



ICLG

The International Comparative Legal Guide to:

Securitisation 2015

8th Edition

A practical cross-border insight into securitisation work

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Securitisation*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of securitisation.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key securitisation issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in securitisation laws and regulations in 38 jurisdictions.

All chapters are written by leading securitisation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Mark Nicolaides of Latham & Watkins LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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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?

It is generally not necessary for the sale of goods or services to be evidenced by a formal receivables contract. Certain types of contract are required to be in writing in order to be binding between the parties. An invoice in conjunction with the actings of the parties may be sufficient to establish a contract between the parties and evidence a debt.

1.2 Consumer Protections. Do Scotland’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?

In consumer credit arrangements, there are statutory restrictions which may affect interest chargeable. Excessive interest could be challenged if, prior to 6 April 2007, it constituted an extortionate credit transaction under s.137 of the Consumer Credit Act 1974 (the CCA) and from 6 April 2007 it constituted an unfair relationship under s.140A of the CCA. Default interest provisions which are penalties may be unenforceable. Certain provisions in consumer contracts may be unenforceable as being unfair under the Unfair Terms in Consumer Contracts Regulations 1999.

The Late Payment of Commercial Debts (Interest) Act 1998 provides for payment of interest in commercial transactions where the parties have not specified that interest is payable following late payment under the contract. The Act applies to commercial contracts for the sale of goods and services but does not apply to consumer contracts.

The CCA contains consumer protections regarding certain forms of consumer credit arrangement including the ability for the consumer to cancel receivables contracts within a specified period of time.

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?

With the exception of potential immunity issues associated with state entities, there are no different requirements and laws applicable to the sale or collection of receivables from the government or government agencies in Scotland.

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 Scotland that will determine the governing law of the contract?

The choice of law is determined with reference to the Contracts (Applicable Law) Act 1990 (the **1990 Act**), the Rome I Regulation (Regulation (EC) 593/2008, dated 17 June 2008) or Scots common law. The 1990 Act applies the Rome Convention on contractual obligations (the **Rome Convention**) in respect of contracts entered into, on, or before 17 December 2009 and the Rome I Regulation (implemented in Scotland by The Law Applicable to Contractual Obligations (Scotland) Regulations 2009/410) applies to contracts entered into after that date.

Under the Rome Convention, in the absence of an express choice of law, the principle of closest connection is applied in determining the law of the contract. Closest connection is presumed to be: the country where a party who is to effect the performance of the contract has its habitual residence (or equivalent), unless the contract is entered into in the course of a party’s trade or profession in which case the closest connection is presumed to be the country in which the party’s principal business is located; or if performance is in another place of business, the country where that other place of business is located.

Under the Rome I Regulation the position is similar save that habitual residence is a fixed rule with exceptions for particular contract classes where specific rules apply. If, however, it is clear that the contract is more closely connected with the law of a different country, the law of that country is the applicable law.

To the extent the relevant contract is beyond the scope of the 1990 Act or the Rome I Regulation, Scots common law will determine the choice of law where the contract is silent. Scots common law applies the ‘proper law’ to the contract, this being the law which

the parties intended or may fairly be presumed to have intended to invoke in creating the contractual relationship.

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

The parties may expressly choose the governing law relating to the contract and such choice will be recognised by the Scottish courts under certain exceptions specified under the 1990 Act or the Rome I Regulation. For contracts beyond the scope of the 1990 Act or the Rome I Regulation, the Scottish courts are likely, subject to issues of public policy, to recognise the express choice of law of the parties provided such choice of law coincides with the intention of the parties. It should be noted that, to the extent a law other than Scots law is expressly applied to the contract, such choice of law would need to be pled in order for it to be recognised by the Scottish courts.

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

The Convention is not in effect in Scotland.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does Scotland'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., Scotland's laws or foreign laws)?

The parties are generally permitted to choose the law to govern contractual obligations between them including those arising under a receivables purchase agreement.

It is common for portfolios of Scottish receivables to be sold under a contract governed by a law other than Scots law. It is not necessary for the contract of sale to be governed by the same law as the underlying receivables. To the extent that the sale contract creates rights to the underlying receivables beyond mere contractual rights (for example, the purchaser acquiring an equitable proprietary interest in the underlying receivables by execution of the sale contract only), it is unlikely that such additional rights would be effective in respect of Scottish receivables without further action being required.

