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The International Comparative Legal Guide to:

Securitisation 2012

A practical cross-border insight into securitisation work

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England & Wales



Jacky Kelly



Rupert Wall

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1 Receivables Contracts

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

With the exception of certain debts arising under regulated consumer credit arrangements, a debt need not be in writing to be enforceable against the obligor but must arise as a matter of contract or deed. Contracts may be written, oral or partly written and partly oral. An invoice (depending on its terms) may itself represent the contract between the parties or evidence a debt arising pursuant to such a contract. Where a contract is oral, evidence of the parties’ conduct is admissible for the purposes of ascertaining the terms of the contract. A contract may be implied between parties based on a course of conduct or dealings where the obligations arising from the alleged implied contract are sufficiently certain to be contractually enforceable.

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

Consumer credit loans are regulated by the Consumer Credit Act 1974 (“CCA 1974”), as amended by the Consumer Credit Act 2006 (“CCA 2006”). There is no maximum interest rate set out by the legislation. It is unlikely that courts will find interest rates unfair unless they are clearly excessive.

There is a statutory right to interest on late payments, but this does not apply to consumer credit agreements.

Certain clauses of receivables contracts may be found to be unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCR”) and consequently may be unenforceable against the consumer. The Consumer Protection from Unfair Trading Regulations prohibit certain practices that are deemed unfair.

The Financial Services Act 2010 contains measures designed to improve the position of consumers. A United Kingdom (“UK”) Government review into consumer credit and personal insolvency has been undertaken and the response was published in November 2011. There have not yet been any specific proposals arising out of

the review. The UK Government is to announce its decision on the most appropriate regime for consumer credit regulation in the coming months.

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 as a result of the 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 England & Wales that will determine the governing law of the contract?

For contracts entered into on or after 17 December 2009, the position is governed by Regulation (EC) 593/2008 of 17 June 2008 (“Rome I”). For contracts entered into prior to that date, the relevant law is the Contracts (Applicable Law) Act 1990, which enacted the Rome Convention on the law applicable to contractual obligations (“Rome Convention”) in England and Wales.

The Rome Convention states that, absent an express choice of law, the applicable law of a contract will be that of the country with which it has the closest connection. There is a presumption that this will be the country where the party who is to effect the performance of the contract has his habitual residence (if an individual) or its central administration (if a corporate entity). However, if the contract is entered into in the course of that party’s trade or profession, the country with the closest connection is the country in which the party’s principal place of business is situated. Where, under the terms of the contract, the performance is to be effected through a place of business other than the principal place of business, it is the country in which that other place of business is situated. Note that certain classes of contracts fall outside the scope of the Rome Convention.

Under Rome I, the position is largely the same, save that the presumption in favour of the law of the place where the party effecting performance has his habitual residence is a fixed rule, which may be displaced if the contract falls into one of several defined classes (for which specific rules apply) or if the contract is manifestly more closely connected with the law of a different country (in which case the law of that country is the applicable law)

or if it is sufficiently certain from the terms or circumstances of the contract which law the parties chose to apply (in which case that law will be the applicable law).

For those types of contract which fall outside the scope of the Rome Convention or Rome I, the applicable law will be decided by reference to English common law principles. Those principles seek first to determine which law the parties intended to govern the contract. If no such intention can be established, the applicable law of the contract is that with which the contract has its closest and most real connection. In deciding this, the English courts will consider which law the ordinary businessman would have intended to apply, rather than applying the principles set out in the Rome Convention or Rome I.

2.2 Base Case. If the seller and the obligor are both resident in England & Wales, and the transactions giving rise to the receivables and the payment of the receivables take place in England & Wales, and the seller and the obligor choose the law of England & Wales to govern their receivables contract, is there any reason why a court in England & Wales 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 England & Wales but the obligor is not, or if the obligor is resident in England & Wales 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 England & Wales 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 that between the seller and the obligor under the receivables contract?

Both the Rome Convention and Rome I stress the importance of the parties' freedom to choose the law of their contract (including a foreign law) and allow for modification of that choice only to the extent that the choice conflicts with overriding mandatory rules or public policy. For those types of contracts not within the scope of the Rome Convention or Rome I, the common law is also highly supportive of the parties' choice of a foreign law and will only modify such a choice in exceptional circumstances.

