England & Wales


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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a binding contract arise as a result of the behaviour of the parties?

With the exception of certain debts arising under regulated consumer credit arrangements and contracts for sale of land (or interests therein), debts need not be in writing to be enforceable against obligors. Contracts may be written, oral, or partly written and partly oral provided the key elements to form a contract coincide. An invoice may itself represent, or evidence a debt arising pursuant to, a contract between parties. Where a contract is oral, evidence of the parties' conduct is admissible to ascertain the terms of such contract. A contract may also be implied between parties based on a course of conduct or dealings where the obligations arising from the alleged implied contract are sufficiently certain to be contractually enforceable.

1.2 Consumer Protections. Do your jurisdiction's laws: (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

Consumer credit in the UK is regulated under three regimes:

(a) the residential mortgage regime, which governs regulated mortgage activities with respect to mortgages secured by a first charge loan, which (from 21 March 2016) has been expanded to include second charge mortgages;

(b) the consumer credit regime, which covers unsecured credit facilities and (prior to 21 March 2016, subject to certain exemptions) secured loans not covered by the regulated residential mortgage regime; and

(c) the consumer buy-to-let (the **CBTL**) regime, which governs secured (first or second charge) and unsecured forms of consumer credit agreements entered into on or after 21 March 2016 relating to property that will in part, or whole, be occupied as a dwelling on the basis of a rental agreement.

Both residential mortgage contracts and consumer credit agreements are regulated by the Financial Conduct Authority (the **FCA**) under the Financial Services and Markets Act 2000 (the **FSMA**) and its secondary legislation, in particular the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 (the **RAO**). Additionally, consumer credit agreements are also regulated by the Consumer Credit Act 1974 (the **CCA**). Consumer buy-to-let mortgages are regulated by the FCA under the Mortgage Credit Directive Order 2015 (SI 2015/910) (the **MCD Order**).

(a) Other than in the context of high-cost, short-term loans (discussed below), there are no usury laws in the UK capping the rates of interest that can be charged under regulated residential mortgages or consumer credit loans. However, in the case of high-cost, short-term loans, the FCA has introduced a 'cap' on interest and other charges levied by lenders under such loans (broadly, unsecured credit agreements where the borrower must repay, or substantially repay, credit advanced within a maximum of 12 months from such advance and for which the annualised percentage rate of interest is 100% or more). This 'cap' on the cost of credit for such loans has three components:

(i) 'total cost cap': the total interest, fees and charges payable by the borrower must not exceed 100% of the amount borrowed;

(ii) 'initial cost cap': interest and other charges payable by the borrower must not exceed 0.8% per day of the outstanding principal during the agreed loan duration and any refinancing; and

(iii) 'default fee cap': default fees must not exceed £15.

In November 2016 the FCA published a "call for input" in order to review the high-cost short-term price cap. Following this call for input, the FCA decided, in July 2017, to maintain the price cap at its current level with a commitment to review the cap again within three years to ensure that it remains effective.

(b) There is no statutory prohibition regarding interest on late payments in respect of regulated mortgage contracts or consumer credit agreements. However, all FCA regulated entities are subject to the principle that a firm must pay due regard to the interests of its customers and treat them fairly. With this in mind, under the FCA's conduct of business sourcebooks with respect to regulated mortgage contracts (**MCOB**) and consumer credit agreements (**CONC**), a lender may only levy charges in relation to a borrower's default or arrears that are necessary to cover its reasonable costs.

(c) Under a regulated consumer credit agreement (an **RCA**) there are two forms of withdrawal rights that may apply to that RCA. The requirements are complex and vary between different categories of RCAs, but in summary:

(i) except in the case of an excluded agreement, borrowers may withdraw from an RCA within 14 days of the "effective date", subject to any outstanding interest and

principal being repaid within 30 days of withdrawal. The effective date is most commonly the date of execution of the RCA; and

(ii) borrowers under unsecured excluded agreements that are deemed "cancellable agreements" under section 67 of the CCA have a minimum five-day cooling off period during which the RCA is cancellable by the borrower. For these purposes, an excluded agreement includes an agreement under which the amount borrowed exceeds a certain statutory limit (being £60,260 at the time of writing). The conditions as to whether an agreement is deemed "cancellable" are complex and should be considered carefully in the context of section 67 of the CCA.

From 21 March 2016 onwards, mortgage lenders under regulated mortgage contracts have been required to make a binding offer and give borrowers a reflection period of at least seven days to consider it. During this time the offer is binding on the lender, not the borrower.

(d) Terms in residential mortgage contracts and consumer credit agreements which are deemed to be unfair, or which are entered into as a result of unfair trading practices, will be deemed unenforceable against the consumer (see question 8.4). It should be noted that residential regulated mortgage contracts and consumer credit agreements may also be rendered unenforceable in other circumstances, including if they are made:

(i) by a lender who is not authorised by the FCA;

(ii) by a lender authorised by the FCA, but without permission to carry on certain credit related activities (including servicing);

(iii) by a lender authorised by the FCA, but where the regulated mortgage contract or consumer credit agreement has been introduced via a third party who is either not authorised by the FCA or does not have permission to carry on certain credit related activities; and

(iv) in the case of an RCA, in circumstances where the agreement has not been documented and/or executed in compliance with the CCA and a court declines to make an enforcement order with respect to it.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

Not specifically, although there may be enforcement issues due to laws pertaining to sovereign immunity.

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in your jurisdiction that will determine the governing law of the contract?

For contracts entered into on or after 17 December 2009, the position is governed by Regulation 593/2008/EC of 17 June 2008 (**Rome I**). For contracts entered into prior to 17 December 2009, a different regime applied.

Under Rome I, absent a choice of governing law by the parties, and subject to specific rules governing contracts of carriage, consumer contracts, insurance contracts and individual employment contracts, the law governing the contract is determined in four stages. First, Rome I sets out rules in relation to specific types of contracts. For example, that a contract for the sale of goods is governed by the law of the country where the seller has their habitual residence. Second, if the governing law cannot be determined by reference to the specific rules, then the contract is governed by the law of the country where the party required to effect the characteristic performance of the contract has their habitual residence. However, if it is clear that the contract is manifestly more closely connected with a country other than that determined in accordance with the first two stages, then the law of that other country applies. Finally, if the governing law is not determined by the first three stages, then the contract is governed by the law of the country with which the contract is most closely connected.

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction would not give effect to their choice of law?

No, there is not.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in your jurisdiction give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

Rome I stresses the importance of parties' freedom to choose the law of their contract (including a foreign law). Such choice may be expressed or implied. Rome I does, however, restrict the effect of the choice parties make as follows: (i) where all elements relevant to the contract (other than the choice of law) are located in a country other than the country whose law has been chosen by the parties and that country has rules which cannot be derogated from by agreement (in which case the court will apply those rules); (ii) where all elements relevant to the contract (other than the choice of law) are located in one or more EU Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of EU law which cannot be derogated from by agreement; (iii) to the extent that the law chosen conflicts with overriding mandatory rules of English law (as the law of the forum); (iv) where the applicable foreign law is manifestly incompatible with English public policy; or (v) where the overriding mandatory rules of the country where the obligations arising out of the contract have to be or have been performed render performance of the contract unlawful. When giving effect to any such choice of foreign law, the courts of England and Wales will consider and rule upon the substantive effects of such foreign law as matters of expert evidence.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does your jurisdiction's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., your jurisdiction's laws or foreign laws)?

As discussed above, under Rome I (subject to the limited exceptions described in question 2.3) the parties to a contract are free to agree that the contract be governed by the law of any country, irrespective of the law governing the receivables. The law governing the sale agreement, together with mandatory rules of the jurisdiction of the relevant forum and/or the country where the contract is performed, will govern the effectiveness of the sale between the seller and the purchaser, whilst the governing law of the receivables will govern perfection of that sale and the relationship between the purchaser and the underlying obligor.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

In general this would be the case, however, as noted in question 2.3 above, there are limited circumstances where certain legal provisions of countries other than the country whose law was selected to govern the receivables purchase agreement may (but need not) be taken into account by English courts. For example, as noted in part (v) of the answer to question 2.3 above, the court may give effect to overriding mandatory rules of the jurisdiction in which the purchaser is located, if such rules render unlawful the performance of obligations under the contract which are to be performed in that foreign jurisdiction. As noted in the response to question 2.3 above, the courts of England and Wales will consider and rule upon the substantive effects of foreign law as matters of expert evidence.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

See questions 3.1 and 3.2 above. The court would respect the parties' choice of law to govern the receivables purchase agreement, subject to the restrictions noted at question 2.3 above. As noted above, the court may give effect to overriding mandatory rules of the jurisdiction in which the obligor or the purchaser or both are located, if such rules render unlawful the performance of obligations under the contract which are to be performed in such foreign jurisdiction(s).

3.4 Example 3: If (a) the seller is located in your jurisdiction but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with your jurisdiction's own sale requirements?