3.2 Example 1: If (a) the seller and the obligor are located in Scotland, (b) the receivable is governed by the law of Scotland, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Scotland to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Scotland, will a court in Scotland 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, the Scottish courts will recognise the express choice of Scots law.

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 Scotland, will a court in Scotland 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?

It is likely that the Scottish courts will recognise the sale contract and in particular give effect to the sale to the purchaser in questions against the seller and any creditor of, or insolvency practitioner appointed to, the seller. The effect of the sale contract in questions against the relevant obligor and the purchaser may require local country law to be considered.

3.4 Example 3: If (a) the seller is located in Scotland 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 Scotland 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 Scotland's own sale requirements?

It is likely that the Scottish courts will recognise the choice of law in respect of the sale contract and will not require any additional Scots law formalities to be complied with in order to give effect to the transfer of the receivables pursuant to the sale in question against the seller, the creditors of, or insolvency administrator appointed to, the seller.

3.5 Example 4: If (a) the obligor is located in Scotland 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 Scotland 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 Scotland's own sale requirements?

See the answer to question 3.4 above.

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

It is likely that the Scottish courts will recognise the choice of law in respect of the sale contract. On the basis that the receivables are governed by Scots law, the transfer of the receivables pursuant to the sale in compliance with the requirements of the purchaser's country will be recognised by the Scottish courts, provided they also comply with the Scots law requirements in respect of the transfer of such receivables.

4 Asset Sales

4.1 Sale Methods Generally. In Scotland 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 way for a seller to sell receivables to a purchaser is by means of a sale contract supported by an assignment or assignment of the receivables with notice to the relevant obligors, or where notice is unattractive (or inconsistent with arrangements to be put in place in other jurisdictions for that particular portfolio) then a trust is declared over the relevant interests under the receivables contracts and related receivables and cash receipts. Scots law does not recognise equitable transfers in respect of Scottish assets and, accordingly, an equitable assignment of the receivable would not, as a matter of Scots law, pass a proprietary interest in the receivables to the purchaser. The trust would, however, create a protected interest in the Scottish receivables which would be good against the seller or any insolvency official appointed to the seller.

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?

The sale of Scottish receivables is perfected by the relevant obligors receiving notice of the assignment. Scots law recognises various forms of notice. While the assignment is effective from the date of receipt of notice by the obligor, an acknowledgment of such notice provides evidence of both receipt and understanding of the new arrangements by the relevant obligor.

If the same receivables are assigned by the seller to several third party purchasers all acting in good faith, the order of priority between such purchasers is determined by the date of receipt of notice by the obligor of the assignments. Accordingly, a subsequent third party purchaser who acquires in good faith and notifies the obligor first will take a better title to the receivables than the first purchaser and any intervening purchaser.

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?

Mortgage loans and related security are transferred by formal assignment with notice and, in the case of the transfer of the mortgage security, by registration of such transfer at the Scottish land registers. Many securitisations are structured on the basis of equitable assignments of mortgage loans and related security. Generally, such arrangements are implemented in Scotland by means of an express trust.

Securities which are in bearer form are generally transferable by mere delivery of the relevant security certificate. Instruments which are negotiable in nature may be transferred by a combination of endorsement and delivery with, in certain circumstances, notice to the relevant obligor under the instrument.

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?

Notice is a requirement of Scots law for the formal transfer of the seller's interest in the receivable. Prior to notification the obligor can obtain a valid discharge of the debt by paying the seller. The proprietary interest in the receivable remains with the seller until notice of the transfer is given to the obligor. Consequently, unless a trust has been declared over the receivables, such interests are available to the creditors of the seller on insolvency.

The consent of the obligor to the sale is not necessary unless expressly required under the contract or unless the principle of *delictus personae* applies (the contract being of a nature specific to the parties to it). The contract does not need to contain an express permission for a party's interest to be assignable.

Notice has the effect of limiting rights of set-off affecting the receivables arising from other ongoing arrangements between the obligor and the seller. The purchaser acquires the receivable subject to any existing rights of set-off the obligor has against the seller. Notice also prevents the obligor from obtaining a valid discharge of the debt from the seller.

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 or the seller 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?

