one in bank created securitization platforms. Yet this alternative only creates indirect access to capital markets. The bank is still involved in the transaction and the securitization has to be conducted according to the mandated rules of the platform. Such a structure, however, is definitely more flexible than resorting to bank lending, which is both more expensive and less flexible. Nevertheless, indirect securitization for companies still cannot confer all the benefits they could have if they conducted securitization directly, e.g., the possibility for companies with lower quality assets to tap into capital markets.

One could suggest that just like banks, commercial companies could also use a private company as an SPV. However, commercial companies cannot overcome the disadvantages of a private company as an SPV. A private company SPV does not hold in the absence of additional factors such as good quality and reliability of the originator.

This may be the reason, why in Germany “the market for corporate and mid-market securiti[z]ation is still incipient and remains sporadic . . . even for large corporates.”

Furthermore, this situation seems to be favored by the authorities. When trying to encourage securitizations in Germany, in 2003, the Government decided to lift the trade tax on SPVs, but only if they

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137. Jobst, supra note 131, at 746.
138. Id.
139. Id.
140. See discussion infra Part II.
141. Jobst, supra note 131, at 746.
142. Litten & Herring, supra note 114, at 428.
purchased receivables exclusively from banks. In this way, one more barrier for bank securitizations was removed, but it remained for commercial company securitizations.

Thus, in Germany there is no entity that can fully perform the functions of an SPV. As a result, businesses use foreign SPVs or resort to using a private commercial company as a domestic alternative. However, this solution can only be taken by banks. Other commercial companies have serious difficulties in accessing capital markets.

V. Transfer of Receivables

Transfer of receivables is another major issue that arises when structuring asset securitization transactions. The intangible nature of receivables makes their possession and ownership less evident than that of tangible assets. Therefore traditional rules of tangible property cannot be applied, but special regulation must address these issues. Moreover, for securitization to take place certain features must be available during the transfer. Namely, the transfer must be easy and not burdened by unnecessary requirements. Furthermore, the array of the kinds of receivables that can be transferred determines how broadly assets can be securitized.

A. France

The traditional way of transferring receivables in France is cession. The cession in French law has in personam nature, and "the right to a claim is a personal right." In personam nature means that the relationship is as between persons, where one has a right to request performance of an obligation and another has a duty to perform it. However this relationship is not connected to any specific thing. Thus in French law, the receivable is not regarded as a piece of property, but rather as a combination of rights and obligations between persons.

Such classification has important consequences for the parties to the cession transaction. An in personam right is unlike the traditional in rem right that is associated with property. Attachment of an in rem right to a specific object is characterized by the usage of the object,

143. Id.
144. See discussion infra Part II.
145. Dvorak, supra note 22, at 556 (describing this as freedom of exchange).
148. Id.
the right to receive the fruits of the object and the right to legally dispose of the object.\textsuperscript{149} An \textit{in personam} right, on the other hand, does not attach to any specific object, but rather attaches to a person.\textsuperscript{150} Therefore, in a case where an assignee fails to transfer the receivable, the assignor cannot look to the specific receivable, but must instead lay a general claim to the property of the assignee.\textsuperscript{151}

Another consequence of the cession transaction is that to render the transfer effective all the requirements stated in the law must be complied with.\textsuperscript{152} Thus, e.g., if the debtor is not properly informed about the transfer, the whole cession transaction is void. Taking into account that the rules for cession in French law are very detailed and their application is cumbersome,\textsuperscript{153} cession transactions are not very well suited for transfers of large amounts of receivables. This inflexibility is already noted by some French authors, who consider that a receivable should be treated as a piece of property to be in line with modern commerce.\textsuperscript{154} However, at least for now, this is not the position of French law.

When faced with the challenge of creating rules for asset securitization, the French legislature decided that none of the existing methods for the transfer of receivables was good enough.\textsuperscript{155} Therefore a new kind of assignment was created, which is performed by delivering a transfer deed (\textit{bordereau}).\textsuperscript{156} The assignment takes effect between the parties and becomes enforceable against third parties on the date affixed on the transfer deed when it is handed over.\textsuperscript{157} Additionally, the law underlines that this takes effect regardless of the receivable's origination date, maturity date or due date, and without any other formality being necessary.\textsuperscript{158} Such a structure ensures the investors that

\textsuperscript{149} \textit{Id.} at 34.
\textsuperscript{150} \textit{Id.} at 33.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} Cashin-Ritaine, \textit{supra} note 43, at 123-124.
\textsuperscript{153} Alain Couret, \textit{Asset-backed Securitization in Europe} 78 (Theodor Baums & Eddy Wymeersch eds., Kluwer Law International 1996).
\textsuperscript{154} Cashin-Ritaine, \textit{supra} note 43, at 35-38.
\textsuperscript{155} In France, besides cession, a more flexible mechanism for transfer of receivables also was created to suit business transactions. In 1981, the Dailly law (\textit{loi Dailly}) was passed, according to which the simple delivery of the signed and dated transfer deed causes the transfer of the receivables indicated on this document. It applies when the debtor is either a legal person or else a private person, acting in his profession, and the assignee is a credit institution. It does not require notification to the debtor. However, besides the restricted kinds of participants, the assignee is also exposed to any counterclaims that the debtor may have had to his original debtor. \textit{C. mon. et fin.} art. L313-29 (Fr.); Dannenberger, \textit{supra} note 45, at 2272.
\textsuperscript{156} Agboyibor, \textit{supra} note 59, at 249.
\textsuperscript{157} \textit{C. mon. et fin.} art. L214-43 (Fr.).
\textsuperscript{158} \textit{Id.}
once a transfer deed is delivered to the SPV it is the only prerequisite required and the transfer is effective between the parties as well as against third persons.\textsuperscript{159} This way the receivables are transferred without the burden of formalities attached to the cession transaction.

