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Contributing Editor:
Rupert Wall
Sidley Austin LLP

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England & Wales

Sidley Austin LLP

Rupert Wall

Simon Nikolov

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?

Receivables contracts are generally governed by ordinary contract law principles. In English law, a contract is formed when there is offer, acceptance, consideration, intention to create legal relations and a certainty of terms, which are all questions of evidence rather than form. With the exception of certain debts arising under regulated consumer credit and hire arrangements and contracts for the sale or disposition of interests in land, 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 alone is not necessarily sufficient to count as a receivables contract as it may merely represent a debtor's payment obligation and whilst it may satisfy the offer, consideration and certainty of terms requirements to imply a contract, additional evidence may be needed to prove acceptance on the part of the debtor and an intention to create legal relations between the parties.

A binding contract could arise from the behaviour of the parties and may be implied where the agreement of the parties is manifested by conduct, provided each of the above contract elements are sufficiently certain to be 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?

Background

Consumer credit businesses are numerous, ranging from banks, hire purchase companies, credit card issuers, payday loan companies, mail order companies, companies offering store cards, pawnbrokers and debt management firms, to debt collectors. In the UK, consumer credit is broadly regulated under three regimes:

- the residential mortgage regime, which governs regulated mortgage contracts and certain other home finance agreements;
- the consumer credit regime, which covers regulated credit agreements and regulated consumer hire agreements (all being unsecured facilities); and
- the consumer buy-to-let (**CBTL**) regime, which governs secured and unsecured finance arrangements with consumers relating to property that will, in part or whole, be occupied as a dwelling on the basis of a rental agreement.

Arrangements within the residential mortgage regime and the consumer credit regime described above are regulated by the Financial Conduct Authority (**FCA**) under the Financial Services and Markets Act 2000 (**FSMA**) and its secondary legislation, in particular the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (**RAO**), as supplemented by the principles, rules and guidance in the FCA Handbook (**FCA Handbook**). Consumer credit/hire agreements are also subject to the Consumer Credit Act 1974 (**CCA**) and related secondary legislation. CBTL agreements are regulated by the FCA under the Mortgage Credit Directive Order 2015 (**MCD Order**).

The government was proposing to extend the scope of the consumer credit regime, to include certain "buy now pay later" agreements (and certain other short-term interest-free credit arrangements) that currently fall within an exemption under the RAO. However, in July 2023, it was reported that the government was considering pausing its plans to regulate "buy now pay later" products due to concerns that this will cause a number of providers to exit the UK market. At the time of writing, the government is yet to comment.

Further, due to widespread support, the government is moving forward with a more substantial overhaul of the consumer credit regime, including by repealing many of the provisions of the CCA and replacing them with rules and guidance in the FCA Handbook. Due to its scale and complexity, the CCA reform will take a number of years to deliver and the timeline for now is uncertain. At the time of writing, the government is undertaking policy development and aims to produce a second stage consultation in 2024.

Finally, the Financial Services and Markets Act 2023 (**FSMA 2023**) contains a mechanism for revocation of the MCD Order. However, as at time of writing, the government has not indicated when it plans to revoke the MCD Order.

Limits on rates of interest

Other than in certain specific contexts (as noted below), there are no laws in the UK expressly capping the rates of interest that can be charged under regulated mortgage contracts/home finance agreements, regulated credit/consumer hire agreements or CBTL agreements.

However, in the case of high-cost, short-term credit (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), the FCA imposes a "cap" on interest and other charges levied by lenders. This "cap" on the cost of credit for such loans has three components:

- "total cost cap": the total interest, fees and charges payable by the borrower must not exceed 100% of the amount borrowed;
- "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
- "default fee cap": default fees must not exceed £15.

In addition, the FCA imposes restrictions in respect of certain "rent to own" arrangements relating to the financing of household goods, including a cap on the total interest, fees and charges payable, which must not exceed the total of the cash price of the goods and the cost of their delivery and installation.

The FCA was scheduled to have reviewed the levels of the applicable "caps" in 2020, but did not do so (and, at the time of writing, has not indicated when any such review may take place).

More generally, there are statutory provisions that, although they do not expressly cap interest rates, may be relevant in the context of interest charges. For example (as noted in our response to question 8.4 below):

- the CCA gives an English court power, in certain circumstances, to make an order in connection with a credit agreement in respect of which the relationship between the creditor and the debtor is unfair to the debtor (and such order could, for example, vary the terms of the relevant contract); and
- the Consumer Rights Act 2015 (**CRA**) provides that, subject to certain limited exceptions, any unfair term in a contract between a trader and a consumer is not binding on the consumer.

In principle, a debtor may seek to rely on such measures as the basis for challenging a contractual provision for the payment of default interest.

In addition, all FCA-regulated entities are subject to the principle (**Principle 6**) that a firm must pay due regard to the interests of its customers and treat them fairly. In that context, under the FCA's conduct of business sourcebooks with respect to regulated mortgage contracts/home finance agreements (**MCOB**) and regulated credit/consumer hire 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. There is a similar restriction under the MCD Order with regard to CBTL agreements.

Interest on late payments

Under the Late Payment of Commercial Debts (Interest) Act 1998 (**Late Payments Act**), a seller of goods or a supplier of services has the right to interest on the price payable in respect of the relevant goods or services, with effect from the day after the agreed payment date (if any) or from such other date as is determined in accordance with the Late Payments Act. The statutory rate of interest is 8% above the Bank of England's base rate. The seller/supplier is also entitled to a fixed default sum and the reasonable costs of recovering the debt. However, such rights apply only in respect of contracts under which both parties are acting in the course of a business, and not to consumer credit agreements or to contracts intended to operate by way of mortgage or other security (and there are certain other conditions and limitations to the rights conferred by the Late Payments Act that are beyond the scope of this chapter).

There is no legislation specifically conferring the right to charge interest on late payments under other types of contract. Nevertheless, on the basis of general principles of contract law, parties are free to agree terms for charging interest on late payments, subject to the principles discussed above.

Cancellation/withdrawal rights

In certain circumstances, the debtor/hirer under a regulated credit/consumer hire agreement may have a right of withdrawal/cancellation. The related rules are complex and vary between different categories of agreement, but in summary (and subject to certain conditions and exclusions):

- a borrower may withdraw from a regulated credit agreement within 14 days of the "effective date", subject to any outstanding interest and principal being repaid within 30 days of withdrawal (with the effective date most commonly being the date of execution of the agreement);
- where such right of withdrawal does not apply, borrowers/hirers under regulated credit/consumer hire agreements that are deemed "cancellable agreements" under section 67 of the CCA have a minimum five-day cooling-off period during which the agreement is cancellable by the borrower. 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; and
- to the extent that hire agreements are entered into as distance contracts or off-premises contracts, they have a cancellation period typically ending 14 days after the receipt of goods, as set out in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

Mortgage lenders under regulated mortgage contracts/home finance agreements are required (except in certain prescribed cases) 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.

Other relevant rights and obligations

As noted above, and in further detail in our response to question 8.4 below, certain terms in regulated mortgage contracts/home finance agreements, regulated credit/consumer hire agreements and certain other contracts that are deemed unfair, or that are entered into as a result of unfair trading practices, will be deemed unenforceable against the consumer. It should be noted that such regulated agreements may also be unenforceable in other circumstances, including if they are made:

- by a lender who is not authorised by the FCA;
- by a lender authorised by the FCA, but without permission to carry on certain credit-related activities (including, for example, servicing – see our response to question 8.2 below);
- by a lender authorised by the FCA, but where the relevant borrower 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
- in the case of an agreement subject to the CCA, 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.