In assessing the validity of the receivables purchase agreement as between the seller and the purchaser, the English courts would apply the law of the receivables purchase agreement (in this case, the law of the obligor's country). When considering the perfection of the sale under the receivables purchase agreement, the English courts would apply the governing law of the receivables (in this case, also the law of the obligor's country) and consider and rule upon such perfection as a matter of expert evidence. However, as discussed in question 2.3 above, certain mandatory principles of the law of England and Wales (such as mandatory principles of insolvency law in the seller's insolvency) would not be capable of disapplication by the parties' choice of a foreign law. Further, the courts would not apply the parties' choice of a foreign law to the extent it conflicted with those mandatory principles, or was manifestly incompatible with public policy.

3.5 Example 4: If (a) the obligor is located in your jurisdiction but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in your jurisdiction recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with your jurisdiction's own sale requirements?

See questions 3.1 and 3.4 above. The English courts would recognise the sale as effective against the obligor as it complies with the requirements of the law governing the receivable (in this case the law of the seller's country). In addition, certain mandatory principles of the law of England and Wales may apply to govern the relationship between the purchaser and the obligor (such as mandatory principles of insolvency in the obligor's insolvency).

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

See questions 3.1 to 3.5 above. The sale would be effective against the seller provided it complied with the perfection requirements of the governing law of the receivables (in this case English law). In addition, certain principles of English law may apply to govern the relationship between the purchaser and the obligor and in any insolvency proceedings of the seller and/or obligor in England and Wales.

4 Asset Sales

4.1 Sale Methods Generally. In your jurisdiction what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology – is it called a sale, transfer, assignment or something else?

The most common method of selling receivables is by way of assignment (which can be equitable or legal), novation (a transfer of both the rights and obligations) or by creating a trust over the receivables (coupled with a power of attorney). Creating a trust over the proceeds of the receivables or sub-participation (a limited recourse loan to the seller in return for the economic interest in the receivables) will not effect a sale.

An outright sale of receivables may be described as a "sale" or (subject to the considerations set out in question 4.9) a "true sale", a "transfer" or an "assignment". The term "true sale" usually connotes a sale not subject to recharacterisation as a secured loan or any clawback risk, an "assignment" most often indicates a transfer of rights, but not obligations, whilst the term "transfer" usually indicates a transfer of rights and obligations by novation. The term "security assignment" is often used to distinguish a transfer by way of security from an outright assignment.

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

In order for an assignment of receivables to take effect in law, rather than equity, s.136 of the Law of Property Act 1925 (the **LPA**) provides that the assignment must be: (i) in writing and signed by the assignor; (ii) of the whole of the debt; (iii) absolute and unconditional and not by way of charge; and (iv) notified in writing to the person from whom the assignor would have been entitled to claim the debt. Where the sale of a receivable does not meet all of these requirements, it will take effect as an equitable assignment only and any subsequent assignment effected by the seller and notified to the obligor prior to the date on which the original assignment is notified to the obligor, will take priority.

A novation of receivables (pursuant to which both the rights and obligations are transferred) requires the written consent of the obligor as well as the transferor and transferee.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

The transfer requirements for promissory notes (and other negotiable instruments) are governed by the Bills of Exchange Act 1882, which provides that they are transferable by delivery (or delivery and endorsement).

Mortgage loans and their related mortgages may be transferred by assignment. With respect to a mortgage over real property in England and/or Wales, as well as the giving of notice, certain other formalities need to be complied with in order to effect a legal assignment, for example registration of the transfer at H.M. Land Registry as required by the Land Registration Act 2002. Most residential mortgage securitisations are structured as an equitable assignment of mortgage loans and their related mortgages to avoid the burden of giving notice to the mortgagors and registering the transfer. However, until notice has been given and the formalities satisfied, the rights of an assignee of a mortgage may be adversely affected by dealings in the underlying property or the mortgage, as described in question 4.4 below.

See questions 8.1 to 8.4 below for specific regulatory requirements in relation to consumer loans.

Transfers of marketable securities in bearer form will be achieved by delivery or delivery and endorsement and, if in registered form, by registration of the transferee in the relevant register. Dematerialised marketable securities held in a clearing system and represented by book-entries may be transferred by debiting the clearing system account of the relevant seller and crediting the clearing system account of the purchaser (or, in each case, its custodian or intermediary).

Specific statutory requirements may also apply for assignments of receivables such as intellectual property rights and certain policies of insurance.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice – such as cutting off obligor set-off rights and other obligor defences?

Assuming the receivable does not fall into a select category of contractual rights which are incapable of assignment (e.g. as a matter of public policy or because the rights are of a personal nature) then, in the absence of an express contractual prohibition or restriction on assignment, receivables may be assigned without notification to, or consent of, the obligor.

The absence of notice has certain implications as follows: (i) obligors may continue to discharge their debts by making payments to the seller (being the lender of record); (ii) obligors may set-off claims

against the seller arising prior to receipt by the obligors of the notice of assignment; (iii) a subsequent assignee of (or fixed chargeholder over) a receivable without notice of the prior assignment by the seller would take priority over the claims of the initial purchaser; (iv) the seller may amend the agreement governing the terms of the receivable without the purchaser's consent; and (v) the purchaser cannot sue the obligor in its own name (although this is rarely an impediment in practice).

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings have commenced against the obligor or the seller? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

Whilst no particular form of notice is required, it must be in writing, given by the seller or the purchaser to the obligor, and must not be conditional. The notice does not need to give the date of the assignment, but to the extent that a date is so specified, it must be accurate. The main requirement is that the notice is clear that the obligor should pay the assignee going forward.

There is no specific time limit for the giving of notices set down in the LPA and notice can be given to obligors post-insolvency of the seller (including pursuant to an irrevocable power of attorney granted by the seller) or of the obligor. The giving of such notice should not be prohibited by English insolvency law, although failure to give notice will have the effects set out in question 4.4 above.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

As a general matter, it is not possible under English law to transfer or assign the burden (i.e. obligations, as distinct from rights) under a contract without the consent of the obligor. Obtaining this consent constitutes a novation. A novation is not, strictly speaking, a transfer, but is the replacement of the old contract with an identical new contract between the new party and continuing party. Therefore, where a contract refers to the "assignment of an agreement", an English court would likely find that this refers either to a novation of the rights and obligations thereunder or an assignment of rights coupled with the sub-contracting of obligations from the purported assignor to the purported assignee.

As such, whilst the appropriate classification will ultimately be a question of construction on any given set of facts:

(a) the first restriction (an explicit restriction on transfer or assignment of rights or obligations) would likely be interpreted as prohibiting a transfer of receivables by the seller to the purchaser (absent consent);

(b) the second restriction (an explicit restriction on transfer or assignment, but no explicit reference to rights or obligations) would likely be interpreted in the same way provided that, at the time the receivables contract was entered into, the intention of the seller and the obligor was to restrict both the transfer of the performance of the receivables contract (e.g. the right to require performance of the receivables contract) as well as the transfer of any rights and/or obligations under that contract (e.g. accrued rights of action or rights to receive payments); and

(c) the third restriction (explicit restriction on transfer or assignment of obligations but no explicit reference to rights) is more likely to be viewed as permitting a transfer of receivables by the seller to the purchaser.

Notwithstanding the above, it should be noted that there have been recent legislative proposals in the UK aimed at prohibiting restrictions included in business contracts that prevent the assignment of receivables (subject to certain exceptions). The government is yet to publish final regulations implementing these measures.

See also questions 4.1 and 4.4 above and 4.7 below.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment of receivables and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or tort, or on any other basis?

Restrictions on assignments or transfers of receivables are generally enforceable. If a contract is silent on assignability, then such contract and the receivables arising thereunder will be (with certain limited exceptions related to personal contracts where the specific identity of a contracting party goes to the heart of the contract, such as contracts of service) freely assignable. In very limited circumstances, such as upon the death of an individual or in certain limited statutory transfers, assignment may take place by operation of law, overriding an express contractual provision prohibiting assignment. It may be possible to utilise a trust arrangement where non-assignment provisions within contracts would otherwise prevent assignment.

If an assignment is effected in breach of a contractual prohibition on assignment, although ineffective as between the obligor and the seller (to whom the obligor can still look for performance of the contract), the prohibition will not invalidate the contract between the seller and purchaser if in compliance with the governing law and explicit terms of the receivables purchase agreement itself, such that the seller may still be liable to account to the purchaser for the obligor's payment; the seller may hold any such proceeds received on trust for the purchaser; the seller may subrogate the purchaser to its rights under the invoice due for payment by the obligor; and the seller may grant the purchaser a funded sub-participation in respect of the rights to receive payment of the relevant part of the receivable. Furthermore, if the seller can establish that the obligor has accepted the assignment either through its conduct or by waiver (for example, by course of dealing) then the obligor may be estopped from denying the assignment, even where there is a contractual prohibition on assignment.

