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Chapter 18

Ireland


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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?

To be enforceable against the obligor, a debt obligation need not be evidenced by a formal written contract, but must be evidenced as a matter of contract or deed. Contracts may be written, oral or partly written and partly oral. An invoice could itself constitute the contract between the seller and obligor if the standard elements of a contract are present. Where a contract is oral, evidence of the parties' conduct may be used in determining the terms of the contract. A "binding contract" may also be implied based on a course of conduct or dealings between the parties.

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?

Consumer credit agreements are regulated by the Consumer Credit Act 1995 (as amended) (the **CCA**) and the European Communities (Consumer Credit Agreements) Regulations 2010 (as amended) (the **CCA Regulations**).

There is no statutory interest rate cap, but under the CCA if the cost of credit under a credit agreement is excessive it may be unenforceable. In addition, pursuant to Section 149 of the CCA a "credit institution" (as defined under the CCA) must notify the Central Bank of Ireland (the **CBI**) of any increase of any existing charge it imposes on its customers (or any new charge not previously notified to the CBI) and the CBI may direct the credit institution to refrain from imposing or changing the charge.

There is no statutory right to interest on late payments, but contractual "default interest" may be imposed (as long as the rate of such default interest is not so high as to constitute a penalty).

If a consumer credit agreement does not comply with the requirements of the CCA, the creditor may not be able to enforce it. Certain clauses in a receivables contract with a consumer could be also found to be unfair under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (the **UTCCR Regulations**) and hence unenforceable.

The Consumer Protection Code (the **CPC**) of the CBI also imposes obligations on "regulated entities" in their dealings with their "customers". The Consumer Protection Act 2007 contains a general prohibition on unfair, misleading, aggressive and prohibited trading practices that could result in a contract with a consumer being rendered void or unenforceable.

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?

Under the Prompt Payments of Accounts Act 1997, all Irish public bodies and contractors on public sector contracts must pay amounts due to their suppliers promptly (i.e. on or before the due date in the contract or, if there is no due date (or no written contract), within 45 days of receipt of the invoice or delivery of the global servicers).

In certain circumstances, enforceability of receivables contracts with the government/a government agency could potentially be an issue as a result of the law of sovereign immunity.

2 Choice of Law – Receivables Contracts

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

Contracts entered into on or after 17 December 2009 will be governed by Regulation (EC) 593/2008 of 17 June 2008 (**Rome I**). Contracts entered into prior to 17 December 2009 will be subject to the Contractual Obligations (Applicable Law) Act 1991, pursuant to which the Rome convention on the law applicable to contractual obligations (the **Rome Convention**) was enacted in Ireland.

Under Rome I in the absence of an express choice of law in a contract, the applicable law of the contract will be that of the country with which it has the "closest connection", which is the country where the party who is to perform the contract has its habitual residence or its central administration (unless the contract is within one of a number of defined classes for which specific rules apply, or is manifestly more closely connected with the law of a different country, or if it is sufficiently certain from the terms or circumstances of the contract which law the parties intended to apply).

Similarly, under the Rome Convention the applicable law of a contract is presumed to be that of the country with which the contract has the "closest connection" (i.e. the country where the party performing the contract has its habitual residence or its central administration). However, if the contract is a commercial or professional contract, the applicable law will be the law of the place in which the principal place of business of the party performing the contract is situated or, where performance is to be effected through a place of business other than the principal place of business of that party, the country in which that other place of business is situated.

If the contract falls outside the scope of Rome I or the Rome Convention, Irish common law principles will determine the applicable law by reference to the parties' intentions. If the parties' intention cannot be established, the applicable law will be the law with which the contract has its "closest and most real connection".

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?

In those circumstances the Irish courts should give effect to the choice of Irish 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?

As discussed above, Rome I and the Rome Convention provide that the parties to a contract may freely choose the law of their contract and that choice is generally only overridden if it conflicts with mandatory rules or public policy. Contracts falling outside the scope of Rome I or the Rome Convention will be subject to standard Irish common law principles which also generally support the parties' right to choose the governing law of their contract and will only displace their choice in exceptional circumstances.