The form of notice is not prescribed under Scots law. Various forms of notice or intimation are recognised including those permitted by the Transmission of Moveable Property (Scotland) Act 1862. The 1862 Act provides for notarial intimation and postal intimation. In the latter case, to obtain the benefit of the terms of the Act, the

intimation should contain a certified true copy of the assignation. The notice can be delivered after the sale. The transfer would, however, be subject to the rights of parties who have effected diligence in the meantime, third party purchasers acquiring in good faith, perfected security holders and insolvency officials appointed to the seller. The intimation can be delivered after the commencement of insolvency proceedings against the obligor. The impact of insolvency of the seller is considered in the answer to question 6.1 below.

While an assignation of receivables arising under future contracts is theoretically possible under Scots law, the position is subject to much academic debate and issues arise around the ability to clearly identify the receivable in question. It is a fundamental principle of Scots law for the assignation to be effective that the receivable is either identified or identifiable. Accordingly, assignations of receivables arising under future contracts should be treated with care.

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)?

Restrictions of this nature (whether expressed in relation to the assignation or transfer of rights or obligations under the Agreement or relating to the assignation or transfer of the Agreement itself) will generally be interpreted as prohibiting a transfer at least in any question between the purchaser and any obligor. Dependent upon the purchaser’s awareness of the prohibition and the terms of the assignation itself, the purchaser may have a claim against the seller for failing to transfer title to the receivables.

Generally, obligations cannot be assigned under Scots law (whether the contract contains a prohibition on assignations of obligations or not). It is more common for the transfer of obligations to be effected by a novation between the seller, the purchaser and the relevant obligor. As such, the co-operation of the obligor is required. An assignation of receivables should not be captured by a prohibition on transfer or assignation of obligations of the seller.

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 Scotland? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Scotland 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?

Such restrictions are generally enforceable in Scotland. There are no particular exceptions to this rule. If a sale or assignment is effected in breach of a prohibition, the sale or assignment is likely to be ineffective as between the seller and the obligor. A claim for damages for breach of contract may also be available to the obligor against the seller.

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 receivables must be identified or identifiable for the purposes of the sale and transfer of the receivables. The receivables must be ascertainable for the purpose of any transfer. Relevant information usually includes the obligor’s name, invoice number, invoice date and amount. The receivables being sold do not need to share objective characteristics. It is possible for the seller to contract to sell all of their receivables to the purchaser or all receivables other than those specifically excluded (and identifiable). It is unlikely that this would be sufficient to identify the receivables for the purpose of an assignation and notice.

4.9 Respect for Intent of Parties; Economic Effects on Sale. 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 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; (c) control of collections of receivables; or (d) a right of repurchase/redemption without jeopardising perfection?

A transaction expressed to be a sale may be re-characterised by the courts in Scotland as potentially a secured financing in certain circumstances. A true sale analysis of the sale is usually undertaken. In the Scottish context, this involves reviewing the transaction documentation and deal structure and considering the tests applicable in the English case of *Re Inglefield* and an assessment of the ‘ultimate right’ in the receivables sold.

No single factor will result in the transaction being characterised as a sale or a secured financing. Retention of credit risk by the seller may suggest that the purchaser has not truly acquired the receivables and accordingly buy back provisions are required to be formulated with care. Again, interest rate risk may be characterised as either an indication of true ownership being retained by the seller or merely a purchase price adjustment mechanism. Control of collections of receivables when such services are provided for a commensurate fee and where the seller does not retain any economic exposure to the receivables either for failing to collect or entitlement to profit from collection is unlikely, in itself, to result in the sale being re-characterised.

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?

The seller can agree in an enforceable manner to a continuous sale of receivables as and when they arise (at least so far as the purchaser acquiring a contractual right to the receivables) provided such

receivables are identifiable. Such contractual arrangements would be effective until the insolvency of the seller.

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 or after the seller’s insolvency?

See question 4.10 above. The transfer of such receivables to the purchaser would, however, need to be documented separately and an automatic transfer of such receivables (at least in respect of Scottish receivables) is unlikely to be recognised by the Scottish courts without the Scottish formalities being met. To the extent relating to future receivables, we would generally recommend that express supplemental trusts are declared over receivables as and when they are originated (or regularly in batches) pending formal transfer of the receivables to the purchaser.

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?

