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The International Comparative Legal Guide to:

Securitisation 2005

A practical insight to cross-border Securitisation Law

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1 Choice of Law

1.1 If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivable contract and the receivables?

Yes, pursuant to the freedom of choice principle established by the Rome Convention on the Law Applicable to Contractual Obligations dated 19 June 1980 (the "Rome Convention"), to which Spain is a party. Under Sections 3.1 and 3.2 of the Rome Convention, any law agreed upon by the parties shall be applied, irrespective of it being the law of a contracting state or not.

This notwithstanding, Section 3.3 of the Rome Convention provides that the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, i.e. the so-called "mandatory rules".

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.

1.2 If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, can the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement?

Yes, the law of the purchaser's country or of a third country may be chosen to govern the sale agreement (Sections 2, 3 and 12 of the Rome Convention).

1.3 In the case described in 1.2 above, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser, (ii) whether the sale is perfected, (iii) whether the sale is a true sale, and/or (iv) whether the sale is effective and enforceable against the debtors?

No matter what the choice of law may have been, under Section 12 of the Rome Convention Spanish law shall determine the assignability of the underlying receivable, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question on whether the debtor's obligations have been discharged.

Therefore, the effectiveness of the transfer of the receivables as between the parties thereto shall be governed by the chosen law, whilst the means to perfect the sale and ensure effectiveness of any such transfer vis-à-vis the debtor and other parties interested in the underlying relationship shall be governed by Spanish law. Finally, "true sale" treatment shall also be assessed under Spanish law.

2 Receivables Contracts

2.1 Can a receivable be sold without the debtor's consent if the receivable contract does not prohibit assignment?

Yes. Under Spanish law, the consent of the assigned debtors is not necessary in order to guarantee full enforceability against the debtors, the only requirement being that the assigned debtors are notified of the assignment. If the debtors are not served notice of the assignment of the receivables, the sale will still be regarded as valid, but the debtors' obligations will be fully discharged by paying the amounts due to the seller.

2.2 If the receivable contract does prohibit assignment, will the sale of receivables be ineffective and/or give the debtor the right to sue the seller and/or the buyer?

If the receivable contract does prohibit assignment or requires the consent of the debtor and the latter is not obtained, the sale of receivables will be valid and effective

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amongst the parties to the sale agreement, but will not be enforceable against the assigned debtors. Under normal conditions, the assigned debtors will not be given any right to sue the buyer, particularly if the buyer acted in good faith (i.e. was unaware of the existence of any such restriction). On the contrary, the assigned debtors will be given the right to sue the seller for any damage or prejudice which may result from the breach of contract.

2.3 Do your country's laws limit rates of interest on consumer credit, loans or other kinds of receivables?

Other than as specified below, there is no limitation or restriction of that sort under Spanish law.

Spanish law does not provide for a specific threshold rate beyond which interest should be generally treated as usurious, with the consequence that in such cases the relevant loan or credit provision shall be 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.

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 a rate which cannot exceed the legal limit of 2.5 times the legal interest rate in force from time to time (the legal rate is fixed by the government on a yearly basis).

3 Asset Sales

3.1 In your country what is necessary generally in order for a seller to sell accounts receivable to a purchaser and for the sale to be perfected?

Under Spanish law, accounts receivables may be transferred in the following different ways:

1. ordinary assignment pursuant to the 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 *Fondo de Titulización de Activos*.

1. **Ordinary assignment.** No special formalities are required in order for an ordinary assignment of credits to be effective between the parties, though the written form is customary. Nevertheless, under arts. 1218-1227 of the 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; see question 6 below). This certainty of the date of the transfer may be achieved, *inter alia*, by formalisation of the transfer in a public deed (*escritura pública* or *póliza intervenida*) before a Spanish Notary Public.