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)?

Irish law does not require the sale of receivables to be governed by the law governing the receivables themselves. Whether under Rome I, the Rome Convention or general principles of Irish common law, the parties to a contract can (subject to certain exceptions) choose the law of any country to govern the contract, irrespective of the law governing the receivable.

However, whether a receivable has been validly sold and whether such sale has been perfected will generally be a matter for the law governing the receivable and not the law governing the receivables sale agreement. Furthermore, the enforceability of the receivables against the obligor may be determined by the law of the jurisdiction in which the obligor is located.

3.2 Example 1: If (a) the seller and the obligor are located in 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)?

Yes, it should.

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?

See section 2 and question 3.1 above. In addition, under Rome I and the Rome Convention, laws other than the governing law of the receivables purchase agreement may sometimes be taken into account. For instance, where a contract is governed by Irish law but will be performed in a place other than Ireland, the Irish courts might apply certain mandatory provisions of the law of the country where the contract is to be performed (if the contract would be otherwise rendered unlawful in that country).

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?

As per Section 2 and questions 3.1 and 3.3 above, under Rome I and the Rome Convention where there is an express choice of law by the parties to a contract, the Irish courts should recognise the choice of law and assess the validity of the contract in accordance with the law chosen by the parties.

However, certain mandatory principles of Irish law cannot be disapplied and the courts might not apply the parties' chosen law to the extent it conflicted with those mandatory principles.

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?

Yes. See section 2 and questions 3.1, 3.3 and 3.4 above.

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)?

Yes. See section 2 and questions 3.1, 3.3, 3.4 and 3.5 above.

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?

In Ireland receivables are most commonly sold by way of equitable (or legal) assignment. Other methods which are more rarely used include: a declaration of trust over the receivables (or over the proceeds of the receivables), a sub-participation or a novation. An outright sale of receivables may be described as a "sale", a "transfer" or an "assignment", although "assignment" often indicates a transfer of the rights in respect of the receivables (and not the obligations), while a "transfer" often indicates a transfer of both rights and obligations by way of novation. The phrase "security assignment" is often used to distinguish a transfer by way of security from an outright assignment.

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

A sale of receivables by way of an outright legal assignment is perfected by the delivery of notice in writing of the sale to the obligor(s) of the relevant receivables in accordance with the requirements of Section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 (the **Judicature Act**). The provision of notice does not in itself result in the transfer becoming a legal (as opposed to an equitable) assignment as certain other formalities are also required; namely, the assignment must be: (i) in writing under the hand of the assignor; (ii) of the whole of the debt; and (iii) absolute and not by way of charge. If the assignment does not fulfil all these requirements, it will likely take effect as an equitable assignment so that any subsequent assignment effected by the seller which is fully compliant with the Judicature Act requirements will take priority, if notified to the obligor prior to the date on which the original assignment is notified to the obligor.

A novation of receivables (i.e. of both the rights and obligations in respect of such receivables) requires the written consent of the obligor, the seller and the purchaser.

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

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

Mortgage loans and their related mortgages may be transferred by way of assignment. For a mortgage over real property in order to effect a full legal (rather than just equitable) assignment, the transfer will need to be registered at the Land Registry or the Registry of Deeds (depending on whether the land is registered or unregistered). Most residential mortgage-backed securitisation transactions are structured as an equitable assignment of mortgage loans and their related mortgages to avoid having to give notice to the underlying mortgagors and to register the transfer. Under the CBI's Code of Conduct on the Transfer of Mortgages (if applicable), a loan secured by a mortgage of residential property may not be transferred without the written consent of the borrower (the relevant consent is usually obtained under the mortgage origination documentation).

Questions 8.3 and 8.4 below outline some of the regulatory requirements in relation to consumer loans. Under the CCA Regulations, a consumer must be provided with notice of any transfer by the creditor of its loan, except where the original creditor continues to service the credit. Under the CPC where part of a regulated business is transferred by a regulated entity (including a transfer of consumer loans) at least two months' notice must be provided to affected consumers if the transfer is to another regulated entity (and one month if it is not).

