General overview of a typical Dutch true sale securitisation[1]

1. INTRODUCTION

Since the first Dutch public securitisation transactions came alive in the mid-1990s, the Netherlands has a strong residential mortgage-backed securities (RMBS) market.

In structuring securitisation transactions a number of credit, legal, tax and regulatory issues must be taken into consideration. The choice of a particular securitisation transaction structure is primarily dependent on the reasons for setting up the transaction.

The main intention of this note is to give a general overview of a typical Dutch true sale residential mortgage-backed securitisation (Dutch RMBS) structure and related issues, main participants and their respective roles in such transaction.[2]

Except for the matters specifically mentioned in this note, it does not address Dutch, European or U.S. mandatory requirements (including, without limitation, those pursuant to the CRR, AIFMR, CRA Regulation, Solvency II or the ECB Regulation)[3] relating to securitisation or securitised assets, application or maintenance of structured credit ratings in respect of exposures or requirements relating to eligibility for Eurosystem (or other) credit operations which may apply to certain institutions (including banks, insurers and investment funds and managers) involved in a Dutch RMBS. It does also not deal with the application of standards and practices of Dutch and European industry bodies and associations, including the Dutch Securitisation Association, that may apply to a Dutch RMBS.[4]

2. TRUE SALE TRANSACTI ON

Securitisation can be described as a financing transaction whereby certain identified cash flows are applied to repay debt financing that has been attracted by, typically, a special purpose vehicle ("**SPV**"), through debt, equity or a combination of both. Recourse of the creditors of the SPV is limited to these cash flows and the assets that generate these cash flows.

A true sale transaction is the traditional form of securitisation. An SPV acquires receivables or other assets from one or more sellers (which are often but not necessarily the originators of the assets) and pays a purchase price for these receivables. The "**true**

---

1 This general overview is prepared on the basis of a publication on Securitisation in 2015 by P.N.J. van Welzen, at that time, attorney at law at Clifford Chance LLP, Amsterdam. This general overview has been updated on 14 October 2024 with input from M. van der Weide, N. van Stekelenburgh and E.R. Schreuder, attorneys at law at Clifford Chance LLP, Amsterdam. This general overview does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. Neither the DSA nor any other person assumes any responsibility or accepts any liability for the content of this general overview.

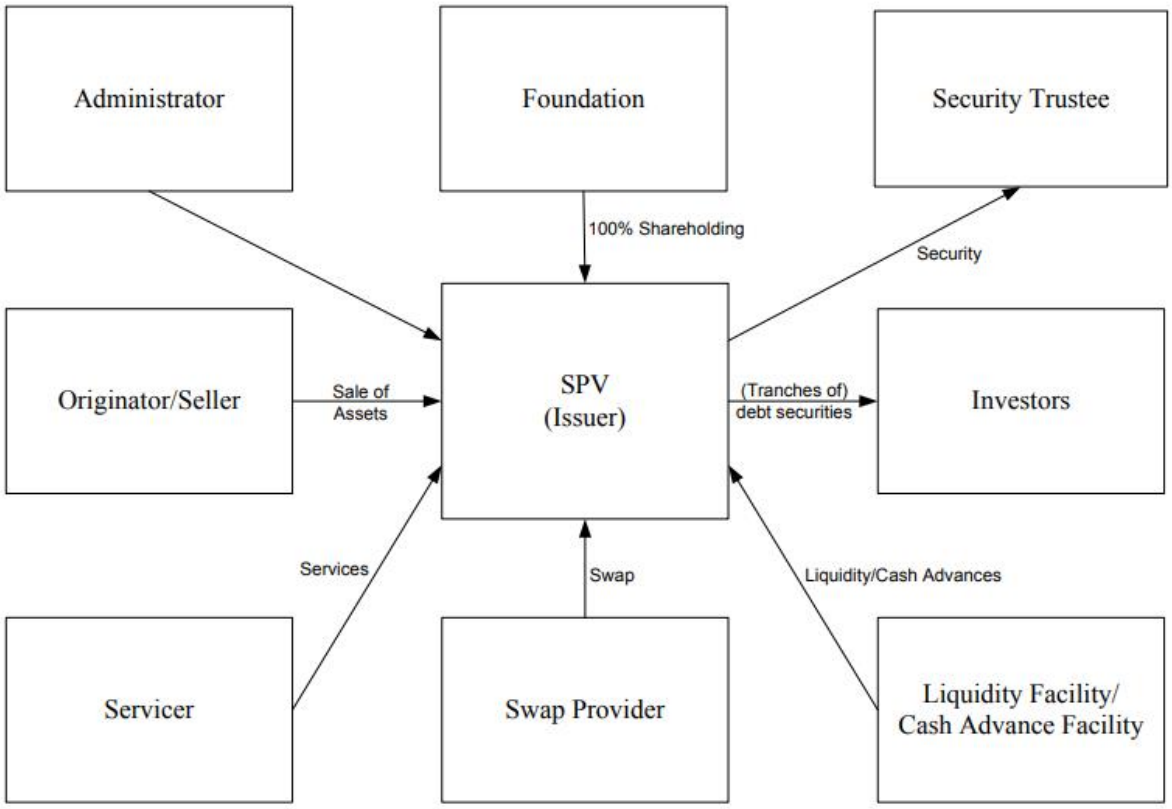
2 They do not purport to give an exhaustive summary or description of all relevant issues that one can come across in structuring a securitisation transaction.

3 Regulation (EU) No 575/2013 (as amended) (**CRR**), Commission Delegated Regulation (EU) No 231/2013 (as amended) (**AIFMR**), Regulation (EU) No 1060/2009 (as amended) (**CRA Regulation**), Commission Delegated Regulation (EU) 2015/35 (as amended) (**Solvency II**), Regulation (EC) No 24/2009 (as amended) (**ECB Regulation**).

4 See website: www.dutchsecuritisation.nl

sale" element means that the assets are transferred by the seller to the SPV and, as a result of which, the SPV becomes entitled to the cash flows that are generated by the assets (including those resulting from a subsequent sale of the assets). The legal arrangements should ensure that, in the event of insolvency of the seller, the cash flows remain the property of the SPV and, therefore, that the seller's creditors cannot challenge the validity of the transfer. This is typically achieved through an effective legal transfer of the assets or a perfected security interest created over such assets[5]. The SPV finances the purchase price of the assets through debt, equity or a combination of both. The basic structure of a typical Dutch true sale transaction is set out in Figure 1.

Figure 1. Dutch True Sale Transaction



3. FUNDI NG OF DUTCH TRUE SALE TRANSACTI ON

3.1 Type Of Securities

True sale securitisations are typically financed through the issue of debt securities. Depending on the type of underlying assets that are being securitised and the funding that is required, these securities can include securities with a short term (such as commercial paper) as well as securities with a medium to long term (such as medium-term notes and bonds). The securities can be publicly or privately issued.

[5] A security interest created on the assets may pursuant to the law governing the security interest and the law governing any insolvency proceeding of the relevant security provider not have the same legal effect as an effective legal transfer of such assets and/or be subject to cooling-off periods.

In the case of a public issuance, the securities will typically be transferable and often be listed. Given the complexity of the transaction and the risks embedded in the securities, the securities are generally not offered to the public but to professional or otherwise sophisticated investors. This means that often the securities have a high denomination (e.g., EUR 100,000 or more) and that appropriate selling restrictions are imposed on any offering of these securities, so that they cannot be offered to retail investors.

The debt securities can in certain circumstances be used as collateral by financial investors for financing transactions with their central bank. In those circumstances, the securities (although listed) are typically not offered to the public but acquired by the originating financial institutions, which will then offer the securities as collateral to the central bank.

3.2 Term of Securitisation, Listing and Credit Rating

A typical Dutch RMBS provides financing for a fixed term and can therefore be characterised as a term securitisation. The term of the transaction can relate to the term or life of the asset that is being securitised or it can involve a shorter term, in which case arrangements will need to be made that ensure that at the time the transaction terminates, the SPV has funds available to repay the debt securities that it issued to fund the acquisition of the assets. If the term of the debt securities would be equal to the life of the securitised assets (e.g., mortgage loans with a term of thirty years or more), these securities may be less interesting for investors who may prefer securities with a shorter term. Therefore, many true sale term securitisations involving long-term assets contain features that allow the debt securities issued by the SPV to be redeemed prior to their legal maturity. An incentive to redeem the debt securities early is an increase of the interest rate on the securities after a certain period. This increase affects the cash flow in the transaction, and subsequently results in a reduction of the amount that will be available to the originator after deduction of the funding costs incurred by the SPV.

Because the debt securities issued in the context of a term securitisation typically have a medium to long-term maturity, they are suitable for listing and trading on securities markets. The debt securities issued by the SPV will be rated by credit rating agencies. Apart from the quality of the securitised assets, this credit rating is also dependent on the counterparties of the SPV, such as swap counterparties and liquidity providers and the terms of the swaps and liquidity arrangements.

3.3 Redemption Of Securities

If in a true sale transaction the securitised receivables are redeemed, this will in principle result in a corresponding redemption of the debt securities issued by the SPV. However, the terms of these transactions sometimes provide for a period during which the SPV can apply the redemption proceeds to acquire new receivables that meet the eligibility criteria (the so-called revolving period). This mitigates the risk that the investors receive redemption payments prior to the expected maturity of the debt securities. The originator benefits from this arrangement because it can still use the full amount of the funding proceeds of the securitisation during this revolving period.