At the same time, however, when the deed receivables are transferred, they are sold by one party to another. Though the provisions of the French Monetary and Financial Code are not detailed on this point, it is clear, that through the assignment the assignee becomes the new owner of the receivables. Thus, the law on asset securitization does not provide for creation of security interest over receivables—a sale is the only option. This does not mean that French law is not generally familiar with the concept of security interest over receivables.\textsuperscript{160} However the transactions of asset securitization must be conducted within the framework of the laws specifically adopted for that purpose.\textsuperscript{161} Therefore in France, only true sale securitizations can be conducted.

Such a solution, though, also has its drawbacks. In some situations it may be more desirable for the receivables to remain the property of the originator. Absence of provisions allowing this, deprives the industry of wider possibilities in structuring asset securitization transactions. This is most evident in the context of whole business securitizations.\textsuperscript{162}

Since assignment is performed by delivery of a deed, certain requirements are applicable to this document.\textsuperscript{163} The deed must be named an ‘act of assignment of receivables’, it must indicate that it is subject to the provisions of the Monetary and Financial Code dealing with asset securitization, the name of the assignee must be included, and the assigned receivables must be indicated and identified.\textsuperscript{164} The peculiarity of the French formulation is that such a deed is not regarded as a contract in the sense that it is not a document prepared by two parties—assignor and assignee—together. In fact, the assignee is not even required to sign it. Instead it is the assignor, who determines the contents of the document and performs the transfer by handing in the document to the assignee.\textsuperscript{165} Once the assignee has the deed, it

\begin{itemize}
\item \textsuperscript{159} Agboyibor, supra note 59, at 249.
\item \textsuperscript{160} Cashin-Ritaine, supra note 43, at 387-402 (describing the possibilities for creation of security interests over receivables under French law).
\item \textsuperscript{161} These are the laws described supra Part III.A of this article (the Monetary and Financial Code and the decree).
\item \textsuperscript{162} Rentmeesters & Tallot, supra note 6, at 75.
\item \textsuperscript{163} Decree No. 2004-1255 of November 24, 2004, art. 18 (Fr.).
\item \textsuperscript{164} Id.
\item \textsuperscript{165} C. MON. ET FIN. art. L214-43 (Fr.).
\end{itemize}
has all rights to the specified receivables. Such a construction seems somewhat confusing because of its similarity to other ways of dealing with documentary intangibles, i.e. when a document represents all the rights to the intangible, the one who holds the document has the rights.

Analyzing the assignment of the receivables in France, several other points merit attention. These issues relate to the types of receivables that can be transferred by a deed and therefore used in asset securitization transactions. First, as noted before, the transfer deed has to indicate and identify the assigned receivables. The information required includes, for example, the name of the debtor, the place of payment, the amount of the receivable, and the date of its maturity. Thus only the receivables that can be individually identified can be used in asset securitization transactions according to French law. Such provisions have a restrictive effect because they limit the number of assets that can be used for securitization. The global assignment of all present and future receivables is therefore not possible because the originator is usually barely able to provide the identifying data about all of its possible future receivables.

It is difficult to find an explanation for the legislature’s position on this issue. A glimpse into general law on cession reveals that “in French law it is impossible to assign all one’s present and future receivables in a single act.” Thus, it appears that the idea was simply carried over to securitization assignment, without a specific detailed analysis. Seeing that businesses continue to get more interested in the possibilities of securitizing all of their receivables, this author remains hopeful that this restriction will be eliminated in the future.

Another uncertainty regarding the assets suitable for securitization in France has arisen concerning future receivables. This uncertainty arose when the French Supreme Court (Cour de Cassation) ruled on “a matter involving the sale of future receivables arising under an ongoing contract continued after the date of the beginning of an insolvency proceeding of the seller.” The court ruled that the sale of

166. Id.
168. Id.
such receivables was not effective.\textsuperscript{172} This meant that once the seller faced insolvency proceedings, the receivables that arose thereafter and were previously sold to the assignee, could not be passed to the assignee and instead fell into the bankruptcy estate of the assignor.\textsuperscript{173} It is no wonder, that "[t]his case law caused a stir in French securitization circles."\textsuperscript{174} Increasing the uncertainty, another section of the French Supreme Court upheld "the enforceability of an attachment of post-bankruptcy claims" in a later case.\textsuperscript{175} As it appears from the literature, the legislature intended allowing the transfer of future receivables in all circumstances.\textsuperscript{176} However, pending the reform on French bankruptcy law, it decided to postpone the solution until the reform was complete.\textsuperscript{177} However, when the reform was complete the point was not considered part of the insolvency reform\textsuperscript{178} and, so, the uncertainty still subsists.

In summary, the concept of cession in French law is not suitable for asset securitization. Seeing this, the French legislature came up with a new way to transfer receivables, unburdened by formalities and completed by a mere transfer of a document. However, the transfer is restricted to the sale of receivables to the SPV and the law and its resulting uncertainties limit the kinds of receivables that can be used in French securitization transactions.

