



ICLG

The International Comparative Legal Guide to: **Securitisation 2019**

12th Edition

A practical cross-border insight into securitisation work

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PREFACE

On behalf of Latham & Watkins, I would like to thank Global Legal Group for their efforts in publishing the 12th edition of *The International Comparative Legal Guide to: Securitisation*.

Maintaining an accurate and up-to-date guide regarding relevant practices and legislation in a variety of jurisdictions is critical, and the 2019 edition of this *Guide* accomplishes that objective by providing global businesses, in-house counsel, and international legal practitioners with ready access to important information regarding the legislative frameworks for securitisation in 26 individual jurisdictions.

The invitation to participate in this publication was well received by the world's leading law firms, thereby validating the continued growth and interest in securitisation around the world. We thank the authors for so generously sharing their knowledge and expertise, and for making this publication so valuable a contribution to our profession. The *Guide's* first 11 editions established it as one of the most comprehensive guides in the practice of securitisation. On behalf of Latham & Watkins, I am delighted to serve as the *Guide's* contributing editor and hope that you find this edition both useful and enlightening.

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1 Receivables Contracts

- 1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a binding contract arise as a result of the behaviour of the parties?**

Cyprus Contracts Law, Cap. 149 (as amended) states that a contract may be: made orally; partly written and partly oral; entirely in writing; or even implied by the conduct of the contracting parties. Therefore, there is no formal legal requirement that the sales of goods or services be evidenced by a formal receivables contract. Nevertheless, as a matter of good commercial practice and for purely evidential reasons, it is advisable that such transactions be evidenced in writing. In principle, invoices coupled with any parol evidence may be sufficient to evidence such a contract. A binding contract may also be adduced by the behaviour of the parties concerned.

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

There are no limits imposed on the rates interest that may be charged on consumer credit, loans or other kinds of receivables in Cyprus as this is a matter left to agreement of the contracting parties, with the possible exception of the usury provisions in the Cyprus Criminal Code and default interest rate charged by credit institutions. Under section 314A of the Criminal Code, Cap. 154, as amended, usury is a criminal offence and persons (credit institutions are exempted) are prohibited from receiving, collecting or charging interest at a rate that is higher than the interest rate ceiling (as calculated and published by the Central Bank of Cyprus) during the provision of any loan period. Furthermore, credit institutions may not charge more than 2% as default interest rate to obligors in respect of any loan instalment payment arrears.

In relation to consumers, the Consumer Rights Law of 2013 (Law 133(I)/2013, as amended) provides for a 14-day withdrawal period in which consumers have a general right to withdraw from a sales contract or service contract for whatever reason, which has been concluded either as a distance contract or an off-premises contract, and also includes a right of the consumer to a refund of money received by the seller when the consumer exercises their right of withdrawal. Furthermore, the Consumer Credit Law of 2010 (Law 106(I)/2010, as amended) provides for a 14-day withdrawal period in which consumers have a general right to withdraw from a consumer credit contract for whatever reason, with the withdrawal period commencing from the date of conclusion of the contract.

- 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?**

Aside from any requirement (to the extent relevant) to comply with local public procurement rules, the same contract law principles will apply to contracts entered into with governmental or government agencies as those that apply with private law entities or persons.

2 Choice of Law – Receivables Contracts

- 2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in your jurisdiction that will determine the governing law of the contract?**

EU Regulation 593/2008 on the law applicable to contractual obligations (Rome I Regulation) is directly applicable in Cyprus. Where no law is expressly specified in the contract, then in accordance with article 4 of Rome I Regulation, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence and a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. In respect of contracts that may fall outside Rome I Regulation, the case law of the Cyprus courts suggests that the Cyprus courts will look first as to what was the perceived intention of the parties. If this cannot be established, the applicable law will be the law having the closest and most real connection to the underlying transaction.

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction would not give effect to their choice of law?

