

France has introduced a flexible and efficient security trustee for syndicated loans

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Since 1 October 2017, French law has been giving members of banking pools security agents comparable to the security trustees of the Anglo-Saxon system.

The security agent can now manage all securities and guarantees.

As a special fiduciary, he/she is holder of the securities and acts without an additional mandate to defend the interests of the pool members.

The security agent manages a fiduciary trust which is distinct from his or her own estate.

A change of one of the members of the pool does not affect the security agent and requires no additional formalities.

The replacement of the security agent automatically entails the transfer of the assigned trust to the new agent, without any formalities.

In syndicated loan transactions with a banking pool, the administration and the consistent and effective management of securities for the benefit of all creditors by the security agent is a major challenge.

However, the “French-style security agents”, which were hastily established in French law in 2007 with Law No. 2007-211 of 19 February implementing the trust disappointed practitioners, who quickly abandoned this mechanism.

Threatened by the mechanisms of foreign laws, especially since the jurisprudential recognition by the “Belvédère” decision of 13 September 2011¹ of the effectiveness in France of the security trustee and parallel debt, the security agent mechanism was especially criticised for its vague regime (uncertainties between the mandate, the trust and a sui generis institution), the limitation of the agent’s powers and the lack of flexibility of the procedure.

¹ Court of Cassation, Commercial Chamber, 13 September 2011, No. 10-25.731, No. 10-25.533 and No. 10-25.908

Unlike Anglo-Saxon security trustees, the powers of security agents under French law were limited to simple security administration mandates on behalf of banking pools.

In order to overcome these failings, Order No. 2017-748 of 4 May 2017, made pursuant to the Sapin Law II², fundamentally changed the existing security agent regime (Articles 2488-6 to 2488-12 of the French Civil Code).

With the reform of the status of security agents, which has been in force since **1 October 2017**³, French law has finally given itself the means to compete with the existing systems in Anglo-Saxon jurisdictions and is providing banking pools with a modern and attractive tool.

I. Extended powers of security agents

Security agents can be a natural⁴ person or a legal person, a lender from the banking pool or simply a third party.

One of the reform's significant contributions was to extend the competence of security agents, which was previously limited exclusively to security interests, to "*all securities and guarantees*". Security agents can now manage and enforce security rights in a personal or a property right, as well as guarantees under French law, but also all foreign law securities, liens and guarantees. This is particularly useful in the context of international financing putting in place guarantees in different jurisdictions.

² Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of the economy.

³ The new law only applies to security agents appointed after its entry into force, i.e. 1 October 2017

⁴ Report by the President of the Republic on Order No. 2017-748 of 4 May 2017

II. Efficient transposition of the security trustee regime

In order to achieve the same degree of flexibility and efficiency as the security agent regime built on the pillar of the Anglo-Saxon trust, the French law chose a double innovative principle: ownership and the fiduciary trust.

1. The agent is holder of the securities

The new Article 2488-6 of the French Civil Code modernises the status of agents by stipulating that new security agents "*act in their own name for the benefit of the creditors of the secured obligation*" and that they are "*holders of securities and guarantees*". The procedure therefore becomes much more flexible: change of one of the creditors of the pool does not affect security agents and requires no additional formalities.

In addition, security agents may, "*without having to justify a special mandate, take any action to defend the interests of the creditors of the secured obligation and make any statement of claim*"⁵. Prior to the reform of their status, security agents were unable to take legal action to defend the interests of creditors holding securities or realising them, except with a special mandate from each creditor. This requirement was binding on syndicated lenders, who were in practice hindered in continuing to sell stakes in financing in particular during pending judicial proceedings.

The role of the security agent has shifted from being a simple representative to that of a fiduciary holding securities. This is in particular interesting for credit institutions which are reluctant to become holders themselves of certain securities and guarantees, such as, for example, possessory pledges ("*gage avec dépossession*").

⁵ Article 2488-9 of the French Civil Code.

2. The security agent manages a fiduciary trust which is distinct from his or her own estate

Moreover, Article 2488-6 of the French Civil Code⁶ provides that the rights and property acquired by security agents in the exercise of their missions form a fiduciary trust which is distinct from his or her own estate.

The existence of a fiduciary trust, in which the securities held by the agent are isolated from his or her personal assets, protects syndicated creditors in case of the agent being the subject of bankruptcy proceedings. On the one hand, the agent's personal creditors are not allowed to seize the securities guaranteeing the credits granted by the pool. On the other hand, the creditors created by the management of securities cannot seize the agent's personal assets.⁷

This is a major innovation in French law. Indeed, the parallel debt mechanism does not create an estate distinct from the agent's own estate.

Although the security agent's powers are similar to those of a true fiduciary⁸, the formalities⁹ required for the agreement

⁶ *The rights and property acquired by security agents in the exercise of their missions form a fiduciary trust which is distinct from his or her own estate.*

⁷ Article 2488-10 of the French Civil Code.

⁸ As mentioned in the report by the President of the Republic on Order No. 2017-748 of 4 May 2017, *"the security agent is given the powers of a fiduciary since he or she becomes the holder of the securities and guarantees, which are transferred to a fiduciary trust which is distinct from his or her own estate, which he/she will manage in the interest of the beneficiary creditors."*

⁹ Article 2488-7 of the French Civil Code: *"In order to be valid, the agreement by which the creditors appoint the security agent must be recorded in a written document mentioning his or her capacity, the purpose and duration of the mission and the scope of his or her powers"*. It is no longer necessary for the security agent to be named in the deed recording the secured obligation. The appointment of the agent may therefore take

between the security agent and the creditor turn out to be much faster and more flexible than the trust agreement¹⁰. The security agent must nevertheless be sure to *"make specific reference to his or her capacity"* when *"he/she is acting for the benefit of the creditors of the secured obligation"*¹¹. However, the powers of the security agent are based on the powers that have been granted by the creditors in the appointment agreement.

III. Replacing the security agent – Liability

Contrary to the provisions of many foreign laws, the old French regime did not provide for the conditions for replacing the security agent: this has now been done. This replacement may first be contractually agreed. Where applicable, any creditor of the pool may apply to court for the appointment of a provisional security agent or the replacement of the agent if it turns out that the agent is failing in his or her duties, that he/she is jeopardising the interests entrusted to him or her or that he/she is the subject of bankruptcy proceedings¹².

In addition, through the security agent's fiduciary trust, the replacement of the security agent automatically entails the transfer of the assets assigned to the new agent, without the need for any formalities¹³. This is a real time-saver and provides legal certainty. In fact, it is the security granted to the original agent that is transferred to the new agent, without any increased risk of potential nullity during the twilight period.

Finally, in the event that the security agent commits faults in the exercise of his or her

place in a separate deed upstream or downstream of the financing transaction.

¹⁰ Governed by Articles 2011 and following of the French Civil Code.

¹¹ Article 2488-8 of the French Civil Code.

¹² Article 2488-11, paragraph 1 of the French Civil Code.

¹³ Article 2488-11, paragraph 2 of the French Civil Code.

mission, Article 2488-12 of the French Civil Code states that he/she is liable for such faults at his or her own estate. Subject to the general rules, in practice, it is to be expected that the security agent will provide for limiting or elusive liability clauses in this respect.

Thanks to the reform, French-style security agents have become efficient and modern tools that meet the expectations of practitioners. This is now an attractive and practical mechanism for credit institutions, particularly in the context of syndicated loans, which can only be encouraged in the future.