Marketable debt securities in bearer form may be transferred by delivery and endorsement; in registered form, by registration of the transferee in the relevant register. Dematerialised marketable securities may be transferred by debiting the clearing system account of the purchaser (or its custodian or nominee/intermediary).

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?

A seller or purchaser need not notify the obligors to effect a valid equitable sale of the receivables (which would be effective against the seller). However, in order for a legal sale of the receivables to be effected (enforceable against both the seller and the underlying obligor) written notice would need to be provided to the underlying obligor. Ideally, from an evidentiary perspective, the underlying obligor would acknowledge the notice, but the obligors' consent is not required for the sale to be effective against them.

If notice is not provided, the assignment will only be equitable and: (i) obligors can discharge their debts by paying the seller; (ii) obligors may set off claims against the seller even if they accrue after the assignment; (iii) a subsequent assignee without notice of the prior assignment would take priority over the claims of the initial purchaser; and (iv) the purchaser cannot sue the obligor in its own name, but must join the seller as co-plaintiff.

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?

See also the response above to question 4.3.

Notice must be in writing and given to the obligor at the time of, or after the sale (preferably after), but there is no particular form specified. The notice should clearly state that the obligor must pay the assignee (the purchaser) from then on.

There is no specific time limit for the giving of notices set down in the Judicature Act and notice can be given to obligors post-insolvency of the obligor or the seller (including pursuant to an irrevocable power of attorney granted by the seller). The notice should only apply to specific receivables.

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)?

Either of the first two formulations would likely be interpreted by an Irish court as prohibiting a transfer of relevant receivables by the seller to the purchaser (see our response to question 4.7 below).

In the last instance, the seller will implicitly have the authority to assign its rights to a purchaser (but not its obligations), as in the absence of an express contractual prohibition on the assignment of rights, the receivables may be assigned without the obligor's consent.

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 or transfers of receivables are generally enforceable in Ireland. As noted in question 4.6 above, if a contract is silent on the question of assignment, then it (and the receivables arising thereunder) will normally be freely assignable. If an assignment is effected in breach of a contractual prohibition on assignment, it will be ineffective as between the obligor, the seller and the purchaser, but should still be effective as between the seller and purchaser.

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 must specify the receivables being sold with sufficient clarity that they are identifiable and distinguishable from the rest of the seller's assets. The receivables being sold need not share objective characteristics but normally a portfolio of receivables being sold is all of the same type. To our knowledge, the scenario has not been considered by the Irish courts but a purported sale of all of a seller's receivables other than those owing by specifically identified obligors might be effective if the contract sufficiently identifies the receivables not being sold.

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?

If a transaction is expressed to be an outright sale and the sale agreement (and other documents) purports to effect an outright sale, but this does not reflect the actual agreement between the parties, the purported sale could be recharacterised as a secured loan.

Irrespective of the label given to a transaction by the parties, the court will look at its substance (including the particular economic characteristics of the transaction) and will examine whether it creates rights and obligations consistent with a sale.

English case law (for example, *Re: George Inglefield, [1933] Ch. 1, as considered and applied by the English Court of Appeal in Welsh Development Agency v. Export Finance Co Ltd, [1992] BCC 270*) has established a number of key questions which must be considered when determining whether a transaction is a sale rather than a secured loan:

(i) Is the transaction a "sham" (i.e. do the transaction documents accurately reflect the intention of the parties or is there some other agreement or agreements that constitute the real transaction between the parties)?

(ii) Does the seller have the right to reacquire the receivables?

(iii) Does the purchaser have to account for any profit made by it on the sale of the receivables?

(iv) Is the seller required to compensate the purchaser if it ultimately realises the acquired receivables for an amount less than the amount paid?

The principles set out in the above English case law were recently confirmed by the Irish High Court in *Bank of Ireland v. Eteams International Ltd [2017] IEHC 393*.