See also questions 4.1, 4.4 and 4.6 above.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

The sale document must describe the receivables (or provide for details of the receivables to be provided at the point of sale) with sufficient specificity that the receivables can be identified and distinguished from the rest of the seller's estate. For reasons relating to confidentiality and data protection law (see question 8.3 below), it is atypical for obligors' names to be included in the information provided to the purchaser.

4.9 Recharacterisation Risk. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or is there a risk that the transaction could be characterised by a court as a loan with (or without) security? If recharacterisation risk exists, what characteristics of the transaction might prevent the transfer from being treated as an outright sale? Among other things, to what extent may the seller retain any of the following without jeopardising treatment as an outright sale: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; (d) a right of repurchase/redemption; (e) a right to the residual profits within the purchaser; or (f) any other term?

A transaction expressed to be a sale will be recharacterised as a secured financing if it is found to be a "sham", i.e. if the documents do not represent the true intentions between the parties and are intended to mask the true agreement. Irrespective of the label given to a transaction by the parties, the court will look at its substance and examine whether it creates rights and obligations consistent with a sale.

Case law has established a number of key questions to be considered when concluding that a transaction is a sale rather than a secured financing:

1) Do the transaction documents accurately reflect the intention of the parties and are the terms of the transaction documents consistent with a sale as opposed to a secured financing?
2) Does the seller have the right to repurchase the receivables sold?
3) Does the purchaser have to account for any profit made on any disposition by it of the receivables?
4) Is the seller required to compensate the purchaser if it ultimately realises the acquired receivables for an amount less than the amount paid?

However, a transaction may still be upheld as a sale notwithstanding the presence of one or more of these factors. As a result, the intention of the parties, their conduct after the original contract, and the express terms of the contract are all factors a court will take into account, as a whole, when determining whether or not a contract is inconsistent with that of a sale.

The seller remaining the servicer/collection agent of the receivables post-sale, the seller entering into arm's length interest-rate hedging with the purchaser, the seller assuming some degree of credit risk by assuming a first loss position, the right of a seller to repurchase receivables in limited circumstances and the right of a seller to extract residual profits from the purchaser are not generally considered to be inherently inconsistent with sale treatment. The seller retaining an equity of redemption in respect of a transfer of receivables or retaining all risk and reward in the receivables may, however, lead a court to the conclusion that the transaction is a loan arrangement (with or without security) rather than an outright transfer.

If the sale is recharacterised as a financing, the assets "sold" will remain on the seller's balance sheet and the loan will be treated as a liability of the seller. In addition, given the practice in England and Wales not to make "back-up" security filings, the security may not have been registered and may, therefore, be void in a seller insolvency for lack of registration (subject to the application of the FCR as referred to and defined in question 5.3 below).

In addition to recharacterisation, sale transactions are also vulnerable under certain sections of the Insolvency Act 1986 (**Insolvency Act**) such as those relating to transactions at an undervalue and preferences.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

An agreement pursuant to which a seller agrees to sell receivables on a continuous basis prior to the occurrence of certain specified events will take effect, as between the seller and purchaser, as an agreement to assign. The receivables will be automatically assigned to the purchaser as and when they come into existence.

See the answer to question 6.5 below on the effect of an insolvency of the seller on an agreement to assign a receivable not yet in existence.

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to *versus* after the seller's insolvency?

An assignment for value of an identifiable receivable, which is not in existence at the time of the receivables purchase agreement, but which will be clearly ascertainable in the future, is treated as an agreement to assign which will give rise to an equitable assignment of the receivable as soon as it comes into existence.

See the answer to question 6.5 below on the effect of an insolvency of the seller on an agreement to assign a receivable not yet in existence.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Security for a receivable will typically be capable of being assigned in the same manner as the receivable itself. The transfer or assignment

of some types of security may require additional formalities such as registration or payment of a fee as referred to in question 4.3 above.

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

Generally speaking, an obligor's right to set-off: (i) amounts owing to it from the seller; against (ii) amounts it owes to the seller, under that receivables contract will survive receipt of notice of a sale against the assignee of the receivables contract provided that the obligor's cross-debt arose before the obligor received notice of the sale. The assignee takes the benefit of the receivables contract subject to any rights of set-off in existence between the obligor and seller at the time the obligor receives notice of the sale.

If a cross-debt arises after the obligor has received notice of the sale, an obligor will generally be unable to set-off such cross-debt against the purchaser unless the claims of the obligor and the purchaser are sufficiently closely connected.

An obligor's right to set-off under a receivables contract may terminate if the cross-debt becomes unenforceable or time-barred. In the absence of a breach of any provision to the contrary, it is unlikely that either the seller or the purchaser would be liable to the obligor for damages as a result of an obligor's rights of set-off terminating by operation of law.

4.14 Profit Extraction. What methods are typically used in your jurisdiction to extract residual profits from the purchaser?

Techniques that are typically used to extract profit from the purchaser include: paying the seller fees (for example for acting as servicer and/or collection agent of the receivables or for acting as a swap counterparty); paying deferred purchase price or consideration to the seller for the receivables purchased; making repayments or interest payments to the seller in respect of subordinated loans granted by the seller; and/or the seller holding equity securities/ the most subordinated tranche of securities in the purchaser. The method of extracting the retained profit in any given securitisation will depend on a number of factors, including the nature of the assets in the securitised pool, the types of credit enhancement used, rating agency and timing considerations and the consequences to accounting, regulatory capital and tax treatment.

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected (see question 4.9 above)?

It is not customary to create "back-up" security over a seller's ownership interest in receivables and related security when an outright sale is intended, although a seller may create a trust over the receivables in favour of the purchaser to the extent that any outright sale is held not to have occurred or is held to be void or is subsequently recharacterised.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

See questions 5.1 above and 5.3 below.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

Although security may be taken over receivables by way of novation, attornment, pledge (in the case of documentary receivables capable of being delivered) or by retention of title arrangements, security is most commonly taken over receivables by way of mortgage or charge.

Receivables assigned by way of security together with a condition for re-assignment on redemption or discharge of the underlying secured obligations will create a mortgage over the receivables which will either be legal (if the procedural requirements of the LPA identified in question 4.2 above are satisfied) or, in the absence of satisfaction of these requirements (or where the subject property is not currently owned or in existence), equitable in nature. Prior to the perfection of an equitable mortgage, the assignee's security will be subject to prior equities (such as rights of set-off and other defences), will be liable to take priority behind a later assignment granted over the same assets where the later assignee did not have notice of the earlier assignment and himself gives notice to the obligor, and the obligor will be capable of making good discharge of its debt by paying the assignor directly (see questions 4.4 and 4.5 above).

Alternatively, the receivables may be made the subject of a fixed or floating charge. In comparison to a mortgage (which is a transfer of title together with a condition for re-assignment on redemption), a charge is a mere encumbrance on the receivables, giving the chargee a preferential right to payment out of the fund of receivables in priority to other creditors in the event of liquidation or administration. A practical distinction between a mortgage and a charge over receivables is the inability of a chargee to claim a right of action in his own name against the obligor. In practice this distinction is diminished by including a right to convert the charge into a mortgage together with a power of attorney to compel transfer of the receivables to the chargee. Additionally, the statutory rights conferred by Section 101 of the LPA allowing the chargee to appoint a receiver in respect of charges created by deed and the other rights provided to holders of some "qualifying floating charges", provide further enforcement rights for a chargee.

The degree of priority given to a chargee depends on whether the charge is fixed or floating. Whilst definitive definitions have remained elusive, the hallmarks of a fixed charge are that it attaches to the ascertainable receivables over which it is subject immediately upon its creation (or upon the receivable coming into existence). In comparison, a floating charge is a present security over a class or fund of assets (both present and future) which, prior to the occurrence of a specified crystallisation event, can continue to be

managed in the ordinary course of the chargor's business. On the occurrence of a specified crystallisation event the floating charge will attach to the assets then presently in the fund, effectively becoming a fixed charge over those assets. Case law emphasises control of the receivable as the determining factor in distinguishing between a fixed or floating charge whilst asserting that it is the substance of the security created, rather than how it is described or named, that is important.

The distinction is important: on an insolvency of the chargor, a fixed chargeholder will rank in priority to all unsecured claims, whilst a floating chargeholder will rank behind both preferential creditors and fixed chargeholders and equally with a statutory "prescribed part" (up to a maximum amount of £600,000) made available to unsecured creditors; a floating charge granted within 12 months (or 24 months if granted to a "connected" person) prior to the commencement of administration or liquidation will be void except as to new value given; and whereas a fixed chargeholder will obtain an immediate right over definitive assets which can only be defeated by a purchaser in good faith of the legal interest for value without notice of the existing charge (which, as summarised below, is uncommon to the extent that registration provides notice), in contrast, disposing of an asset subject to an uncrystallised floating charge will, apart from certain exceptions, generally result in the purchaser taking the receivables free of the charge.