The seller is liable 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 an agreement between the seller and the buyer so provides. According to this, it is possible to agree on sales with or without recourse by means of an ordinary assignment, always assuming that 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 regime (see section 6 below for a discussion of the legal privileges) will be applicable to those assignments of credits fulfilling the following requirements:

(a) the assignor of the receivables must be a mercantile company and the assigned receivables must arise from its business activity;

(b) the assignee must be a credit entity;

(c) the debtor of the receivables to be assigned cannot be a Public Authority; however, a very similar regime has been introduced in 2002 for those transfers of receivables where the assigned debtor is a Public Authority;

(d) the receivables must be in existence at the time the assignment agreement is executed. 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; otherwise, the future debtors must have been clearly identified in the agreement;

(e) the assignee must pay to the seller, either in cash or on a deferred basis, the consideration agreed for the assigned receivables, less the costs of the services rendered (i.e. financing, collection, etc.); and

(f) the assignment agreement must be executed in such a way that certainty of date is achieved (see paragraph 1 above).

3. **FTA.** In accordance with Royal Decree 926/1998, of May 14th, on Asset-Backed Securitisation Funds, the following requirements apply to assignments made to a Spanish Asset-Backed Securitisation Fund (*Fondo de Titulización de Activos*, hereinafter "FTA"), a form of regulated purchaser which, subject to local registration, is allowed to issue asset-backed notes under privileged conditions (see question 7 for a discussion on FTAs):

(a) The transfer of receivables must be agreed without recourse to the seller and subject to no conditions: the seller shall not be liable in case of insolvency of the debtor.

(b) The seller cannot grant any kind of warranty in favour of the purchaser in relation to the transfer of the receivables; this notwithstanding, it is customary to agree on limited representations and warranties that ensure that the securitised portfolio conforms to the agreed standards.

(c) The annual financial statements of the seller for the last three fiscal years must be audited.

(d) The annual financial statements of the seller must also be filed with the *Comisión Nacional del Mercado de Valores*, the Spanish capital markets regulator.

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(e) The terms of the transfer agreement must be recorded in a contractual document; in addition, the assigned receivables will be described in the public deed of incorporation of the FTA.

3.2 What additional or different requirements apply to sales of promissory notes, mortgage loans, or marketable debt securities?

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.

The transfer as a whole of a number of mortgage loans meeting the requirements laid down in Section 2 of Law 2/1981, of 25 March, on the Mortgage Market, shall be perfected by means of the issue of mortgage certificates (*participaciones hipotecarias*).

Where these mortgage loans fail to meet any of those requirements, the transfer may be perfected by means of the issue of mortgage conveyance documents (*certificados de transmisión de hipoteca*).

The main advantage of this transfer of mortgage loans is that the issue of both *participaciones hipotecarias* and *certificados de transmisión de hipoteca* needs to be documented in a public document (*escritura pública*) but under certain conditions, does not need to be registered in the relevant Property Registries. In both cases, the seller remains as the nominee (i.e. holder of record), but the holder of the certificate becomes the beneficial owner of the mortgage loan, subject to certain conditions that confer upon the transfer the "true sale" treatment.

Promissory notes and marketable 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 (i.e. those established in articles 347 and 348 of the Spanish Commercial Code and articles 1526 through 1536 of the Spanish Civil Code). Finally, those securities represented in bearer form shall be transferred by physical delivery thereof.

3.3 Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be effective against the debtors, that is (i) to allow the purchaser to enforce the debts directly against the debtors, (ii) to prevent the debtor and the seller from amending the receivable contract without the purchaser's consent, (iii) to prevent the debtor from setting off receivables against any obligations of the seller to the debtor, or (iv) to require the debtors to pay the purchaser rather than the seller?

The parties may or may not serve notice of the sale on the assigned debtor. If they decide not to do it, the debtor will be allowed (i) to validly discharge its obligations by paying the seller, and (ii) to validly agree with the seller amendments to the receivable contract. Likewise, the debtor's reasons to oppose payment under the receivable may vary depending on the date of the transfer and the date transfer notice is served (for instance, the debtor's right of set-off will apply to those obligations arising prior to the transfer notice, but not to those arising afterwards, unless it explicitly approves the transfer).