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in England & Wales?

No, it is not.

3 Choice of Law - Receivables Purchase Agreement

3.1 Base Case. Does the law of England & Wales 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., the laws of England & Wales or foreign laws)?

As discussed above, whether under the Rome Convention, Rome I or principles of common law, subject to certain limited exceptions, the parties to a contract (including receivables purchase

agreements) are free to agree that the contract be governed by the law of any country, irrespective of the law governing the receivable.

However, whether a receivable has been validly sold and whether such sale has been perfected will generally be a matter for the law governing the receivable and not the law governing the receivables purchase agreement. In addition, questions of enforcement against the obligor of the receivables may also be governed by the law of the jurisdiction in which the obligor is located.

3.2 Example 1: If (a) the seller and the obligor are located in England & Wales, (b) the receivable is governed by the law of England & Wales, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of England & Wales to govern the receivables purchase agreement, and (e) the sale complies with the requirements of England & Wales, will a court in England & Wales 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)?

Yes, it will.

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 England & Wales, will a court in England & Wales 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 requirements of the obligor's country or the purchaser's country (or both) be taken into account?

See question 3.1 above. In addition, under both the Rome Convention and Rome I, there are certain limited circumstances where certain legal provisions of countries other than the country whose law was selected to govern the receivables purchase agreement may be (but not must be) taken into account such as where performance of the contract (by virtue of the location of the purchaser, the obligor, both or neither) is due in a place other than England and Wales, in which case the English courts have discretion whether to apply certain mandatory provisions of the law of the country where performance of the contract is due, in so far as non-application of those overriding provisions would render the performance of the contract unlawful in that country.

3.4 Example 3: If (a) the seller is located in England & Wales 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 England & Wales 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 England & Wales' own sale requirements?

As above, under the Rome Convention and Rome I, the validity of a contract will be determined by reference to the law that governs the contract in substance under the Rome Convention or Rome I, and therefore the English courts would assess the validity of the contract in accordance with the law chosen by the parties.

However, certain mandatory principles of England and Wales would not be capable of disapplication by choice of law and the courts

would not apply the parties chosen law to the extent it conflicted with those.

3.5 Example 4: If (a) the obligor is located in England & Wales 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 England & Wales 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 England & Wales' own sale requirements?

See question 3.4 above. In addition, questions of enforcement against the obligor of the receivables may also be governed by the law of the jurisdiction in which the obligor is located and as such the English courts may apply English law in this regard.

3.6 Example 5: If (a) the seller is located in England & Wales (irrespective of the obligor's location), (b) the receivable is governed by the law of England & Wales, (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 England & Wales 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 England & Wales and any third party creditor or insolvency administrator of any such obligor)?

See questions 3.1, 3.3 and 3.4 above.

4 Asset Sales

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

The most common method of selling receivables is by way of assignment (either legal or equitable). Alternatives to assignment include a trust of the receivables (coupled with a power of attorney), a trust of the proceeds of the receivables, sub-participation (essentially a limited recourse loan to the seller) and novation (a transfer of both the rights and obligations under the contract). An outright sale of receivables may be described as a "sale", a "transfer" or an "assignment" although the phrase "assignment" often indicates a transfer of the rights, but not the obligations, whilst "transfer" often indicates a transfer of the rights and obligations by novation. The phrase "security assignment" is often used to distinguish a transfer by way of security from an outright assignment.

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

To perfect an assignment of receivables, express notice in writing is

required to be given to the obligor. The giving of such notice will not in itself result in the assignment becoming a legal as opposed to equitable assignment, as certain other formalities are also required under s.136 of the Law of Property Act 1925 ("LPA"), namely the assignment has to be in writing under the hand of the assignor, the assignment must be of the whole of the debt and the assignment must be absolute and not by way of charge. Where the sale of a receivable falls short of these requirements, it will take effect as an equitable assignment, in which instance any subsequent assignment effected by the seller and notified to the obligor prior to the date on which the original assignment is notified to the obligor, will take priority. A novation of receivables (pursuant to which both rights and obligations are transferred) requires the written consent of the obligor, as well as the transferor and transferee.