3.4 Security Trustee

The holders of the debt securities will normally be represented by a security trustee, which will be obliged to take certain actions (such as calling an event of default) if a minimum number of debt securities holders require the security trustee to do so. This is to avoid the situation that a single debt securities holder can take action against the SPV. The security trustee can also act as representative of debt securities holders if certain minor changes are to be made to the terms of the transaction. It is, therefore, not necessary to organise meetings of debt securities holders in order to effect these minor changes.

3.5 LIQUIDITY OR CASH ADVANCE ARRANGEMENTS

The SPV will usually have the benefit of liquidity or cash advance arrangements with an appropriately rated financial institution. This liquidity or cash advance arrangement is intended to cover temporary cash shortfalls and not to assume any default risk in relation to the securitised assets. The liquidity or cash advance arrangement is typically provided for a period of 364 days to ensure that it receives an advantageous regulatory capital treatment. The arrangement can, however, be renewed at the option of the SPV at the end of the 364-day period. The liquidity or cash advance provider is usually not obliged to agree to such renewal request albeit that in such circumstance the SPV will typically be entitled to fully draw the facility if no adequate replacement liquidity or cash advance facility arrangements are entered into.

Depending on the portfolio characteristics of the assets forming part of the transaction and the envisaged capital structure of the transaction, a reserve fund or similar structures are also often used to provide for liquidity buffers for unforeseen liquidity shortages.

3.6 DERIVATIVES

The SPV will normally enter into derivatives transactions that hedge the mismatch between, on the one hand, the income received on the portfolio of securitised assets and, on the other hand, the interest it has to pay on the debt securities (so called securitisation swaps). This hedge arrangement can relate to specific cash flows (e.g., floating rate on the debt securities against an agreed fixed interest percentage) or to substantially all cash flows of the SPV (e.g., the SPV's funding costs against the income received by the SPV on the securitised assets). The swap counterparty of the SPV must be an appropriately rated financial institution in order to comply with the credit rating agency criteria that apply to the transaction. However, certain Dutch RMBS transactions are structured without the usual securitisation swap but they instead use interest rate caps purporting to mitigate the SPV's exposure to increasing floating rates above a certain cap strike rate, in return for payment of a premium by the SPV.

4. DUTCH SPECIAL PURPOSE VEHICLES

4.1 Orphan Versus Originator SPV

Dutch true sale securitisations are generally structured around an entity that is specifically set up for such purpose, the SPV, whose role is effectively limited to acquiring a portfolio of assets and obtaining financing for such acquisition and entering

into agreements in connection with, and useful to, such acquisition and financing (e.g., hedging and cash management and administration contracts). The aim of the transaction is usually to legally separate the assets to be securitised from the other assets and business undertakings of the originator, seller or sponsor that initiates the transaction.[6] By separating the assets from the originator, the originator's credit risk becomes less relevant.[7] This is necessary so that acceptable risk profiles for the debt securities issued by the SPV are obtained (i.e. so-called 'de-linkage' is achieved), and therefore ensure that such debt securities have lower interest rates.[8] Such risk profiles are linked to the quality and performance of the assets and the cash flows they produce.

In order to ensure that the SPV itself is not regarded an asset of the originator, the SPV is usually set up as an orphan company. In Dutch RMBS most orphan SPVs take the form of a Dutch private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*, BV or Dutch SPV).[9]

4.2 **Management**

In order to ensure that the SPV is managed independently from the originator and other participants in the transaction, usually an independent corporate service provider with the appropriate license under the Dutch Trust Companies Supervision Act (*Wet toezicht trustkantoren 2018*), is introduced to act as sole director of the SPV. The terms of such management are incorporated in a management agreement entered into by the corporate services provider and the SPV and - in addition to the terms relating to the scope of services to be provided and the remuneration of such services - aim to protect the interests of the SPV as a separate and independent legal entity.

Because of its limited purpose and function, the SPV will itself not have the infrastructure or experience to service and administer the acquired assets. Therefore, but also for regulatory and commercial reasons, the originator (or seller) is usually appointed by the SPV to service and administer the assets. This means, for example, that in respect of loan receivables acquired by the SPV, the originator will continue to have direct contact with the debtors and will collect the payments from such debtors directly. For similar reasons the SPV will also enter into cash management and administration agreements providing for the appointment of third parties to perform certain cash management functions in connection with the cash flows received by the SPV and to be distributed to the investors and other creditors of the SPV.

---

6 Although a legal transfer of the assets is intended, the accounting treatment from the originator's perspective may be different in respect of the assets and, consequently, such assets may remain on the balance sheet of the originator.

7 Credit rating agencies will not completely ignore the originator's credit risk in a true sale transaction given that the originator, amongst other things, is likely to have certain repurchase obligations in relation to the assets (e.g., as a result of a breach of the eligibility criteria). If the originator is not able to repurchase ineligible assets if required, this may result in losses to the investors.

8 Furthermore, the diversity of investors may increase when a range of acceptable risk profiles in the relevant debt securities are obtained.

9 In some Dutch domestic transactions, a Dutch foundation (*stichting*) is used as an SPV, usually for tax reasons. There is also flexibility for using foreign SPVs in Dutch domestic transactions. Tax implications always need to be considered when choosing the incorporation jurisdiction of an SPV.

4.3 **Bankruptcy Remoteness**

The transaction must be set up in a way that the SPV will be able to comply with its obligations under the various transaction documents, including the debt securities issued by it, and therefore to operate on a solvent basis. The predicted cash flow models in a transaction are essential: the expected cash flow generated by the assets (and the proceeds of a sale of such assets) must be sufficient to enable the SPV to service its debts. Therefore, the SPV is financed on a limited recourse basis, which means that the payments under the debt securities issued by the SPV are only due upon either the SPV's receipt of payments under the securitised portfolio or the collateral, or the security trustee's receipt of the enforcement proceeds of the security interests created by the SPV. Consequently, the investors (and other secured parties) are exposed to certain risks on the performance of the securitised portfolio and to the insolvency of the SPV. The extent of this risk will depend on the security granted to the investors, and the strength of the credit enhancement (such as guarantees or insurances) provided by third parties.

Because of the adverse consequences connected with the SPV's bankruptcy and to preserve the status and priority of the creditors of the SPV participating in the transaction (including the investors), the SPV is made 'bankruptcy remote' (i.e., isolated from compulsory or voluntary insolvency proceedings). Bankruptcy remoteness would normally involve a combination of any of the following measures:

4.3.1 the arranger(s) of the transaction would select a corporate services provider to incorporate the holding foundation, which in turn incorporates the SPV. The corporate services provider can also serve as managing director of the SPV and gives certain covenants in the management agreement in relation to the restrictive business undertakings of the SPV;

4.3.2 the SPV's articles of association should have a very limited objects clause dealing specifically with the relevant transaction. This restriction should be repeated in the principal agreements to which the SPV is a party;

4.3.3 all parties contracting with the SPV should covenant that they will not take any action to have the SPV liquidated, dissolved, or declared bankrupt until such time as all amounts payable in respect of the debt securities have been paid; and

4.3.4 the only creditors that the SPV should have which would not be bound by a non-petition for bankruptcy provision would be the chamber of commerce in whose commercial register the SPV is registered (for annual registration fees), external advisers of the SPV and the tax authorities. As regards these creditors, it is common practice to ensure that the taxes and fees payable by the SPV to them on an ongoing basis can be met from the SPV's earnings and are listed high in the so-called waterfall of payment priorities or can be paid outside such waterfall. Furthermore, the SPV should not have employees.

As to paragraph 4.3.3, under Dutch law parties can contractually prohibit or limit a party's right to petition for the bankruptcy (*faillissement*) of its counterparty. However, it is possible that a Dutch court would deal with a petition for bankruptcy, notwithstanding that such petition has been presented in breach of such non-petition covenant. The court in dealing with the petition may arrive at the conclusion that the

SPV has ceased to pay its debts as they fall due (being the legal ground for bankruptcy in the Netherlands[10]). A Dutch court may also deal with a petition for suspension of payments (*surseance van betaling*), which can only be requested by the debtor (i.e., SPV) itself.[11]

5. LEGAL STRUCTURE[12]

5.1 Transfer Techniques

The appropriate method of transferring receivables under Dutch law is by way of assignment (*cessie*).[13] A transfer of receivables can either take the form of a disclosed assignment (*openbare cessie*)[14] or, **provided that** the receivables exist or arise from a legal relationship existing at the time of such transfer, an undisclosed assignment (*stille cessie*).[15] A disclosed assignment, in order to be effective, must be notified to the debtor of the receivable. For an undisclosed assignment to be effective, the deed of assignment should either be included in a notarial deed or registered with the Dutch tax authorities. In the case of an undisclosed assignment, notification to the debtor will still be required to avoid such debtor validly discharging its obligations (*bevrijdend betalen*) by making a payment to the assignor of the receivable.

Often, the originator of the receivables will be the seller and transferor of the receivable. However, it is possible that the originator has already prior to the transaction transferred the receivable to another party. It may then be necessary to conduct due diligence on the previous transfer(s) and the transaction terms may need to be adapted to reflect this situation. We have for the purpose of this note assumed that the originator also acts as seller and transferor of the receivables.

In particular, in transactions involving consumer receivables, the transfer of receivables is usually for commercial reasons effected by way of undisclosed assignment and will therefore not be notified to the debtors of receivables, except if certain events (e.g., payment defaults, insolvency events and credit rating downgrades) in respect of the originator occur. As long as no notification of the assignment of the receivables from the originator to the SPV has taken place, the debtors under the receivables can only validly discharge their payment obligations by paying the originator.

