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The International Comparative Legal Guide to:

Securitisation 2012

A practical cross-border insight into securitisation work

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Spain

Ramiro Rivera Romero

Uría Menéndez Abogados, S.L.P.

Pedro Ravina Martín

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?

As a general rule, under Spanish law, agreements need not be formalised in writing. Verbal agreements and tacit agreements (those which are construed as a result of the behaviour of the parties) are, as a matter of principle and except for certain types of contracts, fully enforceable between the contracting parties. However, the difficulties to evidence the contracting terms and conditions for verbal and tacit agreements have resulted in a generalised use of written agreements for the sale of goods and services. As a result, the Spanish Civil Code favours the written form for contracts and, though not refusing to render valid verbal agreements, does vest the parties with the right to request written form from their counterparties. Moreover, specific Spanish regulations (such as some of those protecting consumers, banking, etc.) do impose mandatory written form.

As they are not usually signed by the recipient, invoices do not *per se* create an enforceable debt obligation of the obligor to the seller. However, together with other means of evidence, they can help to prove the existence of a contract between the obligor and the seller.

1.2 Consumer Protections. Do Spanish 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?

Limits on rates of interest: Spanish law does not provide for a specific threshold rate beyond which interest should be generally treated as usurious (which would render the relevant loan or credit provision null and void). The only parameter is set out in the law on Usury Repression, of 23 July 1908, which establishes that loan agreements providing for rates of interest, which exceed by far the legal interest, shall be null and void. Over the years, this law has been applied in a large number of judicial precedents, which examine the specific circumstances surrounding each case, thus making it difficult to draw general conclusions.

Interest rate restrictions apply as well in the context of certain consumer-related transactions. Credit facilities granted by credit institutions to consumers and associated to a bank account may be drawn upon in excess of the available funds. Any such overdraft shall bear interest at an effective rate which cannot exceed the legal limit of 2.5 times the legal interest rate in force from time to time (the legal interest rate is regularly fixed by the Government on a yearly basis). Similarly, certain public housing-related mortgages are subject to interest rate limitations or, otherwise, require the use of regulated criteria and formulae which result in rate restrictions.

Additionally, the Spanish Government has recently approved urgent measures (Real Decreto-ley 6/2012, of 9 March) whereby Spanish credit entities and professional lenders which elect to be adhered to a sort of good practices code proposed by the Government shall be obliged to temporarily cap the ordinary interest rate applicable to already existing residential mortgage loans granted for the acquisition of properties for a price below certain levels to individuals who now evidence to be in an extraordinarily difficult situation (as it is legally defined).

Interest on late payments: Unless the contract between the seller and the obligor provides otherwise, the Spanish Civil Code provides that late payments trigger the obligation on the obligor to pay default interest to the seller, at the legal interest rate and calculated as from the date the seller demands payment of the relevant amount.

The urgent measures referred to above also provide for a compulsory (i.e., not subject to adherence to the good practices code by the creditors) cap for default interest applicable to already existing residential mortgage loans granted to individuals who now evidence to be in an extraordinarily difficult situation (as it is legally defined).

Consumers' withdrawal rights: Consumers are entitled to cancel an agreement (and therefore the receivables arising thereunder) if provided under the applicable sector legislation (for instance, financial and telecommunications sectors include withdrawal rights in favour of the consumers) or as agreed between the seller and the obligor-consumer. Unless a different term is provided under the applicable sector legislation, consumers are entitled to cancel the consumer agreement during a period of seven working days since the delivery of the goods or the execution of the service agreement (as the case may be), provided that the seller duly informed the obligor-consumer of the existence and characteristics of the withdrawal right (otherwise, the term would be seven working days since the information obligations have been duly fulfilled, up to a maximum of three months since the delivery of the goods or the execution of the service agreement).

When it comes specifically to consumer financing, Spanish Act 16/2011, of 25 June, which implements Directive 2008/48/EC, of 23 April, provides for a withdrawal right in favour of the obligor-

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consumer for a period of 14 calendar days as from the later date between (i) the date of execution of the credit agreement, and (ii) the date of delivery of certain financial information and terms by the credit institution to the consumer.

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?

Law 30/2007, of 30 October, on public sector contracts, provides for the legal regime applicable to agreements entered into by the majority of public entities (which would include the general, regional or local administrations, but also public-owned or public-controlled entities, such as *organismos autónomos, entidades públicas empresariales* and *empresas públicas*) and third parties. Specific provisions are provided therein for the sale and collection of receivables.

That said, the legal regime applicable to the sale of receivables arising out of agreements subject to Law 30/2007 is, in substance, equivalent to the general regime provided under the Spanish Civil Code (and which shall be described below), including, in particular, the need to notify the obligor in order for the assignment to be fully effective against it. The collection of receivables against public entities is subject to customary procedures followed by public entities (e.g. the need to have budgetary support for any agreed payment, applicable sovereign immunity principles, etc.), and is usually based in the issuance of payment mandates by the relevant entity. Law 30/2007 and other regulations on the payment of business receivables impose strict payment terms of the Spanish public administrations and entities, including very onerous late payment interest duties.

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 Spain that will determine the governing law of the contract?

Under Regulation (EC) No 593/2008 of The European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I) ("**Regulation 593/2008**"), which is directly applicable in Spain, to the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract shall be in principle determined in light of the nature of the agreement. Pursuant to paragraphs (a) and (b) of Article 4.1 of Regulation 593/2008, the law governing the contracts for the sale of goods or the provision of services would be, in principle, the law of the country where the seller or provider of services has his habitual residence. Having said that, if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that resulting from the application of Article 4.1 of Regulation 593/2008, the law of that other country shall apply.

However, where the contract for the sale of goods or the provision of services is entered into with obligors qualifying as consumers, it shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

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

Yes, pursuant to the freedom of choice principle established by Article 3 of Regulation 593/2008.

However, application of the Spanish overriding mandatory provisions (i.e., those provisions the respect for which is regarded as crucial by Spain for safeguarding its public interests, such as its political, social or economic organisation) shall not be limited. Furthermore, Spanish courts may refuse the application of a provision of the chosen law if such application is manifestly incompatible with Spanish public policy.

Typically, none of these limitations would apply in commercial relationships such that between the seller and the obligor under a receivables contract.

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

Yes, and it is in force in Spain as from 1 August 1991.