\textbf{B. Germany}

Transfer of receivables in Germany is conducted on the basis of general commercial laws because Germany lacks special laws on asset securitization. German law provides three mechanisms for the transfer of receivables: novation, sub-participation, and cession.\textsuperscript{179} Novation means "the replacement of each receivable agreement between [a debtor] and the originator by a new agreement made between the [debtor] and the [SPV] on the same terms."\textsuperscript{180} Accounting for the fact that securitization usually involves transferring tens or hundreds of thousands of receivables, novation of all of them would be simply in-

\begin{thebibliography}{99}
\bibitem{173} Id.
\bibitem{175} Id.
\bibitem{176} Rentmeesters & Faure-Dauphin, \textit{supra} note 171, at 64.
\bibitem{177} Id.
\bibitem{178} Dirnat & Souffir, \textit{supra} note 174, at 18.
\bibitem{179} Wang, \textit{supra} note 45, at 35.
\bibitem{180} Id.
\end{thebibliography}
feasible. In sub-participation, "[an SPV] or another third party as a new creditor to [the debtor] joins the contract between the originator and its [debtors]."\textsuperscript{81} However, the new creditor has no direct collection rights against the debtor and the title to underlying receivable remains with the originator.\textsuperscript{82} Thus it is not well suited for asset securitization because without the transfer of the title the receivables cannot be safeguarded against the bankruptcy estate of the originator.

The German concept of cession is peculiar in that it has an \textit{in rem} (\textit{dingliche}) nature. Therefore, it has the effect \textit{erga omnes}, even if specific formalities are not respected.\textsuperscript{83} In other words, the receivable is treated as a piece of property; thus, even if the requirements as to the form of the contract are not properly followed, the parties still retain their obligations against each other. At the same time, such nature of the contract leaves some space for variations; e.g., a failure to notify the debtor about cession of his debts does not void the transaction.\textsuperscript{84}

As defined in the German Civil Code, cession is the transfer of a receivable, accomplished by an agreement between the original creditor and the new creditor, whereby the new creditor steps into the place of the original creditor.\textsuperscript{85} The definition reveals that only an agreement between the original and the new creditor is needed for cession. The participation of the debtor is neither required nor envisaged. Also, the new creditor acquires all the same rights to the receivables that the original creditor had.\textsuperscript{86} Thus the new creditor becomes

\begin{table}
\centering
\begin{tabular}{|l|l|}
\hline
\textbf{The mechanism} & \textbf{Nature of cession} \\
\hline
 & \textit{In personam} \\
\hline
The way of transfer & By delivery of a deed (\textit{bordereau}) \\
\hline
Options & Only sale, no security interest \\
\hline
\textbf{Receivables} & \\
\hline
Future receivables & Uncertain \\
\hline
Global assignment & Not possible \\
\hline
\textbf{Other} & A deed must be delivered \\
\hline
\end{tabular}
\caption{The Transfer of Receivables in France, Summary}
\end{table}

\textsuperscript{81} Id. at 37.
\textsuperscript{82} Id.
\textsuperscript{83} Cashin-Ritaine, \textit{supra} note 43, at 73. Effect \textit{erga omnes} means that the cession is valid not only as between the parties, but also against third persons.
\textsuperscript{84} This is different, for example, from the situation in cession under French law (see \textit{supra} Part V.A of this article). For more about the issue of debtor notification see \textit{infra} Part VII of this article.
\textsuperscript{86} Id.
the true creditor in respect to the debtor – he is entitled to receive all the money and take required actions without resort to the original, now former, creditor. Because of these features, the cession is the most suitable way to transfer receivables for asset securitization.

It is important to remember that in asset securitization, receivables can either be sold or security interests in them may be created. In the first case, they become the property of the new creditor immediately. In the second, they remain the property of the old creditor and the holder of security interests can only execute upon the receivables in a case of default. German law does not have separate sets of rules for different ways of dealing with receivables. The way receivable assignment is introduced in the Civil Code, the new creditor takes over all the powers from the original creditor. As the new creditor steps into the place of the original, the latter steps out of that place. Thus, on their face, these provisions are meant to regulate the sales of receivables.

However, the nature of cession in German law permitted the creation of fiduciary assignment practices. Fiduciary assignment is the assignment of a receivable to the new creditor, but for security purposes only. The transferee cannot execute upon it except in cases of default, and the transferee is also under a duty to return the receivable upon the redemption of obligation. This way, in German asset securitization both the sale of receivables and the creation of security interests over them are known.

Of the two above described methods, the sale of receivables is the method prevalently used in German securitizations. First, this is caused by the intrinsic features of sales: the complete separation of

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187. It must be noted that, in case the debtor is not notified of the transaction, he is free to redeem his obligation to the old creditor. However, the new creditor is the true creditor; he is entitled to get such payments from the old creditor, as well as take any other actions to protect his rights.
188. This is the essence of the sales transaction – the buyer acquires ownership in the object of the sale.
189. Creation of a security interest does not provide ownership of the object to the secured party. Instead, it serves as the collateral upon which the secured party can execute in case the debtor defaults.
190. See Bürgerliches Gesetzbuch [BGB] [Civil code] § 398.
191. See id.
192. CASHIN-RITAS, supra note 43, at 87.
193. Id. at 134.
194. Id.
195. Litten & Herring, supra note 114, at 428 (stating that the banks securitize for the purpose of removing their assets from the balance sheet and this they can only attain by the sale of receivables). See discussion supra Part IV.B (underlining that banks are the main securitizers in Germany).
assets from the originator. Second, this position is reinforced by regulatory interference. The regulatory authority has determined that banks are not allowed to take the assigned receivables off their books unless the receivables are (1) transferred without any possibility for recourse, (2) no substitution of receivables is envisaged, (3) and the seller's right to repurchase the receivables is limited to less than 10% of the receivables transferred. Additionally, the seller's right to finance the SPV is restricted. Nevertheless, sometimes creation of security interest over receivables can be preferred. Such may be the case in whole business securitizations where the assignor may wish to retain the residual part of assigned receivables.