Subject to the rules of Rome I Regulation, a Cyprus court will generally apply the law which the contracting parties intended to apply, termed the ‘proper law of the contract’, and where the parties have expressly chosen the law by which they wish their contract to be governed, this will be the proper law. Therefore, where a seller and obligor both resident in Cyprus have expressly chosen Cyprus law to govern the receivables contract, there is no reason to consider that a Cypriot court would not apply and give effect to their choice of law.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in your jurisdiction give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

Subject to public policy considerations or the application of any mandatory provisions of law (to the extent relevant), Cyprus courts will generally apply the choice of foreign law to govern a receivables contract.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does your jurisdiction’s law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., your jurisdiction’s laws or foreign laws)?

There is no such general rule in Cyprus requiring that the sale of receivables be governed by the same law as the law governing the receivables themselves.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

A court in Cyprus will recognise a sale as being effective against the

seller, the obligor and other parties in the above scenario. The purchaser will not be in any better position, in terms of ranking of priorities of claims *vis-à-vis* other creditors of the obligor than the seller would have been in the event of bankruptcy or insolvency of the obligor. In the event of insolvency of the seller, this assumes that the sale is made on a commercial arm’s-length basis, in good faith and does not constitute a fraudulent preference or fraudulent transfer (i.e. an attempt to defraud the creditors of the seller). A Cyprus court will not uphold any sale constituting a fraudulent preference or fraudulent transfer.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor’s country or the purchaser’s country (or both) be taken into account?

Assuming that the sale is made on a commercial arm’s-length basis and in good faith, and does not constitute a fraudulent preference or fraudulent transfer, and in the absence of any mandatory provisions of law or public policy grounds which would affect the court’s decision in such matters, a Cyprus court would recognise that sale as being effective against the seller and other third parties and apply the choice of law of the parties.

3.4 Example 3: If (a) the seller is located in your jurisdiction but the obligor is located in another country, (b) the receivable is governed by the law of the obligor’s country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor’s country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor’s country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with your jurisdiction’s own sale requirements?

Assuming that the sale is made on a commercial arm’s-length basis and in good faith, and does not constitute a fraudulent preference or fraudulent transfer, and in the absence of any mandatory provisions of law or public policy grounds which would affect the court’s decision in such matters, a Cyprus court would recognise that sale as being effective against the seller and other third parties without the need to comply with any Cyprus sale requirements. The above answer assumes that the Cyprus court will accept that it is the proper forum in terms of jurisdiction to hear or try the relevant matter and that any foreign law element of the transaction in question will be properly pleaded and evidenced before the Cyprus court.

3.5 Example 4: If (a) the obligor is located in your jurisdiction but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in your jurisdiction recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with your jurisdiction's own sale requirements?

Assuming that the sale is made on a commercial arm's-length basis and in good faith, and does not constitute a fraudulent preference or fraudulent transfer, a Cyprus court would recognise that sale as being effective against the obligor and other third parties without the need to comply with any Cyprus sale requirements. The above answer assumes that any foreign law element of the transaction in question will be properly pleaded and evidenced before the Cyprus court.

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

Assuming that the sale is made on a commercial arm's-length basis and in good faith, and does not constitute a fraudulent preference or fraudulent transfer, and in the absence of any mandatory provisions of law or public policy grounds which would affect the court's decision in such matters, a Cyprus court would recognise that sale as being effective against the seller and other third parties. The above answer assumes that any foreign law element of the transaction in question will be properly pleaded and evidenced before the Cyprus court.

4 Asset Sales

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

The most customary form for a seller to sell receivables in Cyprus is through a private sale facilitated by way of assignment of said receivable to a prospective purchaser. Depending on the method utilised, it may be called a sale, transfer or assignment of receivable.

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?

Where the sale of the receivable is facilitated by way of assignment to a prospective purchaser, Cyprus law generally requires that the obligor be notified of said assignment for the perfection of the assignment. Consent of the obligor is not normally required unless such a contractual obligation exists in the contract existing between the seller and the obligor.