3 Choice of Law - Receivables Purchase Agreement

3.1 Base Case. Does Spanish 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., Spanish laws or foreign laws)?

Pursuant to the freedom of choice principle established by Articles 3 and 14 of Regulation 593/2008, the sale of receivables can be governed by a law different from that governing the receivable itself. This notwithstanding, where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (i.e., the so-called "mandatory provisions").

Moreover, Article 14.2 of Regulation 593/2008 establishes that the law governing the receivable shall determine (i) its transferability, (ii) the relationship between the assignee and the debtor, (iii) the conditions under which the assignment can be invoked against the debtor, and (iv) whether the debtor's obligations have been discharged.

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Likewise, some of the rights and obligations arising under promissory notes, bills of exchange and other types of negotiable instruments executed and delivered in Spain may not be submitted to the laws of a different country.

Where the obligations arising under the receivables are secured by security interests on Spanish assets (for instance, a mortgage on real estate located in Spain), mandatory Spanish laws will apply to any such *right in rem*, and will govern, *inter alia*, the perfection and foreclosure of the security interest as well as the assignment thereof for the benefit of third parties.

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

Pursuant to Articles 3 and 14 of Regulation 593/2008, Spanish law would be, in principle, the law applicable to govern the contractual aspects of the sale agreement, as well as the conditions under which the assignment can be invoked against the obligor in this Example 1 (please refer to question 3.1 above). Thus, if the sale complies with the Spanish legal requirements for such purposes (please refer to questions 4.1 and 4.4), a Spanish court would recognise the sale as being effective against the seller and the obligor.

However, Regulation 593/2008 fails to regulate which law should be considered to determine whether the transfer of the receivables is enforceable *vis-à-vis* third parties (in fact, Article 27.2 of Regulation 593/2008 refers to a report to be prepared by the Commission on this topic as the basis for the amendment of the Regulation).

Having said that, taking into account the circumstances of Example 1 (all connected to Spain except for the location of the purchaser), the different solutions on this matter proposed by Spanish scholars in the past and the discussions in the context for the preparation of Regulation 593/2008, it is likely that a Spanish court would recognise the sale as being effective *vis-à-vis* third parties if the sale complies with the Spanish legal requirements for such purposes (please refer to question 4.2).

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 Spain, will a court in Spain 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?

Please refer to questions 3.1 and 3.2 as to the law applicable to contractual aspects of the assignment, the conditions under which the assignment can be invoked against the obligor and the enforceability of the transfer *vis-à-vis* third parties.

If the sale complies with the Spanish legal requirements for such purposes (please refer to questions 4.1 and 4.4), a Spanish court would recognise the sale as being effective against the seller and the obligor.

However, the fact that the obligor is located in a jurisdiction other than Spain (and in absence of additional development of the provisions of Regulation 593/2008) would make generally advisable the fulfilment of the legal requirements for purposes of enforceability of the transfer *vis-à-vis* third parties both under Spanish law and under the law of the location of the obligor, in order to ensure recognition by Spanish and obligor's country courts.

3.4 Example 3: If (a) the seller is located in Spain 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 Spain 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 Spanish own sale requirements?

Please refer to questions 3.1 and 3.2 as to the law applicable to contractual aspects of the assignment, the conditions under which the assignment can be invoked against the obligor and the enforceability of the transfer *vis-à-vis* third parties.

Thus, if the sale complies with the foreign legal requirements for such purposes, a Spanish court would recognise the sale as being effective against the seller (such requirements and foreign law need to be duly evidenced to the Spanish court).

However, the fact that the seller is located in Spain (and in absence of additional development of the provisions of the Regulation 593/2008) would make generally advisable the fulfilment of the legal requirements for purposes of enforceability of the transfer *vis-à-vis* third parties both under Spanish law and under the law of the location of the obligor, in order to ensure recognition by Spanish courts.

3.5 Example 4: If (a) the obligor is located in Spain 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 Spain 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 Spanish own sale requirements?

Please refer to questions 3.1 and 3.2 as to the law applicable to contractual aspects of the assignment, the conditions under which the assignment can be invoked against the obligor and the enforceability of the transfer *vis-à-vis* third parties.

Thus, if the sale complies with the foreign legal requirements for such purposes, a Spanish court would recognise the sale as being effective against the obligor (such requirements and foreign law need to be duly evidenced to the Spanish court).

However, the fact that the obligor is located in Spain (and in absence of additional development of the provisions of Regulation 593/2008) would make generally advisable the fulfilment of the legal requirements for purposes of enforceability of the transfer *vis-à-vis* third parties both under Spanish law and under the foreign law, in order to ensure recognition by Spanish courts.

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

Please refer to questions 3.1 and 3.2 as to the law applicable to contractual aspects of the assignment, the conditions under which the assignment can be invoked against the obligor and the enforceability of the transfer *vis-à-vis* third parties.

Thus, if the sale complies with the foreign legal requirements for such purposes, a Spanish court would recognise the sale as being effective against the seller (such requirements and foreign law need to be duly evidenced to the Spanish court).

However, as the seller is located in Spain and the receivable is governed by Spanish law (and in absence of additional development of the provisions of Regulation 593/2008), it would be generally advisable that the legal requirements for purposes of enforceability of the transfer *vis-à-vis* third parties both under Spanish law and under the foreign law are fulfilled, in order to ensure recognition by Spanish courts.

4 Asset Sales

4.1 Sale Methods Generally. In Spain 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?

Under Spanish law, receivables may be transferred from a seller to a purchaser in the following different ways, in all cases involving the execution of an agreement providing for the transfer of the receivable to the purchaser:

1. ordinary assignment pursuant to the Spanish Commercial and Civil Codes;
2. assignment pursuant to the 3rd Additional Provision of Law 1/1999, of 5 January, on Capital-Risk Entities; and
3. assignment to a Spanish Asset-Backed Securitisation Funds (*Fondo de Titulización de Activos*, hereinafter "**FTA**").

Although there is no a common terminology, the above transactions will be customary named as receivables transfers (*cesiones de crédito*).

1. Ordinary assignment. Under the Spanish Commercial and Civil Codes, the seller remains liable before the purchaser for the existence of the receivable and for the validity of its legal title thereto, but it is not liable for the insolvency of the debtor, unless so agreed with the purchaser. It is thus possible to agree on sales with or without recourse, though in the absence of a specific provision thereon, there will be no recourse against the seller.