For charges or mortgages created by an English company (or LLP) on or after 6 April 2013, there is a registration regime allowing (with some very limited exceptions) the chargor or anyone interested in the charge to register (in some cases electronically) the charge within 21 calendar days (beginning with the day following the creation of the charge) with the registrar of companies at the registry for companies incorporated in England and Wales (**Companies House**) by delivering a statement of particulars of that charge. This regime applies whether the charge is over an asset situated in or outside the UK. A different regime applies to charges created by English companies (or LLPs): (i) if the charge was created before 1 October 2009 (whereby the Companies Act 1985 (**CA 1985**) applies); and/or (ii) if the charge was created on and from 1 October 2009 but before 6 April 2013 (whereby the Companies Act 2006 (the **CA 2006**, and together with the CA 1985, the **Companies Act**) applies) under which regimes certain categories of charge had to be registered at Companies House.

For charges created by an overseas company over UK assets on or after 1 October 2011, there is no requirement to register such charges at Companies House. A different regime applies to charges created by an overseas company: (i) if the charge was created before 1 October 2009 (whereby the CA 1985 applies); and/or (ii) if the charge was created on and from 1 October 2009 to and on 30 September 2011 (whereby the CA 2006 and the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 applies).

Where certain security arrangements exist over financial collateral (cash, financial instruments and credit claims) between two non-natural persons, the Financial Collateral Arrangements (No. 2) Regulations 2003 (as amended, including pursuant to the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 that came into force in England and Wales on 6 April 2011) (the **FCR**) which implement EU Directive 2002/47/EC (the **EU Collateral Directive**) into English law, disapply certain statutory requirements in relation to that security arrangement (such as the requirement to register security at Companies House under the CA 2006 as well as certain provisions of English insolvency law). It should be noted, however, that the status of the FCR, as it applies to financial collateral arrangements in respect of which neither party falls within one of the categories referred to in the EU Collateral Directive, has been brought into doubt as a result of *obiter dicta* in the UK Supreme Court decision of *United States of America v Nolan* [2015] UKSC 63.

Except as noted above with regard to the FCR, failure to register a registrable charge within the prescribed statutory period will (both pre and post 6 April 2013) result in that security interest being void as against a liquidator, administrator or creditors in a liquidation or administration. As such, and notwithstanding the potential application of the FCR, mortgages and charges, whether or not clearly within the categories listed in the Companies Act or a financial collateral arrangement, are habitually registered at Companies House. As registration of a charge is a perfection requirement (and not a requirement for attachment of security), an unregistered charge will still be valid as against the chargor, provided the chargor is not in winding-up or administration. Similarly, registration under the Companies Act is not determinative as to priority such that, in the case of two competing charges, provided that both are registered within the statutory 21-day period after creation, the prior created charge will take priority over the subsequently created charge even where that prior charge is registered second.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, and that security interest is valid and perfected under the laws of the purchaser's jurisdiction, will the security be treated as valid and perfected in your jurisdiction or must additional steps be taken in your jurisdiction?

Notwithstanding the choice of law governing the purchaser's security, the law governing the receivable itself will govern the proprietary rights and obligations between the security holder and the obligor and between the security granter and the security holder (including as to matters of validity, priority and perfection).

The relevant security must therefore be valid and perfected under the laws of England and Wales, as well as valid and perfected under the laws of the governing law of the security, in order for it to be given effect by the English courts. In addition, English courts will also apply certain mandatory rules of English law which may affect the validity of any foreign law governed security-created.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

Security over contractual rights under insurance policies is usually created by security assignment. Security over mortgage loans or consumer loans will be created by mortgage or charge. Creating security over the mortgage securing a mortgage loan is generally accomplished by equitable mortgage.

Security over marketable debt securities or negotiable instruments (including promissory notes and bearer debt securities) is a complicated area and the most appropriate form of security depends on whether the relevant securities are bearer or registered, certificated, immobilised (i.e. represented by a single global note) or dematerialised and/or directly-held or indirectly-held. In (brief) summary: (i) directly-held and certificated debt securities, where registered, may generally be secured by legal mortgage (by entry of the mortgagee on the relevant register) or by equitable mortgage or charge (by security transfer or by agreement for transfer or charge); (ii) security over bearer debt securities may be created by mortgage

or pledge (by delivery together with a memorandum of deposit) or charge (by agreement to charge) and in certain limited circumstances a lien may arise; and (iii) security may be created over indirectly-held certificated debt securities by legal mortgage (by transfer, either to an account of the mortgagee at the same intermediary or by transfer to the mortgagee's intermediary or nominee via a common intermediary) or by equitable mortgage or charge (by agreement of the intermediary to operate a relevant securities account in the name of the mortgagor containing the debt securities to the order/control of the chargee).

The FCR (which removes certain requirements in relation to the creation and registration of security and disapply certain rules of English insolvency law) will apply to any security which is a "financial collateral arrangement" involving "financial collateral". See question 5.3 above.

5.6 Trusts. Does your jurisdiction recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets (so that they are not part of the seller's insolvency estate) until turned over to the purchaser?

Trusts over collections received by the seller in respect of sold receivables are recognised under the laws of England and Wales provided that the trust is itself validly constituted.

5.7 Bank Accounts. Does your jurisdiction recognise escrow accounts? Can security be taken over a bank account located in your jurisdiction? If so, what is the typical method? Would courts in your jurisdiction recognise a foreign law grant of security taken over a bank account located in your jurisdiction?

English law recognises the concept of money held in a bank account in escrow. Security granted by a depositor for a third party is typically taken over the debt represented by the credit balance by way of charge or (provided the securityholder is not the same bank at which the cash is deposited) an assignment by way of security. Security over a credit balance granted in favour of the bank at which the deposit is held can only be achieved by way of charge (not by assignment) and is usually supplemented by quasi-security such as a flawed asset arrangement, a contractual right of set-off and/or a charge in favour of the bank over the depositor's claims for payment of the deposit. The more usual approach is for the parties to ensure that the bank holding the deposit is a separate entity from the beneficiary of the security interest in such deposit. To the extent that the security is a security financial collateral arrangement over cash, as provided for in the FCR, those regulations will apply. The security interest is habitually perfected by registration, as mentioned in question 5.3 above.

As an alternative, quasi-security may be created over a bank account by way of a trust structure pursuant to which a declaration of trust is made by the account holder (as trustee) who holds the cash deposits on trust for the beneficiary. Care must be taken that such a trust is both validly constituted and not recharacterised as a charge which is then void for non-registration.

Foreign law-governed security over a bank account located in England and Wales must be valid under the laws of England and Wales, as well as its own governing law, in order for it to be given effect by the English courts.

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

This is a complicated question that will depend upon (amongst other things) the nature of the security over the bank account (whether on its facts it is a fixed or floating charge or a security assignment and whether it is drafted to cover amounts on credit from time to time), whether there are any competing security interests or trust arrangements over the bank account, the extent of any commingling of cash in the bank account, whether any security interest is also a security financial collateral arrangement under the FCR and whether the account holder is the subject of insolvency proceedings. Where a security financial collateral arrangement under the FCR exists, the parties may agree that the collateral-taker can appropriate the financial collateral, giving the right to become the absolute owner of the collateral should the security become enforceable.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

Any charge over a cash bank account is likely to be a floating charge rather than a fixed charge where the owner has access to the funds prior to enforcement because the chargee is unlikely to have sufficient control over the bank account in order to create a fixed charge. The ramifications of this distinction are set out in question 5.3 above.

Whether a floating charge over financial collateral qualifies as a security financial collateral arrangement under the FCR (with the advantages that this may bring to a chargeholder) remains uncertain. The issue relates to the level of rights a collateral provider can retain in order for a security financial collateral arrangement to exist (in particular there is uncertainty over the terms "possession", "control" and "excess financial collateral"). In 2015, the UK's Financial Markets Law Committee set out the impact of this uncertainty on the UK financial markets in a letter to HM Treasury. While a 2016 ruling by the European Court of Justice confirmed that a security financial collateral arrangement may exist over cash in a bank account, it did not clarify the uncertainty over the level of rights a collateral provider may retain. Therefore, in the absence of continued definitive judicial or legislatory clarification, each case must be taken on its particular facts.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your jurisdiction's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that stay of action? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

Most formal insolvency procedures have an automatic stay of action

against the insolvent entity. The stay will typically apply for the duration of the proceeding from the time it is effective, unless the court grants leave to lift the stay. An automatic interim moratorium applies between the instigation of administration proceedings and the company entering administration. However, on a winding-up petition, no interim moratorium applies until the court grants a winding-up order, unless a provisional liquidator is appointed.

If the right to the receivables has been transferred by legal assignment, the sale will be perfected, the purchaser will have the right to enforce his assigned rights in his own name and a stay of action on the insolvency of the seller should not affect the purchaser's ability to collect income from the receivables.