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

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

Mortgage loans and their related mortgages may be transferred by assignment. With respect to a mortgage over real property, as well as the giving of notice, certain other formalities need to be complied with in order to effect a legal assignment, for example, registration of the transfer at HM Land Registry. Most residential mortgage backed securitisation transactions are structured as an equitable assignment of mortgage loans and their related mortgages to avoid the burdensome task of giving notice to the mortgagors and registering the transfer. However, until notice is 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 8.3 and 8.4 in relation to specific regulatory requirements in relation to consumer loans.

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

The Financial Collateral Arrangements (No. 2) Regulations 2003 (as amended, including pursuant to the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendments) Regulations 2010 that came into force in England and Wales on 6 April 2011) (the "Financial Collateral Regulations") are also relevant to the transfer of negotiable instruments to the extent that a "financial collateral arrangement" exists.

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? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment? Whether or not notice is required to perfect a sale, are there any benefits to giving notice - such as cutting off obligor set-off rights and other obligor defences?

Assuming the receivable does not fall into a select category of contractual rights which are incapable of assignment either as a matter of public policy or because the rights are of a personal nature, in the absence of an express contractual prohibition on assignment, receivables may be assigned without the consent of the obligor. To the extent that a receivable is the subject of a contractual prohibition on assignment, other methods of transfer may be available (see question 4.1 above) depending on the exact wording of the contract.

The absence of notice has the following implications: (i) obligors may continue to discharge their debts by making payments to the seller (being the lender of record); (ii) obligors may set-off claims against the seller arising prior to receipt by the obligors of the notice of assignment; (iii) a subsequent assignee of (or fixed chargeholder over) a receivable without notice of the prior assignment by the seller would take priority over the claims of the initial purchaser; (iv) the seller may amend the agreement governing the terms of the receivable without the purchaser's consent; and (v) the purchaser must agree with the seller if it wishes to sue the obligor in its own name (although this is largely a procedural and not a substantive impediment).

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 against the obligor have commenced? 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?

Notice must be in writing and given to the obligor (or his agent) and may not be conditional, although there is no particular form of notice that is required. The notice need not give the date of the assignment, but a specified date must be accurate. The main requirement is that the notice is clear that the obligor should pay the assignee going forward.

There is no specific time limit for the giving of notices set down in the LPA and notice can be given to obligors post insolvency of the seller (including pursuant to an irrevocable power of attorney granted by the seller). 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; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in England & Wales? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If England & Wales recognises prohibitions on sale or assignment 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 on any other basis?

Restrictions on assignment or transfers of receivables are generally enforceable. If a contract is silent on the question of assignment, then such contract and the receivables arising thereunder will be freely assignable. 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), such assignment is effective as between the seller and purchaser.

4.7 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?

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

4.8 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and/or (c) control of collections of receivables without jeopardising perfection?

A transaction expressed to be a sale will be recharacterised as a financing if it is found to be a "sham", i.e. if the documents do not reflect the actual agreement between the parties.

Further, irrespective of the label given to a transaction by the parties, the court will look at its substance and examine whether it creates rights and obligations consistent with a sale.

Case law has established four key questions which must be considered when concluding that a transaction is a sale rather than a secured financing:

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

The seller remaining the servicer/collection agent of the receivables post-sale, the seller entering into arm's length interest rate hedging with the purchaser and/or the seller assuming some degree of credit risk by assuming a first loss position are not considered to be inconsistent with sale treatment.

If the sale is recharacterised as a secured financing, the assets "sold" will remain on the seller's balance sheet and the loan will be shown 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 be void in an insolvency of the seller for lack of registration.

In addition to recharacterisation, sale transactions are also vulnerable under certain sections of the Insolvency Act 1986 such as s.239 (transactions at an undervalue) and s.240 (preferences).

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables (i.e. sales of receivables as and when they arise)?

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

4.10 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 or after the seller's insolvency?

An assignment for value of an identifiable receivable, which is not in existence at the time of the receivables purchase agreement but which will be ascertainable in the future, is treated as an agreement to assign which will give rise to an equitable assignment of the receivable as soon as it comes into existence. See question 6.5 on the effect of an insolvency of the seller on an agreement to assign a receivable not yet in existence.

4.11 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 receivables themselves. 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.