Furthermore, any sale of credit facilities (e.g. loans) may be subject to the provisions of the Sale of Credit Facilities and Related Matters Law of 2015 (Law 169(I)/2015, as amended) which requires that prior to any such sale, the seller must notify in writing the borrower and any guarantor of said intention and call on them to make an offer to acquire said credit facility within 45 days of said notification (unless the seller publishes the notification in the Official Gazette of the Republic and three daily newspapers). Furthermore, on completion of the sale of the receivable, the seller must notify the affected borrower within five business days from the date of sale of this fact.

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?

In respect of the sale and transfer of promissory notes, the Bills of Exchange Law (Cap. 162, as amended) requires that the notes be delivered to the holder thereof and any subsequent transfer thereof shall require endorsement and delivery to the next holder thereof.

In respect of sale of loans, please see our answer to question 4.2 regarding the sale of credit facilities.

As regards mortgages over land situated in Cyprus, relevant notice of the sale and transfer of the mortgage will need to be given to the relevant District Land Registry Office, and where the land is owned by a Cyprus registered company, a similar notice will need to be filed with the Cyprus Registrar of Companies.

In respect of debt securities registered on a dematerialised clearing system of a regulated market, relevant notice of sale and transfer will need to be filed with the relevant authority or custodian who manages the dematerialised clearing system. Other types of debt securities may be transferred by endorsement and delivery if issued to the bearer or upon registration in the relevant registry.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice – such as cutting off obligor set-off rights and other obligor defences?

Please see our answer given to question 4.2 with respect to requirements for obligor notification or consent.

The benefits of giving notice may include cutting off any set-off of rights of the obligors, and maintaining any priority rights *vis-à-vis*

other creditors of the obligor where the receivable concerns security (e.g. mortgage over land) in the event of subsequent sale of the receivable or insolvency of the obligor (where the obligor is a company).

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings have commenced against the obligor or the seller? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

Where notice must be given to the obligor, said notice should be in writing (although no particular form is prescribed) and be delivered to the obligor clearly informing him of the sale or assignment of the receivable.

In respect of sale of credit facilities, the relevant notice periods prescribed under the Sale of Credit Facilities and Related Matters Law of 2015 (Law 169(I)/2015, as amended) may apply.

In the event of insolvency of the obligors, relevant notice should be given to the liquidator or trustee in bankruptcy within the prescribed time periods indicated in the relevant bankruptcy or insolvency laws regarding notification of proof of debts.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that “None of the [seller’s] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]” be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says “This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]” (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says “The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]” (i.e., the restriction does not refer to rights)?

It is very likely that in the first two formulations, a Cyprus court would interpret them as prohibiting assignment of the receivable without the express consent of the obligor.

Under Cyprus law, obligations are not assignable but may be novated.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or “seller’s rights” under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment of receivables and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or tort, or on any other basis?

Restrictions on assignment contained in a contract are generally

enforceable in Cyprus. The seller may be liable to the obligor for breach of contract where an assignment is made in breach of an express contractual prohibition in this regard. In any event, said assignment will not be effective as regards the obligor.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

The sale document should specify the receivables with sufficient clarity in order to identify them and also distinguish them from any other assets of the seller not subject to said sale. It may not be necessary to itemise each receivable or refer to each obligor if they are capable of being distinguished by reference to a specific category or class (e.g. all consumer loans).

4.9 Recharacterisation Risk. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or is there a risk that the transaction could be characterised by a court as a loan with (or without) security? If recharacterisation risk exists, what characteristics of the transaction might prevent the transfer from being treated as an outright sale? Among other things, to what extent may the seller retain any of the following without jeopardising treatment as an outright sale: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; (d) a right of repurchase/redemption; (e) a right to the residual profits within the purchaser; or (f) any other term?

Where the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, this description and statement of intent will generally be respected by the court provided that the court is satisfied that the agreement reflects the true intentions of the parties and each case will be considered and determined on its own particular facts and circumstances.

Where the seller retains credit or interest rate risk or a right of repurchase/redemption, this increases the risk that the transfer may not be treated as an outright sale. Control of collections of receivables may not in itself give rise to a recharacterisation risk.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller’s insolvency?