More generally, Principle 6 – that FCA-regulated firms must pay due regard to the interests of customers and treat them fairly – is supplemented by a related rule in CONC requiring firms to treat customers in default or in arrears difficulties with forbearance and due consideration. The FCA's guidance in respect of that rule requires (amongst other things) that firms allow such customers reasonable time and opportunity to repay their debts and envisages that appropriate forbearance may include, for example, allowing payments to be deferred and waiving interest and charges.

Consumer Duty

Beginning from 31 July 2023, a new consumer duty (**Consumer Duty**) took effect under the FCA Handbook for open products or services (which are new or existing products or services that

are open to sale or renewal). For closed products or services (that are no longer marketed or distributed to retail customers nor open to renewal), the Consumer Duty will begin to apply from 31 July 2024.

The Consumer Duty is based upon a new principle (**Principle 12**) that all FCA-regulated firms must act to deliver good outcomes for retail clients. The FCA intends that Principle 12 sets a higher standard than the existing Principle 6 (which, as noted above, requires firms to pay due regard to the interests of customers and treat them fairly); and, accordingly, where Principle 12 is applicable, it will supersede Principle 6.

By reference to Principle 12, firms will be required to act in good faith, to avoid causing foreseeable harm and to enable and support retail customers to pursue their financial objectives. In complying with the Consumer Duty, firms will be expected to achieve certain prescribed outcomes, including as to the quality, price and value of their products and services and the provision of information and support to customers. There is extensive FCA guidance as to its expectations of firms in this regard.

The Consumer Duty will not impose any specific new restrictions or obligations with regard to the charging of interest, cancellation or withdrawal rights or the other matters discussed above. However, firms will need to be able to demonstrate that, for example, the interest and other charges payable by their customers, and the forbearance shown to customers in difficulty, align with the Consumer Duty, including the prescribed outcomes.

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?

Following the UK's departure from the EU on 31 January 2020 and the end of the "transition period" on 31 December 2020, the rules depend on when the contract was concluded. Regulation 593/2008/EC of 17 June 2008 (**EU Rome I**) will govern contracts entered into on or after 17 December 2009 and until the end of the transition period. For contracts entered into prior to 17 December 2009, the Convention on the Law Applicable to Contractual Obligations 1980 applied. On 29 March 2019, the UK enacted the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834) under powers granted by the European Union (Withdrawal) Act 2018 (**Withdrawal Act**).

These regulations incorporate the provisions of EU Rome I into UK law with non-substantive changes and apply to contracts entered into following the end of the transition period (**UK Rome I** and, together with EU Rome I, **Rome I**). It should be noted that Rome I is clear on the concept of "universality" in that Rome I will apply laws whether or not such laws are the law of an EU Member State (in the case of EU Rome I) or the law of the UK (or part thereof) (in the case of UK Rome I); for example, EU Rome I will give effect to English law if required to do so. 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.

It should be noted that Rome I does not apply to obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such negotiable instruments arise out of their negotiable character.

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:

- 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 that cannot be derogated from by agreement (in which case the English court will apply those rules);
- where all elements relevant to the contract (other than the choice of law) are located in one or more "relevant states" (in the case of UK Rome I, the states of the UK and EU Member States and in the case of EU Rome I, EU Member States), the parties' choice of applicable law other than that of a relevant state shall not prejudice the application of provisions of (in the case of UK Rome I) "assimilated EU

law" under the Withdrawal Act, and (in the case of EU Rome I) EU law that cannot be derogated from by agreement;
- to the extent that the law chosen conflicts with overriding mandatory rules of English law as to the law of the forum;
- where the applicable foreign law is manifestly incompatible with English public policy;
- 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; or
- in relation to the manner of performance and the steps to be taken in the event of defective performance, regard will be had to the law of the country where performance takes place.

When the English courts give effect to any such choice of foreign law, there are a number of ways in which the parties may prove the content of the foreign law, including, without limitation:
- expert evidence;
- witness evidence;
- disclosing the text of the foreign law;
- submissions at trial; and
- agreement between the parties.

Where neither party pleads that foreign law is applicable, the English courts will apply English law. Where it is pleaded that foreign law is applicable, but the content of the foreign law has not been proved, there is a rebuttable presumption that the foreign law is materially similar to English law (provided that is a fair and reasonable assumption to make).

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 in section 2 above, under Rome I (subject to the limited exceptions described in question 2.3 above), 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 underlying receivables.

The law governing the receivables purchase 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 themselves will govern the 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 the English courts.

For example, as noted in question 2.3 above: (i) an English court may give effect to the overriding mandatory rules of the jurisdiction in which the purchaser is located, if such rules render unlawful the performance of obligations under the contract that are to be performed in that foreign jurisdiction; and (ii) the courts of England and Wales will consider and rule upon the substantive effects of foreign law as matters of evidence (albeit expert evidence may not necessarily be used in each case).

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. An English court would respect the parties' choice of law to govern the receivables purchase agreement, subject to the restrictions noted in question 2.3 above. As noted above, an English 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 that 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 underlying receivables (in this case, also the law of the obligor's country) and consider and rule upon such perfection as a matter of evidence (albeit expert evidence may not necessarily be used in each case).

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 English 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 methods of selling receivables are 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, without more, 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 below) 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 in insolvency proceedings, 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 an assignment 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, section 136 of the Law of Property Act 1925 (**LPA**) provides that the assignment must be:

- in writing and under the hand of the assignor;
- of the whole of the debt;
- absolute and unconditional and not by way of charge; and
- notified in writing to the person from whom the assignor would have been entitled to claim the debt.

Recent caselaw has assessed the exact meaning of some of these requirements (including, for example, what it means to be "under the hand of the assignor"), but 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 for value (legal or equitable) 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 (unless the later assignee knew of the prior sale at the time of the subsequent assignment).

A novation of receivables (pursuant to which both the rights and obligations are transferred) requires the consent, generally in writing, 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, in case of a bill payable to order, by 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 must be complied with in order to effect a legal assignment; for example, registration of the transfer at HM 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 relevant 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 that 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:

- obligors may continue to discharge their debts by making payments to the seller (being the lender of record);
- obligors may set off claims against the seller arising prior to receipt by the obligors of the notice of assignment;
- 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 assignee;
- the seller may amend the agreement governing the terms of the receivable without the purchaser's consent; and
- the joinder of the seller as a party to the purchaser's action against the obligor would usually (though not always) be required and any proceedings may be stayed pending such joinder.

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?

A notice under section 136 of the LPA must be in writing (however, a notice of an equitable assignment need not be). No particular formality is required for a notice of assignment so long as the notice makes it plain that there has been an assignment. A notice may be given by the seller or the purchaser (or a third party) to the obligor, but it would be insufficient to show that the obligor learned about the assignment in some other way (for instance, the mere inference of an assignment may not constitute notice). 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 (however, *obiter* statements in the English courts suggest that mistakes as to the date of assignment in a notice to an obligor may not be fatal if it is otherwise clear that the debt has been assigned). The main requirement is that the notice clearly and unconditionally states that the obligor should pay the assignee going forward.

A notice must relate to an existing assignment of present property. A notice to the obligor of the assignment of future receivables will be ineffective for taking priority.

