

Client Alert

Latham & Watkins
Finance and Restructuring &
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***Coeur Défense* Decision Confirms Efficacy of French Dailly Law Assignment of Receivables**

On 19 October 2009, the Paris Commercial Court issued on 19 October 2009 an important decision in connection with the *Coeur Défense* restructuring confirming the efficacy of the French Dailly law security assignment of receivables (*cession Dailly*) notwithstanding the insolvency proceedings opened against the grantor of such security interest, to the relief of financial institutions and their advisors.

Introduction

The judgment rendered on 19 October 2009 by the Paris Commercial Court, ruling upon the status of the French Dailly law security assignment of trade receivables (*cession Dailly*) (**Dailly security assignment**) in the context of the *Coeur Défense* restructuring, is an important case for the financing community and its advisors. The decision confirmed the efficacy of Dailly security assignments, which had always been viewed as a very efficient receivables security assignment mechanism under French law, in particular because it was not prejudiced by the stay of enforcement proceedings which is mandatorily imposed under French law in the event of insolvency proceedings opened over the grantor of security interests. However, *Heart of La Défense SAS (Hold)*, the borrower

under the *Coeur Défense* financing and its judicial administrator (*administrateur judiciaire*), had sought to challenge the continued efficacy of the mechanism further to the opening of safeguard proceedings (*procédure de sauvegarde*) over Hold which had granted Dailly security assignments over all existing and future claims under existing or future leases of the property complex.

A Paris Court of Appeal ruling in the context of initial summary proceedings, and therefore on an *ex parte* basis without the benefit of pleadings on the substance of the matter, had upheld a Paris Commercial Court judgment deciding the suspension of the effects of the Dailly security assignment as a result of the opening of safeguard proceedings over the borrower, sending worried shock-waves throughout the financing community.

Notwithstanding this temporary setback, the efficacy of the mechanism has now been once again affirmed by the Paris Commercial Court, which ruled on the substance of the litigation, thus providing assurance to the creditors (which included many international credit institutions), and more generally the financing community, that the Dailly security assignment remains a very efficient French law security interest.

"The situation was closely watched by the financing community since the efficacy of the mechanism had been challenged as a result of a summary judgment of the Paris Court of Appeal."

Background — Insolvency Proceedings

Under French insolvency rules, the commencement of insolvency proceedings (whether a safeguard proceeding (*procédure de sauvegarde*) or a judicial reorganization (*redressement judiciaire*)) against the grantor of security interests (including security interests which provide for a mechanism whereby creditors may obtain title to the collateral without a court order¹) will have the effect of staying or prohibiting all enforcement proceedings against such grantor.

This will affect the enforcement of most security interests under French law. However, since a Dailly security assignment has the effect of immediately and absolutely transferring the assigned receivables to the assignee on the date stated on the Dailly form of assignment, the opening of insolvency proceedings against the insolvent grantor of the security interest should have no impact on the efficacy of the Dailly security assignment, since enforcement is not performed against such grantor as the assigned receivables are no longer part of its assets.

Background — Main Characteristics of a Dailly Security Assignment

The so-called "*loi Dailly*" of 1981 (now incorporated in the French Monetary and Financial Code²) provides for a simplified form of assignment of title to receivables by way of security.

A Dailly security assignment may only:

- benefit a French credit institution or a European-regulated credit institution which is acting in France through the so-called "European passport" for the provision of financial services; and
- secure obligations of the borrower under a credit facility. In particular, a Dailly security assignment may not secure guarantee obligations or obligations under a bond or other debt instrument.

The security is perfected by the delivery to the beneficiary by the assignor of a form of assignment of receivables by way of security (*bordereau*) in a strictly prescribed form. The assignment comes into effect and is binding and enforceable as against the assignor and its third-party creditors immediately and simply upon the dating of the form.

Although not necessary for its enforceability, the assignment may be notified to the assigned debtor (also in a prescribed form), as from which time it can validly discharge its obligations only by paying the beneficiary of the Dailly security assignment (prior to such notice, the assignor collects such payments as agent of the beneficiary).

Coeur Défense Restructuring

In July 2007, at the height of the property boom, the *Coeur Défense* complex — a 39-story glass office tower in the center of the Paris *La Défense* financial district — was acquired for €2.11 billion by Hold, a special-purpose vehicle registered in Paris and owned by Dame Luxembourg Sarl (**Dame**). The shareholders of Dame include former Lehman Brothers Holdings Inc. entities and an investment unit that belongs to General Electric Co.

To fund the acquisition, Hold entered into two loans in an aggregate principal amount of €1.64 billion granted by Frankfurt-based Lehman Brothers Bankhaus AG. Such loans were subsequently transferred by way of a securitization to the *Fonds Commun de Titrisation* Windermere XII FCT, which issued 12 categories of commercial mortgaged-backed securities (CMBS). Their purchasers included many first ranking financial institutions. The Windermere XII FCT, managed and represented by Eurotitrisation³, therefore became the sole creditor under the loans.

The documentation provided that such loans would be repayable *in fine* in July 2012 or, under the terms and conditions provided in the facilities agreement, in July 2013 or July 2014.

The loans are secured by certain security interests, which include Dailly security assignments of all existing and future claims under existing or future leases of the property complex.

Another Lehman Brothers entity, Lehman Brothers UK, provided a hedging agreement, in the form of interest-rate caps, in favor of Hold with respect to the loans which provided for a floating interest rate.

The collapse of the Lehman Brothers entities on 15 September 2008 resulted in the downgrading of the Lehman entity providing the hedging and thus triggering an event of default under the loans, crystallizing an obligation upon Hold to substitute another hedging bank. Having failed to provide such a replacement, Hold was notified of the existence of an event of default (although the loans were not accelerated) and therefore decided to file for the opening of a safeguard proceeding. The same filing was made at the level of its holding company, Dame.