Several more remarks have to be added regarding the transfer of different kinds of receivables. In some situations the cession of receivables is excluded by the Civil Code. Other than that, there is no other specification as to what receivables can be transferred. Absent any such exclusion in German law "[b]oth present and future receivables can be assigned." Furthermore, German provisions on cession permit global assignment. The global assignment as well as a fiduciary global assignment is permitted, though the latter is more often used in practice. Such liberal regulation accords more flexibility in constructing asset securitization transactions that best suit the interests of the company seeking finance.

However, despite the liberal framework, some restrictions have been created by regulatory authorities and courts. The banking super-

196. Id.
198. Id.
199. In whole business securitizations, usually all present and future receivables of the company are assigned to the financier. However, if the commercial activity of the company is successful, at the end of the day there may be more receivables left than needed to repay for financing services. If receivables were not sold, but merely used for the creation of security interest over them, the residual part remains with the originator. In case of sale, the residual part belongs to the buyer of receivables. See Ulf Kreppel, Germany. Whole Business Securitization in Germany, STRUCTURED FINANCE YEARBOOK 2002, Oct. 2002, at 77-80.
200. BGB § 399 excludes assignment of receivables when the contract between the debtor and the originator of the debt excludes such a possibility. BGB § 400 excludes assignment of unattachable receivables (for example, certain parts of a debtor's wages, etc.).
201. WOLFGANG ROSENER, SECURITY ON MOVABLE PROPERTY AND RECEIVABLES IN EUROPE 67 (Michael G. Dickson, Wolfgang Rosener & Paul M. Storm eds., 1988).
202. Global assignment is a contract by which assignor assigns to assignee all its current and future receivables originated from certain legal acts or from certain designated debtors. CASHIN-RITAYNE, supra note 43, at 392.
203. Id. at 393.
visory authority ("BAKred")\textsuperscript{204} has expressed its reservations regarding securitizations of revolving receivables.\textsuperscript{205} The use of revolving receivables means that "repayments of principal by the borrowers are used to purchase new receivables" until the maturity period for investors.\textsuperscript{206} According to the BAKred, such structures are very complex and are therefore in need of individual examination.\textsuperscript{207} This means, that the securitization transaction cannot continue until the BAKred is introduced to it, presented with documents, and then grants it a permission to proceed. Such regulation is cumbersome and has a highly discouraging effect. Accounting for the fact that a "revolving structure of the sale of receivables is [ ] normally advisable,"\textsuperscript{208} the securitization industry is prevented from benefiting from this structure because of the discouraging effect of regulation. Instead they have to look for other solutions to attain similar effects.

Also it turned out, that restrictions on asset securitization transactions may arise from the requirements of other laws. The Frankfurt Court of Appeals has ruled in one decision that if the loan is sold in breach of the lending bank’s duty of confidentiality, the assignment is void.\textsuperscript{209} Such an approach has raised much uncertainty. However, German lawyers unanimously agree that this was just a bad decision and even rating agencies accept that the assignment is valid as long as the confidentiality obligations are complied with to the extent required by the supervisory authority.\textsuperscript{210} According to the interpretation of rating agencies, it was the lack of knowledge and competence of the court that led to this decision.\textsuperscript{211} These developments do not reveal new features of securitization; rather they show that courts are not yet

\textsuperscript{204} BAKred stands for Federal Banking Supervisory Office. Later the name was changed into Federal Financial Supervisory Authority (BaFin).


\textsuperscript{206} Id.

\textsuperscript{207} Id.

\textsuperscript{208} This is the case because one time sales can provide liquidity only for a relatively short period. Peter Scherer, Germany. Asset Securitization - Developments in Germany, \textit{Securitization Yearbook} 1999, Dec. 1999, at 41.


\textsuperscript{210} Id. The requirements as to the confidentiality obligations are contained in Circular 4/97 of BAKred. Circular 4/97 (1997), BaFin, English text available at http://www.bafin.de/rundschreiben/97_1997/rs4_97en.htm (last visited Dec. 2006). It emerges from this case that the Frankfurt Court applied higher standards on bank confidentiality obligations than the standards that were established by the banking supervisory authority for securitization transactions. Rating agencies chose to ignore this decision as they believe that the proper confidentiality standard is the one established by the banking supervisory authority and the law does not require the banks to adhere to a higher standard.

\textsuperscript{211} Id.
fully acquainted with securitization and therefore some dubious decisions may still occur.

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| **Table No 3. The Transfer of Receivables in Germany, Summary** |

It can be seen from this analysis that absence of regulation can prove beneficial because it leaves space for flexibility. The nature of German cession permits both sale and creation of security interests over receivables. At the same time it allows various kinds of receivables in securitization transactions to be used. Nevertheless, some limitations arise from administrative authorities and court decisions.

**VI. Transfer of Collateral**

The peculiar feature of receivables most often used in asset securitization transactions is that their payment is ensured through certain tangible property. Specifically, certain property usually serves as collateral for creditor interests until the receivables are redeemed. Once receivables are transferred from the originator to the SPV, the issue arises as to the destiny of the underlying collateral, which in turn directly influences the quality of the receivables. If, upon transfer, the collateral is lost, the new creditor cannot look to it in case the debtor defaults. Such a solution would be hardly acceptable for asset securitization transactions; therefore, it is important to see if the new creditor can acquire the rights to collateral together with the receivables.