There is no specific time limit for the giving of notices 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 gives rise to a novation. A novation is not, strictly speaking, a transfer, but is the replacement of the old contract with a 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:

- 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);
- 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
- 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:

- the Business Contract Terms (Assignment of Receivables) Regulations 2018 (SI 2018/1254) apply to relevant contracts entered into on or after 31 December 2018 and governed by the law of England and Wales (or Northern Ireland). The impact of the regulations is that a term has no effect to the extent that it prohibits or imposes a condition, or other restriction, on the assignment of a receivable arising under that contract or any other contract between the same parties. This includes a term that prevents an assignee from determining the validity or value of the receivable or their ability to enforce the receivable. There are, however, certain exceptions to the position stated above, including:

- where the seller is a large enterprise (generally, this covers entities that do not fall within the small companies/ medium-sized companies regime of the Companies Act 2006 (**CA 2006**));
- where the seller is a "special purpose vehicle" (**SPV**) under the legislation (defined as a firm that carries out as its primary purpose the holding of assets (other than trading stock) or the financing of commercial transactions, which in either case involves it incurring a liability of £10 million or more); and
- contracts relating to certain matters (including certain financial services, land and acquisitions, disposals or transfers of a firm, undertaking or business and certain derivatives contracts);

- when a contract with a consumer is being considered, the law relating to unfair terms in contracts may be relevant (see question 8.4 below); and
- *obiter* statements have suggested the English courts may look favourably on arguments that an equitable assignment should be permitted notwithstanding a non-assignment clause on the basis that the commercial rationale behind upholding restrictions on transfer is often that the obligor is not required to contract with a person with which it initially did not agree to so contract (whereas it may be that concern does not arise in an equitable assignment as the obligor will continue to face the seller).

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?

Subject to the points noted in question 4.6 above, 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 freely assignable (with certain limited exceptions related to: (i) personal contracts where the specific identity of a contracting party goes to the heart of the contract, such as contracts of service; and (ii) assignments prohibited as a matter of public policy).

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; however, the current position of the English courts in relation to trust arrangements where there is a restriction on assignment is uncertain.

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. The subject matter of an assignment can be described in general terms, e.g. wording such as "all present and future book debts" would meet the required standard of clarity. 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, an English 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, including:

- 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?

- Does the seller have the right to repurchase the receivables sold?
- Does the purchaser have to account for any profit made on any disposition by it of the receivables?
- 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 above. 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 a sale.

The seller remaining the servicer or 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 (including where required to comply with risk retention rules, as to which see the response to question 8.6 below), the right of a seller to repurchase receivables (or the right of a buyer to request that the seller repurchase receivables) in limited circumstances (such as breach of representation or warranty) and the right of a seller to extract residual profits from the purchaser, are not, on their own, generally considered 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 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 and The Financial Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2019 (SI 2019/341)) (**FCR**), as such regulation is referred to 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 (see the response to question 6.3 below).

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 response 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 will be clearly ascertainable in the future, is treated as an agreement to assign, which will give rise to an automatic equitable assignment of the receivable as soon as it comes into existence.

See the response 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 amounts owing to it from the seller against amounts it owes to the seller under a 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 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 under 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 (for example, if there is or may be a prohibition on sale or assignment in the underlying documentation that creates the receivable) 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 question 5.1 above.

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 pledge (in the case of documentary receivables capable of being delivered) and quasi-security may be effected by retention of title arrangements or attornment, security is most commonly taken over receivables by way of mortgage (typically as an assignment by way of security) or charge.

Mortgage

A mortgage will involve the transfer of title to an asset by way of security for the discharge of the relevant secured obligations. In the context of receivables, the rights of the purchaser (for instance to receive payment) will usually be assigned together with a condition for re-assignment on redemption or discharge of the purchaser's secured obligations. Under English law, this mortgage will either be: (i) legal (if the procedural requirements of the LPA identified in question 4.2 above are satisfied); or (ii) in the absence of satisfaction of these requirements (or where the rights are future rights or equitable in nature), equitable.

There are no prescribed perfection requirements for an equitable mortgage; however, there must be a sufficient intention to transfer the right concerned, usually in accordance with the LPA requirements, even if they cannot fully be satisfied.

Where the assignment does not comply with section 136 of the LPA, the assignee's security will be subject to prior equities (such as rights of set-off and other defences) and will take priority behind a later assignment for value granted over the same assets where the later assignee did not have notice of the earlier assignment and they themselves gave notice to the obligor. Without notice of such assignment, 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).

Charge

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 their 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" under the Insolvency Act 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 conclusive 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) that, 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 crystallisation event, the floating charge will attach to the assets then presently in the fund, effectively becoming a fixed charge over those assets. This newly created fixed charge will rank behind any fixed security created before it was crystallised. Case law emphasises control of the receivable as the determining factor in distinguishing whether a charge is 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 English courts recently suggested that a complete prohibition on dealing with the charged assets is required for a charge to be characterised as fixed in support of a nuanced approach involving a range of factors (including the nature of the assets and the chargor's business).

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 (which includes HM Revenue & Customs (**HMRC**), the UK's tax, payments and customs authority, in UK insolvency proceedings commencing on or from 1 December 2020 via the re-introduction of the so-called Crown preference in respect of certain UK taxes) and fixed chargeholders. A floating chargeholder will also rank behind a statutory percentage of ring-fenced assets available for unsecured creditors. These ring-fenced assets are

known as the "prescribed part", and currently comprise assets up to a maximum value of £800,000 (for floating charges created on or after 6 April 2020).

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, if at the time of the grant the chargor was unable to pay its debts or became unable to do so as a result of granting the charge (unless granted to a "connected" person, in which case the chargor's ability to pay its debts is irrelevant). A fixed chargeholder will obtain an immediate right over definitive assets that 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.

Perfection

For charges or mortgages created by an English company (or a limited liability partnership (**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 the charge within 21 calendar days (beginning with the day following the creation of the charge) with 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):

- if the charge was created before 1 October 2009 (whereby the Companies Act 1985 (**CA 1985**) applies); and/or
- if the charge was created on and from 1 October 2009 but before 6 April 2013 (whereby the CA 2006 (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 (whether registered as an overseas company in the UK or not) 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:

- if the charge was created before 1 October 2009 (whereby the CA 1985 applies); and/or
- 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 apply).

Where certain security arrangements exist over financial collateral (cash, financial instruments and credit claims) between two non-natural persons, the FCR (see question 4.9 above), which implement EU Directive 2002/47/EC (**EU Collateral Directive**) into English law, disapply certain statutory requirements in relation to such security arrangements (such as the requirement to register security at Companies House under the CA 2006, as well as certain provisions of English insolvency law).

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: (a) that security interest being void as against a liquidator, administrator or creditors in a liquidation or administration; and (b) the secured liabilities thereby becoming immediately payable (which could potentially trigger cross-defaults under any pre-existing financing arrangements the chargor may have). 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 a 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, the English courts will also apply certain mandatory rules of English law that 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 mortgage, whereby the policyholder assigns the benefit by way of security to the assignee.

Security over mortgage loans or consumer loans can be created by mortgage or charge. Creating security over a mortgage securing a mortgage loan is generally accomplished by equitable mortgage (see question 4.3 above).

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: (i) bearer or registered; and (ii) certificated (i.e. existing in physical form), dematerialised or immobilised (where a single global note representing the entire issue is held or registered in the name of a depository).

In (brief) summary:

- certificated registered securities 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);
- 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

- security may be created over dematerialised and immobilised 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 securities to the order/control of the chargee).

The FCR (which disapply certain requirements in relation to the creation and registration of security and certain rules of English insolvency law) will apply to any security that 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. Where the trust is validly constituted the trust assets would not form part of the seller's insolvency estate.