Although it will depend on the particular circumstances, the fact that the seller remains as servicer/collection agent of the receivables post-sale, or retains some degree of credit risk in respect of the receivables post-sale, is not considered to be inconsistent with the transfer being treated as a sale (rather than a secured loan).

There is no Irish case law on the point, but a right of repurchase/redemption for the seller would likely be inconsistent with the transaction being one of true sale. However, if the seller has only a right to ask the purchaser to sell the receivables back, such an arrangement might not be inconsistent with a true sale.

If the sale is recharacterised as a secured loan, the assets "sold" will remain on the seller's balance sheet and the loan will be shown as a liability of the seller. In addition, as it is not the practice in Ireland to make "back-up" security filings, the security may not have been registered and may be void in an insolvency of the seller for lack of registration.

In addition to recharacterisation, sale transactions are also vulnerable under certain provisions of the Irish Companies Act 2014 (the **Companies Act**) such as Section 443 (*power of court to order the return of assets improperly transferred*), Section 604 (*unfair preferences*) and Section 608 (*power of court to order return of assets which have been improperly transferred*).

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?

Yes. However, the sale of the receivables would need to be by way of an equitable assignment (an agreement whereby a seller purports to sell receivables on a continuous basis will generally take effect as an agreement to assign); the receivables will then be automatically equitably assigned as and when they come into existence.

See question 6.5 for the effect the seller's insolvency could have on such an agreement to assign.

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. See question 4.10 above — an assignment of a receivable not in existence at the time of the agreement, but which will be ascertainable in the future, is treated as an agreement to assign and should give rise to an equitable assignment as soon as the receivable comes into existence. See question 6.5 for the effect the seller's insolvency could have on such an agreement to assign.

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?

Related security will typically be capable of being assigned in the same manner as the receivables themselves. It is important, however, to ensure that the assignment provisions are consistent. The transfer or assignment of certain types of security may require additional formalities (some of which are referred to in question 4.3 above).

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?

Until notice of the sale of the receivables contract is provided to the relevant underlying obligor, the obligor will be entitled to exercise any rights of set-off against the purchaser even if they accrue after the date of the sale. It would likely depend on the circumstances, but if an obligor's set-off rights were terminated due to notice or for some other valid reason, the seller or purchaser should not be liable to the obligor for damages caused as a result.

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

A number of methods of profit extraction are commonly used in Ireland including:

(i) the SPV making loan payments on subordinated loans by the originator; and

(ii) the originator holding a majority of a junior class of notes issued by the purchaser and being paid interest on the notes.

Other profit extraction methods used include:

(i) the originator taking fees for:

- administering the receivables contracts and collecting the receivables;

- arranging or managing the portfolio of receivables; and/or
- acting as a swap counterparty;

(ii) the purchaser paying the originator deferred consideration on the receivables purchased;

(iii) originating, providing and receiving a fee from the purchaser for credit enhancement arrangements; and

(iv) the originator holding equity securities in the purchaser.

The type of profit extraction method used in any given securitisation transaction will depend on a number of factors, including:

- the nature of the assets in the pool;
- the type of credit enhancement used;
- rating agency and timing considerations; and
- accounting and regulatory capital treatment which may be applied.

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)?

It is not customary in Ireland to take such a "back-up" security when the intention is to effect an outright sale of the relevant receivable.

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 question 5.3 (below).

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 is most commonly taken over receivables by way of a legal (or equitable) assignment or a charge over book debts.

Receivables assigned by way of security will create a mortgage over the receivables, either legal (if the requirements of the Judicature Act are followed – see question 4.2 above) or (in the absence of these requirements) equitable. Prior to the perfection of an equitable mortgage by notice to the obligor, the assignee's security will be subject to prior equities (such as rights of set-off and other defences), and will rank behind a later assignment (where the later assignee has no notice of the earlier assignment and has itself given notice to the obligor). In addition, the obligor will be able to discharge its debt by continuing to pay the assignor (as described in questions 4.4 and 4.5 above).

Alternatively, a fixed or floating charge could be granted over the receivables. In comparison to a mortgage (which is a transfer of title together with a condition for re-assignment on redemption), a charge is a mere encumbrance on the receivables, giving the chargee a preferential right to payment out of the receivables in priority to other creditors of the relevant company.