If the seller is appointed as servicer for the receivables, the stay of action may prevent the purchaser from taking action to enforce the servicing contract and any proceeds held by the servicer, other than in a binding trust arrangement, may be deemed to be the property of the servicer, not the purchaser.

If the receivables have been sold by equitable assignment and notice has not been given to an obligor, such obligor may continue to pay the seller. Typically, such proceeds will be subject to a trust in favour of the purchaser. If such a trust has not been imposed on the collections, the purchaser will be an unsecured creditor of the seller with respect to such collections.

6.2 Insolvency Official's Powers. If there is no stay of action, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of its ownership rights over the receivables (by means of injunction, stay order or other action)?

Assuming the receivables have been sold by legal assignment or perfected equitable assignment, an insolvency official appointed over the seller would not be able to prohibit the purchaser's exercise of its ownership rights over the receivables, unless there had been fraud or another breach of duty or applicable law (such as the antecedent transaction regime described in question 6.3 below).

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the seller's insolvency proceedings? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties? If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period? If a parent company of the seller guarantee's the performance by the seller of its obligations under contracts with the purchaser, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period?

The insolvency official would need a court order to reverse an antecedent transaction, except for a disposition of property made after a winding-up petition has been presented (assuming a winding-up order is subsequently made). Such dispositions are void and, unless validated by a court order, any receivables purportedly transferred during that period would remain the property of the seller.

Otherwise, the court may set aside a transaction made at an undervalue in the two years ending with the commencement of the administration or liquidation (the **onset of insolvency**) if the company was, at that time, or as a result of the transaction became, unable to pay its debts (either as they fall due or on a balance sheet basis). This inability to pay debts is presumed where the transaction is with a connected person, unless proven otherwise. There is a defence if the court is satisfied that the company entered into the transaction in good faith with reasonable grounds for believing that it would benefit the company. If a transaction at an undervalue is done with the purpose of putting assets beyond the reach of creditors, there is no requirement to show the company was or became insolvent, and no time limit for bringing court proceedings.

A transaction which would put a creditor or guarantor of the seller into a better position than it would otherwise have been in a winding-up can be set aside by the court if such preference is made: (i) in the two years ending with the onset of insolvency (in the case of a preference to a person "connected" with the company); or (ii) in the six months ending with the onset of insolvency (in the case of any other preference). It is necessary to show that a preference was made with a desire to prefer the creditor or guarantor, though this need not be the dominant intention. The desire to prefer is presumed where the preference is with a "connected" person unless proved otherwise. As with a transaction at an undervalue, it is also necessary for a preference to have been made at a time when the company was unable to pay its debts, either as they fall due or on a balance sheet basis. Other transactions which can be challenged by liquidators or administrators are voidable floating charges and transactions to defraud creditors.

The seller and the purchaser will be "connected" persons if either of them has "control" of the other (in that the directors of one company (or of another company which has control of it) are accustomed to act in accordance with the instructions of the other company or that at least one-third of the voting power at any general meeting of one company (or of another company which has control of it) can be exercised by the other company). They will also be connected if they are both controlled by another company or by companies which are connected with each other. The seller and the purchaser will be connected persons if the purchaser is majority owned or controlled by the seller or an affiliate of the seller. The transaction will not constitute a related party transaction if the parent company of the seller guarantees the performance by the seller of its obligations under contracts with the purchaser as the seller (and the parent company of the seller) and the purchaser are not connected persons.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding? If the purchaser is owned by the seller or by an affiliate of the seller, does that affect the consolidation analysis?

The equitable remedy of substantive consolidation, which permits the court to treat the assets and liabilities of one entity as though they were those of another, is not recognised by the English courts. Only in circumstances where the assets and liabilities of two companies were indistinguishably amalgamated together, and where to do so would be in the interests of both companies' creditors, might the court sanction an arrangement reached by the insolvency official and those creditors. There is no presumption that substantive consolidation would apply where the purchaser is owned by the seller or by an affiliate of the seller or is otherwise "connected" with the seller.

It is a fundamental principle of English law that a company has a legal personality distinct from its shareholders (a "corporate veil") emanating from the House of Lords decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22. The separate legal personality of a company will only be ignored in very limited circumstances. Examples include fraud, illegality, where a company is formed to evade contractual obligations or defeat creditors' claims or where an agency or nominee relationship is found to exist.

Securitisation transactions habitually attempt to minimise the risk of a court treating the assets of an SPV as those of an originator or other third-party seller to that SPV, or of a creditor or liquidator of a third party being found to have a claim on the SPV's assets, by ensuring (either structurally or contractually) that some or all of the following apply:

- There are no grounds for setting aside any transaction entered into between the SPV and another company under the Insolvency Act.
- The SPV has not given any surety or security for the obligations of another company.
- There are no grounds for holding that one company is a shadow director of the other and could be held to be liable for wrongful or fraudulent trading if the other company is in liquidation.
- No financial support direction or contribution notice could be issued under UK pensions legislation and the SPV is not jointly and severally liable with any other company under any relevant tax legislation.
- Corporate activities of the SPV are kept separate from those of other transaction parties, and constitutional and other decision-making formalities of the SPV (such as board minutes) are accurately kept and filed separately from those of any other party.
- There is limited or no pooling or intermingling of assets (with the SPV having segregated and/or ring-fenced bank accounts).
- The corporate veil is not used for improper or dishonest purposes (such as to conceal illegal activities, deception or evasion of certain SPV obligations).
- The SPV has, and holds itself out as having, a distinct, independent existence and can acquire and hold assets and carry on business in a manner separate to any other party (achieved, among other things, by the SPV conducting its business in its own name, paying debts out of its own funds and maintaining arm's length relationships with other parties).
- The SPV has independent directors or other management and produces separate (non-consolidated) accounts.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in your jurisdiction, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) on sales of receivables that only come into existence after the commencement of such proceedings?

If the receivables purchase agreement provides that no further action is required by the seller for the receivables (including receivables arising in the future) to be transferred, the agreement will generally continue to be effective to transfer the receivables even after the initiation of insolvency proceedings. However, either party could exercise a contractual right to terminate.

Further, in certain circumstances, a liquidator might be able to, under the Insolvency Act, disclaim (and thereby terminate) an ongoing receivables purchase agreement if it were an "unprofitable contract". If the agreement requires further action from the seller, the insolvency official may choose not to take that action and, in that situation, the purchaser's remedy is likely to be limited to an unsecured claim in any insolvency proceedings.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

Historically, it has generally been understood that provisions providing creditors limited recourse to the assets of a debtor would be effective in making the debtor insolvency-remote, provided that, on the face of the contractual documents, this was the clearly expressed intention of the parties.

Although, on an unopposed application by a debtor to initiate insolvency proceedings (*ARM Asset Backed Securities S.A.* [2013] EWHC 3351 (Ch) (9 October 2013) (**ARM**)), a debtor was held to be insolvent in spite of the fact that its debts were limited in recourse (although the court did not question the provision's effectiveness as a matter of contract), this judgment is capable of being limited to its context on a number of factual and legal grounds.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics? Is there a regulatory authority responsible for regulating securitisation transactions in your jurisdiction?

Other than certain tax laws (see question 9.2 below in relation to special purpose entities which are "securitisation companies" and their treatment for tax purposes), there is (currently) no single regulatory regime covering UK securitisations specifically. Instead, the market is regulated by a number of EU directives and regulations, domestic legislation and the rules of the UK financial regulators. As well as legislative rule-making authorities, there are also market-sponsored bodies that issue guidelines, codes of conduct and other rules that are relevant to securitisation market participants.

FSMA sets out the basis of the UK financial services regulatory framework, including the general prohibition of carrying out a regulated activity unless authorised or exempt. FSMA therefore addresses which parties to a securitisation transaction may need to be authorised under FSMA in order to carry out a regulated activity in the UK or communicate a financial promotion capable of having an effect in the UK. The UK FCA and the UK Prudential Regulation Authority (**PRA**) are the two UK regulators for these purposes. Depending on the nature of the activities to be carried out by a firm, they may need to be regulated by both the FCA and the PRA, or just the FCA.

In addition, the FCA has been designated as the competent authority for the purposes of making the Listing Rules, Prospectus Rules and Disclosure Guidance and Transparency Rules, which may apply in respect of UK securitisations. The FCA (as the UK Listing Authority) is responsible for vetting and approving prospectuses for the purposes of the Prospectus Directive as implemented in the UK.

7.2 Securitisation Entities. Does your jurisdiction have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

English law does not specifically provide for the establishment of special purpose entities for securitisation transactions (although see question 9.2 below in relation to special purpose entities which are "securitisation companies" and their treatment for tax purposes).

7.3 Location and form of Securitisation Entities. Is it typical to establish the special purpose entity in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the special purpose entity in your jurisdiction? If offshore, where are special purpose entities typically located for securitisations in your jurisdiction? What are the forms that the special purpose entity would normally take in your jurisdiction and how would such entity usually be owned?