2. Privileged assignment. In accordance with the 3rd Additional Provision of Law 1/1999, a specific and more beneficial insolvency-related regime will be applicable to those assignments of credits which, though generally structured as ordinary assignments, fulfil the following requirements:

(a) the seller is a business company (or an entrepreneur) and the receivables arise from its business activity;

(b) the assignee is a credit entity or a securitisation fund;

(c) the receivables exist at the time of execution of the receivables transfer agreement. However, the sale of "future" receivables is also allowed, provided that those receivables arise from the business activity of the seller within a maximum term of one year from the date of execution of the agreement or, otherwise, the future debtors are clearly identified in the agreement;

(d) the assignee pays to the seller, either upon closing or on a deferred basis, the consideration agreed for the receivables, less the costs of the services rendered (i.e., financing, collection, etc.); and

(e) where the assignment is agreed on a non-recourse basis, there is evidence that the purchaser has paid, in full or in part, the consideration for the receivables prior to the maturity of such receivables.

3. FTA. In accordance with Royal Decree 926/1998, of May 14, on Asset-Backed Securitisation Funds, additional requirements apply to ordinary assignments made in favour of FTA, a form of regulated securitisation SPV which, subject to local registration, is allowed to issue asset-backed notes under insolvency-related privileged conditions (please refer to question 6.3). These requirements include the following, among others:

(a) the transfer of receivables must be agreed on a non-recourse basis to the seller, subject to no conditions, and for the remaining maturity of the receivables; and

(b) the seller cannot grant any kind of warranty (*garantía*) in favour of the purchaser nor guarantee the success of the transaction (*asegurar el buen fin de la operación*). Notwithstanding this, it is customary to agree on certain limited representations and warranties in order to ensure that the securitised portfolio conforms to the agreed eligibility criteria.

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?

No special formalities are required in order for an ordinary or privileged sale of receivables (or for a sale to a FTA) to be effective between the contracting parties, though (a) the written form is customary, and (b) where the receivables result from a contract agreed in a public document, the parties may legally require that the assignment be executed also as a public document (though failure to do it does not affect the validity of the transfer amongst themselves).

Nevertheless, under Articles 1218, 1227 and 1526 of the Spanish Civil Code, certainty of the date of the transfer is required in order for it to be fully effective *vis-à-vis* third parties (for instance, in order to ensure that true sale treatment is achieved or for insolvency protection purposes). This certainty of the date of the transfer may be achieved, *inter alia*, by formalising the transfer in a public deed (*escritura pública* or *póliza intervenida*) before a Spanish Notary Public.

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?

1. Payment instruments. Receivables represented by way of bills of exchange (*letras de cambio*), promissory notes (*pagarés*) and other analogous securities supporting abstract means of payment

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(*efectos cambiarios*) may be transferred by means of the physical delivery of the security document, followed (in the case of negotiable bills of exchange and registered promissory notes) by an endorsement, that is, a written and signed transfer statement issued by the seller in the title itself. Such means of transfer result in a full transfer of all rights attached to the relevant *efecto cambiario*, though not necessarily in a full transfer of the underlying receivable.

The issuance and transfer of *efectos cambiarios* is regulated by a special law, is specifically excluded from the application of Regulation 593/2008 and may involve Stamp duty (please refer to question 9.3).

2. Mortgage loans. The transfer of a single mortgage loan needs to be documented in a public document and registered with the relevant Property Registry. Otherwise, the transfer will be valid amongst the parties, but will not be effective *vis-à-vis* third parties and the foreclosure procedure may be severely limited. Similar requirements apply to the transfer of receivables secured with a chattel mortgage (*hipoteca mobiliaria*) or a pledge without displacement of possession (*prenda sin desplazamiento de posesión*).

The transfer by credit entities of mortgage loans meeting the eligibility criteria set forth in Section 2 of Law 2/1981, of 25 March, on the Mortgage Market, can be also perfected by means of the issue of mortgage certificates (*participaciones hipotecarias*). Where these mortgage loans fail to meet any of those criteria and provided that the purchaser is a qualified investor or an FTA, the transfer may be perfected by means of the issue of mortgage conveyance documents (*certificados de transmisión de hipoteca*). *Participaciones hipotecarias* and *certificados de transmisión de hipoteca* qualify as transferable securities.

In addition to a more favourable tax and insolvency regime (which shall be described below), the main advantage of this means of transfer of mortgage loans is that, under certain conditions, the issue of both *participaciones hipotecarias* and *certificados de transmisión de hipoteca* needs not to be documented in a public deed (*escritura pública*) or registered in the relevant Property Registries.

In any event, the seller/issuer of the certificates remains as the nominee and holder of record of the underlying loans in the corresponding Property Registries, but the holder of the certificates becomes the beneficial owner of the mortgage loan, subject to certain conditions that confer upon the transfer the "true sale" treatment.

3. Consumer loans. No special requirements apply for the sale of receivables when the obligors are consumers. However, Article 31 of the Act 16/2011, of 25 June, requires that notice of the transfer is served on the consumer, where the seller ceases to provide servicing.

4. Debt securities. In addition to the assignment contract, those securities represented in book-entry form shall be transferred through an accounting record transfer. Those securities represented in registered form shall be transferred through the endorsement of the relevant title or under an ordinary assignment of receivables. Finally, those securities represented in bearer form shall be transferred by physical delivery of the title.

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?

Unless otherwise is stated in the receivables contracts, consent of the obligors is not required in order for the sale of receivables to be effective against the obligor.

The parties may or may not serve notice of the sale on the obligor. If they choose not to do it, the obligor will be allowed to validly discharge its obligations by paying the seller as the original creditor. Likewise, the legal regime applicable to the obligor's defences to challenge or object payment demands under the receivable varies depending on the date of the transfer and the date when transfer notice is served (for instance, the debtor's right of set-off will apply to those seller obligations arising prior to the transfer notice, but not to those arising afterwards, unless the debtor explicitly approves the transfer). Accordingly, failure or delay in serving notice on the debtor may result in an increased number of valid objections against any payment demand filed under the transferred receivable.