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. The money deposited by an account holder into an account bank is treated as a debt payable by the account bank to the account holder and therefore a security arrangement would typically be taken over the debt represented by the credit balance by way of charge or (provided the securityholder is not the same account 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 cannot be made by assignment and can only be achieved by way of charge (known as a "charge-back"). The charge 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 re-characterised as a charge that 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 will depend upon (amongst other things) the nature of the security over the bank account (whether on its facts, the security created 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 in a post-enforcement scenario are set out in the response to 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 and, in the absence of 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?

A moratorium only arises in certain insolvency proceedings under English law. For example, in administration proceedings, an interim moratorium will take effect upon filing of a notice of

intention to appoint administrators or on application to appoint administrators, and will be replaced by the statutory moratorium that takes hold from the appointment until conclusion of the administration. However, in compulsory liquidation proceedings, the moratorium only takes effect once the English court grants a winding-up order, unless a provisional liquidator is appointed in the interim. While the moratorium is in place, parties are restricted from enforcing their rights against the insolvent company without the prior consent of the relevant insolvency practitioner or the English court.

There is no moratorium under the Part 26A Restructuring Plan or a Company Voluntary Arrangement. However, directors of financially distressed companies can apply for a moratorium under Part A1 of the Insolvency Act in order to gain some breathing space from enforcement action by certain creditors while the company seeks to secure a viable rescue through one of these tools. This standalone moratorium can endure a maximum of 40 business days without consent from creditors or the English court, up to a year with creditor consent, and beyond that with English court consent, provided the company continues to satisfy certain eligibility criteria. During this time, non-financial creditors (such as landlords) are prevented from enforcing their rights against the insolvent company, though it does not prevent enforcement by financial creditors (such as lenders).

If the right to the receivables has been transferred by legal assignment and appropriately perfected, the insolvency practitioner would not have any right of recourse to the receivables and the insolvency practitioner should not prevent the purchaser from exercising their rights over the receivables. However, the insolvency practitioner would need evidence to show that the receivables belonged to the purchaser and therefore fall outside of the insolvent estate. Further, there may be practical limitations if the purchaser requires assistance from the insolvency practitioner in exercising its ownership rights; for example, by providing access to property or diverting collections as the insolvency practitioner would not have any contractual obligation to do so.

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 those subject to a binding trust arrangement, may be deemed to be the property of the servicer, not the purchaser.

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). However, as mentioned above, there may be some practical restrictions in exercising ownership rights if this requires assistance from the insolvency practitioner.

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 practitioner 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 the English court orders otherwise, any receivables purportedly transferred during that period would remain the property of the seller.

Otherwise, the English court may set aside a transaction made at an undervalue (i.e. where a company either: (a) makes a gift or otherwise enters into a transaction on terms that provide for the company to receive no consideration; or (b) enters into a transaction for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company) in the two years prior to the commencement of the administration or liquidation (onset of insolvency) if the company was, at the time of the transaction, 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 (as to which see below), unless proven otherwise. There is a defence if an English court is satisfied that the company entered into the transaction in good faith for the purpose of carrying out its business and 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 there is a time limit of at least six years for bringing court proceedings.

A liquidator or an administrator can petition the English court to set aside a transaction that would put a creditor or guarantor of the seller into a better position than it would otherwise have been had the transaction not taken place, if such a preference is made either: (i) in the two years prior to the onset of insolvency (in the case of a preference to a person "connected" with the company: as to which see below); or (ii) in the six months prior to 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 that can be challenged by liquidators or administrators are voidable floating charges and transactions to defraud creditors.

"Connected person" for the purpose of antecedent transactions is defined under section 249 of the Insolvency Act. Accordingly, a person is connected with a company if that person is a director or shadow director of the company, an associate of a director or shadow director of the company, or an associate of the company (with "associate" being separately defined under section 435 of the Insolvency Act). In circumstances where the purchaser is

majority-owned or controlled by the seller, then they would be deemed to be connected. However, if the parent company of the seller guaranteed the performance by the seller of its obligations under contracts with the purchaser, that guarantee would not itself cause the purchaser and seller to be 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 a 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 an English 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. However, in *Leite v Amicorp (UK) Ltd* [2020] EWHC 3560 (Ch), the High Court granted recognition in the UK under the Cross-Border Insolvency Regulations 2006 (**CBIR 2006**) of Brazilian "extension proceedings" in respect of certain associated entities of the debtor. As such, although substantive consolidation is not a concept recognised under English insolvency law, similar proceedings within the scope of the CBIR 2006 could be recognised by the English courts.

It is a fundamental principle of English law that a company has a legal personality distinct from its shareholders (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 relevant insolvency legislation.
- 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.
- The 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 commingling 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.

Under the Insolvency Act, a liquidator might, in certain circumstances, be able to disclaim (and thereby terminate) an ongoing receivables purchase agreement if it were an "onerous contract".

If the transfer of receivables under the receivables purchase agreement does require further action from the seller, the insolvency official may choose not to take that action. In such a 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 7.4 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 with 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.

Whilst a 2013 case held a debtor to be insolvent in spite of the fact that its debts were limited in recourse (following an unopposed application by such debtor to initiate insolvency proceedings), this judgment can be limited to its context on a number of factual and legal grounds (and, in any case, the English court did not question the limited recourse provision's effectiveness as a matter of contract). See also the response on question 7.4 below.

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? Does your jurisdiction define what type of transaction constitutes a securitisation?

Securitisation laws

There is no single law in the UK establishing a legal framework for securitisation transactions, although various aspects of securitisations are governed by laws, rules and guidance that are of general application (many of which are described elsewhere in this chapter), including as regards the incorporation and governance of SPVs, contractual matters, consumer protection, data privacy, transfers of receivables, security and insolvency aspects, authorisation and licensing requirements and the offering and listing of securities.

However, there are certain laws relating specifically to securitisation: in particular, Regulation (EU) 2017/2402, as it forms part of UK domestic law by virtue of the Withdrawal Act (**UK Securitisation Regulation**).

The UK Securitisation Regulation imposes certain requirements (summarised below) on the following classes of person (each as defined by the legislation): (i) originators, original lenders, sponsors and securitisation special purpose entities (**SSPEs**); and (ii) institutional investors (the definition of which is set out below). The SSPE will typically be the issuer or borrower in the securitisation, although, in principle, other special purpose entities party to the transaction could fall within the definition (and for convenience, we use the conventional term "SPV" throughout this chapter to refer to SSPEs). The UK Securitisation Regulation also establishes a regime for the issuance of simple, transparent and standardised securitisations (**STS**), which attract favourable regulatory capital treatment for investors.

As regards originators, original lenders and sponsors, the key requirements under the UK Securitisation Regulation relate to risk retention, credit-granting criteria and initial disclosure and ongoing reporting (with SPVs also being subject to the disclosure and reporting obligations). The rules with regard to risk retention are summarised in our response to question 8.6 below. In summary, the other requirements noted here are as follows:

- In terms of credit-granting, originators, sponsors and original lenders must apply the same credit-granting criteria and approval processes in all cases, whether the relevant assets are securitised or not, and must have systems in place to apply those criteria and processes in order to ensure that credit-granting is based on a thorough assessment of each obligor's creditworthiness.
- The rules on disclosure and reporting are relatively complex. In brief summary, the originator, sponsor and SPV are required to make available to investors relevant transaction documentation, periodic reports as to the securitised assets, periodic investor reports and certain other information. Such periodic reports (and, in certain cases, other information) must be made available in the form of detailed templates prescribed for the purposes of the UK Securitisation Regulation. In the case of so-called "public securitisations" (those in respect of which a prospectus is required under the FSMA and related legislation), the required information must be made available via a securitisation repository approved for such purpose by the FCA. Certain information must also be made available to the regulators (and the FCA and the Prudential Regulation Authority (**PRA**) have made a direction prescribing their requirements in this regard), and (on request) to potential investors.