5 Security Issues

5.1 Back-up Security. Is it customary in England & Wales to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

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 either held to be void or is subsequently recharacterised.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of England & Wales, and for such security interest to be perfected?

See questions 5.1 and 5.3.

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 England & Wales to grant and perfect a security interest in purchased receivables governed by the laws of England & Wales and the related security?

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

Receivables assigned by way of security together with a condition for re-assignment on redemption of the secured obligation will create a mortgage over the receivables which will either be legal (if the procedural requirements of s.136 LPA, more fully identified in question 4.2, are satisfied) or, in the absence of these requirements, equitable. Prior to the perfection of an equitable mortgage by notice to the obligor, the assignee's security will be subject to prior equities (such as rights of set-off and other defences), will be liable to take priority behind a later assignment where the later assignee has no notice of the earlier assignment and himself gives notice to the obligor and the obligor will be capable of making good discharge of its debt by paying the assignor directly (as more particularly described in questions 4.4 and 4.5).

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 claimants. A practical distinction between a mortgage and a charge over receivables is the inability of a chargee to claim a right of action in his own name against the obligor. In practice, this distinction is diminished by including a right to convert the charge into a mortgage together with a power of attorney to compel transfer of the receivables to the chargee.

The degree of priority given to a chargee depends on whether the charge is fixed or floating. Whilst definitive definitions have remained elusive, the hallmarks of a fixed charge are that it attaches to the ascertainable receivables over which it is subject immediately upon its creation (or upon the receivable coming into existence). In

comparison, a floating charge is a present security over a class or fund of assets (both present and future) which, prior to the occurrence of a specified crystallisation event, can continue to be managed in the ordinary course of the chargor's business. On occurrence of a specified crystallisation event, the floating charge will attach to the assets then presently in the fund, effectively becoming a fixed charge over those assets. Recent case law emphasises control of the receivable as the determining factor in distinguishing a fixed or floating charge whilst asserting that it is the substance of the security created, rather than how described or named, that is important.

This distinction has some important effects in practice: first, on an insolvency of the chargor, a fixed chargeholder will rank in priority to all unsecured claims whilst a floating chargeholder will rank behind preferential creditors and equally with a statutory "prescribed part" (up to a maximum of £600,000) made available to unsecured creditors; second, a floating charge given within 12 months (or 24 months if given to a "connected" person) prior to the onset of insolvency will be void except as to new value given; and third, whereas a fixed chargeholder will obtain an immediate right over definitive assets which can only be defeated by a purchaser in good faith of the legal interest for value without notice of the existing charge (and, as summarised below, as most charges will be registrable (or in practice registered), many purchasers will be held to have notice of such charge accordingly), 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.

In terms of perfection, where a charge or mortgage is taken over certain classes of assets (including receivables constituting book debts), it is a requirement under the Companies Act 2006 (the "Companies Act") for the chargor to register the charge with Companies House within 21 days of its creation.

The requirement to register a mortgage/charge over receivables under the Companies Act will, with some limited exceptions, apply to charges created by companies (or limited liability partnerships) registered in England and Wales. In relation to a mortgage/charge created by an overseas company before 1 October 2011, the mortgage or charge must be registered at Companies House if the company has registered the particulars of an establishment in the UK on the register (in compliance with the statutory requirement to do so), the mortgage/charge is over property in the UK on the date created and the mortgage/charge is of the type requiring registration. A mortgage/charge created by an overseas company on/after 1 October 2011 over UK property is not required to be registered at Companies House although such overseas company must, within 21 days of the creation of any mortgage/charge over UK land, ships, aircraft and intellectual property registered in the UK or any floating charge over any of its property (unless UK property is expressly excluded) enter details of such mortgage/charge on its charges register. This register must be available for inspection as must copies of the instruments creating any such mortgage/charge. These rules are currently the subject of ongoing review.

The Financial Collateral Regulations exempt certain security over "financial collateral" (cash, financial instruments and credit claims) such that a security financial collateral arrangement which constitutes a registrable security interest under the Companies Act or overseas companies registration requirements does not need to be registered at Companies House. In practice, it is still customary to register these charges.