4 True Sale

4.1 In general, what is necessary for a sale of receivables to be a true sale? Among other things, to what extent may the seller retain credit risk, interest rate risk, or control of collections on receivables?

The following is a discussion on true sale conditions under normal circumstances. True sale treatment in insolvency scenarios is addressed in section 6 below.

1 **Ordinary and privileged assignments.** Under Spanish law, a sale of receivables will qualify as a "true sale" if it transfers full legal title of ownership of the receivables to the purchaser under such terms that no third party (e.g. the seller, a creditor of the seller or any other interested party) will be in a position to claim a better legal title to the relevant receivables. In other words, if it is a transaction that is valid and binding *vis-à-vis* third parties (*eficacia traslativa plena*).

Each of the means of assignment described in question 3.1 above will be fully effective between the seller and the purchaser provided that the relevant conditions are fulfilled. Additionally, each of the means of assignment may be effective vis-à-vis third parties as long as certainty of the date of transfer is achieved.

Generally the courts have upheld the true sale treatment of any sale of receivables, irrespective of the parties agreeing such transfer on a recourse or non-recourse basis, but always provided that the purchaser advances the funds agreed as consideration for the transfer of the receivable (in other words, where such transfer is agreed in terms such that the purchaser does not advance any funds, does not bear the risk of the receivable, and is thus hired for collection purposes only, the transfer shall not be treated as a true sale). This having been said, 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 sometimes been construed by the courts as an evidence that the transfer ought not to be treated as a sale, but rather as a collateralised loan by the purchaser. Though this view is considered by the vast majority of legal authors as inadequate, it has been upheld by some courts until recently.

The fact that the parties agree to vest upon the seller collection responsibilities does not alter the above views. The transfer shall still be regarded as a true sale.

In addition to the above, any party intending to enter into a transfer agreement should seek appropriate accounting advice, as under Spanish generally accepted accounting rules off-balance sheet treatment may not be available to any assignment where the seller retains all or part of the credit risk.

Likewise, credit institutions intending to enter into any form of transfer agreement should seek specific advice on special banking accounting rules. These rules are now being considered for change by the regulator in order to implement

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new Basel II guidelines as well as IAS.

2. **FTA**. Any transfer of receivables into an FTA shall be considered as a true sale treatment provided that all appropriate conditions are fulfilled. Such transfer must be made on a non-recourse basis only, and the seller may not give general representations and warranties on the securitised assets. Collection responsibilities are retained by the seller unless otherwise agreed.

4.2 Can there be a true sale of receivables that do not yet exist (as in a "future flow" securitisation), so that a single sale on a certain date results in the purchaser automatically being the owner of the "sold" receivables immediately when they come into existence?

1. **Ordinary assignment**. Although it is generally accepted that the transfer of future receivables may be agreed upon by means of an ordinary assignment (please see question 3.1 above), 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 become outstanding.

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; otherwise, the future debtors must have been clearly identified in the agreement.

3. **FTA**. Existing FTA regulations allow the securitisation of future receivables to the extent they produce a flow of income of an already known or estimated amount, and are transferred by means of a contract that provides enough evidence of the actual transfer of the ownership of the receivables. Thus far, the only receivables included in this category have been those arising in toll road projects under the relevant concession contracts. Other eligible flows must be authorised by the Spanish authorities. Though no such approval has ever been issued, there is a ministerial order currently under development which will set forth those additional future receivables which may be securitised through an FTA (for instance, lease rentals).

4.3 Do your country's laws have any "safe harbour" provision for treating a sale as a true sale? If so, what is required?

See question 6.1 below for a discussion on certain privileges vested upon sales formalised as (i) a "privileged assignment" under the 3rd Additional Provision of Law 1/1999, or (ii) for the benefit of an FTA.

5 Security Interests

5.1 What is necessary for the purchaser to grant a security interest in accounts receivable under the laws of your country and for the security interest to be perfected?