Each relevant interest should be transferred in accordance with the formal transfer requirements under Scots law unless the security is held on a security trust basis. Related security is generally assigned to the purchaser under Scots law and notice given to obligors or registrations at the relevant Scottish land register depending upon the security involved. Under Scots law, an assignation has the effect of ‘ruling off’ the liabilities secured by the related security at the time of the transfer even if the security is expressed as being for “all sums”. Accordingly, further advances would be unsecured unless the security is amended or new security is granted to support the further advance. Pending formal transfer, a trust is commonly declared in favour of the purchaser over the receivables and related security. This can also cover certain ancillary rights which are difficult to formally transfer to the purchaser.

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?

The obligor’s rights of set-off continue after notice of a sale and related assignation is given to the obligor but only in respect of amounts which were subsisting prior to such notice being given. Accordingly, any new liabilities of the seller to the obligor arising after notice of the sale and assignation has been given to the obligor will be excluded from the obligor’s rights of set-off.

The purchaser should not be liable to the obligor for damages caused by set-off rights being restricted after the assignation of the receivable. Depending upon the terms of the Agreement and any

other arrangement between the obligor and the seller, the obligor may have a claim of damages against the seller for losses suffered as a result of set-off rights being restricted after the transfer of the receivable.

5 Security Issues

5.1 Back-up Security. Is it customary in Scotland 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?

It is not customary in Scotland to take back-up security over the seller’s interest in the receivables in the event that the sale is deemed by the court not to have been perfected or being re-characterised as a secured financing.

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 Scotland, and for such security interest to be perfected?

The formalities for granting fixed security over receivables are similar to those in respect of the transfer of such an interest. Accordingly, the receivable should be assigned to the purchaser and notice given to the obligor. The form of security required in respect of related security interests will depend upon the security involved.

In addition, a corporate seller may grant a floating charge over its assets including the receivables and related security.

The security may also need to be registered at Companies House.

The Financial Collateral Arrangements No. 2 Regulations 2003 (as amended) also apply in Scotland.

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

The answer is the same as that to question 5.2 above. The purchaser may also hold an interest as beneficiary under a trust declared by the seller over the relevant receivables. Such an interest is capable of being subject to fixed security by means of an assignation duly intimated to the seller.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of Scotland, 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 Scotland or must additional steps be taken in Scotland?

To the extent that the receivables are governed by Scots law, the Scottish courts may not recognise any security granted over such receivables which falls short of the Scots law formalities in respect of such security. The appropriate form of security is set out under question 5.2 above.

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?

See questions 4.3 and 4.12 above.

5.6 Trusts. Does Scotland 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 are recognised as a matter of Scots law under the Recognition of Trusts Act 1987.

5.7 Bank Accounts. Does Scotland recognise escrow accounts? Can security be taken over a bank account located in Scotland? If so, what is the typical method? Would courts in Scotland recognise a foreign law grant of security (for example, an English law debenture) taken over a bank account located in Scotland?

Scotland recognises arrangements whereby parties hold funds in a designated account and agree to the release of such amounts following satisfaction of certain conditions or on the consent of all relevant parties. Security can be created over bank accounts in Scotland. Certain issues arise in respect of security granted over accounts in favour of the account bank. In such circumstances the security relies upon the operation of set-off. The typical method of taking security is by means of a bank account pledge and assignation duly intimated to the account bank. The Scottish courts would recognise a foreign law grant of security taken over a bank account to the extent that the form of security complies with the Scots law formalities for such a charge.

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?

The rights of the account bank (such as rights of set-off) will usually be waived under the security and any acknowledgment to be signed by them. All amounts received into the account are secured. An arrestor of the bank account should rank behind the holder of an existing duly perfected account charge. Insolvency should not affect the validity of any fixed security over sums subsequently received into the bank account although in practice an insolvency official may seek to divert payments which the purchaser is only contractually obliged to procure are made to such an account. The terms of the bank account security alone can affect the position.

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?

Control by the account holder over the funds in the account

is inconsistent with a duly perfected charge under Scots law. Accordingly, any such arrangements, which occur frequently in practice, would affect the security. The relevant account should be blocked in order for effective security to be created in Scotland.