Failure to register a registrable charge within the prescribed statutory period will result in that security interest being void as against a liquidator, administrator, creditors in a liquidation or

administration or secured creditors. However, as registration of a charge over receivables is a perfection requirement (and not a requirement for attachment of security) an unregistered charge will still be valid as against the chargor, provided the chargor is not in winding-up or administration. Similarly, registration under the Companies Act is not determinative as to priority such that, provided that both charges are registered within the statutory 21-day period after creation, a prior created charge will take priority over a subsequently created charge even where that later charge is registered first.

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

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

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

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

Security over contractual rights under insurance policies is usually created by security assignment.

Security over mortgage or consumer loans will be created by mortgage or charge. Creating security over the mortgage securing a mortgage loan is generally accomplished by equitable mortgage.

Security over marketable debt securities or negotiable instruments (including promissory notes and bearer debt securities) is a complicated area that depends on whether the relevant securities are bearer or registered, certificated, immobilised (i.e. represented by a single global note) or dematerialised and/or directly-held or indirectly-held. In (brief) summary, (i) directly-held and certificated debt securities, where registered, may generally be secured by legal mortgage (by entry of the mortgagee on the relevant register) or by equitable mortgage or charge (by security transfer or by agreement for transfer or charge), (ii) security over bearer debt securities may be created by mortgage or pledge (by delivery together with a memorandum of deposit) or charge (by agreement to charge) and in certain limited circumstances a lien may arise, and (iii) security may be created over indirectly-held certificated debt securities by legal mortgage (by transfer, either to an account of the mortgagee at the same intermediary or by transfer to the mortgagee's intermediary or nominee via a common intermediary) or by equitable mortgage or charge (by agreement of the intermediary to operate a relevant securities account in the name of the mortgagor containing the debt securities to the order/control of the chargee).

To the extent the security is of a type covered by the Companies Act, it may be required to be registered at Companies House. The Financial Collateral Regulations (which remove certain requirements in relation to the creation and registration of security

and disapply certain rules of insolvency law) will apply to any security which is a “financial collateral arrangement” involving “financial collateral”.

5.6 Trusts. Does England & Wales 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 until turned over to the purchaser?

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

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

England and Wales recognises the concept of money held in a bank account in escrow. Security granted by a depositor for a third party is typically taken over the debt represented by a credit balance by way of a charge or security assignment. Security over a credit balance granted by a depositor in favour of the bank at which such deposit is held can only be achieved by way of charge (not by assignment) and is usually supplemented by quasi-security such as a flawed asset arrangement and a contractual right of set-off. To the extent that the security is a “security financial collateral arrangement” over “cash” as provided for in the Financial Collateral Regulations, such regulations will apply.

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.

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 the insolvency laws of England & Wales automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a “stay of action”)? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

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

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

If the receivables have been sold by equitable assignment and

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

6.2 Insolvency Official's Powers. If there is no stay of action under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (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 rights, unless there had been fraud or another breach of duty or applicable law (such as the antecedent transaction regime described below).

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a “suspect” or “preference” period before the commencement of the insolvency proceeding? What are the lengths of the “suspect” or “preference” periods in England & Wales for (a) transactions between unrelated parties and (b) transactions between related parties?

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

Otherwise, the court may set aside a transaction made at an undervalue in the two years ending with the commencement of the administration or liquidation if the company was at that time, or as a result of the transaction became, unable to pay its debts as they fell due. There is a defence if the court is satisfied that the company entered into the transaction in good faith with reasonable grounds for believing that it would benefit the company.

A transaction which puts a creditor or guarantor of the seller into a better position (in a winding-up) than it would otherwise have been in had that transaction not occurred can be set aside by the court if such preference is made (i) in the two years ending with the onset of insolvency (in the case of a preference to a person “connected” with the company), or (ii) in the six months prior to 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. Transactions defrauding creditors may also be reversed by the court.

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?

The equitable remedy of substantive consolidation, which permits the court to treat the assets and liabilities of one entity as though they were those of another, is not recognised by the English courts. Only in circumstances where the assets and liabilities of two companies were indistinguishably amalgamated together, and where to do so would be in the interests of both companies' creditors, might the court sanction an arrangement reached by the insolvency official and those creditors.

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.

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?

Where the receivables sale 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 continue to be effective to transfer the receivables even after the initiation of insolvency proceedings.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in England & Wales establishing a legal framework for securitisation transactions? If so, what are the basics?