The purchaser of receivables may need to grant a security interest in accounts receivable for the benefit of those parties financing the acquisition.

1. If the purchaser has acquired title to the receivables under an ordinary or privileged assignment, the purchaser may pledge the receivables for the benefit of the lenders. In order to ensure that the pledge is enforceable and effective vis-à-vis the debtor under the receivable and any other third party, the pledge needs to be executed in a public document (*escritura pública* or *póliza intervenida*) and notice should be served on the debtor. The pledge needs not be registered in any public registry.
2. If the purchaser is an FTA, the acquisition of the receivables shall be financed by the means contemplated in the law (e.g. issuance of asset-backed securities, loans, etc.). Each of those sources of financing shall be fully supported by the securitised portfolio, and no additional security interests need be created. The FTA shall be prevented for incurring any additional indebtedness, and the FTA rules shall provide for (i) limitations on the ability to dispose of the securitised assets, (ii) strict collection requirements, and (iii) a payment priority order governing the distribution of funds produced by the portfolio.

5.2 What additional or different requirements apply to security interests in promissory notes, mortgage loans, or marketable debt securities?

In addition to the requirements applying to sales of promissory notes, mortgage loans, or marketable debt securities in question 3.2 above, and to those requirements set forth in question 5.1, the granting of security interests on each of those assets require the following:

- 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. Additionally, for this mortgage to be effective vis-à-vis the original debtor and any other third party, it must be notified.
- Promissory notes and marketable debt securities. Where those securities have been represented in book-entry form, the creation of a pledge needs 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.

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5.3 If the purchaser grants a security interest in the receivables under the laws of the purchaser's country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

The answer to this question will depend on the type of security to be granted. 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.

Having said that, any form of security interest related to real estate and located in Spain cannot be governed by a law other than Spanish law. Similarly, any pledge created on receivables governed by Spanish law and where the debtor is Spanish, will be subject to the restrictions and limitations mentioned in question 1.3 above, even if the governing law of the pledge is a foreign law.

6 Insolvency Laws

6.1 If after the sale of receivables the seller becomes subject to an insolvency proceeding, will your country's insolvency laws prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the receivables ("automatic stay")? Does the answer to this question (or the questions below) depend on whether the sale is a true sale?

Spain has recently enacted an all-new Insolvency Law that came into force as of 1 September 2004. The following is a summary of the key principles governing the rescission regime which may affect the sale of receivables.

Upon the insolvency of a Spanish party (an entity or an individual) being declared, 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.

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.

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; and (ii) the creation of *in rem* guarantees (security interests) for the benefit of pre-existing obligations or of new obligations replacing previously existing ones.

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 trustee).

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.

Moreover, ordinary actions carried out by the insolvent party in the ordinary course of its business or professional activity, on an arms length basis, may not be rescinded.

In the light of the above, sales of receivables carried out under each of the available means of assignment will be fully respected to the extent that they do not incur in any cause of rescission as per the above. Accordingly, the purchaser shall be allowed to serve notice on the debtor (where such notice has not been served before) and to exercise full ownership rights, including collection, on the relevant receivables.

1. **Ordinary assignments.** The general rules described above would apply.
2. **Privileged assignments / FTA.** Assignments of receivables pursuant to the 3rd Additional Provision of Law 1/1999 and assignments of receivables to an FTA are granted a privileged treatment as they shall not be rescinded unless evidence is given of the fact that fraud existed at the time the assignment was made.

Therefore, in addition to the requirements set forth in the preceding paragraphs, any party intending to rescind those assignments should provide evidence that the transaction was wilfully conceived as a means to commit fraud. Given the circumstances that normally surround these transactions (e.g. valuation by audit firms, intervention of rating agencies, etc.) and the nature of the receivables (monetary rights), this risk is normally viewed as remote.

6.2 If there is no automatic stay, could the insolvency official prohibit exercise of rights by the purchaser by means of injunction, stay order or other action?