To protect the interests of the SPV (and the security trustee), the purchase agreement would usually contain, in addition to representations and warranties in relation to the receivables, covenants from the originator pursuant to which the originator on-pays to the SPV any proceeds received (or deemed received, for example as a result of set-off) in respect of the receivables until notification of the assignment of the receivables has

---

[10] Article 1 Dutch Bankruptcy Act (*Faillissementswet*).

[11] Generally, there are also limitations on the right of the SPV (and its management) to petition for its insolvency and suspension of payments.

[12] This paragraph only deals with selected legal issues and should not be considered as a complete overview of all potential legal issues.

[13] If it is also intended to transfer a party's obligations under a contract the method of contract transfer (*contractsoverneming*) should be used (Article 6:159 DCC).

[14] Article 3:94(1) DCC.

[15] Article 3:94(3) DCC.

been given to the debtors. Furthermore, the originator would agree not to transfer or encumber the receivables to, or in favour of, any third party (other than the SPV).

It has been debated in respect of Dutch securitisation transactions whether such transactions are at risk to be re-characterised as a secured loan (rather than a sale) as a result of which a transfer of receivables in respect thereof would be void as a matter of Dutch law.[16] The analysis whether there is a valid title depends on the (true) intention of the parties: whether the parties intended a 'true' transfer (which is valid), or merely a transfer for recourse purposes (which is invalid), as can be derived from, *inter alia*, the wording of the transaction documents and the circumstances of the relevant transaction. Examples of facts that may be relevant for such analysis are whether the SPV is required to pledge the acquired receivables in favour of the security trustee as security for the SPV's obligations and the SPV is free to dispose of the receivables once acquired.

5.2 Transfer Restrictions

In determining the legal feasibility of a true sale transaction, it is particularly relevant to determine whether the contract pursuant to which the receivable is originated does not restrict or prohibit an assignment or transfer of such receivables. Under Dutch law, a party to a contract may assign its rights under such contract unless such transfer is prohibited or restricted by law or contract, or such right is a personal right (which by its nature is non-transferable).[17] A contractual restriction or prohibition on assignment can, depending on its wording, have 'proprietary effect' (*goederenrechtelijke werking*), that, actually prevents the receivable from being transferred. There is a presumption that non-assignment clauses do not have 'proprietary effect' unless the parties have expressly agreed otherwise.[18]

Therefore, in order to ensure the validity of the assignment, it must be ensured that the transfer of Dutch receivables (i.e. receivables which are governed by Dutch law) is not excluded or conditioned by the terms of the relevant underlying contracts. Any assignment by an originator contrary to such provision with 'proprietary effect' would be invalid and would not bind the debtor of the receivable purported to be assigned.[19] In such case, consent of the relevant debtor should be obtained prior to the assignment taking place. A breach of a contractual restriction or prohibition on assignment could constitute a breach of contract by the originator and expose it (or even the SPV in exceptional circumstances) to liability for damages (if any) incurred by the debtor. It is noted that a bill has been submitted to the Dutch Parliament (accepted by the House of Representatives) pursuant to which certain non-assignment clauses included in a contract between parties that concluded the contract acting in the course of their business or profession will be null and void.

As part of the due diligence process, the contract or, in respect of large portfolios, a representative sample or standard form contract, would usually be reviewed to

---

[16] Article 3:84(3) DCC.

[17] Article 3:83 DCC.

[18] The same applies, *mutatis mutandis*, to a restriction on the creation of a security right over a receivable.

[19] A non-assignment clause with 'proprietary effect' may also have the effect that a security right created over the relevant receivable may be invalid.

determine whether an assignment of rights under such contract is allowed without involvement of the debtor of the receivable and/or does not result in a contractual breach towards the debtor.

5.3 Security Rights in Respect Of Assigned Receivables

In a true sale transaction, it is relevant to determine whether upon an assignment of a receivable by the originator to the SPV, the SPV shall also have the benefit of any security rights granted to secure such receivable (e.g., a mortgage securing a loan). Pursuant to Dutch law, if a receivable is transferred, in principle the accessory rights (*afhankelijke rechten*) and the ancillary rights (*nevenrechten*) connected to such receivable, such as security rights, privileges, the right of enforcement and the right to stipulate interest or a penalty, pass by operation of law to the transferee of the receivable, except if the right by its nature is, or has been construed by the parties as, a purely personal right of the transferor.[20] This means that upon an assignment of a receivable by the originator to the SPV, the SPV shall also have the benefit of a security right granted to secure such receivable unless such security right is a personal right of the originator.[21]

Under Dutch law no statutory provision exists on the issue of whether upon the creation of a right of pledge on a receivable and notification thereof to the debtor, the pledgee is entitled to exercise the accessory rights and the ancillary rights connected to the receivable upon the exercise of the right of pledge over such receivable. The Dutch Supreme Court has ruled that, if a right of pledge is created over a contractual right which itself is secured by a right of mortgage or pledge, the pledgee is entitled to exercise these rights of mortgage or pledge, provided such right of pledge is disclosed to the debtor of the pledged contractual right.[22] This means that the security trustee having a security interest in the contractual rights of the SPV under the underlying contracts would be entitled to exercise the security rights granted by the debtors as security for the payment obligations of the debtors in respect of the underlying contracts.

5.4 Selected Legal Issues

5.4.1 *Impact of insolvency on assignment*

Registration of a deed of assignment (in the case of an undisclosed assignment) and notification of a deed of assignment to a debtor (in the case of a disclosed assignment) after the transferor (e.g., an originator) has become subject to insolvency proceedings, such as bankruptcy (*faillissement*) or suspension of payments (*surseance van betaling*), in the Netherlands (hereinafter, insolvency proceedings), will not be effective and, consequently, in such event the receivables will not have been validly transferred from the transferor to the

[20] Article 3:82 DCC in conjunction with Articles 3:7 and 6:142 DCC.

[21] Under Dutch law, it is not clear in all circumstances whether, in the case of an assignment or pledge of a receivable secured by a bank mortgage, the mortgage rights created by the bank mortgage will follow such receivable and this issue is usually addressed in the risk factors of the prospectus and the Dutch law legal opinion.

[22] HR 11 March 2005, JOR 2005, 131 and HR 18 December 2015, JOR 2016/105.

transferee (i.e., the SPV).[23] Assuming that an assignment has been perfected either by registration of the deed of assignment with the Dutch tax authorities or the deed of assignment is included in a notarial deed (in the case of an undisclosed assignment) or by notification of the assignment to the debtor of the receivable (in the case of a disclosed assignment) prior to insolvency proceedings becoming effective in respect of the transferor, the validity of such assignment will not be affected as a result of such transferor being subsequently subjected to insolvency proceedings. Notification of a perfected undisclosed assignment of receivables can still be validly given to the debtors of such receivables after the transferor has been subjected to insolvency proceedings.

However, (the validity of) such transaction could still be challenged for other reasons, for example, because the transaction is held not to be in the originator's corporate interests[24] or held to be prejudicial to the interests of other creditors of the originator, and the originator and SPV are or should have been aware of this at the time that they entered into such transaction.[25]

As long as no notification of the assignment has taken place, any payments made by the debtor under a receivable must continue to be made to the originator. In respect of payments so made prior to insolvency proceedings of the originator, the SPV will be an ordinary, non-preferred creditor, having an insolvency claim (*voor verificatie vatbare vordering*). In respect of post-insolvency payments, the SPV will be a creditor of the estate (*boedelschuldeiser*), and will receive payment prior to creditors with insolvency claims, but after preferred creditors of the estate. Creditors of insolvency claims have to share in the general insolvency costs and have to await finalisation of a (provisional) distribution list ((*voorlopige*) *uitdelingslijst*).

The risks set out above can be mitigated if a different cash collection arrangement is used. It is common in a Dutch RMBS that all payments by the debtors under the receivables of the originator are paid into a collection account held and maintained by a collection foundation. A collection foundation is usually a Dutch foundation established as a passive bankruptcy remote entity and managed by a corporate services provider. The administrator of the collection foundation, which can be the originator or a third party (e.g. a corporate service provider), determines what the entitlement is of each beneficiary (according to the receivables owned by, purchased and assigned to, or pledged to that beneficiary) and will arrange for the transfer of the relevant amounts from the collection account to the relevant account of such beneficiary in accordance with the distribution agreement.

The debtors under the receivables are instructed (e.g. in the underlying contract) that they can only validly discharge their payment obligations to the originator by paying into that collection account. As a result of this structure, amounts paid by the debtors into the collection account of the collection foundation will

---

[23] Articles 23 and 35 Dutch Bankruptcy Act (*Faillissementswet*).

[24] Article 2:7 DCC.

[25] Articles 3:45 *et seq*. DCC (pre-insolvency) and ss 42 *et seq*. Dutch Bankruptcy Act (*Faillissementswet*) (post-insolvency), respectively.

not fall within the bankruptcy estate of the originator if it becomes subject to insolvency proceedings. However, there is a risk that the originator (prior to notification of the assignment) instructs the debtors to pay into a bank account of the originator instead of the collection account and any payments made by these debtors would be valid and would fall within the bankruptcy estate of the originator if it becomes subject to insolvency proceedings. The distribution agreement would normally include restrictions for the originator to redirect the payments of the debtors. Furthermore, although the collection foundation is set up as a bankruptcy remote entity, it is still possible that it becomes subject to an insolvency proceeding. In such case, any amounts paid by debtors into the collection account of the collection foundation after it became subject to an insolvency proceeding, will fall within the bankruptcy estate of the collection foundation. To mitigate this risk, the transaction documentation normally arranges that certain events at the level of the collection foundation (e.g., payment defaults, insolvency events and credit rating downgrades of the collection account bank) trigger certain measures to be taken (i.e. notification of the assignment and redirection of the payments into the account of the SPV or a transfer of the collection account to an alternative bank having the appropriate credit rating).