For securitisations of assets or businesses located in England and Wales (such as securitisations of commercial or residential mortgages), the securitisation entity will often be incorporated in England due to market familiarity with the established and respected legal framework applicable to English corporate entities, as well as for various tax reasons relating to underlying assets physically located in the UK (such as UK real estate).

In these circumstances it is usual for the securitisation entity to be formed either as a public or private company limited by shares, or a limited liability partnership (LLP). Both limited companies and LLPs are treated as body corporates with a separate legal personality where the liability of a shareholder/member is limited. Common with other established jurisdictions, the securitisation entity is normally (but not always) formed as an orphan "special purpose vehicle" or "SPV", such that is does not form part of the same corporate group as any other transaction party. This is normally achieved through the shares or membership interests of the SPV being held by an entity on trust for discretionary charitable purposes. It should be noted that such interests are typically nominal.

In response to specific commercial, regulatory, tax, administrative, structural and/or legal reasons, securitisation entities are often incorporated outside of England and Wales. Common jurisdictions include Ireland, Luxembourg, The Netherlands, Jersey and the Cayman Islands, with the choice of jurisdiction influenced by factors including:

- The timing/cost of establishing and maintaining the securitisation entity.
- Minimum capitalisation requirements for the securitisation entity.
- Initial/ongoing disclosure or regulatory requirements (such as requirements for audited accounts).
- Taxation of the securitisation entity and its assets in that jurisdiction, including corporate tax on any minimum required retained profits, deductibility of interest payments made by the securitisation entity, and issues relating to withholding tax (including availability of tax treaty relief in relation to interest and other payments on underlying assets as well as payments of interest on the securities issued by the securitisation entity), VAT or other taxes.
- Licensing and authorisation requirements.
- Insolvency law considerations.

7.4 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

Provisions limiting the recourse of a creditor to the net proceeds of disposal or enforcement of specified assets owned by the obligor or its available funds are likely to be valid under English law, and an English court is likely to hold that, to the extent of any shortfall, the debt of the obligor is extinguished. Whilst the decision of the High Court in ARM, referenced in question 6.6 above, brought into question whether a limited recourse provision will be effective to prevent a debtor from being held unable to pay its debts, with the judge in ARM stating that a useful test as to whether a company is insolvent is to consider the amounts for which bondholders would prove in a liquidation (being the face value of, and interest payable on, their bonds), the judge also confirmed the effectiveness of a limited recourse provision as a matter of contract, stating that "the rights of the creditors to recover payment will be, as a matter of legal right as well as a practical reality, restricted to the available assets, and … the obligations [of the debtor] will be extinguished after the distribution of available funds".

Where an agreement is governed by the law of another country and the English courts have cause to consider its efficacy under that foreign law, the analysis as to whether such a clause would be upheld will be the same as that discussed in questions 3.4 and 3.5 above, namely that the English courts would apply the relevant foreign governing law to determine whether the limited recourse provision was effective.

7.5 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Although there is little authority in English law, it is likely that an English court would give effect to contractual non-petition clauses prohibiting the parties to the relevant contract from taking legal action, or commencing an insolvency proceeding, against the purchaser or another person. The most effective method for enforcing such a clause would be injunctive relief which, as an equitable remedy, is at the discretion of the court. A court will exercise its discretion and would have to consider whether such a clause was contrary to public policy as an attempt to oust the jurisdiction of the court and/or English insolvency laws. It is possible that an English court would deal with a winding-up petition even if it were presented in breach of a non-petition clause. A party may have statutory or constitutional rights to take legal action against the purchaser or such other person which may not be contractually disapplied.

Where an agreement is governed by the law of another country and the English courts have cause to consider its efficacy under that foreign law, the analysis as to whether such a clause would be upheld will be the same as that discussed in questions 3.4 and 3.5 above, namely that the English courts would apply the relevant foreign governing law to determine whether the non-petition clause was effective.

7.6 Priority of Payments "Waterfall". Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

In respect of English law-governed priorities of payments in secured transactions, as a general matter, the courts of England and Wales will seek to give effect to contractual provisions that sophisticated commercial parties have agreed, except where to do so is contrary to applicable law or public policy.

The English Supreme Court decision in *Belmont Park Investments Pty Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc. [2011] UKSC 38* (**Belmont**) considered whether a contractual provision subordinating a creditor's rights to payment on the occurrence of an insolvency event in relation to that creditor (termed a "flip clause") was contrary to applicable English law, specifically the "anti-deprivation" rule (a sub-set of a general principle that parties cannot contract out of insolvency legislation, and specifically that a company cannot be improperly deprived of an asset by virtue of a liquidation or other insolvency process affecting that company to the detriment of the company's creditors). The Belmont judgment noted that the "anti-deprivation" rule is a principle of public policy although there are no clear rules as to the circumstances in which the principle will apply. However, certain guidelines were set out in Belmont, including that: (i) the "anti-deprivation" rule applied where there was an intention to obtain an advantage over creditors in the winding-up or other insolvency process but that such question should be tested in a commercially sensible manner, taking into account the policy of party autonomy and the upholding of proper commercial bargains; (ii) the identity of the persons that provided the property to which the insolvent company was deprived by such provision was relevant in considering the point raised at (i) (in Belmont the party seeking to rely on the provision (certain noteholders) had provided the collateral of which the creditor in question was deprived); and (iii) the "anti-deprivation" rule only applies where the trigger for the deprivation is a winding-up or other insolvency process affecting the deprived party. In Belmont, the "flip clause" was upheld notwithstanding the fact that the subordination provision was triggered by the insolvency of the creditor and particular emphasis, was placed on items (i) and (ii) above. In finding that the flip clause in question was part of a good faith commercial transaction that did not have as its purpose the evasion of the anti-deprivation principle, the court relied, among other things, on the facts that there was a wide range of possible events other than insolvency that would trigger the flip clause and that there was a valid commercial reason for the flip clause (namely to deal with the risk of the swap provider defaulting).

By contrast, the US Bankruptcy Court for the Southern District of New York held in parallel proceedings (*Lehman Brothers Special Financing Inc. v BNY Corporate Trustee Services Ltd (In re Lehman Brothers Holding Inc.) 422 B.R. 407, 420 (Bankr S.D.N.Y. 2010) (BNY)*) that the English law governed "flip clause" in question was unenforceable as a violation of the US Bankruptcy Code.

These competing decisions caused uncertainty as to whether an adverse foreign judgment in respect of the enforceability of a flip clause in a priority of payments would be recognised and given effect by the English courts in a cross-border insolvency case. However, in June 2016, the US Bankruptcy Court substantially distinguished its decision in the BNY case, finding that, subject to the precise drafting of the terms establishing the payment priorities (and the related "flip clause"), such terms would not violate the US Bankruptcy Code (*Lehman Brothers Special Financing Inc. v Bank of America, N.A. (In re Lehman Brothers Holding Inc.), Adv. No.10—3547 (SCC), --- B.R.---- (Bankr S.D.N.Y. June 28, 2016)*). This decision was affirmed by the US District Court on appeal, albeit on different grounds (No. 17 Civ 1224 (LGS), 2018 WL 1322225 (S.D.N.Y. March 14, 2018)) and substantially harmonised US bankruptcy law with English insolvency law in relation to the treatment of certain types of "flip clauses", although it is worth noting that the decision remains subject to further possible appeal and there are several other actions which have commenced in the US courts relating to "flip clauses".

Where the priority of payments provision is governed by a law other than the laws of England and Wales and the English courts have cause to consider its efficacy under that foreign law, the analysis as to whether such a clause would be upheld will be the same as that discussed in questions 3.4 and 3.5 above, namely that the English courts would apply the relevant foreign governing law to determine whether the priority of payments provision was effective.

7.7 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

The articles of association of a company or a contract entered into by a company may, in principle, restrict the authority of its directors and it is likely that an English court would give effect to such a provision or article. However, any restriction or limitation on the ability of the directors to bring insolvency proceedings may be invalid as a matter of public policy or incompatible with certain statutory duties of the directors.

7.8 Location of Purchaser. Is it typical to establish the purchaser in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the purchaser in your jurisdiction? If offshore, where are purchasers typically located for securitisations in your jurisdiction?

See Question 7.3 above.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in your jurisdiction? Does the answer to the preceding question change if the purchaser does business with more than one seller in your jurisdiction?