If the receivable contract does prohibit assignment or requires the consent of the obligor and the latter is not obtained, many Spanish scholars maintain that the sale contract will remain valid amongst the parties to the sale agreement as a source of indemnity obligations, but will not be enforceable against the assigned obligors. Thus the receivables shall not be deemed transferred by the seller, who shall remain as the owner of the receivables. However, other scholars believe that the transfer of the receivables would be valid and enforceable against the obligor, who will be entitled to claim damages to the seller for the contractual breach. Spanish courts have failed to reach a definitive conclusion in relation to this matter.

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?

There are no formal requirements regarding notification to the obligor, thus it may be executed by any means, by the seller or the purchaser. However, it is generally recommended to notify by any means that may latter be regarded as proof on court (i.e., notarial *acta de notificación* or certified mail with acknowledgement of receipt).

No limitations apply regarding the purchaser notifying the obligor of the sale of receivables even after the insolvency of the seller or the obligor, without prejudice to the effects of the lack of notice in terms of discharge of the obligor and the obligor's defences as set out in question 4.4, which shall be applicable as long as notice of the transfer is not served.

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4.6 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Spain? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Spain 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?

In general terms, contractual restrictions to the sale or assignment of receivables are not prohibited under Spanish law.

If the receivable contract does prohibit assignment or requires the consent of the obligor and the latter is not obtained, the assigned obligors will not be given any right to sue the purchaser, particularly if the purchaser acted in good faith (i.e., was unaware of the existence of any such restriction). Please also refer to question 4.4 above.

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?

Identification requirements are not specifically required in the context of the transfer of receivables, but generally stem from Spanish law principles which expect the parties to be able to identify the subject of any contract in between them. Accordingly, no specific details need to be provided, other than those which allow the parties to identify, in clear and undisputable terms, the transferred receivables.

Where the receivables are to be transferred to an FTA, the rules require that the parties define the securitised assets (legally and financially) and provide details on matters such as outstanding balances, yields, financial flows, collection terms, amortisation schedule and maturity dates.

Transactions where all existing receivables (or all receivables fulfilling certain conditions) are sold to the purchaser are generally valid under Spanish law but may face difficulties where necessary to prove effectiveness *vis-à-vis* third parties. Accordingly, the above referred rules on identification apply as well.

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?

Under Spanish law, contracts are to be interpreted not on the basis of the name or character that the parties wish to attribute to them (for instance, in the name or the headings of the different clauses), but rather on the basis of the actual legal nature of the terms and conditions agreed thereunder. Thus, if the parties regard a transaction (for instance, by using that term in the headings or in the contents) as an assignment or other form of "true sale", but the terms and conditions thereof and, in particular, its real intent (*causa*), suggest otherwise (for instance, a form of security), a court is allowed to recharacterise the transaction as per its genuine nature.

Generally the courts have upheld the true sale treatment of the sale of receivables, irrespective of the parties agreeing to such transfer on a recourse or non-recourse basis, but always provided that the purchaser advances all or part of the funds agreed as consideration for the transfer of the receivable (in other words, where such transfer is agreed in terms such that the acquirer does not advance any funds, does not bear the risk of the receivable, and is thus used for collection purposes only, the transfer shall not be treated as a true sale). This having been said, in the past, in conferring true sale treatment to any given transfer, the fact that the seller may have retained credit risk (e.g., by representing the solvency of the debtor) has occasionally been construed by the courts (for instance, in certain minority rulings on factoring agreements entered into by credit institutions) as an evidence that the transfer ought not to be treated as a sale, but rather as a collateralised loan granted by the purchaser.

The fact that the parties agree to vest upon the seller collection responsibilities does not alter the above views (by way of example, where the sale of purchase is an FTA, collection responsibilities shall be retained by the seller unless otherwise agreed).

In addition to the above, legal characterisation or effects of a particular transaction is not necessarily coincident with its treatment under other conditions. For instance, Spanish accounting and capital adequacy rules applicable to credit entities focus on certain terms of the transaction (mainly credit risk retention) to determine whether a sale of receivables can benefit from off-balance sheet treatment.

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)?

Yes, though the effectiveness *vis-à-vis* third parties depends on the need to provide proper identification, as well as execute a public document each time new receivables are transferred.

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?

1. Ordinary assignment. Although it is generally accepted that the transfer of future receivables may be validly agreed upon by means of an ordinary assignment, the scholars and the courts have failed to reach a common view on whether the acceptance by the purchaser (or any other formal requirement, such as the notice to the debtor) upon each receivable effectively coming into existence is necessary (thus casting a shadow of doubt on the efficacy of any such transfer until such time), or if the purchaser is *ab initio* the owner of such receivables from the moment they arise. It is thus advisable to ensure that periodic transfers are executed in public documents.

2. Privileged assignment. The transfer of future receivables is allowed, provided that those receivables arise from the business activity of the seller within a maximum term of one year from the date of execution of the agreement or, otherwise, the future debtors are clearly identified in the agreement (please refer to question 4.1 above).

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3. FTA. Existing FTA regulations allow the securitisation of future receivables to the extent, amongst other requirements, that they produce a flow of income of an already known or estimated amount. Among the types of future receivables which are eligible for such a transfer, the FTA regulations include lease rentals, flows arising out of toll road projects, flows resulting from public concession contracts, IP rights, etc. Pursuant to Orden EHA/3536/2005, of 10 November, the transfer of future receivables in favour of an FTA shall fulfil the following requirements (i) the transfer must be full and unconditional (*plena e incondicionada*), and (ii) the incorporation deed of the FTA must include (a) the terms of the agreement or activity which will generate the future receivables, (b) the powers of the seller over those future receivables transferred, (c) the terms and conditions of the transfer, and (d) the risk allocation between the seller and the purchaser of the receivables.

Please refer to questions 6.1 and 6.5 below on the treatment of receivables arising prior to or after the declaration of insolvency.

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?

In general terms, the sale of a receivable entails the automatic transfer of all rights accessory to such receivable, such as personal guarantees (*fianzas*), pledge, mortgage or privileges (unless otherwise agreed by the relevant guarantor). However, please refer to question 4.3 as to the specific conditions for the sale of mortgage loans.

5 Security Issues

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

Such practice is not customary in Spain.

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 Spain, and for such security interest to be perfected?

Mainly, receivables can be subject to ordinary pledge, pledge without displacement of possession or financial guarantee. Spanish national legal regime (described below) applies generally to these securities but, depending on the location of the pledged object, regional regulations may also be applicable.