5.4.2 *Impact of set-off and deduction*

Set-off risk plays an important role in structuring a securitisation, in particular if banks as originators are involved, since an SPV after having purchased a receivable from the originator may not receive all proceeds to which it is entitled in respect of such receivable if the debtor of such receivable invokes a set-off right (*verrekeningsrecht*) or similar deduction rights against such originator. For example, this can be relevant in respect of deposits or savings held by a debtor with an originator, a current account held by the debtor with an originator or damages claims of a debtor against the originator as a result of acts performed by such originator (e.g., in relation to providing inappropriate investment advice, etc.).

In a true sale transaction, the purchase agreement for the receivables would typically provide that an originator shall pay amounts equal to the difference between the amounts which are set off and which should have been received by the SPV and the amounts that have actually been received by the SPV in respect of the receivable. This is, however, a contractual obligation only and the SPV incurs credit risk on the originator. Transactions involving large loan portfolios therefore usually contain concentration limits in respect of categories of debtors in respect of which set-off risk is believed to be material (e.g., residential mortgage loans granted to employees of the originator or debtors with construction mortgages (*bouwhypotheken*)) or (other) credit risk mitigation solutions such as set-off deposit reserves which must be created upon a credit ratings downgrade of the originator, the inclusion of sub-participation arrangements relating to bank savings mortgage loans,[26] a construction deposits guarantee or a deduction from the purchase price for the receivables under a

[26] Pursuant to such sub-participation arrangement the account bank or originator participates in the receivables acquired by the SPV, for a purchase price equal to the savings received in the bank savings account.

mortgage loan of an amount equal to any construction deposit drawn under such mortgage loan but placed on deposit.

Unless contractual set-off rights are validly waived by the debtor in the underlying contract,[27] under Dutch law a debtor will be entitled to set off amounts due by the originator with amounts the debtor owes to the originator in respect of the receivable, **provided that** the legal requirements (such as mutuality) for set-off are met.[28] After an assignment or pledge of the receivable to the SPV or security trustee, as the case may be, and notification to the debtor, the debtor will also be entitled to such set-off rights[29] - again **provided that** the legal requirements for set-off are met - and furthermore **provided that**:

(a) the counterclaim of the debtor results from the same legal relationship (*rechtsverhouding*) as the transferred (or pledged) receivable; or

(b) the counterclaim of the debtor came into existence and became due and payable prior to the transfer (or pledge) of the receivable and notification thereof to the debtor.[30]

5.4.3 *Interest rate reset*

In a Dutch RMBS involving Dutch law governed loan receivables bearing a fixed or floating interest rate for a fixed period, it is uncertain whether the right to reset the interest rate upon termination of the agreed fixed interest period is transferred to the SPV upon a transfer of the loan receivable. The reason for uncertainty is that neither statute nor case law explicitly deals with this question[31]. It is often argued that such interest rate reset is an ancillary right which by nature follows the right to which it is connected (i.e., the loan receivable) unless it is a personal right of the initial creditor (i.e., the originator), as Article 6:142 of the Dutch Civil Code ("**DCC**") explicitly refers to the right to stipulated interest as an example of an ancillary right and the right to reset the interest rate can be considered as a right to further determine the contents of the right to stipulated interest.

To the extent the interest rate reset right passes upon the assignment of the receivables to the SPV or upon the pledge of the receivables to the security trustee, such assignee or pledgee will be bound by the contractual provisions relating to the reset of interest rates. If the interest reset right remains with the seller, the co-operation of the receiver (in bankruptcy) or administrator (in

---

[27] A waiver of statutory set-off rights by a consumer may not necessarily be enforceable (Article 6:237(g) DCC).

[28] Article 6:127 DCC.

[29] Set-off risks are also relevant in respect of mortgage loans that are combined with insurance, savings and investment products. Any risks in relation thereto are, to the extent applicable, addressed in the risk factors of the prospectus and the Dutch law legal opinion.

[30] Article 6:130 DCC.

[31] Although it can be argued that a judgment of the Dutch Supreme Court (HR 10 July 2020, ECLI:NL:HR:2020:1276) supports the view that interest reset rights should be considered as an ancillary right.

suspension of payments) would be required to reset the interest rates. It is uncertain whether or when such co-operation will be forthcoming.

6. SELECTED REGULATORY REQUI REMENTS[32]

6.1 EU Securitisation Regulation

The EU Securitisation Regulation[33] became applicable from 1 January 2019. It provides for requirements in relation to due diligence to be conducted by institutional investors, credit granting requirements, risk retention requirements, transparency requirements and introduces the requirements for securitisation transactions to qualify as simple, transparent and standardised ("**STS**") securitisations. In addition to the rules stemming from the EU Securitisation Regulation, a number of implementing technical standards ("**ITS**"), regulatory technical standards ("**RTS**") and guidelines from the European Supervisory Authorities (EBA, EIOPA and ESMA) impose requirements on parties involved in securitisation transactions.

6.1.1 *Due diligence requirements*

Institutional investors (as such term is defined in the EU Securitisation Regulation) are required, prior to holding a securitisation position, to verify that the originator or original lender grants all the credits giving rise to the underlying exposures in a securitisation transaction on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing those credits and has effective systems in place to apply those criteria and processes in accordance with Article 9(1) of the Securitisation Regulation. This requirement applies to an RMBS securitisation if the originator or original lender is not a credit institution or investment firm within the meaning of the CRR. Furthermore, institutional investors are required to verify that the originator or original lender retains on an ongoing basis a material net economic interest in accordance with Article 6 of the EU Securitisation Regulation. See also paragraph 6.1.2 below. In addition, institutional investors are required to verify that the originator or securitisation special purpose entity (SSPE) makes available the information required by Article 7 of the EU Securitisation Regulation in accordance with the frequency and modalities as set out in that provision. See paragraph 6.1.3 for further details and disclosure in this respect. Also, an institutional investor must, prior to holding a securitisation position, carry out a due diligence assessment which enables it to assess the risks involved in accordance with Article 5 of the EU Securitisation Regulation.

---

[32] It is not intended to give a complete overview of all regulatory requirements that may apply to a Dutch RMBS transaction.

[33] Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 ("**EU Securitisation Regulation**").

6.1.2 *Risk retention requirements*

Pursuant to Article 6 of the EU Securitisation Regulation, the sponsor, originator or original lender of a securitisation transaction shall maintain on an ongoing basis a material net economic interest in the securitisation of not less than 5 per cent. That interest shall be measured at origination and shall be determined by the notional value for off-balance sheet items. The risk retention requirement must be structured to meet the conditions of Article 6(3) of the EU Securitisation Regulation and the requirements set out in the Commission Delegated Regulation (EU) 2023/2175. To date, most Dutch RMBS purport to comply with the applicable risk retention requirements by providing that the originator shall hold at least 5 per cent. of the nominal value of the first loss tranche of debt instruments issued by the SPV and, if necessary, other tranches having the same or a more severe risk profile than those sold to investors, or that the originator shall hold not less than 5 per cent. of the nominal value of each of the tranches sold or transferred to investors.

6.1.3 *Transparency requirements for sponsors, originators and SSPEs*

Pursuant to Article 7 of the EU Securitisation Regulation, the sponsor, originator and SSPE of a securitisation are required to fulfil certain information requirements. This includes making available the prospectus and the transaction documents, investor reports and loan data tapes, to a regulated securitisation repository or in case it is a private securitisation directly to the investors, potential investors and competent authorities. In addition, the sponsor, originator and SSPE shall designate amongst themselves one entity to fulfil these information requirements.

6.1.4 *STS securitisation*

The EU Securitisation Regulation provides a framework for an 'STS' ('simple, transparent and standardised') securitisation designation for short-term asset-backed commercial paper (ABCP) securitisations and programs, term true sale securitisations and on-balance-sheet synthetic securitisations. If the originator, sponsor (if any) and SSPE wish to use the designation 'STS' for a securitisation transaction initiated by them, each of the originator, sponsor and SSPE involved in the securitisation transaction must be established in the European Union, the requirements set out in Chapter 4 of the EU Securitisation Regulation must be met, ESMA must have been notified and ESMA has added the securitisation to an official list of 'STS' securitisations that it maintains on its website. Exposures to STS securitisations may receive favourable regulatory capital treatment under the CRR if certain conditions are met. The originator, sponsor (if any) and SSPE could use the services of a third party authorised pursuant to Article 28 of the EU Securitisation Regulation, to verify whether the securitisation complies with the requirements of Chapter 4 of the EU Securitisation Regulation. If a securitisation is notified as an STS securitisation, non-compliance could result in various administrative sanctions and/or remedial measures being imposed on the SSPE, originator and sponsor.