As regards institutional investors, the UK Securitisation Regulation provides that, prior to investing in a securitisation, each such investor must verify certain matters, including that:

- subject to certain exceptions, the originator or original lender has granted the credits comprising the receivables on the basis of sound and well-defined criteria and clearly-defined processes and has systems in place to apply those criteria and processes to ensure that credit-granting is based on a thorough assessment of each obligor's creditworthiness;
- the originator, sponsor or original lender retains an interest in the securitisation in accordance with the UK Securitisation Regulation (see our response to question 8.6 below); and
- the originator, sponsor or SPV makes available information in accordance with the requirements imposed on it in that regard by the UK Securitisation Regulation or, where the originator, sponsor or SPV is established outside the UK, it makes available information substantially the same as that which would have been required if it were established in the UK.

In addition, institutional investors must carry out a due-diligence assessment prior to investing and must conduct ongoing monitoring, all as prescribed by the UK Securitisation Regulation.

If an institutional investor fails to comply with such requirements, it may be subject (where applicable) to an additional regulatory capital charge with respect to the relevant securitisation position and may be subject to other regulatory sanctions or required to take corrective action.

For this purpose, "institutional investors" are as follows (and this is a summary only of terms defined in detail in the UK Securitisation Regulation):

- insurance undertakings and reinsurance undertakings;
- occupational pension schemes and their fund managers;
- alternative investment fund managers (**AIFMs**) marketing or managing alternative investment funds in the UK;
- UCITS and their management companies;
- CRR firms (being credit institutions and certain investment firms); and
- FCA investment firms (being investment firms that are not CRR firms).

In addition, the UK Securitisation Regulation imposes other restrictions, including as to the sale of securitisations to retail clients and the jurisdictions in which SPVs may be established (see our response to question 7.2 below); and imposes a ban on re-securitisations (subject to very limited exceptions).

In certain respects, the requirements of the UK Securitisation Regulation differ between asset-backed commercial paper programmes and other types of securitisation. There are also additional or alternative requirements in respect of STS. These differences are beyond the scope of this chapter.

The UK Securitisation Regulation is supplemented by, amongst other things, the Securitisation Regulations 2018 (which make provision as to sanctions for non-compliance, certain aspects of STS transactions and other matters), certain technical standards, regulatory rules, directions and guidance.

The terms of the UK Securitisation Regulation are generally similar to those in effect in the EU under Regulation 2017/2402 (**EU Securitisation Regulation**). However, the two regulations (and the respective related measures) are not identical in all respects. For example:

- the definition of "sponsor" under the UK Securitisation Regulation is understood to be broader than the corresponding definition in the EU Securitisation Regulation;
- the EU Securitisation Regulation's provisions regarding the jurisdiction of establishment of SPVs (e.g. prohibiting their establishment in certain third countries) have a different scope, and are in different terms, to the corresponding rules in the UK Securitisation Regulation;
- in the context of securitisations in which the originator, sponsor or SPV are established in a third country (i.e. outside the UK or outside the EU, as applicable), there are differences, as between the two regulations, in the wording of the requirement for institutional investors to verify that prescribed information is made available to them (interpretative guidance published by the European Commission in October 2022 appears to indicate that the obligation imposed by the EU Securitisation Regulation in this respect is more onerous than the corresponding obligation under the UK Securitisation Regulation); and
- the EU Securitisation Regulation includes certain provisions specific to securitisations of non-performing exposures, whereas the UK Securitisation Regulation does not (but this is expected to change in certain regards – see our response to question 8.7 below).

Our response to question 8.7 below discusses certain future developments that are likely to lead to further divergence between the UK and EU securitisation regimes.

The UK Securitisation Regulation generally applies only with regard to securitisations issued on or after 1 January 2019. Securitisations established before that date generally continue to be subject to requirements as to risk retention and related matters that were in effect under certain other legislation at the relevant time (and which are beyond the scope of this chapter), provided that there is no further issuance of securities under the relevant transaction, and it is not refinanced.

In addition to the UK Securitisation Regulation, there is certain other legislation that makes specific provision with regard to securitisations. This includes:

- Regulation (EU) No. 575/2013, as it forms part of UK domestic law by virtue of the Withdrawal Act (**UK CRR**), which sets out, amongst other things:
  - the criteria to be satisfied by an originator in order to achieve a "significant risk transfer", such that it is entitled to regulatory capital relief in respect of securitised assets (to the extent that it is subject to the UK CRR);
  - the rules as to the regulatory capital treatment of securitisations for investors that are subject to the UK CRR; and
  - certain tax laws (see our response to question 9.2 below).

Regulatory authorities

The regulators designated for purposes of the application and enforcement of the UK Securitisation Regulation are the FCA, the PRA and the Pensions Regulator.

To the extent that laws of general application (as noted above) are applicable to securitisations, enforcement of any relevant requirements in the context of a securitisation will be a matter for the body, if any, having responsibility generally for compliance with such laws (which, in certain cases, will also be the FCA or the PRA).

Definition of securitisation

The UK Securitisation Regulation defines a securitisation as follows (and the same definition applies for purposes of the UK CRR):

"*a transaction or scheme, whereby the credit risk associated with an exposure or a pool of exposures is tranched, having all of the following characteristics: (a) payments in the transaction or scheme are dependent upon the performance of the exposure or the pool of exposures; (b) the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme; (c) the transaction or scheme does not create exposures which possess all of the characteristics listed in [Article 147(8) of the UK CRR – being certain specialised lending exposures]*."

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 SPVs for securitisation transactions (although see our responses below to question 7.3 in relation to the UK Securitisation Regulation's requirements as to the location of the SPV, and question 9.2, in relation to SPVs that are "securitisation companies" and their treatment for UK 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 mortgage loans over properties in England and Wales), the SPV 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 or income being located in or sourced from the UK (such as UK real estate or interest payments from UK borrowers).

An SPV incorporated in England or Wales usually takes the form of a public or private company limited by shares, or an LLP. Both limited companies and LLPs are treated as bodies corporate with a separate legal personality where the liability of a shareholder/member is limited. An SPV incorporated under the laws of England and Wales is subject to English laws that affect corporate entities generally, including (without limitation) the Companies Act, the Limited Liability Partnerships Act 2000 and the Insolvency Act (in each case as amended).

In common with other jurisdictions with established securitisation markets, the securitisation entity is normally (but not always) formed as an orphan 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.

An SPV can be incorporated outside England and Wales for specific commercial, regulatory, tax, administrative, structural and/or legal reasons. Common jurisdictions include Ireland, Jersey, Guernsey, Luxembourg and, less commonly in recent

years for tax and regulatory reasons, the Netherlands 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 filing, disclosure or regulatory requirements (such as requirements for audited accounts).
- Taxation of the securitisation entity and its assets in that jurisdiction, including:
  - the ability to maintain tax residence in that jurisdiction and avoid other (unexpected) taxable presences arising;
  - corporate taxes on any minimum required retained profits;
  - deductibility of interest payments made by the securitisation entity;
  - withholding tax, including the availability of tax treaty relief in relation to payments of interest and other payments on underlying assets to the securitisation entity, as well as payments of interest on the securities issued by the securitisation entity or other distributions by the securitisation entity;
  - value-added tax (**VAT**) on management, investment advisory or other services received by the securitisation entity; and
  - transfer and registration taxes and duties.
- Licensing and authorisation requirements.
- Insolvency law considerations.
- The requirements of the UK Securitisation Regulation, which provides that an SPV must not be established in a country that is listed by the Financial Action Task Force as a high-risk and non-co-operative jurisdiction or that does not comply with certain requirements as to the international exchange of information on tax matters.