A fixed charge is typically granted over specific receivables and attaches to those receivables upon the creation of the fixed charge. In comparison, a floating charge is normally granted over a class of assets (both present and future) which, prior to the occurrence of a "crystallisation event", can continue to be managed in the ordinary course of the chargor's business. On the occurrence of a crystallisation event, the floating charge will attach to the particular class of the chargor's assets, effectively becoming a fixed charge over those assets. The chargee's degree of control over the receivable is the determining factor in distinguishing a fixed from floating charge (and in that regard the Irish courts look at the substance of the security created, rather than how it is described or named).

In terms of perfection, if an Irish company grants security over certain types of assets (including receivables constituting book debts) (i.e. it creates a "registrable charge" for the purposes of the Companies Act), it must register short particulars of the security created with the Irish Registrar of Companies (the **Registrar of Companies**) within 21 days of its creation (see below for outline of the new priority register under the Companies Act).

Section 408(1) of the Companies Act specifically excludes security interests over the following assets from the registration requirement:

(a) cash;

(b) money credited to an account of a financial institution, or any other deposits;

(c) shares, bonds or debt instruments;

(d) units in collective investment undertakings or money market instruments; or

(e) claims and rights (such as dividends or interest) in respect of anything referred to in any of paragraphs (b) to (d).

The expression "charge" (which now excludes the assets referred to in Section 408(1) above) was drafted to give effect to recommendations of the Irish Company Law Review Group, the group involved with drafting the Companies Act and in accordance with the exceptions to the registration requirements envisaged under Directive 2002/47/EC on Financial Collateral Arrangements as implemented in Ireland by way of the European Communities (Financial Collateral Arrangements) Regulations 2010 (as amended) (the **Financial Collateral Regulations**). It should be noted that "cash" has not been defined in the Companies Act but is defined in the Financial Collateral Regulations as "money credited to an account" or a claim for the repayment of money (for example, money market deposits).

The Companies Act created a new priority register so that the priority of charges is now linked to the date of receipt by the Registrar of Companies of the particulars of the charge, rather than the date of creation of the charge (which determined priority of charges under the old Irish Companies Acts 1963 to 2013). Practically speaking this means that filing in the Companies Registration Office should be effected immediately after closing or as soon as possible thereafter.

Failure to register a registrable security interest within 21 days of its creation will result in that security interest being void as against the liquidator and any creditors of the company which created the registrable charge. However, an unregistered charge will still be valid as against the chargor, provided the chargor is not in liquidation.

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?

The relevant security must be valid and perfected under the laws of Ireland and under the governing law of the security, in order for it to be given effect by the Irish courts. If the security over the receivables is created by a purchaser which is an Irish company and the receivables are situated in Ireland, details of the security will generally need to be filed with the Registrar of Companies within 21 days of its creation (see question 5.3 above).

Since the enactment of the Companies Act, details of security over the receivables created by a purchaser which is a foreign company where the receivables are situated in Ireland, do not need to be filed with the Registrar of Companies. Only charges submitted against an Irish or external company already registered with the Companies Registration Office will be accepted.

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?

A security assignment is usually taken over insurance policies.

Security over mortgage or consumer loans will be created by mortgage or charge. An equitable mortgage is typically created over the mortgage securing a mortgage loan.

The type of security over marketable debt securities depends on whether the relevant securities are bearer or registered, certificated, immobilised or dematerialised and/or directly-held or indirectly held: (i) directly-held and certificated debt securities, where registered, are generally secured by legal mortgage (by entry of the mortgagee on the relevant register) or by equitable mortgage or charge (by security transfer or by agreement for transfer or charge); (ii) security over bearer securities may be created by mortgage or pledge (by delivery together with a memorandum of deposit) or charge (by agreement to charge); and (iii) security may be created over indirectly-held certificated debt securities by legal mortgage (by transfer, either to an account of the mortgagee at the same intermediary or by transfer to the mortgagee's intermediary or nominee via a common intermediary) or by equitable mortgage or charge (by agreement of the intermediary to operate a relevant securities account in the name of the mortgagor containing the debt securities to the order/control of the chargee).