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

Most insolvency proceedings for corporate entities provide for some form of automatic stay of action or moratorium preventing court proceedings from being raised or enforcement action being taken against the insolvent entity or its assets for a period of time without either the insolvency practitioner's consent or permission of the court. This would prohibit the purchaser from collecting, transferring or otherwise exercising, ownership rights over the purchased receivables to the extent they continued to be assets of the seller at the time of commencement of insolvency proceedings. If, however, ownership of the receivables has been transferred to the purchaser and that transfer has been perfected, the purchaser could sue the obligor in its own name without reference to the insolvent entity.

There is no formal time period applicable to the stay of action which may subsist throughout the insolvency process unless the insolvency practitioner has consented or permission of the court is obtained.

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)?

On the basis that the receivables have been transferred to the purchaser and that transfer has been perfected, the insolvency official should have no power to interfere with the purchaser's exercise of rights in respect of the receivables unless the transfer is capable of challenge under the various creditor protection provisions outlined under question 6.3 below.

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

UK insolvency legislation contains creditor protections which give rise to suspect periods during which transactions may be rescinded or reversed. Certain protections have UK-wide application and, as such, also apply in Scotland (for example, s.245 (Avoidance of

certain floating charges) of the Insolvency Act 1986). Transactions entered into by Scottish companies and certain overseas companies may be subject to the provisions of ss.242 and 243 of the 1986 Act (Gratuitous Alienations and Unfair Preferences) and to Scots common law equivalents.

The relevant period to challenge a gratuitous alienation is five years for a transaction with a connected party and two years for any other person; and the period for challenge of an unfair preference is six months. An alienation cannot be challenged as gratuitous if: (i) immediately or at any other time after the alienation the company's assets were greater than its liabilities; or (ii) the alienation was made for adequate consideration. An unfair preference is a transaction which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors. A transaction is not a preference if (i) it is in the ordinary course of trade or business, or (ii) it involves the parties undertaking reciprocal obligations unless the transaction was collusive with the purpose of prejudicing the general body of creditors.

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?

This doctrine is not recognised under Scots law. In addition, the courts will only pierce the corporate veil in very limited circumstances.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in Scotland, 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?

The contractual obligations continue albeit the purchaser is likely to have only a claim against the seller's estate which will rank with other unsecured creditors. As the future Scottish receivables are not transferred to the purchaser without further action of the seller (i.e., the grant of an assignation duly notified to the relevant obligors), the Scottish receivables will remain the property of the seller unless the insolvency official transfers the receivables to the purchaser pursuant to the sale contract.

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

Much will depend upon the terms of the limited recourse wording. Generally, limited recourse provisions will result in the liability being extinguished by the realisation of the relevant assets and application of proceeds in satisfaction of the equivalent value of debt (any balance being cancelled). As such they are asset/liability-neutral. Scottish corporate debtors can be declared insolvent if, among other things, their liabilities exceed their assets. They can also be declared insolvent if a creditor has served on the debtor a written demand for payment and the debtor has failed to pay such demand within the prescribed period. The limited recourse wording should be checked to establish whether or not it permits the creditor to serve such a demand. A Scottish corporate debtor

may also be declared insolvent if it is proved to the court that the company is unable to pay its debts as they fall due. The debtor's whole assets and liabilities position needs to be taken into account when considering this final test.

7 Special Rules

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

There is no special securitisation law or special provisions in other law in Scotland establishing a legal framework for securitisation transactions, although particular tax laws may apply.

7.2 Securitisation Entities. Does Scotland 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 mandatory or special requirements in respect of the establishment of special-purpose entities for securitisations in Scotland.

7.3 Limited-Recourse Clause. Will a court in Scotland 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?

Generally, the courts in Scotland would recognise a limited-recourse clause.

7.4 Non-Petition Clause. Will a court in Scotland 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 no direct Scottish authority in this regard, non-petition clauses are likely to be valid in Scotland provided such provisions are not contrary to public policy. A Scottish court might still accept a winding up petition contrary to the terms of a non-petition clause resulting instead in only a damages claim for breach.

7.5 Priority of Payments "Waterfall". Will a court in Scotland 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?

Yes. Pre-insolvency of the purchaser, contractual arrangements fixing the priority of distributions are of a type which would be recognised by the Scottish courts. Priority of payments of unsecured amounts post insolvency may still be recognised, however, as a

general rule an insolvency official would not be bound by the terms of such provisions and is required to pay creditors in accordance with statutory rules. Payments in breach of such arrangements will create only contractual claims against the parties to the contract.