The benefit of a security interest perfected over a receivable will also extend to any related security (please refer to question 4.11 above). In addition, under certain limited circumstances, additional security interests may be perfected over existing security interests (e.g., perfecting a mortgage over a pre-existing mortgage or perfecting a pledge over the rights stemming from a pre-existing pledge or a personal guarantee (*fianza*)).

1. Ordinary pledge. A "displacement of the possession" of the pledged asset is required in order for the pledge to be valid. Although it is not clear how this dispossession requirement is to be interpreted when the object of the pledge is a receivable (i.e., an intangible asset), many scholars understand that the displacement of possession is effected through the notice to the debtor, while others (as well as Spanish insolvency rules) maintain that the mere agreement of the parties is sufficient for validity purposes, with no need to notify the obligor. In order to ensure that the ordinary pledge is enforceable and effective *vis-à-vis* the obligor and any other third party, the pledge needs to be executed in a public document (*escritura pública* or *póliza intervenida*). The pledge needs not to be registered in any public registry. However, in case of insolvency of the pledgor, the special privilege for claims secured with ordinary pledges and generated after the insolvency declaration is subject to discussion following a recent (and, in the opinion of most of the scholars, defective) amendment to the Spanish insolvency law.

2. Pledge without displacement of possession. In order for the pledge without displacement of possession to be valid, it shall be executed in a public document (*escritura pública* or *póliza intervenida*) and shall be duly registered with the relevant movable assets registry (*Registro de Bienes Muebles*). This may attract certain tax costs.

3. Financial guarantees. Following a recent reform of the Spanish legal regime applicable to financial guarantees (i.e., those resulting from the implementation in Spain of the Directive 2002/47/EC, of 6 June, on financial guarantees), certain receivables held by credit institutions may be the object of financial guarantees in the form of pledge or *repos* (such securities benefitting from the privileged legal regime applicable to financial guarantees in terms of, *inter alia*, perfection, enforcement and insolvency).

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

Please refer to question 5.2 above.

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

As per Article 14.3 in Regulation 593/2008 (please refer to question 3.4 above), the principles set out in this rule are expected to apply to any form of assignment by way of collateral. Accordingly, the concept of "assignment" includes "*not only outright transfers of claims, (but also) transfers of claims by way of security and pledges or other security rights over claims*".

Generally speaking, provided that the applicable conflict of law rules are complied with, the granting of a security interest under a foreign law would be treated as valid and perfected in Spain.

As mentioned above, Regulation 593/2008 leaves open the question of the enforceability of the sale *vis-à-vis* third parties (see Article 27(2)). It is therefore not fully clear which law should govern the effectiveness of a pledge of receivables as against other creditors of the seller, insolvency administrators or even third parties alleging a priority legal title on the relevant pledged receivables. In the meantime, it is generally advisable that, when enforceability of a pledge *vis-à-vis* third parties is expected to be sought before a Spanish court (for instance, in the context of an insolvency of a Spanish-based pledgor or where the obligor is located in Spain),

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Spanish law perfection requirements be met as well. Under Spanish law, a security interest over receivables (either formalised as an ordinary pledge, as a pledge without displacement or a financial guarantee) is generally a right *in rem*. Spanish Civil Code provides that rights *in rem* over assets located in Spain must be governed by Spanish law. Location of receivables is not a clear-cut issue, but to the extent that receivables are deemed located in the country of the law governing the receivable, or where the seller or obligor operate, and the country of the purchaser is different from those, Spanish courts may refuse enforcement of the pledge, even if requirements for the validity and perfection of the security interest have been followed.

The above notwithstanding, it must be noted that Spanish regulations implementing the Directive 2002/47/EC, of 6 June, on financial guarantees have been recently amended and now expressly provide that, when the object of the financial guarantee is receivables (please refer to question 5.2 above), the law governing the enforceability of the financial guarantee *vis-à-vis* third parties shall be the law governing the underlying receivable which is the object of the guarantee. Although it is true that this provision refers to a very specific security interest, it cannot be discarded that Spanish courts make, in the absence of any other Spanish or EU legal provision on this matter, an analogous interpretation of this rule and apply it to other type of security interest over receivables and even to the enforceability of receivables transfers *vis-à-vis* third parties.

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?

In addition to those requirements set forth in question 5.2, the granting of security interests on each of those assets require the following:

1. Mortgage loans. Under Spanish law, the creditor in a mortgage loan may grant an additional mortgage on its right of credit (the so-called "mortgage on the mortgage" or "sub-mortgage"). This mortgage needs be executed in a public deed and registered in the relevant Public Registry.

2. Promissory notes and marketable debt securities. Where those securities have been represented in book entry form, the creation of a pledge needs to be registered in the relevant registry to ensure effectiveness *vis-à-vis* third parties. If the securities have been issued in registered form, the securities must be delivered to the beneficiary-pledgee and the pledge needs be registered in the relevant certificate by way of an "endorsement for guarantee purposes". If the securities have been issued in bearer form, the securities must be delivered to the beneficiary-pledgee.

3. Insurance policies. No specific requirements are applicable for the granting of security interest over rights arising out of insurance policies. However, in case of creation of any security interest over assets which are insured against damages, the scope of the security shall be extended to the indemnities recovered by the insured party as a consequence of an insured event (for such purpose, the insurance company must be served notice of the creation of the security).

5.6 Trusts. Does Spain 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?

The concept of "trust" is not one which is regulated and/or fully recognised (i.e., generally accepted by Spanish courts) under Spanish law and practice. It is therefore not usual to find trusts used as a means to ensure that flows resulting from the assigned receivable and temporarily held by the seller are kept legally isolated from the rest of the seller's assets. However, similar effects may be achieved through a pledge over the bank account where the collections received by the seller are credited, securing the seller's obligations *vis-à-vis* the purchaser. Such a pledge would in principle create a special privilege in favour of the purchaser over the balance of the account, either in an insolvency or non-insolvency situation (although claims of the purchaser arising after the insolvency declaration might face difficulties to be recognised as privileged claims in light of the current regulations). Moreover, special arrangements with the credit entity where the account is opened could be implemented so that, upon the occurrence of a specified insolvency event on the seller, disposal instructions need to be received from the purchaser.