6.2 Dutch Banking Regulations

The Dutch Financial Supervision Act (*Wet op het financieel toezicht*, "**FSA**") includes a general prohibition for any person or entity to attract, obtain or have the disposal of repayable funds (*opvorderbare gelden*) from the public in the conduct of a business in the Netherlands.[34] The SPV is however not subject to this prohibition if it obtains repayable funds by means of an offering of debt securities in accordance with the Prospectus Regulation.[35] [36] Furthermore, there is no minimum maturity requirement applicable to the funding of the SPV. In order to avoid a banking license requirement, the SPV may solicit and borrow monies under normal loan facilities (e.g. liquidity or cash advance facilities) if the aggregate facility amount, and the minimum drawdown amount are at least EUR 100,000.[37] Finally, the SPV will be permitted to grant and to purchase (interests in) loans made to, and other receivables relating to indebtedness of, Dutch and foreign corporate borrowers (for consumer borrowers, see Clause 6.5 below), and the SPV will also be permitted to invest in other assets.

6.3 Alternative Investment Fund Managers Directive

The SPV could in certain transaction structures be considered an alternative investment fund ("**AIF**") within the meaning of AIFMD.[38] An AIF is defined as a collective investment undertaking (other than a UCITS[39]) which raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors.[40]

An SPV in a typical Dutch securitisation will not qualify as a UCITS given the basis on which it holds the assets and the manner in which it is funded. Furthermore, an SPV used in a public Dutch RMBS should be able to benefit from a limitation of the scope of the AIFMD which exempts "**securitisation special purpose entities**" from the AIFMD's scope.[41] The definition of "**securitisation special purpose entities**" in the AIFMD is similar to the definition of "**securitisation special purpose entity**" in the EU Securitisation Regulation.

---

[34] See Article 3:5(1) FSA. Repayable funds are defined in Article 1:1 FSA as "deposits or other repayable funds, as referred to in the definition of credit institution in Article 4 of the Capital Requirements Regulation (575/2013)".

[35] Regulation (EU) 2017/1129, as amended ("**Prospectus Regulation**").

[36] Article 3:5(2d) FSA.

[37] Article 3(2) Definitions Decree FSA (*Besluit definitiebepalingen Wft*). If the aggregate facility amount and minimal drawdown amount are less than EUR 100,000, the SPV can still borrow monies under normal loan facilities from lenders **provided that** such lenders (otherwise) qualify as professional market party (*professionele marktpartij*) (e.g. regulated entities such as banks, insurers or pension funds) within the meaning of Article 1:1 FSA.

[38] Directive 2011/61/EU (**AIFMD**), also taking into account ESMA's final report on the guidelines on key concepts of the AIFMD (ESMA/2013/600).

[39] As defined in Directive 2009/65/EC.

[40] Article 4(1)(a) AIFMD.

[41] Article 2(3)(g) AIFMD.

6.4 Prospectus Requirements

The Prospectus Regulation, applicable in the Netherlands since July 2019, imposes prospectus requirements on an SPV issuing debt securities. In principle, if the relevant securities are to be offered by the Dutch SPV to the public in the EU, it will be necessary to prepare a prospectus, to have it approved by the competent supervising authority (in the Netherlands: *Autoriteit Financiële Markten*, "**AFM**") and to publish it, all in accordance with the requirements prescribed by the Prospectus Regulation. Preparation and approval of a prospectus can be time-consuming and costly. Transaction parties may be exempted from these requirements, for instance, if the debt securities issued by the SPV have a denomination per unit of at least EUR 100,000 (or equivalence in other currency) unless such debt securities are (to be) listed on a regulated market in the EU (e.g., the regulated market of Euronext Amsterdam N.V.), in which case a prospectus will have to be made available by the SPV satisfying the disclosure requirements of the Prospectus Regulation (including to have the prospectus approved by the competent supervising authority).

6.5 Consumer Credit Regulations

Certain asset classes in securitisations such as residential mortgages and consumer finance are generally subject to specific regulatory regimes. In case of a Dutch RMBS, the originator of mortgage credit (*hypothecair krediet*) to consumers (*consumenten*) is subject to a license requirement as an offeror of mortgage credit (*aanbieder van hypothecair krediet*) under the FSA. By acquiring mortgage receivables arising under such mortgage credit, the SPV in a Dutch RMBS is deemed to offer mortgage credit. However, the SPV can rely on an exemption from this license requirement if the SPV outsources the servicing of the mortgage credit and the administration thereof to an entity which is adequately licensed under the FSA to act as (consumer) mortgage credit provider or intermediary (*bemiddelaar*) and which complies with certain information duties towards debtors of consumer receivables.[42] Usually, a servicing contract is entered into by the SPV with the originator (or any other party to which the originator had already outsourced the servicing and administration of the receivables) pursuant to which the SPV outsources the servicing and administration of the consumer receivables to such party.

Furthermore, the Debt Collection Services Quality Act (*Wet kwaliteit incassodienstverlening*, the "**Debt Collection Act**") entered into force on 1 April 2024. If the collection of the acquired receivables under contracts entered into with natural persons in the Netherlands (which includes natural persons who run a business, e.g. where the debtors are sole traders (*eenmanszaken*) or partnerships) is delegated by the SPV to a third party, such third party may need to be registered as collection service provider (*incassodienstverlener*) in accordance with the Debt Collection Act. However, if the original lender is appointed by the SPV to continue the collection of receivables on behalf of the SPV, it can be argued that the original lender should not fall within the scope of the Debt Collection Act. The SPV itself should generally not be in scope of the Debt Collection Act either, in particular if the collection of the receivables is outsourced to the original lender or a servicer that is registered in accordance with this Debt Collection Act. This is because the Debt Collection Act

[42] Article 3 Exemption Regulation FSA (*Vrijstellingsregeling Wft*).

applies to the party that actually collects the receivables and not to the party that has merely purchased the receivables. Furthermore, collection foundations that are used in securitisation transactions should not be in scope either, in particular where these foundations are established and used by creditors for efficiency or asset segregation purposes and not as a commercial debt collection proposition.

6.6 Data Protection and Confidentiality Regulations

In respect of true sale transactions (in particular transactions involving receivables of debtors that qualify as natural persons) data protection rules, including those laid down in the GDPR[43], and confidentiality arrangements may be relevant and may restrict the provision of (personal) data of debtors in the securitised portfolio by the originator to the various parties involved in the transaction (e.g., SPV, security trustee, verification agents and credit rating agencies), and/or may require the prior consent of such debtors for the provision of such data and/or a notification to the competent public authorities. To ensure compliance with data protection rules, transactions often include escrow arrangements pursuant to which personal data of debtors in the securitised portfolio will be provided by the originator or servicer to an escrow agent in encrypted form, which data may only be released by the escrow agent to the SPV and security trustee in default scenarios under the transaction, or otherwise in connection with the enforcement of the securitised portfolio.

6.7 Other Transparency and Reporting Requirements[44]

On 1 January 2009 rules implementing the EU Transparency Directive[45] came into force in the Netherlands. They are incorporated in the FSA and various implementing decrees. Pursuant to the FSA the (periodic) financial reporting requirements do not apply to an issuer exclusively of debt securities with a denomination of at least EUR 100,000 or equivalence in other currency, which is likely to be the case for an SPV in a Dutch RMBS.

However, the civil law requirements under Dutch law, in particular those regarding the publication and filing of the annual financial accounts and annual reports will nevertheless apply to any company with its corporate seat in the Netherlands. Also, pursuant to Dutch law, a Dutch SPV must have its accounts audited if its securities are listed on a regulated market within the EU. In addition, if the securities issued by the Dutch SPV are listed on such a regulated market, the relevant rules also contain incidental reporting obligations (e.g., changes in the rights attaching to securities and price sensitive information), provisions on the equal treatment of securities holders, and certain specific information requirements (e.g., maintaining a website).

Furthermore, for (market) transparency, capital adequacy, ECB eligibility, mandatory due diligence and other purposes (as the case may be), various EU and domestic legislation (including, without limitation, the EU Securitisation Regulation, MAR, AIFMR, CRR, Solvency II, the CRA Regulation and the ECB Regulation) requires issuers of securitisation exposures, originators and/or other relevant parties to disclose

---

[43] Regulation (EU) 2016/679.

[44] It is not intended to give a complete overview of all reporting obligations that may apply to an SPV.

[45] Directive 2004/109/EC, as amended ("**EU Transparency Directive**").

information on the securitisation and the securitised assets (e.g., loan level data) at inception and during the life of the transaction.[46]

6.8 European Market Infrastructure Regulation (EMIR)

Derivatives provide a means of transferring risk from one party to another. In a securitisation transaction, a SPV may enter into a derivative contract to hedge or remove risk from a receivables portfolio so as to make the securities issued to fund the acquisition of the receivables more attractive to prospective investors.

EMIR[47] establishes certain requirements for over-the-counter ("**OTC**") derivative contracts, including a mandatory clearing obligation, risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty ("**CCP**") and reporting requirements. EMIR has been amended several times and several regulatory technical standards supplementing EMIR have been issued by the European Commission. Under EMIR, parties to derivatives transactions whose positions in OTC derivatives (including the positions of certain other entities in their group but excluding any hedging positions) exceed a specified clearing threshold must in principle clear OTC derivative contracts that are entered into on or after the effective date for the clearing obligation.