In principle, as a matter of Cyprus law, a seller could agree to a continuous sale of receivables. However, in the event of insolvency of the seller, a liquidator may be able to challenge such a sales agreement if it can be shown and proven that it is an onerous contract or constitutes a fraudulent transfer or fraudulent preference

(i.e. a contract made not for fair commercial value or in the sense of an arm's-length transaction).

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., “future flow” securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to *versus* after the seller’s insolvency?

Yes, a seller can commit to the sale of future receivables. However, please also see our answer to question 4.10 above.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Yes, please see our answer to question 4.3 above regarding certain notification/registration requirements that may need to be satisfied.

4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor’s set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor’s set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

In the context of assignment of a receivable, the obligor’s set-off rights are terminated on receipt of notice of assignment by the assignee. The termination of such rights as aforesaid do not render the seller or purchaser liable to the obligor for damages.

4.14 Profit Extraction. What methods are typically used in your jurisdiction to extract residual profits from the purchaser?

Profit extraction methods that may be used include: (i) the seller/originator taking fees for administering the receivables contracts and collecting the receivables and/or arranging or managing the portfolio of receivables; (ii) the purchaser paying deferred consideration to the originator on the receivables purchased; or (iii) the originator holding a stake or equity interest in the purchaser.

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction to take a “back-up” security interest over the seller’s ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected (see question 4.9 above)?

Where the transaction is intended as an outright sale, it is not usual for a ‘back-up’ security to be taken.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

See our answer given to question 5.1 above.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

Security taken over receivables is commonly taken in the form of an assignment or by a fixed or floating charge. Security interests to be perfected and enforceable against a liquidator and other creditors in the event of insolvency of the purchaser (assuming the purchaser to be a Cyprus company) may need to be notified to and registered with the Cyprus Registrar of Companies, pursuant to section 90 of the Companies Law, Cap. 113 as amended. Granting of security by way of assignment may also require giving notice to the seller affected by said assignment.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, and that security interest is valid and perfected under the laws of the purchaser’s jurisdiction, will the security be treated as valid and perfected in your jurisdiction or must additional steps be taken in your jurisdiction?

In relation to receivables governed under Cyprus law, there may be a need to ascertain that Cyprus law perfection requirements are also satisfied, to ensure that the Cyprus courts will give effects to these security interests.

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?

Similar perfection requirements may apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities that generally apply to security interests. See our answer to question 5.3 above.

5.6 Trusts. Does your jurisdiction recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets (so that they are not part of the seller's insolvency estate) until turned over to the purchaser?

Cyprus recognises and applies Common law principles in relation to trusts. Therefore, a trust arrangement in respect of receivables will, in principle, be enforced by the Cyprus courts.

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

Cyprus recognises the concept and operation of escrow accounts. Security can be taken over a bank account located in Cyprus, usually in the form of a fixed charge over account. Cyprus courts would recognise a foreign law grant of security over a bank account in Cyprus, as long as any legal formalities and perfection requirements under Cyprus law and the foreign law that may apply are satisfied.

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

The secured party controls all cash flowing into the bank account from enforcement forward until the secured party is repaid in full in accordance with the terms of the security document creating the security. In practice, to ensure proper enforcement of the security, a notice of the security is given to the account-holding bank informing of the creation of the security coupled with an acknowledgment and undertaking of the bank to abide by the terms of the security document.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

The owner of the account may have access to the funds in the account prior to enforcement only with the express consent of the chargee. If the owner of the account has free access without need for consent of the chargee, this may affect the nature of the security itself (i.e. may be deemed to be a floating charge rather than a fixed charge) which may impact the priority of the security *vis-à-vis* other creditors of the owner of the account.

6 Insolvency Laws

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

Generally speaking, the insolvency of a seller and appointment of a liquidator operates as a stay of action against the assets of the insolvent entity. The appointed liquidator may proceed to honour the transaction assuming the transaction in question is not deemed to be an 'onerous contract', a fraudulent transfer or fraudulent preference. If the purchaser is deemed a secured party, the security may need to be registered in accordance with section 90 of the Companies Law to ensure its validity and enforceability against the liquidator and other secured creditors of the seller. Furthermore, the purchaser may also need to file a proof of debt with the liquidator within prescribed time limits to ensure proper consideration of the obligations owed to the purchaser by the insolvent seller by the liquidator.