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 2013 decision of the High Court 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 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 judgment also confirmed the effectiveness of a limited recourse provision as a matter of contract. *In Re Lendy* [2021] EWHC 2285 (Ch), the English court, while distinguishing the prior referenced decision, held that any proof of debt should be valued by the company's administrators in accordance with the investors' limited recourse contractual entitlement.

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 English court. In exercising its discretion, an English court would have to consider whether such a clause was contrary to public policy as an attempt to oust the jurisdiction of the English 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 that 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 (**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:

- 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 such a question should be tested in a commercially sensible

manner, taking into account the policy of party autonomy and the upholding of proper commercial bargains;
- 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 above (in *Belmont*, the parties seeking to rely on the provision (certain noteholders) had provided the collateral of which the creditor in question was deprived); and
- the anti-deprivation rule only applies where the trigger for the deprivation is a winding-up or other insolvency process affecting the deprived party and it requires that the party seeking to gain advantage from the deprivation was intending to evade the liquidation rules.

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 the points outlined in the first two bullets 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 rule, the English 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* case**)) 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. 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 (No. 17 Civ 1224 (LGS), 2018 WL 1322225 (S.D.N.Y. March 14, 2018)) and subsequently by the US Court of Appeals for the Second Circuit (No. 18-1079, 2020 WL 4590247 (2d Cir. August 11, 2020)), albeit on different grounds in each case.

These cases 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 some decisions may be subject to further possible appeal, there are potentially other actions that have commenced and are ongoing in the US courts relating to flip clauses, and certain aspects of the *BNY* case remain relevant with the effect that certain flip clauses may constitute unenforceable *ipso facto* clauses. It is therefore unclear at this stage the extent to which a secured party to a securitisation that is the subject of US bankruptcy proceedings or, for that matter, insolvency proceedings outside of England and Wales, would be able to successfully challenge a flip clause on the basis of the laws governing those proceedings.

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. Restrictions on the authority on the directors should not interfere with the directors' ability to exercise their statutory and fiduciary duties to the company. 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. When a company becomes insolvent, the directors' duty to promote the success of the company is replaced by a duty to act in the best interests of the company's creditors pursuant to which the directors must protect the value of the company assets and minimise losses to creditors as far as possible.

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 mortgage contracts/home finance agreements, regulated credit/consumer hire agreements or CBTL agreements may require authorisation under the FSMA and/or registration under 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 as to give rise to a new loan and/or regulated mortgage contract.

As regards 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.

In principle, a purchaser of loans that is not an authorised person under the FSMA (and does not fall within certain other

categories of person) may be required to register with the FCA as an "Annex 1 financial institution" under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. However, the FCA has published a statement relating to the application of this requirement to SPVs: "if your firm is a special purpose vehicle that's involved in lending, you only need to register with us as an Annex 1 financial institution if you're the original lender. If only the legal or beneficial interest in loans are transferred to your firm, you don't need to register with us."

The position regarding the above matters would be the same, in principle, regardless of whether 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 nature of the contract giving rise to the receivables in question and whether the receivables have been sold by way of an equitable assignment or legal transfer. In summary:

- in the case of regulated credit/consumer hire agreements, where the receivables are assigned by way of an equitable transfer, provided that the seller retains its authorisation under the FSMA to enter into regulated credit/consumer hire agreements as a lender/owner, the seller should not be required to be separately and expressly authorised under the FSMA 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 within the scope of its existing authorisation;
- in the case of regulated credit/consumer hire agreements, where the receivables are sold by way of a legal transfer but the seller retains the servicing function, the seller will require a separate and express authorisation under the FSMA for the regulated activities of debt administration and debt collection; and
- in the case of regulated mortgage contracts/home finance agreements, the seller will require separate and express authorisation under the FSMA or, in the case of CBTL agreements, registration under the MCD Order, for the relevant regulated activity – for example, as regards regulated mortgage contracts, authorisation to administer regulated mortgage contracts, and possibly also authorisation to advise on regulated mortgage contracts (in order to be able to advise an obligor on varying the terms of its mortgage contract). These authorisation/registration 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/registration detailed in the latter two bullets above before taking any action to enforce or collect monies owed under regulated mortgage contracts/home finance agreements, regulated credit/consumer hire agreements or CBTL agreements.

The parties, to the extent they are controllers under the UK's implementation of the General Data Protection Regulation (**UK GDPR**), will also be required to register as fee payers with the Information Commissioner's Office in the UK.

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 in the UK, who can be identified, directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or by reference to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual (personal data) is regulated by the UK GDPR, as supplemented by the Data Protection Act 2018 (as amended) (**DPA**). The UK GDPR and DPA only apply to personal data of individual, living and identifiable obligors in the UK and not enterprises. However, enterprises and other organisations processing personal data of consumer obligors located in the UK are under an obligation to process such personal data in accordance with the requirements set out in the UK GDPR and DPA, respectively. Where the processing of personal data is carried out, the UK GDPR distinguishes between controllers and processors performing personal data processing activities. Controllers are any legal or natural person who (either alone or jointly with others) determines the purposes for which, and the manner in which, any personal data is to be processed, and so may include a purchaser of receivables serviced by the seller. Processors are any natural or legal persons who process personal data on behalf of the controller, for example, a vendor engaged by the enterprise to process personal data of consumer obligors on the enterprise's behalf.

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 outlined in our responses to questions 8.1 and 8.2 above, there are a large number of statutes, regulations, rules and guidance governing consumer interests within the context of regulated mortgage contracts/home finance agreements, regulated credit/consumer hire agreements and CBTL agreements. The relevant measures comprise, variously, provisions that impose obligations and restrictions on lenders/owners and provisions conferring rights on borrowers/hirers and include the following, amongst other things:

- The CCA (and related delegated legislation), which applies to consumer credit and consumer hire agreements (as defined in the CCA) and contains several important requirements for lenders/owners under such agreements. In addition (as noted in our response to question 1.2 above), the CCA gives an English court power, in certain circumstances, to make an order in connection with a credit agreement in respect of which the relationship between the creditor and the debtor is unfair to the debtor. Note that a credit agreement, for this purpose, is (subject to certain exceptions) any agreement between: (i) an individual, a partnership of two or three persons (at least one of which is not a body corporate), or an unincorporated body of persons (at least one of which is not a body corporate or a partnership) as the debtor; and (ii) any other person as the creditor, by which the debtor is provided with credit of any amount (whether or not it is otherwise a regulated agreement). An English court has power to order, for example, variation of contractual terms or repayment of sums paid by the debtor.

- In the case of firms authorised under the FSMA to carry on consumer credit and consumer hire-related regulated activities, CONC and other elements of the FCA Handbook (which apply in addition to the requirements of the CCA). 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 (see our response to question 1.2 above).
- For lenders under regulated mortgage contracts/home finance agreements, MCOB (and other parts of the FCA Handbook). The rules in MCOB cover, amongst other things, certain pre-origination matters such as financial promotion, disclosure at various stages (pre-application, pre-contract, start-of-contract and post-contract), contract changes, charges and arrears and repossessions.
- In the case of firms registered to undertake regulated activities in respect of CBTL agreements, the conduct of business requirements under the MCD Order. 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 Contract Terms Act 1977 (**UCTA**), 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 CRA, which (as noted in our response to question 1.2 above) includes provisions relating to unfair contract terms in agreements and notices between a trader and a consumer. 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 that will in all cases be considered unfair.