An SPV used in a Dutch RMBS usually qualifies as a non-financial counterparty ("**NFC**"). However, if such SPV would be considered to be a member of a "group" and if the gross notional value of non-hedging OTC derivative contracts entered into by such SPV and the other NFCs that are members of the group exceeds the applicable threshold, such SPV would in principle be subject to the clearing obligation. If the SPV is an SSPE that solely issues securitisations meeting the STS requirements, the OTC derivative contracts are used only to hedge interest rate or currency mismatches, and the arrangements under the securitisation adequately mitigate counterparty credit risk with respect to the OTC derivative contracts, the clearing obligation does not apply.[48]

OTC derivative contracts that are not cleared by a CCP are subject to certain other risk-mitigation requirements. These include that any counterparty must timely report the conclusion, modification and termination of their derivative contracts to a trade repository. However, since the SPV usually qualifies as an NFC below the clearing threshold, a swap counterparty, qualifying as financial counterparty, is solely responsible, and legally liable, for reporting on behalf of both counterparties. Under the derivatives contract, the swap counterparty usually undertakes to report the details of the derivatives transactions under the derivatives contract to the trade repository on behalf of the SPV. Another risk mitigation requirement under EMIR is the mandatory margining of non-cleared OTC derivative contracts. This requirement does, however, not apply to NFCs below the clearing threshold.

If the SPV or its "group" were to exceed the applicable clearing thresholds, the SPV would be required to clear any eligible OTC derivatives contracts, which could also entail the posting of margin. It would also be subject to the full set of risk-mitigation

---

[46] It goes beyond the purpose of this general overview to describe these requirements in detail.

[47] Regulation (EU) No 648/2012, as amended ("**EMIR**").

[48] Article 4(5) EMIR.

requirements, which means that even if a securitisation swap, taking into account its characteristics, would not qualify as an eligible OTC derivative contract for clearing purposes, mandatory margining requirements may nonetheless apply to the SPV in relation to such swap. If an SPV in a securitisation would for the above reasons become subject to clearing or margin posting requirements, the transaction or cashflow structure of a securitisation may need to be modified in order to ensure that the SPV is able to comply with such requirements.

If any party fails to comply with the rules under EMIR it may be liable for an incremental penalty payment or fine.

6.9 Benchmarks

The use of benchmarks is typical for securitisation transactions. Basically, a benchmark is a figure which is made public and used to price payments under financial instruments and financial contracts. A well-known example of a benchmark is the euro interbank offered rate ("**Euribor**"), used for interbank interest rates. The Benchmark Regulation[49] sets common EU standards to prevent manipulation of benchmarks that could affect the price of financial instruments, or financial contracts such as loans or mortgages.

The Benchmark Regulation applies to activities such as issuing securities that reference a benchmark and entering into other types of financial contracts that reference a benchmark. Generally, a benchmark can be used only if it is included on the ESMA's register of benchmarks, and is provided by an authorised EU administrator or a third country administrator listed in the ESMA registers.[50] Accordingly, in any securitisation transaction that references a benchmark, the transaction parties should check the ESMA's register and ensure the used benchmark complies with the Benchmark Regulation.

6.10 Credit Ratings

A party that is commonly involved in a traditional securitisation transaction is a credit rating agency ("**CRA**"). The parties in a securitisation transaction may decide to engage a CRA to issue ratings in respect of the securities that will finance the securitisation (for example, if such ratings would be expected to enhance the marketability or price of the issued securities). The rating may generally vary from AAA to D: i.e., an AAA-rating ensures investors that the SPV is highly probable to pay the returns and interest on the debt security.

If parties engage a CRA they should consider the requirements of the CRA Regulation.[51] The CRA Regulation seeks to regulate the activity of CRAs to protect investors and European financial markets against the risk of malpractice. The CRA Regulation also lays down obligations for issuers and related third parties established in the EU regarding securitisation transactions, including, but not limited to, the requirement to appoint at least two CRAs to provide credit ratings where an issuer or a related third

---

[49] Regulation (EU) 2016/1011, as amended.

[50] See ESMA's registers here: https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_bench_entities and here: https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_bench_benchmarks

[51] Regulation (EC) No 1060/2009 (as amended).

party intends to solicit a credit rating of a securitisation instrument and to consider appointing at least one smaller CRA.[52]

6.11 Capital Adequacy Requirements

If the originator in a proposed securitisation transaction is a credit institution within the meaning of the CRR, it will be subject to certain capital adequacy requirements. Amongst other things, the originator will be required to hold a prescribed amount of regulatory capital to protect against the risk of default on its assets (such assets including, for example, loans it has made).[53]

Compliance with such regulatory capital requirements can have significant financial (and other) implications for CRR institutions, which they will commonly seek to mitigate. Therefore, where an originator is a CRR credit institution, it may be that one of its objectives in establishing the securitisation will be to enhance its regulatory capital position. Specifically, the credit institution may be aiming to reduce the total amount of regulatory capital it needs to hold (and the costs associated with holding such capital). For example, an originating credit institution which is currently required to hold x per cent. amount of regulatory capital in respect of a pool of personal loans made to its customers may plan to securitise those loans so that it can then make new loans but without increasing its net regulatory capital. Firms can attain such regulatory capital relief by way of securitisation only where there is a *significant risk transfer* (SRT): i.e. significant credit risk associated with the securitised assets is considered to have been transferred to third parties (e.g., an SPV). The CRR sets detailed requirements for the recognition of an SRT.[54]

6.12 Rules Concerning Liquidity Management

The Amending LCR Delegated Regulation[55] provides for rules allowing securitisation positions meeting certain requirements and conditions to be comprised as high-quality liquid assets ("**HQLA**") of the Level 2B type ("**Level 2B HQLA**") in the liquidity buffer of credit institutions. This Regulation amends the LCR Delegated Regulation[56] and integrates the STS criteria for securitisations set out in the Securitisation Regulation in the LCR Delegated Regulation to the effect that securitisation positions will only qualify as HQLA if the securitisation positions have been issued under a securitisation in respect of which an STS-notification has been made with and processed by ESMA.

6.13 Authorisation Issues and Customer Due Diligence

When setting up a securitisation transaction, it must be ensured that any party which provides securities, banking or other regulated services to a Dutch SPV should be authorised to conduct business in the Netherlands, either by having a license or - for EU entities - by having the relevant services or activities passported under the

---

52 See Articles 8c and 8d CRA Regulation.

53 See Chapter 5 of Title 2 of Part 3 CRR.

54 See Articles 244 - 246 CRR.

55 Delegated Regulation (EU) 2018/1620 (the "**Amending LCR Delegated Regulation**").

56 Delegated Regulation (EU) 2015/61 (the "**LCR Delegated Regulation**").

applicable EU directives or regulations. This would typically apply to all hedging counterparties and liquidity or cash advance facility providers.

Furthermore, relevant parties in a securitisation transaction may be required to conduct customer due diligence ("**CDD**") on the relevant parties in accordance with the Dutch Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*).

6.14 Green securitisations

Not until recently with the introduction of the EU Green Bond Standard under the EUGBS Regulation[57], there was no clear standard in Europe for 'green' or 'sustainable' securitisations. The International Capital Market Association ("**ICMA**") has developed a voluntary framework entitled the 'ICMA Green Bond Principles'[58] for 'green' securitisations. The ICMA Green Bond Principles are voluntary process guidelines that recommend transparency and disclosure and promote integrity in the development of the green bond market by clarifying the approach for the issuance of a 'green bond'. The four core components for alignment with the ICMA Green Bond Principles are (i) use of proceeds, (ii) process for project evaluation and selection, (iii) management of proceeds and (iv) reporting.

In addition, a basis for the determination of a definition of 'sustainable note' has been established in the European Union with the Sustainable Finance Taxonomy Regulation.[59] Under Article 3 of the Sustainable Finance Taxonomy Regulation, for the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity: (a) contributes substantially to one or more environmental objectives listed in the Sustainable Finance Taxonomy Regulation, including climate change mitigation, (b) complies with technical screening criteria, (c) does not significantly harm any of the environmental objectives and (d) is carried out in compliance with the minimum safeguards laid down in Article 18 of the Sustainable Finance Taxonomy Regulation.[60]

Furthermore, the EUGBS Regulation enters into force in December 2024 and the EU Green Bond Standard set out therein will create a high-quality voluntary standard available to all issuers (private and sovereigns) to help financing sustainable investments. The EU Green Bond Standard requires issuers to (i) allocate the funds raised to projects fully aligned to the framework established by the Sustainable Finance Taxonomy Regulation to facilitate sustainable investment (the "**EU Sustainable Finance Taxonomy**"); (ii) be fully transparent on how bond proceeds are allocated

---

[57] Regulation (EU) 2023/2631 (the "**EUGBS Regulation**").

[58] International Capital Market Association's voluntary process guidelines for issuing green bonds entitled the green bond principles and dated June 2021 (with June 2022 Appendix 1) (https://www.icmagroup.org/assets/documents/Sustainable-finance/2022-updates/Green-Bond-Principles_June-2022-280622.pdf).

[59] Regulation (EU) 2020/852 (the "**Sustainable Finance Taxonomy Regulation**").

[60] The EU Sustainable Finance Taxonomy is subject to further development by way of the implementation by the European Commission through delegated regulations of technical screening criteria for the environmental objectives set out in the Sustainable Finance Taxonomy Regulation.

through detailed reporting requirements; (iii) all EU green bonds must be checked by an external reviewer (who is registered with and supervised by the ESMA) to ensure compliance with the EUGBS Regulation and that funded projects are aligned with the EU Sustainable Finance Taxonomy. Given that the EU Green Bond Standard is a voluntary standard, market participants are still free to issue securitisation bonds on the basis of the principles of the EU Green Bond Standard (e.g. on a best efforts basis). Though, such market participants will then not be able to use the labels "European green bond" or "EuGB", as the EUGBS Regulation will require that the designation "European green bond" or "EuGB" may be used only for bonds that comply with the requirements set out therein.