7.6 Independent Director. Will a court in Scotland 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?

As a matter of UK company law, directors are unable to limit the exercise of their powers. Constitutional documents may be drafted so as to require director consent for certain actions. However, to the extent such provisions are contrary to public policy they would be unenforceable. The directors have overriding duties to creditors including, where appropriate, to call for winding up or administration of a corporate entity in certain circumstances. It is unlikely that such provisions would be overridden by contractual or constitutional document provisions.

8 Regulatory Issues

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

The acquisition, collection or ownership of receivables will not in itself result in the purchaser being required to do business or to obtain a licence or its being subject to regulation as a financial institution in Scotland unless such activities are regulated (for example, origination or administration of regulated mortgage contracts for which FCA authorisation would be required) or constitute consumer credit activities (for which a consumer credit licence would be required). In either case, Data Protection Act registration should also be obtained.

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?

Servicing activities are likely to require a CCA licence and FCA authorisation and permissions if they relate to consumer credit activities or regulated activities. Any third party replacement servicer will require the same licences and authorisations.

8.3 Data Protection. Does Scotland 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 provisions of the Data Protection Act 1998 apply in Scotland. The laws apply only to individuals and not to enterprises.

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 Scotland? Briefly, what is required?

If the obligors are consumers, the purchaser will probably be required to comply with the UK consumer credit protection laws and to be authorised by the FCA.

If the contract constitutes a regulated mortgage contract (or equivalent regulated contract) for the purposes of the Financial Services and Markets Act 2000, the purchaser would need to be authorised by the FCA and comply with the detailed requirements of the FCA Handbook relating to such contracts.

Certain unfair terms in consumer contracts may not be enforceable against the consumer. Similarly, provisions in a contract, which purport to restrict liability of a party for damage caused, may be restricted or struck at by the Unfair Contract Terms Act 1977.

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

Subject to currency transfer and dealing restrictions applicable under current United Nations Sanctions and to compliance with anti-money laundering/anti-terrorism legislation, there are no restrictions on currency exchange or the making of payments to persons outside Scotland.

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 Scotland? 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?

Withholding tax is subject to UK-wide legislation. Accordingly, the Scottish rules follow that applicable elsewhere in the UK (including in respect of the potential re-characterisation of any deferred purchase price). In summary, withholding tax applies in respect of payments of interest unless the purchaser is resident in the UK, or carries on business in the UK through a permanent establishment. Withholding tax may be subject to treaty relief under a Double Taxation Convention, though there are practical difficulties in particular cases.

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

The seller tax treatment follows the UK tax requirements, which are based on the accounting treatment subject to specific regulations.

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

Certain documents are subject to stamp duty in Scotland and certain transactions to the extent not documented are subject to stamp duty reserve tax (**SDRT**). Those relating to land or interests in land may be subject to the Land and Buildings Transaction Tax (**LBTT**) or in some cases to Stamp Duty Land Tax (**SDLT**) which applied to transactions in Scotland prior to 1 April 2015. The transfer of mortgages, lease and trade receivables and finance payments are normally exempt from stamp duty, SDRT, LBTT and SDLT.

9.4 Value Added Taxes. Does Scotland 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?

VAT is generally payable in Scotland in respect of the supply of goods and services within the UK by taxable persons in the course or furtherance of a business. The current standard rate of VAT is 20 per cent, although different rates apply depending upon the goods or services supplied. Certain supplies are exempt and some transfers are outside the scope of VAT.

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?

To the extent payable, VAT has to be accounted for by the provider of services only (i.e., the seller). Stamp duty liability falls to the party seeking to enforce the transfer (i.e., the purchaser). Generally, HM Revenue & Customs would not have a claim against the purchaser for VAT for which the seller had to account.

9.6 Doing Business. Assuming that the purchaser conducts no other business in Scotland, 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 Scotland?

The purchase of receivables by the purchaser or its appointment of the seller as its servicer and collection agent should not, in itself, result in the purchaser being liable to pay tax in Scotland; however, as with the rest of the UK, enforcement of receivables may require more detailed consideration. In each case all circumstances need to be considered and advice obtained.

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