**A. France**

Initially, the position of the French law regarding the transfer of collateral over securitized receivables was not clear. Doubts were raised since, according to the law, the sole and exclusive purpose of

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212. Dvorak, *supra* note 22, at 559 (underlining the importance of collateral for investors).
the French SPV (the FCC) was to acquire receivables. However, because the FCC was not supposed to acquire any other kinds of property, the question arose whether sureties and collateral form an integral part of receivables, or whether they are a different kind of property and must thus be treated as separate objects.

This issue was clarified by the legislature through later amendments to the law. The current formulation provides that the delivery of the transfer deed automatically gives rise to the transfer of sureties, the collateral, and any ancillaries attached to each receivable including mortgages. Additionally, such transfer of collateral is enforceable against third parties without any other formality being necessary.

These provisions highlight several important issues. First, sureties and collateral form an integral part of a receivable and once the receivable is transferred, they also pass together with the receivable to the new creditor. Second, the transfer of sureties and collateral becomes enforceable against third parties after the new creditor receives the delivery deed. This solution is very favorable to the party acquiring the receivables. It means that once the transfer is effected between the two parties (assignee and assignor), it becomes binding on third parties (providers of sureties and collateral). One may note that this is the same consequence as in the case of the transfer of receivables where a third party—the debtor—becomes the debtor of the assignee. However, the peculiarity, in respect to collateral, is that usually mortgages have to be registered in a registry. If the transfer of mortgages becomes effective after delivery of the deed, without any need to inform the registry, the records of the registry become unreliable.

Such a solution may be justified by a strong wish of French authorities to promote asset securitization. On the one hand, requiring a

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213. C. MON. ET FIN. art. L214-43 (Fr.) (stating that the object of the FCC is to acquire receivables and issue units which represent them).


215. Agboyibor, supra note 59, at 249.

216. C. MON. ET FIN. art. L214-43 (Fr.).

217. Id.

218. See id.

219. Id.

220. See, e.g., CODE CIVIL [C. civ.] art. 2425 (Fr.), which provides that a mortgage as between the creditors ranks only from the day of registration in the land registry.

221. Shenker & Colletta, supra note 1, at 1423 (stating that French government was the main promoter of asset securitization in France).
change of registry records with respect to collateral for every security would make the transaction too cumbersome. On the other hand it has to be noted, that such an approach is not totally irreconcilable with the need for registration. Specifically, usually it is more important to know who is the debtor than who is the obligee. The record ensures that the one who has undertaken an obligation to provide the collateral is bound by such an obligation against his creditor as well as against third persons. From this point of view the change of the creditor is not so crucial: it is more vital that the property over which the security interests are created, as well as its owner, are registered.

Thus, the French legal framework ensures that in securitization transactions the collateral passes to the FCC together with the receivables. No additional steps are required. Though some uncertainties remain for the registration system, these should not affect the success of asset securitization.

B. Germany

The rule in German law is partially similar to the one in French law. The Civil Code states that sureties and mortgage rights pass to the assignee together with the receivables for which they exist. This rule is created in correspondence with another provision, which prohibits transferring receivables, if such a transfer needs modifications to the original contract between the debtor and the originator. This means that the transfer of sureties and mortgage rights per se does not require modifications to the original contract. Therefore they can be transferred and pass to the new creditor together with the receivables over which they are created.

However, the peculiarity of German law is that not all collateral is treated equally. Instead it is divided into accessory (abhängig) and non-accessory (unabhängig) collateral. Accessory collateral is understood to be one that is needed for a new creditor to exercise his rights as the owner of receivables. Into this group falls collateral

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222. See Aris, supra note 128.
223. BGB § 401.
224. BGB § 399.
225. ELIZABETH SCHÜTZE, ZESSION UND EINHEITSRECHT 203 (Mohr Siebeck 2005).
226. Id.
that is created through mortgage, ship mortgage and pledge.\textsuperscript{227} This kind of collateral is automatically transferred to the new assignee.\textsuperscript{228}

The collateral defined as non-accessory is one, which according to German law, is not so closely connected and therefore independent from the receivables which it ensures.\textsuperscript{229} A majority of authors agree that collateral created through land mortgages (\textit{Sicherungsgrundschuld}) falls into the category of non-accessory collateral.\textsuperscript{230} This kind of collateral does not follow the receivables automatically. Nevertheless, it can also be assigned through a separate agreement between the originator and the SPV.\textsuperscript{231} Additionally, an agreement on land mortgage must be registered in an appropriate registry.\textsuperscript{232}

Such regulation raises barriers for securitization of loans given to acquire real estate (mortgages). To preserve the value of such receivables through underlying collateral, the assignee has a strong interest in preserving the collateral.\textsuperscript{233} At the same time it means that each of the mortgages has to be reregistered in the name of the new creditor. This procedure is costly because the registration fee depends on the amount of the actual mortgage and is also time consuming.\textsuperscript{234}