6.2 Insolvency Official's Powers. If there is no stay of action, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of its ownership rights over the receivables (by means of injunction, stay order or other action)?

The liquidator may apply to the court for injunctive relief to prevent the purchaser's exercise of its ownership rights over the receivables. This assumes that the sale of the receivables was not made on a commercial arm's-length basis, or there is suspicion and evidence of fraudulent transfer/preference.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the seller's insolvency proceedings? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties? If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period? If a parent company of the seller guarantee's the performance by the seller of its obligations under contracts with the purchaser, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period?

The only preference period prescribed in Cyprus law in the event of the seller's insolvency, concerns the application of section 301 of the Companies Law, which states that any transaction relating to

property of a company that is entered into six months prior to the commencement of the winding-up with a view to giving a creditor a preference over other creditors, will be invalid as a fraudulent preference. If the transaction is entered into with a purchaser is majority-owned or controlled by the seller or an affiliate of the seller, so as to constitute it a 'related party' transaction, this fact by itself will be immaterial if it can be demonstrated that the terms of the transaction were entered into on a commercial arm's-length basis. In any event, the liquidator would have to prove in court that a transaction was a fraudulent preference in order to rescind or reverse it.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding? If the purchaser is owned by the seller or by an affiliate of the seller, does that affect the consolidation analysis?

Assuming that the purchaser and seller are two distinct legal entities and not affiliated or related in any manner, then under no circumstances could a liquidator consolidate the assets and liabilities of the purchaser with those of the seller in an insolvency proceeding.

If the purchaser is owned by the seller, then the liquidator of the seller could, in practice, pass a resolution to voluntarily wind up/liquidate the purchaser and, in this sense, consolidate the assets and liabilities of the purchaser with those of the seller in the insolvency proceedings of both entities which could run in parallel. Also, the liquidator of the seller in such scenario may also sell the equity interest held by the seller in the purchaser to an interested third-party buyer.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in your jurisdiction, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) on sales of receivables that only come into existence after the commencement of such proceedings?

Assuming that the transaction does not constitute an onerous contract or a fraudulent preference/transfer, the insolvency of the seller should not affect the rights of the purchaser. If the agreement for the sale of receivables still requires certain action on the part of the seller, at the time of the seller's insolvency, this may mean that the purchaser is rendered as an unsecured creditor of the seller.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.4 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

Although such limited recourse provisions do not seem to have been tested before the Cyprus courts, in principle, such a contractual provision freely negotiated and agreed between the contracting parties is likely to be deemed effective under Cyprus law. In this regard, a debtor whose debts fall under such limited recourse provision will not be able to be declared insolvent on grounds that it cannot pay its debts as they become due.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics? Is there a regulatory authority responsible for regulating securitisation transactions in your jurisdiction? Does your jurisdiction define what type of transaction constitutes a securitisation?

In Cyprus, the new Securitisation Law (Law 88(I)/2018) came into force on 13/07/2018, which now establishes a special legal framework for securitisation of transactions relating to loans and other similar credit facilities. The Law permits a transferring entity (e.g. credit institution) to proceed to bundle and transfer loans (e.g. NPLs) to a company/vehicle, called a Special Purpose Entity for Securitisation, set up especially for this purpose which will in turn issue bonds that it will direct to interested investors. The Central Bank of Cyprus is the regulatory authority which under the Law supervises and oversees the securitisation process.