No, except in the circumstances and subject to the requirements set forth in question 6.1. In any event, the insolvency officials would not be entitled to order any such action unilaterally, as they would be required to seek the intervention of the insolvency judge, that will be vested with the right to decide upon the official's claim.

6.3 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 any circumstances. Consolidation is an extreme scenario normally associated with a situation where the purchaser and the seller are closely related parties and the respective estates cannot be separated.

6.4 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?

Please see question 6.1 above.

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6.5 Can an insolvency official reject or rescind any of the seller's obligations (such as warranties) under receivable contracts (thus potentially giving rise to claims against the seller that could be set off against the receivables)?

Under Spanish law, the debtor may refuse to honour its obligations under the receivable, by opposing set-off rights (amongst other contractual reasons to oppose) for debts held against the seller which existed prior to the date the sale of the receivable was notified to the debtor. The risk of this set-off right is normally guaranteed by the seller. If any such set-off occurs before the seller's insolvency is declared, the purchaser will hold a claim against the seller.

Set-off will not be allowed if such right accrues as a result of the insolvency or afterwards.

7 Special Purpose Entities

7.1 Does your country have laws specifically providing for establishment of special purpose entities for securitisation? If so, then what is required and what legal attributes and benefits will the entity have?

Standard, market-oriented securitisation transactions are structured with FTAs (and their close relatives, Mortgage-Backed Securitisation Funds or FTHs, where specially defined mortgage loans are securitised), which 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 a handful of institutional investors) are allowed under the FTA/FTH format, provided that the relevant ABS/MBS bonds will not be listed in the Spanish regulated markets.

An FTA/FTH (hereinafter, the "Fund") is defined as a separate estate that lacks legal personality (*personalidad juridíca*) 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.

Customised local securitisation transactions are rather uncommon. It is extremely difficult to set up a bankruptcy remote vehicle (SPV) as the purchaser of the receivables and issuer of the securitisation bonds. There are debt issue limitations applicable to ordinary companies (i.e. not licensed as a credit institution) that hinder the ability to issue large amounts of debt securities. Similarly, the 3rd Additional Provision of Law 1/1999 will not apply to sales of receivables made to a non-credit institution.

1. Assignment of receivables to an FTA

Please see questions 3.1 and 4.2 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.

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 securities issued must be listed in an Official Regulated Market.
  - 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 public deed. 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 institutional investors (*Inversores Institucionales*), such as credit institutions, insurance companies, certain investment firms and other kinds of funds 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 public limited company (*sociedad anónima* or "S.A.") 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 If an agreement with a special purpose entity provides that the other parties will not take legal action against it or that they will not commence an insolvency proceeding against it, is that provision valid and enforceable?

Customised local securitisation transactions are uncommon since it is extremely difficult to set up a locally based

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bankruptcy remote vehicle (SPV) -other than FTA/FTH- as the purchaser of the receivables and issuer of the securitisation bonds. Under Spanish public policy principles, it cannot be assured that a court will uphold a commitment not to ask for the insolvency of any party.

Obviously, the insolvency of a foreign SPV will be governed by the relevant foreign law. This, amongst other reasons, explains why many of the customised local securitisation transactions are structured on a cross-border basis (i.e. the purchaser of the assets is not organised in Spain).

Regarding FTA/FTHs, in accordance with Section 1 of Royal Decree 926/1998, they are organised as separate estates (*patrimonios separados*) that lack legal personality. Under the new Insolvency Law, any debtor, whether an individual or a legal entity, as well as the estate of a decedent under certain conditions, may be declared insolvent. Since FTA/FTHs do not qualify as legal entities, at this stage and in the absence of any court precedent or ruling which may determine any future line of interpretation, they should not be considered as subject to the insolvency rules.

7.3 If the organisational documents or agreements of a special purpose entity provide that the directors or managers will not commence an insolvency proceeding involving the entity unless required under applicable law, is that provision valid and enforceable?