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

Bank accounts opened in the name of a given party, but where disposal by its record holder is limited, blocked or otherwise conditioned to the occurrence of a specific event, the consent or instructions of a third party or any other circumstance, are legally admissible and market practice under Spanish law. Moreover, security can be taken over receivables arising out of a bank account located in Spain, through an ordinary pledge or a pledge without displacement (please refer to question 5.2 above for more details on these types of securities). Pledge over bank accounts can benefit from a specific privileged regime (especially when it comes to enforcement and in case of insolvency of the seller) if certain conditions in relation to the nature of the parties to the pledge and the secured obligations are met.

In case that a bank account is located in Spain (i.e., it is opened in a Spanish credit entity), receivables deriving thereunder shall most likely be understood as located in Spain and, as a result, Spanish courts may refuse enforcement of a foreign law pledge which has not been perfected as per applicable Spanish rules (please refer to question 5.4 above on more details on this issue).

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 Spanish insolvency laws 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?

Sale of receivables. No stay of action would be applicable under Spanish insolvency regulations. Where the transferred receivables have been properly identified, the purchaser should be allowed to continue collecting and exercising ownership rights over the transferred receivable. If not done already, the purchaser is allowed

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to serve notice of transfer on the obligors. Additional transfers (e.g., in the context of a sale of future receivables or a continuous sale of receivables) may be delayed or even suspended. Funds held for credit by the seller (e.g., collection monies) for the account of the purchaser, may be subject to insolvency proceedings (commingling risk).

As a matter of practice, though, where administration of receivables is still being conducted by the seller (and therefore some acts by the seller are necessary so that the purchaser may continue to collect the receivables), it cannot be discarded that the insolvency officials dispute the need to continue serving the receivables and/or that specific arrangements are put in place to allow collection funds to be paid out of the insolvency proceedings.

Pledge of receivables. Unless the foreclosure proceedings have reached certain stages before the insolvency proceedings have started, the enforcement of security interests over assets owned by the seller and used for its professional or business activities will be stayed following the declaration of insolvency until the first of the following circumstances occurs: (a) approval of a creditors' composition agreement (unless the content has been approved by the favourable vote of the purchaser as secured creditor, in which case it will be bound by the composition agreement); or (b) one year has elapsed since the declaration of insolvency without liquidation proceedings being initiated.

There is general controversy on whether a pledge on a portfolio of receivables would qualify as a security on assets "used for its professional or business activities".

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)?

Please refer to question 6.1 above.

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 Spain for (a) transactions between unrelated parties and (b) transactions between related parties?

Pursuant to the general regime set forth under the Spanish insolvency law, upon the insolvency of a Spanish party (an entity or an individual) being declared:

(i) those actions which are judged detrimental to the estate of the insolvent party and which have been carried out during the two years preceding such date, may be rescinded even in the absence of fraudulent intention;

(ii) the detriment to the estate is presumed *iuris et de iure* (i.e., without possibility of providing evidence to the contrary) in the case of actions of disposal without consideration, and payments or other actions aimed at discharging obligations with an original date of maturity subsequent to the date of the insolvency declaration, except where the discharged obligation is secured with an *in rem* right, in which case paragraph (iii) shall apply;

(iii) furthermore, detriment is presumed *iuris tantum* (i.e., unless evidence is provided to the contrary) in the event of: (i) disposal actions carried out in favour of a party related to the insolvent party; (ii) the creation of *in rem* guarantees (security interests) for the benefit of pre-existing obligations or of new obligations replacing previously existing ones (except for refinancing transactions where certain conditions are met); and (iii) payments or other actions aimed at discharging obligations secured with an *in rem right* with an original date of maturity subsequent to the date of the insolvency declaration;

(iv) in the case of actions not included in any of the above two categories, the detriment must be proven by the person bringing the action of rescission (e.g., the insolvency official);

(v) ordinary actions taken by the debtor as part of the ordinary course of business under normal conditions shall not be subject to claw-back actions described in paragraphs (i) to (iv); and

(vi) notwithstanding the above, actions of rescission will not be available in the event that the beneficiary of the detrimental action proves that such a transaction is governed by a foreign law which does not permit its rescission in any case.

This general regime applies to the sale of receivables benefiting from the ordinary and privileged regimes. Notwithstanding, where the sale of receivables is made in favour of an FTA, such sale shall not be rescindable unless evidence is given of the fact that fraud existed at the time the assignment was made.

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?

Such consolidation should not be carried out under normal circumstances. Spanish law does not contemplate "substantive" consolidation in an insolvency scenario, other than in respect of certain procedural matters and in situations where purchaser and seller are closely related parties (e.g., member of the same group) and the respective estates cannot be separated, in the terms of Chapter III of the Spanish insolvency law.

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 an agreement has been entered into by the seller and the purchaser for the sale of the seller's future receivables arising out of contracts, as specified or generally described in the sale agreement, and the seller is declared insolvent, the general principles should provide for the need to ensure that the transfer is generally respected and that the receivable arises in the estate of the purchaser, even in the context of an insolvency of the seller. However, this matter remains a disputed issue under Spanish law, i.e., whether the receivables arising after the declaration of the insolvency situation must be subject to the insolvency or directly arise as part of the purchaser´s estate, thus being left outside of the seller´s insolvency estate.

Though the court precedents are scarce and not yet definitive, it is generally accepted that "privileged" transfers of future receivables (please refer to question 4.1) should be upheld by the insolvency officials and the judge.

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7 Special Rules

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

Standard, market-oriented securitisation transactions are structured through FTAs, and their close relatives, Mortgage-Backed Securitisation Funds (*Fondos de Titulización Hipotecaria*, hereinafter, "**FTH**" and together with FTA, the "**Funds**"), where specially defined mortgage loans are securitised. Those Funds are the standard vehicles designed by the Spanish legislator to develop the local market for securitisation transactions aimed at the general public. Additionally "private" securitisation (i.e., non-listed transactions addressed to qualified investors) are allowed under the FTA/FTH format, provided that the relevant ABS/MBS bonds will not be listed in the Spanish regulated markets.

A Fund is defined as a separate estate that lacks legal personality (*personalidad jurídica*) and is represented by the managing company. Therefore, all actions taken by, and all agreements, transactions or arrangements entered into by the managing company on behalf of the Fund will be deemed, under Spanish law, to be actions taken and agreements, transactions or arrangements entered into by the Fund.