A purchaser of regulated consumer loans and regulated residential and CBTL mortgage contracts may require authorisation under the FSMA and/or the MCD Order by the FCA, insofar as it proposes to advance new loans, make further advances on existing facilities or vary existing loans and/or mortgage contracts in such a way so as to give rise to a new loan and/or regulated mortgage contract. As regards to activities relating to the collection and enforcement of receivables and other administrative functions (such as serving

notices on obligors), there are certain exemptions available where a purchaser enters into a servicing agreement with an appropriately authorised third party in relation to the receivables and certain other conditions are met. The purchaser may also be obliged to notify its data processing activities to the UK's Information Commissioner's Office under the Data Protection Act 1998 (the **DPA**). It makes no difference whether or not the purchaser does business with other sellers in England and Wales.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third-party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

The requirements will vary with respect to the seller depending on the regulated facility in question and whether the receivables have been sold by way of an equitable assignment or legal transfer. They can be summarised as follows:

(a) in the case of regulated consumer credit loans and consumer hire facilities, where the receivables are assigned by way of an equitable transfer, provided that the seller retains its authorisation to enter into regulated consumer credit and/or hire agreements as a lender/owner, the seller should not be required to be specifically authorised to undertake regulated enforcement and collection activities with respect to the receivables, given that the seller still retains legal title to the loans and may continue to administer those loans in its capacity as a lender;

(b) in the case of regulated consumer credit loans and consumer hire facilities, where the receivables are sold by way of a legal transfer but the seller retains the servicing function, the seller will require authorisation under the FSMA for the regulated activities of debt administration and debt collection; and

(c) in the case of regulated mortgage contracts, the seller will require authorisation under the FSMA (with respect to residential mortgage contracts) and/or the MCD Order (with respect to CBTL mortgage contracts) for the regulated activity of administering regulated mortgage contracts, and possibly advising on these in order to be able to advise an obligor on varying the terms of its mortgage contract. These authorisation requirements would apply irrespective of whether the loan has been transferred by way of a legal or equitable assignment.

Any standby or replacement servicer will require the authorisations detailed in (b) and (c) above before taking any action to enforce or collect monies owed under regulated credit agreements or regulated mortgage contracts.

Both the seller and third party servicer will also be subject to registration requirements under the DPA.

8.3 Data Protection. Does your jurisdiction have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

The handling and processing of information on living, identifiable individuals (**personal data**) is regulated by the DPA. The DPA only applies to personal data, so it affects data on individual, living and identifiable obligors and not enterprises. The DPA specifies that a data controller is any legal or natural person who (either alone or jointly) determines the purposes for which, and the manner in which, any personal data is to be processed, and so may well include a purchaser of receivables serviced by the seller. A data controller in the UK must comply with the requirements under the DPA. From 25 May 2018, the EU General Data Protection Regulation (**GDPR**) will become effective. The UK is in the process of finalising the Data Protection Bill which will implement the GDPR in the UK and will replace the DPA. The GDPR introduces a number of new and onerous obligations and imposes significant potential fines of up to 4% of annual worldwide turnover for non-compliance.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your jurisdiction? Briefly, what is required?

In addition to the authorisation requirements discussed above, there is a large number of statutes, regulations, rules and guidance governing consumer interests within the context of regulated consumer credit and consumer hire agreements and regulated mortgage contracts. These include amongst others:

- The CCA (and delegated legislation thereunder), which continues to apply to consumer credit and consumer hire agreements and contains several important requirements for lenders/owners under regulated consumer credit/hire agreements. In addition to the requirements of the CCA, firms authorised under the FSMA to carry on consumer credit and consumer hire-related regulated activities must comply with the FCA's Handbook of rules and guidance, including CONC. These rules are aimed at ensuring the fair treatment of consumers and hirers, and contain prescriptive rules and guidance relating to all aspects of the product lifecycle, including in relation to arrears management.
- First and second charge residential mortgage lenders authorised under the FSMA are also required to comply with the FCA's Handbook, including MCOB. The rules in MCOB cover, amongst other things, certain pre-origination matters such as financial promotion and pre-application illustrations, pre-contract, start-of-contract and post-contract disclosure, contract changes, charges and arrears and repossessions.
- The MCD Order, which sets out conduct of business requirements for firms registered to undertake regulated activities in respect of CBTL mortgage contracts. Like MCOB, these include amongst other things, requirements pertaining to the provision of information to consumers, calculation of the annual percentage rate of charge, early repayments, arrears and repossessions.
- The Unfair Contracts Terms Act 1977, which restricts the limitation of liability by a party. Liability for death or personal injury caused by negligence cannot be limited and any clauses that limit liability for other damage caused by negligence must satisfy a reasonableness test.
- The Consumer Rights Act 2015 (the **CRA**), which harmonises and simplifies domestic legislation in relation to consumer protection legislation in the UK. The CRA came into force on 1 October 2015 and contains important provisions relating to unfair contract terms in agreements and notices. A term is "unfair" if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Such an unfair term will not be binding on the consumer. A consumer for these purposes is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.
- The Consumer Protection from Unfair Trading Regulations 2008 (**CPUTRs**), which affect all contracts entered into with persons who are natural persons and acting for purposes outside their respective business. The CPUTRs have a general prohibition on unfair commercial practices, but also contain provisions aimed at aggressive and misleading

practices (including, but not limited to: (i) pressure selling; (ii) misleading marketing (whether by action or omission); and (iii) falsely claiming to be a signatory to a code of conduct) and a list of practices which will in all cases be considered unfair.

8.5 Currency Restrictions. Does your jurisdiction have laws restricting the exchange of your jurisdiction's currency for other currencies or the making of payments in your jurisdiction's currency to persons outside the country?

No, subject to any restrictions and financial sanctions imposed by the United Nations and the European Union. It is a criminal offence to breach a financial sanction without an appropriate licence or authorisation from HM Treasury.

8.6 Risk Retention. Does your jurisdiction have laws or regulations relating to "risk retention"? How are securitisation transactions in your jurisdiction usually structured to satisfy those risk retention requirements?

Articles 404 – 410 of the EU Capital Requirements Regulation (Regulation (EU) No 575/2013 (as supplemented by Commission Delegated Regulation (EU) No 625/2014 and Commission Implementing Regulation (EU) No 602/2014) (**CRR**) set out the relevant risk retention requirements and apply, in general, to newly issued asset-backed securities after 1 January 2011, and to asset-backed securities issued on or before that date from 31 December 2014 to the extent that new underlying exposures are added or substituted after 31 December 2014.

The CRR restricts a credit institution and investment firm regulated in a Member State of the European Economic Area (**EEA**) and consolidated group affiliates thereof (each, a **CRR Investor**) from investing in a securitisation (as defined by the CRR) unless the originator, sponsor or original lender in respect of that securitisation has explicitly disclosed to the CRR Investor that it will retain, on an ongoing basis, a material net economic interest of not less than 5 per cent in that securitisation in the manner contemplated by Article 405 of the CRR. The CRR also requires that a CRR Investor be able to demonstrate that it has undertaken certain due diligence in respect of, amongst other things, the securities it has acquired and the underlying exposures, and that procedures have been established for monitoring the performance of the underlying exposures on an on-going basis.

Article 17 of the EU Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (as supplemented by Section 5 of Chapter III of Commission Delegated Regulation (EU) No 231/2013) (the **AIFMD**) and Article 135(2) of the EU Solvency II Directive 2009/138/EC (as supplemented by Articles 254-257 of Commission Delegated Regulation (EU) No 2015/35) (**Solvency II**) contain requirements similar to those set out in Articles 404 – 410 of the CRR and apply, respectively, to EEA regulated alternative investment fund managers and EEA regulated insurance/reinsurance undertakings. While such requirements are similar to those in the CRR, they are not identical and, in particular, additional due diligence obligations apply to relevant alternative investment fund managers and insurance and reinsurance companies. The risk retention requirements prescribed by the CRR, together with those under the AIFMD and Solvency II are collectively referred to here as the **EU Retention Regulations**.

Under the EU Retention Regulations, the risk retention must be by way of one of the five specified methods which are:

(a) retention of no less than 5% of the nominal value of each of the tranches sold or transferred to the investors;

(b) in the case of securitisations of revolving exposures, retention of the originator's interest of no less than 5% of the nominal value of the securitised exposures;

(c) retention of randomly selected exposures, equivalent to no less than 5% of the nominal value of the securitised exposures, where such exposures would otherwise have been securitised in the securitisation, provided that the number of potentially securitised exposures is no less than 100 at origination;

(d) retention of the first loss tranche and, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors, so that the retention equals in total no less than 5% of the nominal value of the securitised exposures; and

(e) retention of a first loss exposure not less than 5% of every securitised exposure in the securitisation.

8.7 Regulatory Developments. Have there been any regulatory developments in your jurisdiction which are likely to have a material impact on securitisation transactions in your jurisdiction?

A new EU risk retention regime will apply, in place of the existing EU Retention Regulations, to securitisations in respect of which the relevant securities are issued on or after January 1, 2019. There will be material differences between that new regime and the existing requirements. The new regime will be implemented primarily by Regulation (EU) 2017/2402 (the **Securitisation Regulation**) which will (amongst other things):

- impose restrictions on investment in securitisations and requirements as to due diligence;
- apply to EEA investors currently subject to the existing EU Retention Regulations and also to: (i) certain investment companies authorised in accordance with Directive 2009/65/EC, and managing companies as defined in that Directive (together, **UCITS**); and (ii) institutions for occupational retirement provision falling within the scope of Directive (EU) 2016/2341 (subject to certain exceptions), and certain investment managers and authorised entities appointed by such institutions (together, **IORPS**).