RMBS transactions originated by Dutch mortgage providers in respect of which the issuance of the mortgage-backed notes are intended to comply with the ICMA Green Bond Principles and on a best efforts basis with the Sustainable Finance Taxonomy Regulation are for example the 'Green STORM RMBS' [61] and the 'Green Lion RMBS'[62]. The mortgage receivables of these 'green' securitisations need to comply with so-called 'green eligibility criteria' which require, in short, that the mortgaged asset on which the relevant mortgage loan from which such mortgage receivable arises is secured, is assigned: (i) if it is built on or before 1 January 2021: a definitive energy performance certificate of at least 'A' or (ii) if it is built after 31 December 2020, a definitive energy performance certificate confirming a maximum primary energy demand (PED) of: (i) 27kWh/m2 per year if the mortgaged asset is a residential house (*woning*) or (ii) 45kWh/m2 per year if the mortgaged asset is a residential apartment (*appartement*) based, in either case, on an energy performance demand determination method prescribed or permitted under applicable legislation at the relevant time that the relevant energy performance certificate was issued or otherwise referred to in the relevant energy performance certificate. Furthermore, the issuers of these 'green' securitisations have engaged third parties to verify alignment of the bonds with the ICMA Green Bond Principles and the Sustainable Finance Taxonomy Regulation on a best efforts basis and to perform an impact study in respect of the CO2-emmission of the mortgaged assets.

With the introduction of the EU Green Bond Standard it remains to be seen how the market of 'green' securitisations will develop, which delegated acts are still to be adopted and how supervisory practice will progress.

7. CREDIT ENHANCEMENT

7.1 General

The creditworthiness of an SPV or the quality of the debt securities issued by the SPV can be enhanced by using various financing techniques that reduce the likelihood of default by the SPV or on the debt securities issued by the SPV.

The credit rating agencies have established models and credit rating requirements to determine the credit rating of the debt securities issued by the SPV. These models and

[61] Prospectus of the Green STORM 2024 transaction can be found at: https://pcsmarket.org/wp-content/uploads/01.-Green-STORM-2024-Prospectus-Final-Version-25-March-202410282909602.1.pdf.

[62] Prospectus of the Green Lion 2024-1 transaction can be found at: https://pcsmarket.org/wp-content/uploads/C2405-00537-Approved-prospectus-Green-Lion-2024-1.pdf.

requirements will take account of the credit enhancement included in a transaction. As a result, the credit rating of the debt securities issued by the SPV can be increased if on the basis of these models and requirements, the credit rating agencies conclude that the creditworthiness of the SPV or the debt securities issued by the SPV has been sufficiently increased. A higher credit rating (and the lower risk profile) should correspond to lower interest rates. However, credit enhancement also comes at a cost. An originator will need to consider whether, when the costs of credit enhancement are taken into account, the lower interest rates will indeed result in overall cheaper funding costs.

The techniques that are most frequently used in a Dutch RMBS are described below. A transaction will typically include a combination of these techniques.

7.2 Subordination

Credit enhancement can be provided to one or more tranches of debt of the SPV by subordinating other debt obligations of the SPV to the obligations of this tranche or tranches. This implies that in the event of losses on the portfolio of assets, rather than having such losses allocated to all outstanding debt of the SPV on a *pro rata* basis, such losses are first absorbed by the lower ranking debt obligations. As a result, the chances of repayments in full of the senior tranches of debt are higher than on the lower tranches, and the credit ratings attributed to the debt will reflect this risk allocation. Because of this risk allocation, interest rates on the lower ranking tranches will be higher than the interest rates on the more senior tranches.

Given the higher interest rate that is generally paid on the junior debt, it may be attractive to certain sophisticated investors that are willing to assume the risk.

The terms of the subordination in a transaction will provide that the holders of junior debt are not entitled to payments of interest and principal until interest and principal on the senior debt obligations have been paid. In addition, they will also provide that the junior debt holders cannot take any enforcement or other action under their debt arrangements unless the holders of the senior debt agree. Amendments to any of the terms of the junior debt arrangements will require the approval of the senior debt holders.

Under Dutch law, a creditor can agree with the debtor that the creditor's claim against the debtor will be given a lower ranking in relation to all or specific creditors than the law provides.[63] The agreement must be made between the debtor and the creditor and not between the creditors concerned only. The SPV must therefore be a party to the subordination arrangements, and the creditors should ensure that the subordination agreement cannot be amended without the consent of all affected creditors by for example stipulating that the debtor is not allowed to enter into different arrangements with one or more creditors unless all other creditors approve.

7.3 Overcollaterisation

In most true sale transactions, overcollateralisation is being used. It implies that the value of the assets which the originator transfers to the SPV is greater than the

[63] Article 3:277(2) DCC.

consideration paid by the latter to the originator. The funding that the SPV requires for paying the consideration will be less than the value of the assets, so that there is a buffer against defaults under the cash flows received from these assets.

A transfer of assets for a consideration less than their value is potentially prejudicial to creditors of the originator and could result in tax and accounting issues (because the originator could be deemed to have made a loss on the sale of the assets to the SPV). Therefore, the terms of the sale will provide that the consideration paid by the SPV at the time that the assets are transferred to the SPV constitutes initial consideration and that the originator is entitled to deferred consideration as and when the SPV has funds available for this purpose on the basis of the applicable priority of payments. This deferred consideration will be calculated by reference to the portfolio as a whole and will not be allocated to particular assets. On the basis that, if the originator had kept the assets, it will also have suffered the defaults and would have to pay for funding costs, it can be argued that in these circumstances, there should be no reason for creditors of the originators to challenge a transfer of assets on this basis.

A transaction can also involve more than one originator, in which case it would be possible to introduce a form of cross-collateralisation. This means that for the determination of the available deferred consideration, the cash flows of the total asset portfolio (including the assets of all originators) rather than the assets of a particular originator are considered. Each originator will be entitled to, generally, a *pro rata* part of the available surplus cash flows by way of deferred consideration.

If the credit quality of the portfolios of the various originators differs, the originator with the portfolio of better quality is providing support to the originator with the portfolio of weaker quality. This could give rise to corporate law (corporate benefit) and voidable preference (*pauliana*) issues. These issues must be considered from the perspective of each originator that is involved in the transaction.

7.4 Reserves

The SPV typically receives in a true sale transaction more income than the amounts of its funding costs and expenses. The surplus will normally be paid out to the originator by way of deferred consideration. The terms of the transaction can provide that a part of this surplus is retained by the SPV, and this will be added to, or used as, a reserve. The amount of the reserve is generally calculated as a percentage of the amounts due under the assets or the SPV's debt obligations with a minimum (absolute) amount. If the reserve has reached the agreed amount, surplus proceeds will no longer need to be retained. If the agreed reserve amount is reduced (e.g., because the amounts due under the assets are reduced through payments), amounts can be released from the reserve and paid to the originator as deferred consideration.

An SPV can maintain several types of reserves, for example, a default reserve that can be applied to cover unexpected or expected costs and expenses of the SPV as well as any losses that the SPV may suffer as a result of a payment or other default.

If the SPV has agreed to swap its cash flows resulting from the securitised assets against the amount due by it as funding costs, the arrangements can provide that the SPV must retain a certain part of its cash flows, generally based on a percentage of the amounts

due on the assets or the debt obligations it has outstanding. This amount will be applied to establish and fund a reserve.

In some circumstances (local true sale requirements or tax or accountancy treatment) it may be preferable that the assets are transferred by the originator to the SPV against their fair market value and that the originator (or an affiliated company) grants a subordinated loan to the SPV. The proceeds of this subordinated loan can be used to fund a reserve that can be used to compensate for any losses incurred on the asset portfolio. The subordinated loan will be repaid at the end of the transaction to the extent that there are remaining funds to the reserve (or earlier, if the reserve has been funded through cash flow generated by the assets).

7.5 External Support to SPV

There are various other ways in which an SPV can be supported in order to increase its creditworthiness. For example, the swap agreement pursuant to which income on the assets is swapped against the SPV's funding costs can provide that the swap counterparty remains obliged to pay the SPV's funding costs, even if the income in respect of the assets is reduced as a result of defaults. In these circumstances the swap counterparty will, in fact, be providing credit support to the transaction. This may also have an impact on the capital adequacy and accounting treatment of the swap.

8. TRANSACTION SECURITY

8.1 Legal Structure

It is usually intended to create an efficient security structure whereby a representative of the creditors of the SPV (security trustee) is appointed to hold the security for the ultimate benefit of such creditors to avoid that - at least in respect of a Dutch RMBS - a co-shared security right (*gemeenschappelijk zekerheidsrecht*)[64] may arise which by operation would be the case if such security was held by two or more creditors jointly. Co-shared security rights are avoided since the cooperation of the co-holders of such security could be required should a holder wish to enforce such security (which could result in undesirable enforcement disputes and/or delays), and such security would have to be re-created if new additional creditors were to be introduced into the transaction (e.g., in the case of a tap or further issue of notes under a securitisation programme).

However, the prevailing opinion under Dutch law is that a security right cannot be validly created in favour of a party that is not the creditor of the claim which the security right purports to secure. To address this uncertainty in a Dutch RMBS, the SPV - as separate and independent obligations -would undertake to pay to the security trustee amounts equal to the amounts due by the SPV to the secured parties. Such arrangement is commonly referred to as a parallel debt arrangement. Leading authors in Dutch legal literature conclude that such parallel debt in principle creates a claim of the security trustee against the Dutch SPV which can be secured by a Dutch right of pledge. In addition, it would have to be **provided that** upon enforcement of such right of pledge, the security trustee shall distribute the enforcement proceeds to the creditors of the Dutch SPV in accordance with the pre-agreed waterfall of payment priorities.