Fortunately, the industry has found ways to overcome these barriers. One way is to regard the originator as a fiduciary who holds the mortgage with his name at the register office throughout the lifetime of the securitization transaction.\textsuperscript{235} Then the SPV does nothing until the ratings of originator are good. Only in a case where the ratings fall below a certain limit would the SPV start reregistering the mortgages.\textsuperscript{236} In Germany such a construction is not exposed to major monetary dangers because bank-originated receivables are usually used in securitization transactions and their credit worthiness is often stable. Nevertheless, the rating agencies have realized that there are certain risks inherent in such an incomplete transfer.\textsuperscript{237}

\begin{itemize}
\item \textsuperscript{227} In German: Hypotheeken, Schiffhypotheken und Pfandrechte. BGB § 401. Here, a mortgage over a ship is distinguished as a separate kind of mortgage. Pledge means creation of security interest over an object when that object is handed over to the obligee for the duration of security interest.
\item \textsuperscript{228} \textit{Schütze}, supra note 225, at 203.
\item \textsuperscript{229} \textit{Id.} at 205.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} Wang, supra note 45, at 36.
\item \textsuperscript{232} Aris, supra note 128.
\item \textsuperscript{233} Dvorkak, supra note 22, at 559 (underlining the importance of collateral for investors).
\item \textsuperscript{234} Aris, supra note 128; Wang, supra note 45, at 36.
\item \textsuperscript{235} See Wang, supra note 45, at 37.
\item \textsuperscript{236} \textit{Id.}
\item \textsuperscript{237} \textit{Id.}
\end{itemize}
Another solution used in Germany is certificated mortgages. A certificated mortgage is a documentary intangible represented by a document. Thus transfer of the document also means the transfer of the mortgage. Such mortgages do not have to be reregistered and the possession of the document is sufficient to prove mortgage rights. Currently, this appears to be the most acceptable solution for asset securitization as many German banks have switched to certificated mortgages.

Thus, in Germany, passage of collateral together with receivables is not direct in all cases. Only collateral that is neither land nor real estate automatically passes together with receivables to the SPV. Additional steps are required for mortgages on land and real estate. Nevertheless, the industry has come up with certain solutions to evade these additional steps.

**VII. Notification of the Debtor**

One more issue that arises after the receivables are transferred to the assignee is whether the debtor must be informed about the assignment. The law may require notification to the debtor as a means of protecting the debtor from being exposed to unknown creditors. However, in the context of asset securitization such a requirement would hamper the transaction.

**A. France**

The rules of French law on cession require that notification be made to the debtor. The legislature took a formal approach considering the debtor to be properly informed only if certain rules are complied with. The actual effect of the notification is not important, as long as the rules are followed. Moreover, the rules are quite complicated and have led to much jurisprudence trying to determine how they must be complied with. Such rules are too cumbersome and uncertain to be used in commercial transactions. For this reason the legisla-

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238. See Aris, *supra* note 128; See Wang, *supra* note 45, at 37.
239. See Wang, *supra* note 45, at 37.
240. *Id.*
241. See Aris, *supra* note 128.
242. Because of automatic transfer of accessory collateral, see the text above.
244. *Id.* at 406. See *supra* Part V.A of this article for more about the requirements on cession in France.
245. *Id.* at 408-409.
ture made a separate set of rules applicable to the assignment of receivables for securitization purposes.246

The laws on asset securitization do not require that the debtor be notified once receivables are transferred. The transfer is completed by the agreement between the assignor and the assignee and no involvement of the debtor is required.247 Such an approach seems very appropriate, since in securitization transactions there are usually tens or hundreds of thousands of receivables transferred. The requirement to contact each of the debtors to inform them about the transfer, or ask for their consent would simply be impractical.248 The increase in time and costs could erase the profitability of asset securitization.

However, an issue may still arise here. If the debtor does not know that the receivables were transferred, he will continue to make payments to his old creditor, the assignor. The legislature has considered this issue and has made the default rule that the assignor continues to service the receivables even after they are transferred.249 In such a case, the position of the debtor is not affected—he pays to his old creditor and the latter passes the payments on to the assignee.

The situation becomes more complicated if the assignee appoints someone else, e.g., a credit institution, to service his receivables. The law prescribes that in such a case the debtor must be informed of this by an ordinary letter.250 The consequences of informing the debtor are twofold. On the one hand, it is a measure of protecting the debtor from being exposed to a creditor he does not know.251 The letter informs the debtor that his debts were transferred to a new creditor and the new creditor is identified.

On the other hand it also imposes additional burden on the debtor. First, he has to start directing his payments to another account—that of the new creditor. Second, a debtor’s failure to do so can impact him negatively. Namely, if he continues to process the payments to his old creditor and if the creditor does not pass them on to the assignee, the debtor will still be liable to the assignee.252 This may be

246. See Agboyibor, supra note 59, at 249.
247. C. MON. ET FIN. art. L214-43 (Fr.).
248. See Wang supra note 45.
249. C. MON. ET FIN. art. L214-46 (Fr.).
250. Id.
251. See Cashin-Ritaine, supra note 43, at 408-409 (discussing notification of the debtor as a means to protect him).
252. This emerges from C. MON. ET FIN. art. L214-43 (Fr.), that once the assignment by deed becomes effective, it is enforceable against third parties. Debtor is one of the third parties, so the enforcement of assignment against him means, that he incurs and obligation to a new creditor and must redeem it to the new creditor.
curable if the assignor is in good financial health—he would have to return the payments to the debtor because he acquired them without proper grounds, and then the debtor can pay them to the true creditor. However, if the assignor goes bankrupt or its reorganization procedure is started, the funds advanced to him get frozen in the estate and it is not likely that the debtor will get much back. Then the debtor would be forced to pay twice since he would still have to fulfill his obligation to his proper creditor.

The pro-securitization approach of the French legislature led to rules which release the creditor from formally notifying the debtor of an assignment of receivables. Instead, the legislature provided a simplified procedure of informing the debtor by ordinary letter when a new creditor wants to cause the debtor to make payments to a different account.

B. Germany

German law provisions on cession accept a transfer of receivables without notifying the debtor. However, if the debtor is unaware of the transfer, he will fulfill his obligation to the originator. As was already explained in the previous section of this article, this may be convenient and acceptable as long as the originator is in good financial health. Then the originator can perform the function of the servicer and pass the payments to the assignee.