The Securitisation Regulation also sets out a framework and criteria for identifying "simple transparent and standardised securitisations" (**STS securitisations**). Exposures to STS securitisations will generally be given preferential regulatory capital treatment when compared with exposures to non-STS securitisations.

Certain aspects of the Securitisation Regulation will be supplemented by regulatory technical standards that are currently being consulted on by the European Banking Authority. At the time of writing it is not certain as to what form the final regulatory technical standards may take or when they will be adopted.

Further, while the Securitisation Regulation (being an EU Regulation) will apply directly in all EU member states without the need for national implementation, consideration will need to be given to the potential implications of Brexit. There is currently a great deal of uncertainty surrounding the likely final form of any Brexit and various aspects of the UK financial services regulatory regime (not just relating to securitisation) may, potentially, be significantly affected.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in your jurisdiction? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest? If withholding taxes might apply, what are the typical methods for eliminating or reducing withholding taxes?

The withholding tax treatment of UK receivables depends not only on their nature, but on the nature of the recipient to whom they are paid. Very broadly, payments of interest with a UK source may be paid without withholding to a purchaser which is either resident in the UK or carries on business in the UK through a permanent establishment. Payments of interest to a non-UK resident purchaser may often be subject to withholding, subject to any available treaty relief pursuant to a double taxation convention. Typically, where such treaty relief is available, an application must first be made by the non-UK resident purchaser to H.M. Revenue & Customs (**HMRC**) who will issue a direction to the relevant obligor to make payments free of withholding tax. The administrative process for claiming treaty relief is different, however, if the non-UK resident purchaser holds a passport under HMRC's double taxation treaty passport scheme. Generally, however, (except in the case of large serviced static pools of assets where there have been some recent administrative advances for some transactions) the use of relief under a double taxation convention where there are multiple assets may be administratively challenging. Accordingly, loan receivables are typically securitised through the use of a UK resident purchasing company.

Generally, trade receivables payments and lease rental payments are not subject to UK withholding unless they provide for the payment of interest, in which case the interest element will be subject to withholding in the same way as interest on loan relationships. The recharacterisation of deferred purchase price as interest depends upon the facts of the case in question, but is not a typical outcome under the UK rules.

9.2 Seller Tax Accounting. Does your jurisdiction require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

The tax treatment of a company within the charge to UK corporation tax would be expected, at least as a starting point, to follow its accounting treatment. For a company purchasing receivables, in many cases the rules imposed by the appropriate accounting regime would be expected to result in the creation of accounting profits, and accordingly taxable profits, which do not reflect the actual cash position of the company in question.

For accounting periods commencing on, or after, 1 January 2007, the Taxation of Securitisation Companies Regulations have been in force. These regulations apply to companies which are "securitisation companies" (as defined in the regulations) and permit a securitisation company to be subject to tax treatment reflecting the cash position of its securitisation arrangements, such that it is taxed only on the cash profit retained within the company after the payment of its transaction disbursements according to the transaction waterfall. As such, balanced tax treatment can be achieved and the regime has been seen as providing effective relief from the complex or anomalous tax rules which could otherwise apply to UK incorporated special purpose vehicles.

9.3 Stamp Duty, etc. Does your jurisdiction impose stamp duty or other transfer or documentary taxes on sales of receivables?

Stamp duty exists in the UK and is chargeable on documents in certain circumstances. Transactions may also be subject to UK Stamp Duty Reserve Tax (**SDRT**) levied on transfers of certain types of securities whether effected by document or otherwise. Generally, transfers of loans (which are not convertible and have no "equity" type characteristics such as profit-related interest), trade and lease receivables should not be subject to UK stamp duty or SDRT.

9.4 Value Added Taxes. Does your jurisdiction impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

UK value added tax (**VAT**) is chargeable on supplies of goods and services which take place in the UK and which are made by "taxable persons" in the course or furtherance of a business. The standard rate of VAT is currently 20%, although certain supplies (including the supply of certain financial services) are exempt from VAT.

In *MBNA Europe Bank Ltd v HMRC* [2006] it was decided by the UK High Court that the transfer of credit card receivables by an originator in a securitisation was not a supply for VAT purposes. However, that decision may not apply to all such transfers. To the extent that the decision does not apply, a transfer of financial receivables would generally be treated as an exempt supply for VAT purposes.

Generally, fees payable for collection agent services are not exempt from VAT and will usually give rise to VAT at the standard rate, to the extent they are treated as taking place in the UK.

9.5 Purchaser Liability. If the seller is required to pay value-added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

As described above, the transfer of financial receivables would usually either constitute an exempt supply for VAT purposes, or fall outside the scope of VAT altogether. However, a seller might incur VAT on a supply of assets which does not fall within any of the exemptions: for example, property or trading assets on a true sale securitisation. If so, the seller would generally be liable to account for such VAT to HMRC.

Broadly, HMRC would not be able to require the purchaser to account for VAT unless the purchaser was a member of the same group as the seller for VAT purposes. Although there are limited exceptions to this general position, it is unlikely that such exceptions would apply in a securitisation context.

Where charged, stamp duty and SDRT are generally payable by the purchaser.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in your jurisdiction?

Generally, the purchase of receivables will not give rise to tax liabilities for a purchaser conducting no other business in the UK, and the appointment of a servicer by the purchaser which carries out normal administrative activities on its behalf should not result in tax liabilities for the purchaser. The question of enforcement would need to be considered in the light of the particular circumstances.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.3 above), is that debt relief liable to tax in your jurisdiction?

A purchaser which is a "securitisation company" falling within the Taxation of Securitisation Company Regulations will, generally, only be subject to tax on its retained cash profit, as provided for in the transaction waterfall (see further question 9.2 above). The tax treatment of a purchaser which does not fall within the Taxation of Securitisation Company Regulations will (as referred to in question 9.2 above) generally follow its accounting treatment for its loan relationships. In certain circumstances, such a company may be taxed on an amount of a debt from which it is released. This is subject to exemptions for specified insolvency and restructuring situations.

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Rupert Wall advises arrangers, originators, asset and investment managers and investors on all aspects of securitisation, structured finance and derivatives. He also advises counterparties in relation to general capital markets issuances, leveraged finance transactions and portfolio sales.

Rupert has been recognised in legal directories as "*one of the brightest young partners in the market*" and as "*responsive, commercially minded*" with "*considerable experience and talent*". In *The Legal 500 UK* 2017 he is recognised as a Leading Individual for Securitisation and is recommended for Derivatives & Structured Products, with clients describing him as "*a standout lawyer for ABS and CLO deals*", and whom one client describes as "*a subject matter expert with the ability to get straight to the point; he has a brain the size of a planet and works very well in high pressure situations*". In addition, Rupert is ranked in *Chambers UK* 2018 for Capital Markets: Structured Finance & Derivatives and recommended for Capital Markets: Securitisation, with clients saying he "*stands out as being a valued adviser who, as well as being hugely bright and intellectual, has a unique ability to listen carefully to the often complex commercial dynamics that we require of a transaction and meld those seamlessly into its structure*". A source from the 2017 edition of *IFLR 1000* told the publication Rupert has "*excellent product knowledge*" and is a "*very good communicator*". A year prior, sources told the publication "*he demonstrated the right balance between legal understanding and commercial awareness. We would highly recommend him*".

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Roisin Nagle has a main area of focus advising on derivatives and structured finance transactions. In particular, Roisin has advised asset managers, investment firms and other financial institutions on the regulation of derivatives under the European Market Infrastructure Regulation (EMIR) and MiFID II, the regulation of securities financing transactions under the Securities Financing Transactions Regulation (SFTR), and general structured finance transactions.

SIDLEY

SIDLEY has been at the forefront of the European securitisation market since the early 1990's and since that time has been involved in a number of ground-breaking securitisation products and structures in numerous European jurisdictions, including establishing domestic and pan-European CMBS platforms, asset-backed commercial paper and securities conduits, RMBS related products, whole business securitisations and covered bonds as well as a deep experience in advising arrangers, managers and investors on CLO and CDO transactions. Sidley's securitisation lawyers in Europe and the US have a well-established practice in all areas of securitisation, structured finance and derivatives, with market-leading experience of the full gamut of asset classes and structures including securitisations and secured financings involving corporate (mid-market and syndicated) loans, rental fleets, consumer assets such as personal loans, auto loans and leases and credit cards, trade and other more specialised receivables, and more recently in the emerging market for financings involving online marketplace and peer-to-peer lending and blockchain and distributed ledger technology. Sidley has also been at the cutting edge of structuring financings of innovative and esoteric asset classes such as solar energy and renewables, insurance products and IP securitisations amongst many others.