1. Assignment of receivables to an FTA

Please refer to questions 4.1, 4.2 and 4.10 above for a discussion on the conditions for the assignment of receivables to an FTA.

2. Types of FTA

Closed funds: the assets transferred thereto and the liabilities thereof will not be modified as from the date of the incorporation of the Fund, without prejudice to possible replacements in certain cases, such as the existence of non-eligible assets. FTH shall be closed funds.

Open funds: the assets of the fund, or its liabilities, or both of them, may be modified (renewed) and/or extended after the incorporation of the fund. For instance, new assets may be assigned to the FTA or new notes issued to finance the existing portfolio.

3. Funding of the FTA

Fixed income securities. The total amount of the securities issued must be above 50% of the total liabilities. The financial risk of the securities issued must be rated by a rating agency recognised by the Spanish Commission for the Securities Market (*Comisión Nacional del Mercado de Valores*; hereinafter "**CNMV**") for such purposes.

The securities are issued under the terms of the incorporation public deed of the Fund. Unlike other markets, there is no such thing as a trustee; the bondholders will be represented by the managing company and they will not have any individual right other than the claim against the Managing Company/Fund for breach of the relevant contracts and legal duties.

Loans granted by credit institutions. Contributions by qualified investors (*Inversores Institucionales*), such as credit institutions, insurance companies, certain investment firms and other types of schemes and investment entities established under Spanish laws, which will have rights on the residual value of the Fund.

4. Incorporation of an FTA

The basic requirements (some of which may be exempted) are the following:

- Previous communication to the CNMV.
- Informative Prospectus (Offering Circular), which must be registered with the CNMV and examined thereby; the Prospectus will not be required in the event that the issue is addressed to institutional investors and the relevant bonds will not be listed in the Spanish regulated markets.
- The securitised receivables must be audited by an auditor.
- Formalisation of a public deed of incorporation before a Spanish Notary Public.

5. Managing company

A Spanish managing company of securitisation funds (*Sociedad Gestora de Fondos de Titulización*) duly incorporated and authorised by the CNMV, will be responsible for the incorporation, management and representation of the FTA. The managing company will be empowered with any rights conferred upon the Fund as holder of the securitised portfolio of assets.

7.2 Securitisation Entities. Does Spain 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?

Please refer to question 7.1 above.

Funds enjoy a special treatment in relation to some legal aspects, such as claw-back provisions in case of insolvency of the seller or a special tax regime, which are analysed in other questions of this chapter.

As Funds are not legal entities, they do not have shareholders or directors; however, shareholders with a significant stake in a management company (basically, more than 10%) need to meet certain individual suitability standards, and members of the board of directors need to be honourable, the majority of them having to be experienced.

7.3 Non-Recourse Clause. Will a court in Spain 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?

A court would in principle give effect to a contractual provision whereby one of the parties agrees to limit recourse to a limited number of the other party's assets.

7.4 Non-Petition Clause. Will a court in Spain 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?

Voluntary waiving of rights recognised by law shall not be valid if deemed to be contrary to public order, or made to the prejudice of a third party; furthermore, under Spanish law, waiver of future rights not yet existing or of pure expectations could be deemed null and void, unless ratified at the time of the existence of the rights. The right to bring action where in the presence of fraud of wilful misconduct cannot be validly avoided by the parties. Further, a full and unconditional waiver of any action may be found to lack any cause and be held invalid.

As for the non-insolvency clauses, they may be validly agreed upon by the parties, though no such clause will have any efficacy *vis-à-vis* third parties. Even if the contractual provision was deemed valid and effective, it is most likely that the court would admit the legal action or the application of insolvency, without prejudice to the effects among the parties that such contractual breach could bring..

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7.5 Independent Director. Will a court in Spain 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?

Spanish directors are bound by fiduciary and other legal duties including, among others, the duty to seek for insolvency protection where legally required. Failure to comply with those duties will expose the directors to direct and immediate legal responsibility *vis-à-vis* the company and its creditors, among others.

8 Regulatory Issues

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

In principle, the only activity reserved to credit institutions in Spain is the gathering of reimbursable funds from the public (deposits) on a general basis. Therefore, the business of acquiring existing portfolios of receivables is not generally regarded as one requiring prior administrative authorisation as a financial entity.

Needless to say, these principles would not apply to locally based Funds and other entities subject to local capital market regulations.

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 and administration of the assigned receivables does not itself entail the need to obtain a local licence. However, to the extent that the actual activities within the scope of the administration fall within the scope of a regulated sector (e.g., insurance mediation), a local licence may be required.

Additionally, as a general rule, the assistance of a court representative (*procurador*) and a lawyer is required to appear in courts.

8.3 Data Protection. Does Spain 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?

Yes. Organic Law 15/1999, of December 13, on Personal Data Protection, restricts the use and dissemination of personal data of individual obligors. In order for a personal data controller to transfer personal data to a third party legally (regardless of whether the third party is located in Spain or abroad), the data subject must be informed, before or upon the transfer, of the circumstances of the transfer, and then, as a general rule, the data subject's prior consent regarding the transfer must be obtained.

In certain cases in which the data are transferred to a country outside the European Economic Area whose regulations, as identified by the European Commission or the Spanish Data Protection Agency, do not afford an adequate level of protection, then the controller must obtain the Spanish Data Protection Agency's prior authorisation, unless the controller -despite not being legally required to do so- obtains the data subject's consent to process his/her personal data in such country.

Organic Law 15/1999 does not apply to data of enterprises. However, other rules (for instance, banking secrecy and confidentiality duties) may hinder the ability of a seller/purchaser to disclose in a publicly available document (e.g., a prospectus) key data of the assigned debtor.

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 Spain? Briefly, what is required?

No. However, if the receivables assigned to the purchaser are subject to Law 16/2011, of 24 June, consumer finance, the consumer-obligor may exercise against the purchaser the same exceptions which he could exercise against the seller (including the right to set off).

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

No restrictions are imposed to the transfer of receivables from the seller to a foreign purchaser. However, since these kinds of transactions may be construed as financing structures, similar to loans granted by foreign entities to domestic non-banking companies, it is necessary to obtain a financial identification number (*número de operación financiera* or "**NOF**") from the Bank of Spain, provided that the amount of the transaction exceeds Euro 3,000,000.

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 Spain? 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?