7.2 Securitisation Entities. Does your jurisdiction have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

Yes, the Securitisation Law (Law 88(I)/2018) provides for the establishment of special purpose entities for securitisation (SPES). The Law defines SPES as a special purpose entity established either as a limited company or a trust or other legal entity for the purpose of undertaking one or more securitisations and whose activities are limited to those required to achieve this purpose and whose structure aims to distinguish its obligations from those of the transferring entity and which does not include a transferring entity. Each SPES, notified to the Central Bank of Cyprus, must satisfy the following criteria: (a) its constitutional or other founding documents must provide that its activities must be limited to those reasonably required to perform transactions in respect of securitisations; (b) the management organ of the SPES must be comprised of persons endowed with qualities of ethos and honesty and who are not members of the management organ of the transferring entity; and (c) the manager/administrator of the SPES is an entity that undertakes its activities in accordance with Part VI of the Securitisation Law (Law 88(I)/2018) and is one of the entities mentioned in article 7 of the Law.

7.3 Location and form of Securitisation Entities. Is it typical to establish the special purpose entity in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the special purpose entity in your jurisdiction? If offshore, where are special purpose entities typically located for securitisations in your jurisdiction? What are the forms that the special purpose entity would normally take in your jurisdiction and how would such entity usually be owned?

As the new Securitisation Law (Law 88(I)/2018) only came into effect fairly recently on 13/07/2018, it is too early to make any safe assessment regarding custom or practice in relation to where the special purpose entity will be set up or its preferred form.

7.4 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

Yes, please see our answer to question 6.6 above.

7.5 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Subject to any public policy considerations, it is likely that a Cyprus court shall give effect to such a non-petition clause, although each instance will be examined on a case-by-case basis.

7.6 Priority of Payments "Waterfall". Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

A court in Cyprus will generally give effect to contractual provisions in an agreement (e.g. an intercreditor agreement) distributing payments to parties in the order specified on a contract. However, in the event of insolvency of a party, priority of debts and debt repayments will need to abide by applicable mandatory provisions of law regarding insolvency and therefore contractual provisions in this regard may not be given effect in such instance.

7.7 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

A provision in a party's organisational documents prohibiting the directors from taking specified actions without the affirmative vote of an independent director may be recognised and given effect by a Cyprus court. A contractual provision in an agreement prohibiting the directors from taking specified actions without the affirmative vote of an independent director which is contrary to the provisions of a party's constitutional documents may not be given effect by a Cyprus court.

In relation to commencement of insolvency proceedings, irrespective of any provision contained either in the constitutional documents of a party or in a contractual provision of an agreement, where the party is a Cyprus company, mandatory provisions of law dictate that such provisions would be ineffective as the law prescribes for the commencement of liquidation proceedings by resolution passed in a general meeting of a company (i.e. by the shareholders of a company), with the exception of any court-issued liquidation/winding-up order.

7.8 Location of Purchaser. Is it typical to establish the purchaser in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the purchaser in your jurisdiction? If offshore, where are purchasers typically located for securitisations in your jurisdiction?

There is no legal prohibition or prescription as regards to whether the purchaser needs to be offshore or onshore, i.e. based in Cyprus. Please see our answer given to question 7.3 above.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in your jurisdiction? Does the answer to the preceding question change if the purchaser does business with more than one seller in your jurisdiction?

Any sale of credit facilities (e.g. loans) that fall within the scope of the Sale of Credit Facilities and Related Matters Law of 2015 (Law 169(I)/2015) will require the approval of the Central Bank of Cyprus where the purchaser is not a locally licensed credit institution, credit-acquiring company, credit institution licensed in an EU Member State or financial institution which is a subsidiary of a credit institution licensed in an EU Member State.

In the context of the Securitisation Law (Law 88(I)/2018), the SPES or the entity administering it may require the approval/licence of the Central Bank of Cyprus, where the acquiring entity is an SPES.

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

The seller does not require any licence in order to continue to enforce and collect receivables following their sale to the purchaser. A third-party replacement servicer does not require any licence to enforce and collect sold receivables but should ensure compliance with local data protection laws and regulations.

8.3 Data Protection. Does your jurisdiction have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

Where the data of obligors concerns natural persons or individuals, then parties dealing with any personal data will need to comply with the rules and regulations of the EU's General Data Protection Regulation (GDPR). These rules do not apply to data concerning enterprises (i.e. legal persons).

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your jurisdiction? Briefly, what is required?