To separate the risks of the originator’s business from the risks of the receivables, the law found a way to separate payments for receivables from the estate of the originator. This way, if the originator went bankrupt, the payments would not get stuck in the originator’s account. For this reason German laws allow the assignee to inform the debtor of the cession of receivables and ask him to pay directly to the new creditor.

The law does not entail specific rules to determine how notice of assignment is to be given. Instead, it relies on the concept of effective knowledge. Specifically, the party willing to prove notification, has to show that whatever was the way of communication, the debtor had

253. For more about the doctrine of unjust enrichment in France see Cases, Materials and Texts on Unjustified Enrichment (Jack Beatson & Eltjo Schrage eds., 2003).
254. See supra Part V.B of this article.
255. See Schwarz, supra note 22, at 135 (stating that the sale of receivables removes it from the originator’s bankruptcy estate).
257. Id. at 417. Only in certain specific cases the law prescribes the form in which the debtor must be informed. For example, in insurance law, the cession of receivables must be notified in written form, and so on. See id. at 419.
the knowledge that the debt was ceded. From the moment of notification the debtor cannot relieve his obligation by paying to the old creditor: the payments have to be made to the new creditor.258

In this context, it is interesting to note that in 2003 the German legislature decided that the servicer of the receivables in these transactions does not have to be a credit institution.259 It "explicitly stated that [asset securitization] transactions are excluded from the requirement of a collection license."260 This meant that any company willing to perform the functions of collection and servicing could do so. Such legislation deprived the banks of monopoly rights in servicing of debts and opened the way for commercial companies. However, since the regulation of asset securitization is hostile to non-bank securitizations, it is not very likely that many commercial companies could enter the field.261 Nevertheless, the law permits the originator—a non-commercial company which securitizes its assets through bank platforms—to retain the servicing of the receivables, thereby diminishing the costs of the securitization transaction.262

The nature of the German cession permits it to be done without notification to the debtor. However, if the new creditor decides to inform the debtor, there are no specific provisions on how it has to do so. The only requirement is that the debtor becomes aware of the transfer; thereafter he is bound by the notification.263

VIII. CONCLUSIONS

Asset securitization, though very beneficial, is a complicated mechanism. It relates to several branches of law and requires certain leeways in order to be conducted. Some specificities of asset securitization create particular challenges for civil law jurisdictions attempting to adopt mechanisms developed in common law jurisdictions, but being unable to do so because of the differences in the legal systems. The challenges discussed in this paper are: (1) the creation of a special purpose vehicle, (2) the flexibility of the mechanism for the transfer of receivables, (3) the transfer of collateral securing the payment for receivables, and (4) the requirement to notify the debtor about transfer of receivables. The major difference between French

259. See Wang, supra note 45, at 52.
260. Id.
261. See supra Part IV.B of this article (showing that in Germany banks are best positioned to conduct asset securitization transactions).
262. See supra Part IV.B of this article (discussing securitization through bank platforms).
263. See Cashin-Ritaine, supra note 43, at 417-422.
and German regulation on these issues is that one jurisdiction has passed specific legislation for this purpose whereas the other relies on general laws. This difference determines the availability of required mechanisms as well as their flexibility.

French law has created a new entity specifically to be used for asset securitization—the FCC. The legislature considered possible issues that may arise and incorporated them into the law on the FCC. First, the structure of the FCC ensured its bankruptcy remoteness. Absence of a legal personality as well as special accounts with the servicer served this purpose well. Second, allocation of control over the FCC is meant to preserve it from mismanagement. While the management company performs FCC’s everyday business, the custodian holds on to its funds and at the same time supervises the actions of the management company. Third, the creation of the special vehicle permitted the legislature to deal with the rights of investors. The legislature could choose which rights are essential for investors and permit them to supervise their investments. Thus, other rights that may be of importance to shareholders in a company but should not be exercised by investors in the FCC could be distinguished. Altogether the FCC was constructed to perfectly suit the needs of asset securitization.

The different approach of the German legislature led to a different result. Absent a domestic entity appropriate for asset securitization, German originators have to look to foreign jurisdictions. The fact that commercial actors have to use entities from foreign jurisdictions shows insufficiency of the legal system. If they can reach a result not available in their home jurisdiction by merely employing elements of foreign law, the legislature should consider how to upgrade the regulation in its own jurisdiction. Still, originators did find a way to use German domestic law by creating a private company. However, though this form is closest to what is needed for asset securitization, it also has several shortcomings. Requirements of minimum capital, insecurity regarding mismanagement, and most importantly an inability to be truly bankruptcy-proof raises major concerns to the organizers of asset securitization. Practice has shown that some originators are more able than others to deal with these concerns. Regulation and supervising of banking activities places German banks in a position where investors can see that the concerns raised by use of a private company can be tackled in other ways. However, this does not hold for other originators, like commercial companies, whose solvency is not under such a close scrutiny by regulators. Therefore, commercial companies do not have any other domestic alternatives for asset securitization except for using it indirectly through banks.
This analysis shows how different approaches to regulation can lead to very different results. Through this comparison it can be seen that not just any entity can serve as a special purpose vehicle in asset securitization transactions. As the name reveals, it has to perform a special function to attain a special goal. Therefore, it needs certain specific characteristics, which can not be designed through restructuring conventional companies available in civil law jurisdictions. In these circumstances the best solution seems to be the creation of a new entity that has the required characteristics. This also allows the legislature to determine and restrict the framework within which such an entity should function, instead of leaving it in the jungle of commercial company regulations.