---

64 Articles 3:166 *et seq*. DCC.

8.2 Security Types

Even though the SPV is made bankruptcy remote it is common practice for true sale securitisation transactions to include security arrangements to further strengthen the position of the investors and certain other creditors of the SPV in the event that the SPV would default on its payment obligations. In most securitisations all material assets of the SPV serve as collateral for the SPV's payment obligations. A typical security package in a Dutch true sale securitisation would include:

8.2.1 an undisclosed first ranking right of pledge (*pandrecht*) over (Dutch law governed) receivables (and related rights) acquired by the SPV;

8.2.2 a disclosed first ranking right of pledge over the bank accounts (and related rights) of the SPV located in the Netherlands; and

8.2.3 a disclosed first ranking right of pledge over the rights of the SPV under the (most important) transaction documents (e.g., purchase, servicing, cash management and hedging agreements).

Under Dutch law a right of pledge over receivables and other contractual rights can take the form of a disclosed right of pledge (*openbaar pandrecht*) or an undisclosed right of pledge (*stil pandrecht*). In order for a disclosed right of pledge to be effective, the deed of pledge must be notified to the debtor of the receivable. For an undisclosed right of pledge to be effective, the deed of pledge should either be included in a notarial deed or registered with the competent Dutch tax authorities. In the case of an undisclosed right of pledge, notification to the debtor will still be required to ensure that such debtor can no longer validly discharge its obligations (*bevrijdend betalen*) by making a payment to the pledgor of the receivable (e.g., the SPV).

8.3 Security Trustee

In Dutch RMBS a security trustee has effectively two roles, namely: (i) it is appointed by the investors as their representative to hold the benefit of rights and covenants granted by the SPV in respect of the debt securities; and (ii) it holds the security granted by the SPV for the ultimate benefit of the investors and other parties in the transaction whose interests are secured. The appointment as security trustee and the terms and conditions of such appointment are provided for in the trust deed, which is the document pursuant to which the debt securities are issued by the SPV, and which will set out the terms and conditions applying to such securities. In a pre-enforcement scenario, the role of a security trustee is limited to considering and - if deemed appropriate - granting requested waivers and approvals for amendments to the transaction documentation. In a post-enforcement scenario, one would expect the security trustee to become more active, particularly if it is requested by the investors to enforce the security.

In Dutch RMBS the security trustee would typically take the form of a Dutch foundation (*stichting*). Similar to the (shareholder of a) SPV it has a limited business purpose and is set up as a bankruptcy remote vehicle. The security trustee is usually set up and managed by a corporate services provider. The corporate services provider must be independent from the originator and should not be the same legal entity as the director of the SPV or its shareholder.

8.4 Enforcement Of Security

The assets of the Dutch SPV are generally limited to receivables and other contractual rights over which a right of pledge is created by the SPV in favour of the security trustee as security for the parallel debt.

A pledge of receivables can be enforced under Dutch law by way of collection (*inning*) of the related payment either through (a) in respect of undisclosed rights of pledge, notification of the pledge to the debtor of the receivable (and until such notification the pledgor is authorized to collect the receivables and the debtors can continue to validly discharge their debts by paying to the pledgor); or (b) in respect of disclosed rights of pledge, termination of the authorisation that may have been given by the pledgee thereunder to the pledgor to collect the receivables, after which the debtors can only validly discharge their debts by paying to the pledgee.[65]

As set out above, notification of the pledge (or revocation of the authorisation to the pledgor to collect the receivables) will usually only take place upon the occurrence of a default at SPV level (e.g., failure to pay amounts due under the debt securities issued by the SPV, insolvency of the SPV or breach of material covenants of the SPV under the transaction documents). The pledgee can also foreclose (*uitwinnen*) the pledged receivables by selling such receivables, **provided that** there is a default (*verzuim*) in the obligations secured thereby.[66] This sale must take the form of a public auction or - with approval of the competent court - a private sale.[67] A foreclosure of rights of pledge by way of a foreclosure sale may be particularly relevant in circumstances where the pledged receivables have long maturities (e.g., residential mortgage loans).

8.5 Impact of Insolvency on Security

Registration of a deed of pledge (in case of an undisclosed right of pledge) and notification of a deed of pledge to a debtor of a receivable (in case of a disclosed right of pledge) after the Dutch SPV has been declared bankrupt (*failliet verklaard*) or has become subject to a suspension of payments (*surseance van betaling*), will not be effective and, consequently, in such event the receivables will not have been validly pledged in favour of the security trustee.[68] In respect of payments under pledged receivables made to the Dutch SPV following notification to the debtors of the assignment of the receivables to the Dutch SPV but prior to notification to the debtors of the pledge and prior to the Dutch SPV having been subjected to insolvency proceedings, and not on-paid to the pledgee prior to the insolvency of the Dutch SPV, the security trustee (as pledgee) will be an ordinary, non-preferred creditor, having an insolvency claim (*voor verificatie vatbare vordering*). In respect of post-insolvency payments, the pledgee will be a preferred creditor having an insolvency claim.[69]

---

65 Article 3:246 DCC.

66 Article 3:248 DCC.

67 Articles 3:250 and 3:251 DCC.

68 Articles 23 and 35 Dutch Bankruptcy Act (*Faillissementswet*).

69 HR 17 Feb. 1995, NJ 1996, 471 (Mulder q.q./CLBN).

Creditors of insolvency claims have to share in the general insolvency costs and have to await finalisation of a (provisional) distribution list (*(voorlopige) uitdelingslijst*).[70]

A security trustee can, in the event of insolvency proceedings involving the Dutch SPV, exercise its rights as pledgee as if there were no insolvency proceedings.[71] However, if the Dutch SPV is subject to insolvency proceedings, the position of the security trustee as pledgee would be affected in some respects, the most important of which are, that:

8.5.1 a mandatory 'cool-off' period (*afkoelingsperiode*) of up to four months may apply in the case of bankruptcy or suspension of payments involving the Dutch SPV (applicable in respect of each procedure), which, if applicable, would delay the exercise of enforcement rights under the right of pledge. However, such cool-off period does not prevent the pledgee from giving notice to the debtors of any pledged receivables and collecting the proceeds, but it will prevent the pledgee from taking recourse against any amounts so collected during such period; and

8.5.2 the security trustee could be obliged to enforce its rights of pledge within a reasonable period as determined by the judge-commissioner (*rechter-commissaris*) appointed by the court in the case of bankruptcy of the Dutch SPV, failing of which will entitle the bankruptcy receiver (curator) to sell the pledged receivables or assets. In such case, the pledgee will receive payment prior to ordinary, non-preferred creditors having an insolvency claim, but after creditors of the estate (*boedelschuldeisers*).

To the extent that rights purported to be pledged by the Dutch SPV to the security trustee under the Dutch pledge agreements are future rights (*toekomstige vorderingen*), such rights are no longer capable of being pledged after the Dutch SPV becoming subject to an insolvency proceeding. For example, amounts from time to time credited to a Dutch SPV's bank account held in the Netherlands are regarded as future rights and a right of pledge thereon will only become effective at the time the amount is credited to the bank account. If an amount is credited to such bank account after the Dutch SPV becoming subject to an insolvency proceeding, such amounts would not become subject to the pledge and would fall in the insolvent estate of the Dutch SPV.[72]

8.6 Impact Of WHOA on Security

On 1 January 2021 the WHOA[73] entered into force. The WHOA, a proceeding somewhat similar to the chapter 11 proceedings under United States bankruptcy law and the scheme of arrangement under English bankruptcy laws, has become available for companies in financial distress, where the debtor stays in possession and can offer a composition plan to its creditors (including secured creditors and shareholders) which is, subject to certain safeguards for creditors' being met, binding on them and changes their rights provided all conditions are met. The WHOA will not be available for banks

---

70 Article 182 Dutch Bankruptcy Act (*Faillissementswet*).

71 Article 57 Dutch Bankruptcy Act (*Faillissementswet*).

72 Articles 23 and 35 Dutch Bankruptcy Act (*Faillissementswet*).

73 Act on Confirmation of Extrajudicial Restructuring Plans (*Wet Homologatie Onderhands Akkoord*, "**WHOA**").

and insurers in their capacity of debtors and although it seems inappropriate to be applied to a Dutch SPV with a view to the structure of a common Dutch RMBS transaction and the security created under the security agreements in that respect, the WHOA when applied to a Dutch SPV, could affect the rights of the security trustee under Dutch law security agreements.

The court can, *inter alia*, refuse to confirm/sanction a composition plan if an affected creditor did not vote in favour of such composition plan and would be worse off than in case of a bankruptcy. The court may grant the debtor a stay on enforcement of a maximum of 4 months, with a possible extension of 4 months. During such period, *inter alia*, a pledgee of claims may not collect nor notify the debtors of the pledged receivables in case of an undisclosed pledge, **provided that** the pledgor has provided sufficient substitute security for the recourse position of the pledgee under the right of pledge. A debtor may offer its creditors a composition plan which may also entail changes to the rights of any of its creditors. As a result thereof, it may be that claims of creditors against a Dutch SPV, subject to a composition plan under the WHOA, can be compromised as a result of a composition if the relevant majority of creditors within a class vote in favour of such a composition.