In relation to consumers, the Consumer Rights Law of 2013 (Law 133(I)/2013, as amended) the Consumer Credit Law of 2010 (Law 106(I)/2010, as amended) may be of relevance. These laws grant certain rights to consumers and would require the purchaser to comply with certain conditions and procedures, including various cooling-off periods in certain circumstances. Please also see our answer given to question 1.2 above.

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

Subject to compliance with local AML rules and regulations, and the EU sanctions regime, Cyprus does not have currency restrictions or exchange control rules in place.

8.6 Risk Retention. Does your jurisdiction have laws or regulations relating to "risk retention"? How are securitisation transactions in your jurisdiction usually structured to satisfy those risk retention requirements?

Cyprus being an EU Member State complies with EU rules and regulations in respect of 'risk retention', through harmonisation of its domestic law with EU Directives (such as AIFMD and Solvency II) or through the direct applicability of EU Regulations (such as the Capital Requirement Regulation (CRR)). The CRR requires that an originator, sponsor or original lender must explicitly disclose that it will retain, on an ongoing basis, a material net economic interest in the securitisation for the life of the transaction. For the purposes of the CRR, 5% has been specified as the minimum net economic interest required in order for such retention to be 'material'. While the CRR only applies to regulated credit institutions and investment firms in the EU, similar requirements have been incorporated into Solvency II (with respect to insurance/reinsurance undertakings) and AIFMD (for managers of alternative investment funds).

8.7 Regulatory Developments. Have there been any regulatory developments in your jurisdiction which are likely to have a material impact on securitisation transactions in your jurisdiction?

Aside from the recent introduction of the Securitisation Law (Law 88(I)/2018) into domestic legislation, there have not been any other recent regulatory developments which are likely to have a material impact on securitisation transactions in Cyprus.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in your jurisdiction? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest? If withholding taxes might apply, what are the typical methods for eliminating or reducing withholding taxes?

Payments on receivables by obligors to purchasers or sellers will not be subject to any withholding tax in Cyprus. In the case of payments made by obligors out of Cyprus to persons not resident in Cyprus, there is no withholding tax. In cases where the purchasers or sellers are tax residents of Cyprus, then any interest payments to them will be subject to a withholding tax of 30%. Under Cyprus tax law, any interest income derived outside the ordinary activities of the entity is subject to defence tax at the rate of 30%.

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

No specific accounting policy is required for tax purposes in the context of securitisation.

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

Securitisation transactions falling within the scope of the Securitisation Law (Law 88(I)/2018) are exempted from the application of stamp duty. Any other agreements for the sale of receivables may be subject to the payment of stamp duty in accordance with the provisions of the Stamp Duty Law (Law 19/1963, as amended).

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

Cyprus does apply VAT on the sale of goods and services. The current rate is 19%.

Any purchaser of receivables will be required to register and account on a reverse-charge basis for Cyprus VAT at the rate of 19%, on the receipt of certain services from out of Cyprus in connection with the purchase of receivables (e.g. legal, accounting, or consultancy services). The sale of receivables should be exempt from VAT.

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

Under Cyprus law, the taxing authority will not be able to make a claim against the purchaser or against the receivables.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in your jurisdiction?

The above actions or conduct on behalf of the purchaser would not render the purchaser liable for tax. The purchaser will only be subject to tax if the purchaser is tax resident in Cyprus.

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

If structured in accordance with the legal and accounting viewpoint, a debt relief as a result of a limited recourse clause will not trigger any Cyprus income tax.



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Achilleas Malliotis is a partner and advocate in the law firm Elias Neocleous & Co LLC and is also a licensed insolvency practitioner. His field of work includes Corporate Law & Restructuring, Insurance Law, Labour Law, Banking & Finance Law, Commercial Law, Insolvency Law, Energy Law, Aviation Law, EU Law and Environmental Law. His work experience includes: litigation; providing general and specialised legal advice and opinions to clients on issues relating to Cyprus law (including legal due diligence and legal capacity opinions on Cyprus companies, and regulatory & financial services advice); and acting as an appointed receiver/manager and liquidator of Cyprus companies.



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