Another important issue for asset securitization is the possibility of transferring receivables from the originator to the special purpose vehicle. The French law created a new way of assigning receivables to be used specifically in asset securitization transactions. This step was caused largely by imperfect regulation on cession of receivables in general commercial laws. The nature of French cession mandated stringent adherence to complicated rules of the transaction, including the requirement to inform the debtor. Therefore, this mechanism could not be used without modifying it for asset securitization transactions. Instead of adapting the concepts found in general commercial laws, a new one was created to operate these transactions. However, the legislature also chose to restrict the use of this concept—Bordeveau assignment can only be used for a sale of receivables and does not provide an opportunity to create a security interest over receivables. Furthermore, though it evaded some shortcomings of French cession, some other shortcoming were taken over. Namely, identification requirements prevent global assignment of receivables. Also, absent specific provisions it remains unclear whether assignment of future receivables will survive the bankruptcy of originator.

A very different situation occurred in Germany, because of the different nature of the cession there. The transfer of receivables in Germany is not subjected to so many formalistic rules. Therefore, it is more flexible and survives various modifications. The most important modification for asset securitization is the possibility of fiduciary assignment. Though special provisions for creation of security interest over receivables are absent, the general provisions on cession can be used for this purpose. Additionally, assignment of future receivables as well as global assignment is possible under the German concept of cession. Under these circumstances, German originators do not need a special kind of assignment allocated exclusively for the purposes of
securitization. At the same time, however, the authority which supervises the banking industry does try to regulate several aspects of the transfer of bank receivables. However, it does not restrict their options to transfer receivables; instead it proscribes the consequences for the routes used as well as scrutinizes the more complicated structures.

This analysis reveals that not all aspects of asset securitization call for specific regulation. This is also subject to the features of general law concepts that can be used for asset securitization. If the concept of cession is flexible enough, it permits various modifications that may be needed for the transaction. Such modifications may include the creation of a security interest and no mandatory notification of the debtor. However, if the general assignment of receivables is formalistic and detailed, other mechanisms must be sought to make securitization efficient. Additionally, once new concepts are created, special care should be taken to incorporate only those features that are necessary, and to evade all the shortcomings of the general concepts of commercial laws that made it inapplicable to asset securitization in the first place.

Another issue examined in this paper is the transfer of collateral securing the payment of assigned receivables. The French law demonstrates a pro-securitization approach by stating that the collateral is automatically transferred to the FCC as soon as receivables are sold to it. This saves the transaction from additional burdens. However, this solution undermines another institute of law, namely the registry and the accuracy of its records. In Germany this problem is approached differently. The collateral is distinguished into accessory and non-accessory. Of these two, the former passes to the assignee together with receivables, whereas additional steps are required for the latter. These steps tackle the registry problem and oblige parties to make adequate records in the registry books when mortgages are transferred. At the same time, this requirement creates a burden on the transaction. Therefore, the parties look for ways to overcome them.

It can be seen that both solutions aim to facilitate the transfer of collateral securing the receivables. However, both solutions raise additional problems. They appear as two sides of the same coin. On the one hand, asset securitization requires an easy transfer of collateral—requiring reregistration of security interests over every receivable is too burdensome. On the other hand, if the collateral is transferred automatically without appropriate entries in the registry, the data of the registry loses its reliability. To solve this problem, the best solution would be to make changes to the registry that would be fast and
cheap, or else to evade interference with registry altogether. The German concept of certified mortgages has exactly the latter effect.

The final issue examined in this paper is notification of the debtor regarding the transfer of receivables. Both France and Germany have found ways to transfer receivables without notifying the debtor. In France, legislation has not attached such a requirement to the bordereau assignment. Similarly, German law permits the assignor to skip this requirement. At the same time both jurisdictions leave an option for the new creditor to inform the debtor. Such an option may be needed when the originator of receivables loses its credibility and another company must service the receivables. The effect of such notification is the same in both France and Germany – the debtor has to direct his payments to the new creditor. Therefore, the debtor is regarded as one whose interests are unaffected by asset securitization and the transaction is not burdened by including him as an additional actor.

In the end, it can be seen that it is not possible to state that one regulation is better than another one. Both French and German legal frameworks have their shortcomings and advantages. The French FCC structure is well suited for a special purpose vehicle, but the mechanism for the transfer of receivables lacks flexibility. In Germany, general provisions on cession were well employed by the asset securitization industry; however the absence of an entity that could serve as a special purpose vehicle imposes restrictions on asset securitization. Both jurisdictions have found a solution for the issue of collateral as well as debtor notification. These various advantages show that in general both France and Germany are capable of conducting asset securitization transactions under their current regimes. However, the above-described disadvantages help explain why the businesses in France and Germany can only use this transaction to a limited extent. The barriers that still exist deprive many businesses in these jurisdictions of the possibility of securitizing their receivables and of collecting the sweet fruits that capital markets could offer them.
APPENDIX I: ASSET SECURITIZATION: STRUCTURE OF THE TRANSACTION

Debtors

Originator

- Income producing assets
- Pooling or very big assets
- Assets secured by collateral

sale or pledge of receivables

- issue of debtor notification

SPV

- Separate legal personality
- One time or multiseller

issue of securities

eating increase/enhancement

Insurance companies
Rating agencies
Credit enhancers

Private placement or capital markets

Investors
APPENDIX II: ASSET SECURITIZATION: CASH FLOW

The diagram illustrates the process of asset securitization, where an Originator provides loans to Debtors and sells receivables to an SPV (Special Purpose Vehicle). The SPV then sells securities to Investors at a price. The Servicer manages the securitized assets, and returns to investors. The process includes the flow of money to pay off loans and return profits.