Section 408 of the Companies Act specifically excludes security interests over shares, bonds or debt instruments from the security interest registration requirement. If the security interest contributes a "security financial collateral arrangement", the Financial Collateral Regulations may apply (see 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?

Ireland recognises trusts, and a trust over collections received by the seller in respect of sold receivables should be recognised under the laws of Ireland (provided it is validly constituted).

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?

Ireland recognises the concept of money held in escrow in a bank account. Security may be taken over a bank account in Ireland and is typically taken by way of a charge or security assignment. Security over a credit balance granted by a depositor in favour of the bank at which such deposit is held can only be achieved by way of charge (not by assignment). If the security constitutes a "security financial collateral arrangement" over "financial collateral" within the meaning of the Financial Collateral Regulations, then those regulations should apply (as to which, see question 5.3 above).

Foreign law-governed security over an Irish situated bank account must be valid under both Irish law and the foreign law in order for it to be given effect by the Irish courts (see question 5.4 above).

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?

Normally, notice of the creation of security over the account is provided to the bank with which the account is held, and an acknowledgment sought that the bank will, *inter alia*, (upon notification that the security has become enforceable) act in accordance with the instructions of the secured party. If such an acknowledgment has been obtained, once the secured party enforces its security over the relevant bank account, the bank should follow its instructions in respect of all cash in (or flowing into) the account until the obligations owed to the secured party are discharged in full.

However, this control is conferred on the secured party by contract – the bank could refuse to act in accordance with the secured party's instructions. Furthermore, rights of set-off (under statute, common law or contract) might be exercisable in respect of the cash in the account to the detriment of the secured party. Finally, under the Central Bank (Supervision and Enforcement) Act 2013, the CBI has powers to direct the activities of Irish credit institutions in certain circumstances, and the exercise of such powers could interfere with the secured party's control over the bank account.

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?

This depends on the type of security granted over the account/account balance. If a floating charge is granted, the fact the owner of the account may access funds in the account should not affect the validity of the floating charge. However, if the security granted purports to be a fixed charge, the more freely the owner can access the funds in the account, and the less likely it is that the Irish courts would treat it as a fixed charge and the more likely it would be recharacterised as being a floating charge.

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?

The appointment of a liquidator or an examiner to an insolvent Irish company imposes an automatic stay of action against the entity, but if the receivables have been transferred by legal assignment, the sale will have already been perfected, and the stay should not affect the purchaser's ability to enforce its rights in the receivables.

In the event that a winding up order is issued against the seller and a liquidator is appointed, a plaintiff will need the leave of the court to continue or commence proceedings against the seller.

As regards examinership, a stay of action can be imposed for up to 100 calendar days where the seller goes into examinership (an examiner's appointment is initially for 70 days, but may be extended by another 30 days with the sanction of the court).

If the seller has been appointed as the servicer of the receivables, the stay of action could block the purchaser from enforcing the servicing contract, and any amounts held by the servicer in respect of the receivables (if not held on trust for the purchaser under a valid and binding trust arrangement) could be deemed to form part of the insolvency estate of the servicer, rather than being the property of the purchaser.

If only an equitable assignment has been effected (i.e. no notice has been given to an obligor), an obligor may continue to pay the seller. Normally, the seller will hold any such amounts on trust for the purchaser, but if no such trust has been created, such amounts will likely form part of the seller's insolvency estate and the purchaser would be an unsecured creditor of the seller in respect of those amounts.

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)?

See question 6.1 above. Assuming the receivables have been sold by legal assignment or by means of a subsequently perfected equitable assignment, an Irish insolvency official appointed over the seller should not be able to prohibit the purchaser's exercise of its ownership rights over the receivables (unless there has been a fraudulent preference or an improper transfer of company assets, as described in our response to question 6.3 below).

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the 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?