Safeguard proceedings were opened over Hold and Dame by the Paris Commercial Court on 3 November 2008. Mr. Christophe Thevenot was appointed judicial administrator (*administrateur judiciaire*)⁴ by the court.⁵

On 9 September 2009, a safeguard plan was decided by the Paris Commercial Court with respect to Hold and Dame. Under the plan, the court in particular extended the 10 July 2012 maturity of the loans to 10 July 2014.

Summary Proceedings Suspending the Implementation of the Dailly Security Assignment

Following the opening of safeguard proceedings over Hold, Eurotitrisation notified the Dailly security assignment to the assigned debtors (*i.e.*, the lessees), such notification prohibiting them from paying any amount due under the leases to Hold⁶. Further to such notification, the lessees could validly discharge their obligations only by paying

Eurotitrisation, as beneficiary of the Dailly security assignment.

Notwithstanding the afore mentioned notification, Hold obtained an order on a summary basis from the Paris Commercial Court on 16 December 2008 to the effect that the lessees should pay amounts due under the leases to the judicial administrator in escrow, thus preventing Eurotitrisation from exercising their rights under the Dailly security assignment. The order also provided that the judicial administrator could debit from the amounts held in escrow the amounts necessary for the maintenance of the *Coeur Défense* complex. The summary order was confirmed by the Paris Court of Appeal on 16 June 2009.

These decisions were rendered as part of summary proceedings in accordance with the provisions of the French Code of Civil Procedure, which provide that the President of the Commercial Court may take, in the event of emergency, any protective measure which is justified by the existence of a dispute and which is necessary to avoid imminent damage.

Although such decisions should not prejudice the court decisions to be rendered separately on the substance of the matter, they affected the implementation of the Dailly security assignment by effectively freezing one of its main effects, *i.e.*, the ability of its beneficiary to notify the assigned debtors (*i.e.*, the lessees) of the assignment at any time and thus prohibit them from paying the assigned amounts due under the leases to Hold and instructing them to pay them instead to Eurotitrisation, as beneficiary of the Dailly security assignment.

Commercial Court Decision

Deciding upon the substance of the case, the Paris Commercial Court on 19 October 2009:

- confirmed that the assigned receivables had become the property of Eurotitrisation as from the date stated on the Dailly assignment form (*bordereau*), so that such receivables were not affected by the subsequent

opening of safeguard proceedings over the assignor, and that the notification had been validly made in accordance with the provisions of the French Monetary and Financial Code (rents should therefore no longer be paid into an escrow account, but directly to the assignee);

- ordered the release of all amounts which were held in escrow by the judicial administrator and their transfer to Eurotitrisation;
- acknowledged, incidentally, the proposal made by Eurotitrisation on a voluntary basis to repay to Hold from time-to-time the amounts necessary to cover the expenses required for the maintenance of the *Coeur Défense* complex. The parties have three months to determine the necessary amounts to be set aside for that purpose and the terms and conditions for such repayments.

The judgment thus confirmed one of the main effects of a Dailly security assignment, which is the ability of its beneficiary to notify the assignment, thereby prohibiting the assigned debtors (*i.e.*, the lessees) from paying any amount due under the leases to Hold and requiring the assigned debtors to discharge validly their obligations only by paying Eurotitrisation, as beneficiary of the Dailly security assignment, notwithstanding the opening of safeguard proceedings over its grantor. The notification should not be regarded as an enforcement of such security interests (which would have been prohibited as a result of the safeguard proceeding), but only as a means of revealing the existence of the Dailly security assignment to the assigned debtors.

Hold may appeal the decision within one month as from the date it was notified of the judgment.

Conclusion

The judgment rendered on 19 October 2009 by the Paris Commercial Court is an important case for the financing community and its advisors. The decision confirmed the efficacy of Dailly security assignments, which had always

been seen as a very efficient receivables security assignment mechanism under French law, in particular because it was not prejudiced by the stay of enforcement proceedings which is mandatorily imposed under French law in the event of insolvency proceedings opened over the grantor of security interests.

This judgment should also provide food for thought as to the overwhelming efficacy of a Dailly security assignment in this context: where a Dailly security assignment is granted by a special purpose vehicle, with no resources other than the receivables which are so assigned by it, it may be advisable to provide that amounts necessary for the operation/maintenance of the asset may be transferred back to or retained by the borrower upon certain conditions to ensure that it is not completely starved of resources by the Dailly security assignment in these circumstances.

If you have any questions about this *Client Alert*, please contact one of the members of the Finance and Restructuring & Insolvency Practice Groups listed below or the Latham attorney with whom you normally consult:

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Endnotes

- ¹ Pursuant to a "*pacte commissaire*," which may be provided in certain security interests since the *ordonnance* n° 2006-346 of 23 March 2006.
- ² Articles L. 313-23 to L. 313-34 of the French Monetary and Financial Code.
- ³ For ease of reference, this *Client Alert* refers just to "Eurotitrisation" (instead of referring to Windermere XII FCT as managed and represented by Eurotitrisation) when referring to the creditor of Hold under the loans.
- ⁴ In safeguard proceedings, the judicial administrator (*administrateur judiciaire*) is in charge of evaluating the situation of the debtor, making recommendations with respect to the outcome of the proceedings and exercising certain management responsibilities.
- ⁵ Investors in Windermere XII challenged the Paris Commercial Court decision to open safeguard proceedings with respect to Dame and Hold, but on 7 October 2009 the Paris Commercial Court upheld that decision.
- ⁶ Article L. 313-28 of the French Monetary and Financial Code — see above.

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