Other than certain tax laws, there are no laws specifically providing for securitisation transactions.

7.2 Securitisation Entities. Does England & Wales 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?

There are no laws specifically providing for the establishment of special purpose entities for securitisation.

7.3 Non-Recourse Clause. Will a court in England & Wales give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

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.

7.4 Non-Petition Clause. Will a court in England & Wales give effect to a contractual provision (even if the contract'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?

Non-petition clauses are likely to be valid (whether governed by English law or the law of another country), although there is little authority in English law. The most effective method for enforcing such a clause would be injunctive relief which, as an equitable remedy, is at the discretion of the court. A court would have to consider whether such a clause was contrary to public policy as an attempt to oust the jurisdiction of the court or the insolvency laws of the UK. It is possible that an English court would deal with a

winding-up petition even if it were presented in breach of a non-petition clause. A party may have statutory or constitutional rights to take legal action against the purchaser or such other person which are not possible to be contractually disapplied.

7.5 Independent Director. Will a court in England & Wales give effect to a contractual provision (even if the contract'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?

A restriction or limitation on the ability of the directors to bring insolvency proceedings contained in the articles of association of a company or in a contract entered into by a company may be invalid as a matter of public policy or incompatible with certain statutory duties of the directors.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in England & Wales, 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 England & Wales? Does the answer to the preceding question change if the purchaser does business with other sellers in England & Wales?

A purchaser of consumer receivables requires a licence under the CCA 1974, as amended by the CCA 2006. A purchaser of residential mortgage loans who assumes a servicing and collection role with respect to such mortgage loans will require authorisation from the Financial Services Authority (the "FSA"). The purchaser may also be obliged to register under the Data Protection Act 1998 (the "DPA"). It makes no difference whether or not the purchaser does business with other sellers in England and Wales.

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

The seller is likely to need a licence from the Office of Fair Trading (the "OFT") under the CCA 1974, as amended by the CCA 2006 (since debt collection is a business that the OFT specifies as requiring a licence) and registration under the DPA. Where the seller continues to act as servicer with respect to residential mortgage loans, it will be required to be authorised to perform such role by the FSA. Any standby or replacement servicer will require the same licences and authorisations.

8.3 Data Protection. Does England & Wales 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 individuals is regulated by the DPA. The DPA only applies to individual obligors and not enterprises. Data controllers are subject to annual

notification requirements. A data controller would include a purchaser of receivables serviced by the seller.

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 England & Wales? Briefly, what is required?

The purchase of receivables would not in itself require the purchaser to be authorised as a bank, financial institution or equivalent.

The CCA 1974, as amended by the CCA 2006, governs consumer credit loans. A purchaser of such receivables is likely to require a licence under this legislation and will be required to comply with such legislation in its dealings with obligors and with the EU Consumer Credit Directive as implemented into the law of England and Wales.

The UTCCR applies to agreements made on or after 1 July 1995. 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 a term will not be binding on the consumer.

The Unfair Contracts Terms Act 1977, 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 the reasonableness test.

Mortgage contracts are regulated by the Financial Services and Markets Act 2000 (“FSMA”). Entering into a regulated mortgage contract, arranging or administering it or advising on it is a regulated activity, requiring authorisation from the FSA under FSMA. Second mortgages and buy-to-let mortgages are currently excluded from “regulated mortgages”. Mortgage lenders are required to comply with the FSA’s Mortgages: Conduct of Business handbook.

8.5 Currency Restrictions. Does England & Wales have laws restricting the exchange of England & Wales’ currency for other currencies or the making of payments in England & Wales’ currency to persons outside the country?

No, subject to any restrictions imposed by United Nations sanctions.

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 England & Wales? 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?

The withholding tax treatment of UK receivables depends not only on their nature but on the nature of the recipient to whom they are paid. Very broadly, payments of interest with a UK source may be paid without withholding to a purchaser which is either resident in the UK or carries on business in the UK through a permanent establishment. Payments of interest to a non-UK resident purchaser may often be subject to withholding, subject to any available treaty relief pursuant to a double taxation convention. Generally, the use of relief under a double taxation convention where there are pools of assets that run to more than a very few obligors is administratively challenging. Accordingly, loan receivables are

typically securitised through the use of a UK resident purchasing company.