In addition, as outlined in our response to question 1.2 above, the Consumer Duty imposes on FCA-regulated firms new requirements in respect of retail clients, based upon Principle 12 (which will require that firms act to deliver good outcomes for such clients). In complying with the Consumer Duty, firms are expected to achieve certain prescribed outcomes, including as to the quality, price and value of their products and services and the provision of information and support to customers. The intention is to enhance the protection provided to retail clients of financial services firms, but without altering existing statutory consumer protection measures such as those provided by the CCA, the UCTA, the CRA and the CPUTRs (as noted above).

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?

There are no general laws to this effect, but applicable sanctions laws may prohibit or restrict the making of payments (or other action) in certain circumstances.

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?

As noted in our response to question 7.1 above, risk retention requirements are imposed by the UK Securitisation Regulation, as supplemented by certain technical standards. Such requirements are imposed on originators, original lenders and sponsors; there are also related due-diligence requirements that apply to institutional investors (see our response to question 7.1 above for the definition of an institutional investor).

Article 6 of the UK Securitisation Regulation imposes on the originator, the original lender or the sponsor of a securitisation a requirement to retain, on an ongoing basis, a material net economic interest in the relevant securitisation of not less than 5% in accordance with one of the prescribed retention methods (see below). The UK Securitisation Regulation is silent as to the jurisdictional scope of Article 6, but there are indications that it is intended to be applicable only to entities established, or regulated, in the UK.

Article 5 of the UK Securitisation Regulation provides that an institutional investor is permitted to invest in a securitisation only if, amongst other things, it has verified that the originator, the original lender or the sponsor in respect of the relevant securitisation: (i) if established in the UK, complies with Article 6 of the UK Securitisation Regulation; or (ii) if established elsewhere, retains a material net economic interest of not less than 5% determined in accordance with Article 6.

Article 6 of the UK Securitisation Regulation prescribes five permitted methods of risk retention, as follows:

- the retention of not less than 5% of the nominal value of each of the tranches sold or transferred to investors;
- in the case of revolving securitisations or securitisations of revolving exposures, the retention of the originator's interest of not less than 5% of the nominal value of each of the securitised exposures;
- the retention of randomly selected exposures, equivalent to not less than 5% of the nominal value of the securitised exposures, where such non-securitised exposures would otherwise have been securitised in the securitisation, provided that the number of potentially securitised exposures is not less than 100 at origination;
- retention of the first loss tranche and, where such retention does not amount to 5% of the nominal value of the securitised exposures, 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 not less than 5% of the nominal value of the securitised exposures; or
- the retention of a first loss exposure of not less than 5% of every securitised exposure in the securitisation.

These are the only permitted methods of risk retention. However, related technical standards provide for additional or alternative means of complying with certain of these methods.

Where there are multiple originators, original lenders or sponsors, each will generally be required to retain a *pro rata* share of the prescribed economic interest. However, in certain circumstances, it is possible for a single entity to retain the entire interest.

The retained economic interest must not be subject to any credit risk mitigation or hedging.

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?

Treatment of non-UK STS

The provisions of the UK Securitisation Regulation relating to STS provide that the "STS" designation may be used only where certain prescribed requirements are satisfied, including that the originator/sponsor is established in the UK and the securitisation is included in a list maintained for this purpose by the FCA. Transitional arrangements are in place, such that, until 31 December 2024, a securitisation satisfying the corresponding requirements under the EU Securitisation Regulation may be treated as STS for the purposes of the UK Securitisation Regulation.

In addition, amendments to the UK Securitisation Regulation in 2023 provide for an STS equivalence regime, by which HM Treasury may designate other jurisdictions, such that relevant securitisations issued in those jurisdictions will be treated as if they are STS issued in compliance with the UK Securitisation Regulation. HM Treasury has not yet designated any jurisdiction for these purposes.

Repeal of retained EU law

The UK withdrew from the EU in January 2020, and a transition period implemented upon its withdrawal ended on 31 December 2020. Since that date, certain EU legislation that formerly had effect in the UK by virtue of it being a Member State of the EU (and certain UK legislation that was passed to give effect to EU legislation) has formed part of UK domestic law, pursuant to the Withdrawal Act, and was previously referred to as "retained EU law".

The Retained EU Law (Revocation and Reform) Act 2023 (**REUL Act**) provides for the repeal of retained EU law except to the extent that it is expressly designated for assimilation into domestic law (which law is consequently referred to as "assimilated law" as opposed to "retained EU law"). The REUL Act also ended the principle of EU supremacy with respect to assimilated law.

The REUL Act does not, however, provide for the repeal of certain assimilated law relating to financial services. Generally, this will be repealed and (except in certain cases) replaced under the framework created by FSMA 2023. FSMA 2023 provides that existing legislation will be replaced (in some cases, with modifications) through new domestic laws, rules and guidance. These reforms will affect financial services law that is of relevance to securitisations and securities offerings, such as the UK Securitisation Regulation (see below), the UK CRR, the UK Prospectus Regulation and the UK PRIIPs Regulation. The process of replacing all relevant assimilated law is expected to take several years, and it is not yet possible to predict with certainty the extent, nature or timing of this process.

Repeal and replacement of UK Securitisation Regulation

Amongst other things, FSMA 2023 provides for the repeal of the UK Securitisation Regulation, the Securitisation Regulations 2018 and related technical standards. Measures broadly similar to those contained in the current legislation will be implemented by means of the enactment of new secondary legislation and the implementation of new rules and guidance by the PRA and the FCA.

The Securitisation Regulations 2024 (**2024 Regulations**) have been enacted for this purpose (although most of the regulations are not yet in force) and further secondary legislation is expected to be published in 2024. In addition, the FCA and PRA have consulted on changes to their respective rulebooks to replace and amend the so-called "firm-facing requirements" of the existing regime (discussed in more detail below). Amongst other things, these rules will cover some of the requirements discussed in this chapter, including risk retention, credit-granting, disclosure and due-diligence requirements. Those requirements are expected to be similar in most respects to the current regime.

Repeal of the UK Securitisation Regulation is expected to be simultaneous with the commencement of the rest of the 2024 Regulations, any other secondary legislation and the FCA/PRA's rules. The timing of this is uncertain, although it is not expected to take place before Q2 2024.

Amendments to UK securitisation regime

Proposals to amend certain aspects of the UK securitisation regime date back to December 2021, when HM Treasury reported on a review it had undertaken in respect of the UK Securitisation Regulation. Some of these proposals are expected to be implemented in connection with the repeal and replacement of the UK Securitisation Regulation (as discussed above).

In particular, the following changes have been, or are expected to be, made through the implementation of the new regime:

- to permit risk retention of securitisations of non-performing exposures to be calculated based on the market value rather than the face value of the relevant exposures;
- to permit institutional investors to take a principles-based approach to their due-diligence rather than being required to obtain information in a prescribed format (this applies in respect of UK and non-UK securitisations, which goes beyond the scope of HM Treasury's proposal to clarify investors' information requirements in respect of non-UK securitisations);
- to refine the meaning of "private securitisations" and "public securitisations" (which distinction is relevant for the purposes of the reporting obligations) through a further consultation by the FCA in 2024 or 2025;
- to simplify or otherwise amend the requirements as to the content and format of reports required to be made available by sponsors, originators and SPVs to institutional investors and others through a further consultation by the FCA in 2024 or 2025; and
- to exclude from the definition of "institutional investor" unauthorised non-UK AIFMs.

In addition, the PRA is considering amendments to the regulatory capital treatment of securitisations in the UK.