Please see question 7.2 above. Provided that the directors or managers may commence insolvency proceeding in those circumstances required under Spanish law, we see no obstacle to the validity and enforceability of such a provision. However, please note that the terms of the Insolvency Law are such that the directors and managers will be granted a broad discretion to determine when to seek the protection of insolvency laws, and that the directors and managers' fiduciary duties may, in practice, leave this provision rather empty.

8 Regulatory Issues

8.1 Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors 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 debtors. 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.

8.2 If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? Briefly, what is required?

No. However, the consumer/debtor may exercise against the purchaser the same exceptions which he could exercise against the seller under Law 7/1995, of 23 March, on Consumer Credit (including the right to set off).

8.3 Assuming that the purchaser does no other business in your country, 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 license or its being subject to regulation as a financial institution in your country?

Lending on a regular basis and in the ordinary course of business may be regarded as a reserved activity requiring a banking license in Spain. A one-off purchase of receivables should not be considered as lending, and would not require a banking licence. However, purchasing Spanish receivables on a regular basis could well be regarded as lending/factoring services, thus requiring a local banking licence.

Needless to say, these principles would not apply to locally based FTA/FTHs.

8.4 Does your country have laws restricting the exchange of your country's currency for other currencies or the making of payments in your country's 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 Will any part of payments on receivables by the debtors to the seller or the purchaser be subject to withholding taxes in your country? 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 our opinion, in the absence of any rulings or court decisions on the matter, the income obtained by the purchaser on the difference between the price paid for the receivables and the payments received from the debtor under

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the receivables will qualify as interest income.

In general, interest from Spanish source is subject to withholding tax under Non Resident Income Tax Law at a 15% withholding tax rate.

Reduced rates may apply if the purchaser is entitled to benefit from the provisions of a convention for the avoidance of the double taxation entered into by Spain. Furthermore, under the Spanish Non Resident Income Tax Law, interest obtained by European Union resident lenders/purchasers is exempt from Spanish withholding tax.

In certain cases, if the seller is not a Spanish resident entity, it may be argued that the income generated by the purchaser does not qualify as Spanish source interest.

9.2 Does your country 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 issuance of the draft document rather than as a consequence of its transfer. However, any person that intervenes in connection with the draft documents, i.e. the purchaser, will be joint and severally liable with the issuer of the instrument for any unpaid stamp duty.

9.3 Does your country 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 a special rule contained in article 70.First.5 of the VAT Law, 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.

9.4 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 against the purchaser or on the receivables or collections for the unpaid tax?

No, in general terms (and except as mentioned in question 9.2) the Tax Authorities may not claim the payment of taxes to entities or individuals other than the taxpayer (the seller) unless the 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).

9.5 Assuming that the purchaser conducts no other business in your country, 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 debtors, make it liable to tax in your country?

In such an scenario, the seller may represent a permanent establishment of the purchaser in Spain (and thus, subject to Spanish taxation), if the seller, in its condition as servicer, acts as an agent of the purchaser with the right to enter into agreements with third parties e.g. the debtors, 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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Uría & Menéndez has played an important role in the formation and development of securitisation transactions in Spain.

As regards domestic securitisation of assets assigned to locally incorporated funds, Uría & Menéndez advised one of the leading banks in Spain in the implementation of the first mortgage securitisation carried out in Spain in 1991. The scheme of this transaction formed the basis for the mortgage securitisation regulation included in the Law 19/1992, of July 7, in the design of which Uría & Menéndez played a key role alongside the Dirección General del Tesoro y Política Financiera.

In addition, Uría & Menéndez advised on the incorporation of the first management company of securitisation funds and the incorporation of the first mortgage securitisation fund.

In relation to non-mortgage asset securitisation, Uría & Menéndez advised one of the largest Spanish utility companies in the securitisation of the nuclear moratorium debt (1994) and acted for one of Spain´s leading banks in the constitution of the first non-mortgage asset securitisation fund. Just recently, the firm has advised in the first securitisation of utility receivables. Uría & Menéndez also acts regularly as adviser to underwriters and providers of financial support and credit enhancement and has also acted as adviser to rating agencies.

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