Under Section 443 of the Companies Act, if a liquidator can show that any company property was disposed of and the effect was to "perpetrate a fraud" on either the company, its creditors or its members, the High Court may, if just and equitable, order any person who appears to have "use, control or possession" of the property or the proceeds of the sale or development thereof, to deliver it or pay a sum in respect of it to the liquidator on such terms as the High Court sees fit.

Section 604(2) of the Companies Act provides that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company, which is unable to pay its debts as they become due to any creditor, within six months of the commencement of a winding up of the company with a view to giving such creditor (or any surety or guarantor of the debt due to such creditor) a preference over its other creditors, will be invalid. Case law (under the equivalent provision of the previous Irish Companies Act 1963) indicates that a "dominant intent" must be shown on the part of the entity concerned to prefer a creditor over other creditors. Furthermore, Section 604 is only applicable if at the time of the conveyance, mortgage or other relevant act, the company was already insolvent. Where the conveyance, mortgage, etc. is in favour of a "connected person", the six-month period is extended to two years.

If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, the purchaser will be considered a "connected person" under Section 604. If a parent company of the seller guarantees the performance by the seller of its obligations under contracts with the purchaser, the question of whether or not the purchaser would be considered a "connected person" under Section 604 depends on the relationship between the purchaser and the seller. For example, if the purchaser was a "related company" (for example, if the purchaser was a subsidiary of the seller or if the purchaser was a company controlled by the seller) then it would be considered a "connected person" and the six-month period would be extended to two years.

Section 597 of the Companies Act renders invalid (except to the extent of monies actually advanced or paid, or the actual price or value of goods or services sold or supplied, to the company at the time of or subsequently to the creation of, and in consideration for the charge, or to interest on that amount at the appropriate rate) floating charges on the property of a company created within 12 months before the commencement of the winding up of that company (unless the company was solvent immediately after the creation of the charge). Where the floating charge is created in favour of a "connected person", the 12-month period is extended to two years.

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?

Irish law gives an Irish court the power, in certain circumstances, to treat the assets and liabilities of one company as though they were assets and liabilities of another company.

An Irish court may exercise its equitable jurisdiction and treat two or more companies as a single entity if this conforms to the economic and commercial realities of the situation and the justice of the case so requires.

Furthermore, if an Irish company goes into liquidation or examination, the Companies Act specifies particular scenarios where an Irish court has the power to "make such order as it thinks fit" in respect of transactions entered into by that company to restore the position to what it would have been if it had not entered into the transaction. In addition, in certain limited instances, a court may "pierce the corporate veil".

Also, depending on the particular case, a court may: (i) order that the appointment of an examiner to a company be extended to a "related company" of the company in examination; (ii) (if it is just and equitable to do so) order that any related company of a company being liquidated pay some or all of the debts of the company in liquidation (a "contribution order"); or (iii) provide that where two or more "related companies" are being wound up (and it is just and equitable to do so), both companies be wound up together as if they were one company (a "pooling order"). Each of the above "related company" orders may apply where the purchaser is owned by the seller or by an affiliate of the seller.

However, case law suggests that the above powers/orders will only be exercised/granted in exceptional circumstances.

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?

If a true sale of the receivables (including future receivables) has already been effected, the purchase price for the receivables has been paid (subject to the matters described in questions 6.1 and 6.3 above), and no further action is required by the seller, the seller's insolvency should not of itself affect the purchaser's rights as purchaser of the receivable.

If a receivables purchase agreement has been entered into, but the purchase price is not paid prior to the seller's insolvency, the purchaser will be left 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 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

A contractual provision limiting the recourse of the creditors of the debtor (as specified in question 7.3 below) is likely to be valid as a matter of Irish law (although such provisions have not yet been adjudicated upon by the Irish courts). Accordingly, if all of the debtor's contracts contain a limited recourse provision whereby its creditors agree to limit their recourse to the debtor (and assuming the limited recourse provisions operate correctly), it should not be possible for the debtor 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?