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

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

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

From 1st January 2007, the Taxation of Securitisation Companies Regulations 2006 came in to force. These regulations apply to companies which are “securitisation companies” (as defined in the regulations) and permit such securitisation companies to be subject to a tax treatment reflecting the cash position of its securitisation arrangements such that it is taxed only on the cash profit retained within the company after the payment of its transaction disbursements according to the transaction waterfall. As such, a balanced tax treatment can be achieved and the regime has been seen as providing effective relief from the complex or anomalous tax rules which could otherwise apply to UK incorporated special purpose entities.

9.3 Stamp Duty, etc. Does England & Wales impose stamp duty or other documentary taxes on sales of receivables?

Stamp duty exists in the UK and is chargeable on documents in certain circumstances. Transactions effected without the use of a document may also be subject to UK Stamp Duty Reserve Tax (“SDRT”) levied on transfers of certain types of securities whether by document or otherwise. Generally transfers of loans (which are not convertible and have no “equity” type characteristics, such as profit-related interest), trade and lease receivables should not be subject to UK stamp duty or SDRT.

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

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

In *MBNA Europe Bank Ltd v HMRC* [2006] EWHC 2326 (Ch) it was decided by the UK High Court that the transfer of credit card receivables by an originator in a securitisation was not a supply for VAT purposes. However, that decision may not apply to all such transfers. To the extent that the decision does not apply, a transfer of financial receivables would generally be treated as an exempt supply for VAT purposes.

Generally, fees payable for collection agent services are not exempt

from VAT and will usually give rise to VAT at the standard rate, to the extent they are treated as taking place in the UK.

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

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

Broadly, HMRC would not be able to require the purchaser to account for VAT, unless the purchaser was a member of the same

group as the seller for VAT purposes. Although there are limited exceptions to this general position, it is unlikely that such exceptions would apply in a securitisation context.

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

9.6 Doing Business. Assuming that the purchaser conducts no other business in England & Wales, 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 England & Wales?

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

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Jacky is head of Weil's London securitisation, structured finance and derivatives practice. She has been practising since the mid-eighties when the UK securitisation market was conceived.

She has represented both banks and corporate clients on the securitisation of a wide range of asset types in some of the most innovative deals in the market, including ports revenues, residential mortgages, commercial real estate, trade receivables, credit cards, computer/equipment leases, auto loans, HP receivables and music royalties as well as football ticket and stadium financing. Jacky also has extensive experience in CLO/CDOs, SIVs, ABCP conduits and covered bonds. Legal 500 UK notes that her "depth of industry and technical knowledge are second to none" whilst Chambers UK states that she is "able to cut through what appears to be insurmountable problems with direct and incisive advice".

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Weil

Weil's London structured finance team has consistently been at the forefront of developments in the securitisation and derivatives industry, and has earned a reputation for developing innovative and ground-breaking structures. As the securitisation industry starts to revive, Weil has recently been called upon to advise on a number of prestigious new securitisation issuances coming to market especially those relating to the securitisation of consumer assets and residential mortgages. In 2012, Weil's structured finance team were nominated for the 2012 Legal Business Awards "Finance Team of the Year" for their work in structuring a wholly new lease funding structure and continue to be involved in some of the most challenging and ground-breaking litigation in the securitisation market relating to issues such as contractual subordination and set-off. Chambers UK has described the Weil securitisation team as "an excellent group, superb at working as a team, providing cost-effective and thorough advice" whilst Legal 500 UK notes that Weil is "traditionally one of the top firms for securitisation" and that it "rates highly on all categories, from response times, business acumen and strength in depth to value for money".

As Weil is one of the very few firms who have top quality, highly-ranked, self-standing structured finance practices in both the UK and the US, they are able to offer access to full service global advice with regard to specialist areas which impact on structured finance products being placed both in Europe and the US such as the Securities Act, Investment Company Act, ERISA, the Dodd-Frank Act and FATCA as well as the impact of regulatory issues such as Rule 15Ga-1 of the U.S. Securities Exchange Act, Article 122a of the EU Capital Requirements Directive and ongoing Rating Agency reforms under SEC Rules 17g-5 and 17g-7.

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