As a result of developments in the UK, such as those noted above, and proposals for legislative changes in the EU, the rules applicable in the UK under the new regime for securitisations are expected to continue to diverge from the rules applicable in EU Member States under the EU Securitisation Regulation.

Pillar 2

The Finance (No. 2) Act 2023 introduced legislation to implement the OECD Inclusive Framework Pillar 2 rules (**Pillar 2**), applying a minimum effective tax rate of 15% for qualifying large multinational and United Kingdom groups through the creation of a "domestic top-up tax" (**DTT**) and a "multinational top-up tax" (**MTT**). These taxes came into effect in the UK in respect of accounting periods beginning on or after 31 December

2023 and UK tax-resident companies, such as an SSPE, can in certain circumstances be assessed to MTT or DTT as a primary liability, or on a secondary basis for unpaid DTT or MTT that has been assessed on another entity with which it is consolidated for accounting purposes. In the Finance Act 2024, revisions were made to the MTT and DTT to restrict their impact on companies taxed under the UK securitisation tax regime (as to which see the response to question 9.2 below). Similar rules implementing Pillar 2 have been implemented in other jurisdictions commonly used for UK securitisation transactions (including Ireland and Luxembourg), although similar exclusions do not apply to SSPEs.

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 UK withholding tax treatment of payments on receivables depends not only on their nature, but on the identity and status of the recipient to whom payments are made.

Broadly, payments on loan receivables will only give rise to a UK withholding tax obligation (at a current rate of 20%) where the actual or intended term of the loan is 365 days or more, the payment constitutes interest for these purposes (it should be noted that discount will not generally constitute interest for this purpose) and that payment has a UK source. Various exemptions from UK withholding tax exist, including where the recipient is a UK company or UK permanent establishment of a non-UK company and the payment is brought into account in computing the UK corporation tax liability of that company or (as the case may be) permanent establishment. For recipients that are non-UK companies (and not acting through a UK permanent establishment with respect to the receivable), relief from UK withholding tax may be available pursuant to the terms of an applicable double taxation treaty, provided that certain procedural requirements are satisfied. The procedural requirements are simpler and more efficient if the non-UK resident holds a so-called "treaty passport" under HMRC's double taxation treaty passport scheme.

Generally, trade receivables payments and lease rental payments are not subject to UK withholding tax unless they provide for the payment of interest, in which case the interest element will be subject to withholding tax in the same way as interest on loan receivables.

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 UK tax treatment of a UK tax-resident company would generally, at least as a starting point, follow its accounting treatment, subject to any applicable UK tax legislation that has the effect of altering or amending this position. For such a company purchasing receivables, in various cases the rules imposed by the appropriate accounting regime could 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 2006 (as amended) (Taxation of Securitisation Companies Regulations) apply to companies that are "securitisation companies" (as defined therein) and permit a securitisation company to be subject to tax treatment more closely reflecting the cash position of its securitisation arrangements, such that it is taxed only on the profit actually retained within the company after the payment of its transaction disbursements according to the transaction waterfall. This regime has been seen as providing effective relief from the complex rules and any anomalous tax results that could otherwise apply to UK tax-resident SPVs.

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

Broadly, UK stamp duty is chargeable on documents transferring an interest in property falling into the definition of "stock" or "marketable securities". Transactions may also (or alternatively) be subject to stamp duty reserve tax (**SDRT**), which is generally levied on an agreement to transfer certain types of securities (or interests in such securities) whether effected by document or otherwise. Stamp duty land tax (**SDLT**) applies to certain types of transactions in respect of land located in England and Northern Ireland (but not security interests in respect of land); similar land transactions in Wales and Scotland are within the scope of land transaction tax and land and building transaction tax respectively.

Generally, transfers of loans or interest in loans (which, in either case, are not convertible and have no "equity" type characteristics such as profit-related interest or which constitute non-marketable debentures for this purpose) and transfers of trade and lease receivables should not be subject to UK stamp duty, SDRT, SDLT, land transaction tax or land and buildings transaction tax.

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 VAT is chargeable on supplies of goods and services that take place in the UK and that 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 supplies of certain financial services) are exempt from VAT.

In *MBNA Europe Bank Ltd v HMRC* [2006], it was decided by the English 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 loan 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 loan receivables would usually either constitute an exempt supply for VAT purposes, or fall outside the scope of VAT altogether. However, a seller might be required to charge VAT on a supply of assets that 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 on securitised receivables, UK 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 UK tax liabilities for a purchaser with no taxable presence in the UK (except in relation to potential future liabilities to UK withholding tax on UK-source interest payments (see question 9.1 above)).

Broadly, the appointment of an independent servicer that carries out servicing activities for clients in the ordinary course of its business should not result in UK tax liabilities for the purchaser.

The question of enforcement would need to be considered in the light of the particular circumstances at that time.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.4 above), is that debt relief liable to tax in your jurisdiction?

A purchaser that is a "securitisation company" falling within the Taxation of Securitisation Companies Regulations will, generally, only be subject to tax on its retained profit, as provided for in the transaction waterfall (see further question 9.2 above).

The tax treatment of a purchaser that does not fall within the Taxation of Securitisation Companies Regulations will (as referred to in question 9.2 above) generally follow its accounting treatment for its loan relationships, subject to certain exceptions. 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.

Note

This chapter is current as of 1 April 2024 and does not take into account any changes that may be made to English law and/or regulation or UK tax after this date.

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Rupert Wall is the Head of Sidley's Global Finance practice in Europe and is the Contributing Editor of the ICLG to Securitisation. He 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 and financings (both performing and non-performing/distressed).

Rupert has consistently been recognised in all the major legal directories as a leading individual for Securitisation and Structured Finance, with clients describing him as "*a standout lawyer for ABS and CLO deals*" 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*". He has been recognised by other clients as "*technically excellent, with an encyclopaedic knowledge*" and "*thorough and detailed and personable to work with*", with other clients commenting to legal directories that 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*".

Sidley Austin LLP
70 St Mary Axe
London EC3A 8BE
United Kingdom

Tel: +44 20 7360 2035
Email: rwall@sidley.com
LinkedIn: www.linkedin.com/in/rupertwall

Simon Nikolov is a Managing Associate in Sidley's Global Finance practice in London and works across a variety of structured finance, securitisation and general finance matters, including portfolio acquisitions and disposals. Simon's experience includes representing arrangers, investment firms and originators on both public and private securitisations of numerous asset classes such as residential mortgages, commercial mortgages and credit cards.

Sidley Austin LLP
70 St Mary Axe
London EC3A 8BE
United Kingdom

Tel: +44 20 7360 3743
Email: simon.nikolov@sidley.com
LinkedIn: www.linkedin.com/in/simon-nikolov-56693999

Sidley has been at the forefront of the Securitisation and Structured Finance markets for over 40 years and during that time has been involved in a number of ground-breaking securitisation products and structures in numerous jurisdictions across the UK and Europe, including establishing domestic and multi-jurisdictional commercial mortgage-backed securities platforms, asset-backed commercial paper and securities conduits, residential mortgage-backed securities related products, whole business securitisations and covered bonds, as well as developing a deep experience in advising arrangers, managers and investors on collateralised loan obligations, collateralised debt obligations and other structured credit transactions.

Sidley's securitisation lawyers in the UK, Europe, the US and Asia have a longstanding 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 broadly syndicated) loans, consumer assets such as personal loans, auto loans and leases, student loans and credit cards and residential mortgages; trade, film/media and other more specialised receivables; and, more recently, the emerging market for financings involving online marketplaces and peer-to-peer lending, 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, financings backed by artwork, insurance products and IP securitisations amongst many others.

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