Income obtained by the non-Spanish resident purchaser on the difference between (i) the payments made by the obligors, and (ii) the purchase price paid by the purchaser to the seller (i.e., taking into consideration any agreed discount) may be regarded by the Spanish tax authorities as either Spanish source interest income or as a capital gain. To the best of our knowledge, there are no rulings issued by the Spanish tax authorities or the Spanish courts on the subject of the transfer of receivables and its classification for Spanish direct income tax purposes.

However, under an internal exemption of the Non-Resident Income Tax, income obtained by the purchaser, regarded either as interest or as capital gains, will not be subject to Spanish tax to the extent that the purchaser (i) is resident of a Member State of the European Union for tax purposes and may obtain and submit a certificate of tax residence issued by the relevant tax authorities of its country of residence, (ii) does not act with respect to the transaction through a permanent establishment located in Spain or outside the European

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Union, and (iii) does not act through a territory regarded as a tax haven jurisdiction for Spanish tax purposes.

Regarding interest paid by the obligor to the seller if the latter is a Spanish company, it will be typically subject to a 19% (21% for calendar years 2012 and 2013) withholding tax (this does not apply to a recipient which is a financial entity). Indeed, since the assignment of the receivable is not disclosed to the obligor, the obligor will assume that the payment is due to the Spanish seller, and that the withholding tax is due i.e., the tax is levied on the Spanish seller, not on the purchaser.

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

A Spanish seller will need to follow the Spanish GAAP on de-recognition of financial assets. This rule focuses on the existence of an actual transfer of risk and benefits by the seller to the purchaser and is in line with the International Accounting Standards adopted by the European Commission. The tax law will follow the accounting rule in this matter.

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

Stamp duty will be levied upon the issuance of those Spanish receivables which credit right is evidenced by bills of exchange (*letras de cambio*), promissory notes (*pagarés*), or other draft documents in which the document has the purpose of transferring funds (*titulo-valor, documento cambiario* or *instrumento con función de giro*), on the basis of its amount and its maturity.

However, registered promissory notes which are issued on a non-endorseable basis (*pagarés nominativos no a la orden*) will not be subject to Stamp Duty unless, pursuant to Article 33 of the Transfer Tax and Stamp Duty Law, they are issued as part of a series, with a maturity shorter than eighteen months and with a consideration represented by a discount over the face value. This notwithstanding, in such a case, these notes will benefit from the exemption regulated in Article 45.I.B) 15 of the Transfer Tax and Stamp Duty Law.

In general terms, stamp duty will be levied at the issuance of the draft document rather than as a consequence of its transfer. However, any person that intervenes in connection with the circulation of the draft documents, including the purchaser, will be joint and severally liable with the issuer of the instrument for any unpaid stamp duty.

9.4 Value Added Taxes. Does Spain 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?

In accordance with Spanish law, a sale of receivables, as any transfer of credits, is subject to, but exempt from VAT, to the extent the transfer of credits by the seller to the purchaser is made without recourse and, consequently, the seller does not assume the risks of insolvency of the debtors.

In principle, under Spanish VAT Law, collection services receive a different tax treatment than that applicable to the transfer of credit with or without recourse. Therefore, there would be grounds to maintain that the collection services provided to the purchaser should be subject to VAT since collection services do not benefit from the VAT exemption set forth in the VAT Law for transfer of credits without recourse (Article 20.1.18.e of the VAT Law).

However, under the general rule contained in Article 69.1 of the VAT Law concerning the place from where the supply of services is deemed to be rendered for VAT purposes, collection services are deemed to be supplied in the state where the customer has established its business, or has a fixed permanent establishment to which the service is supplied, or, in the absence of such place, the place where it has its permanent address or usually resides.

Thus, if the entity to which the services are supplied (i.e., the purchaser) is not established in Spain for VAT purposes, the services will not be deemed to be supplied in Spain and, therefore, will not be subject to Spanish VAT.

Having said the above, if the agreement entered into by the seller and the purchaser qualifies as a factoring agreement, there would be a range of services deemed to be rendered for VAT purposes by the purchaser to the seller (namely, financial services, management and collection services and, if applicable, a guarantee services). In particular, the management and collection services, and the guarantee services, would be subject to and not exempt from Spanish VAT and the seller should assess the VAT due on that transaction given that the supplier of the service (i.e., the purchaser) is not established in the Spanish VAT territory. Additionally, the delivery of the receivables by the seller to the purchaser will not qualify as a VAT taxable transaction and will be disregarded for any VAT purposes (including for purposes of assessing the entitlement of the seller to deduct any input VAT borne).

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?

Following Spanish VAT Law, recipients of the supplies of goods and services might be liable for the unpaid VAT under certain circumstances. That is the case of those recipients of goods or services which, through any intentional acts or omissions, avoid the correct chargeability of the VAT.

Likewise, any purchaser of goods might be liable for any unpaid liability triggered on prior acquisitions of the same goods acquired when the goods were purchased for a price lower than the market value, if the acquirer should have presumed in light of the relevant evidences that the VAT corresponding to the previous supply of the same goods was not paid. Finally, there are a number of cases where entities acting in the name of the importer (either as an agent or as a representative) might be liable for VAT not paid by the taxpayer (the importer).

As it could be followed, the role of the purchaser (limited to the acquisition of receivables from the seller) should not lead to this entity becoming liable for any VAT not charged or unpaid by the seller in its commercial dealings with the obligors.

In addition, General Tax Law allows the tax authorities to claim the payment of taxes to entities or individuals other than the taxpayer (the seller) when such Spanish tax authorities understand and provide evidence of (i) the collaboration of the purchaser in the tax law infringement, or (ii) the transfer of a business activity to the purchaser as an on-going concern (which would not be applicable in a sale of receivables).

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

In such an scenario, the seller may constitute a permanent establishment of the purchaser in Spain (and thus, subject to Spanish taxation), if the seller, in its condition as services provider, acts as an agent of the purchaser with the right to enter into agreements with third parties e.g., the obligors, on behalf of the purchaser.

This would typically not be the case. Nevertheless, in order to exclude the risk of a permanent establishment, the seller should not be provided with any powers of attorney of relevance with respect to the purchased receivables (e.g., contemplating the right to forgive, set off, reduce or postpone collection of the receivables), but only with the faculties related to the cash collection of the receivables.

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