Yes. Section 110 of the Taxes Consolidation Act 1997 (the **TCA**) allows for the special treatment of Irish companies (**Section 110 SPVs**) under which securitisations and other structured transactions can be effected. Section 110 SPVs can either be private limited companies (**CLS**) or designated activity companies (**DAC**) incorporated under the Companies Act which, if they meet the conditions set out in Section 110, have their profits calculated for Irish tax purposes as if they were carrying on a trade. Where it is envisaged that a Section 110 SPV will issue debt securities it must be registered as a DAC.

This enables Section 110 SPVs to make deductions for all expenditure (subject to certain limitations/restrictions), in particular, interest payments that must be made on the debt instruments issued by them. This ensures that there is very little or no Irish tax payable by Section 110 SPVs. This legislative regime has facilitated the development of securitisation in Ireland, and Section 110 SPVs have been used in numerous cross-border securitisations.

There are also generous exemptions available from Irish withholding tax on payments of interest made by Section 110 SPVs which are structured to fall within the securitisation legislation (these are discussed in more detail in question 9.1 below). One clear advantage for Section 110 SPVs is that they can make payments of "profit dependent" interest without any negative implications and can use straight "pass through" structures, for example, collateralised debt obligations.

In order to avail of the relief under Section 110, the company must be a "qualifying company"; i.e.:

(i) it must be resident in Ireland;

(ii) it must acquire "qualifying assets";

(iii) it must carry on in Ireland a business of holding, managing, or both the holding and management of, qualifying assets;

(iv) it must, apart from activities ancillary to that business, carry on no other activities;

(v) the market value of the qualifying assets is not less than EUR 10 million on the day on which they are first acquired; and

(vi) it must have notified the Revenue Commissioners that it is or intends to be a Section 110 company.

The notice referred to in item (vi) above must be delivered in the prescribed form to the Revenue Commissioners within eight weeks of the 'qualifying company' meeting the requirements outlined in the definition above.

A company shall not be a qualifying company if any transaction or arrangement is entered into by it otherwise than by way of a bargain made at arm's length.

The definition of "qualifying assets" is non-exhaustive and includes shares, bonds, receivables, other securities, futures, etc. Please note, however, that a Section 110 SPV may not hold real estate assets directly (albeit it may hold shares in a property holding company). In addition, where the qualifying assets derive some or all of their value from real estate located in Ireland, particular care must be taken to ensure strict compliance with Section 110.

Section 110 SPVs are unregulated entities and as such there is no regulatory authority responsible for regulating securitisation transactions in Ireland. As noted in item (iv) above, however, the Revenue Commissioners must be notified that the Section 110 SPV is a "qualifying company" for the purpose of Section 110, and the Central Bank should be notified that it is a "financial vehicle corporation" for the purpose of Regulation (EU) No. 1075/2013 (ECB/2013/40) concerning statistics on the assets and liabilities of financial vehicles corporations engaged in securitisation transactions (the **FVC Regulation**).

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?

Irish law does not specifically provide for the establishment of special purpose entities for securitisation transactions, but see question 7.1 above.

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?

Typically where the underlying assets being securitised are situated in Ireland, the Section 110 SPVs will be incorporated in Ireland. This is subject to any specific legal, commercial, regulatory, tax or administrative reasons and/or any structural practicalities which could require a securitisation entity to be incorporated outside Ireland.

Ireland is considered one of the more attractive jurisdictions in which to establish Section 110 SPVs to effect securitisation transactions. Ireland has a favourable tax regime applicable to Section 110 SPVs and the tax treatment afforded by Section 110 is a key advantage of using an Irish Section 110 SPVs (whether the underlying securitised assets are situated in Ireland or not). The special purpose entity is often incorporated in Ireland (as opposed to other jurisdictions) because investors and market participants are familiar with the established legal framework and tax relief in relation to interest available, due to Ireland's double taxation treaty network.

The main benefits/advantages include:

(i) A highly regarded onshore location. Ireland is a member of the EU and Organisation for Economic Co-operation and Development (**OECD**).

(ii) A trusted and transparent tax regime (Section 110).

(iii) An extensive tax treaty regime. Ireland has 73 double taxation treaties with other countries (72 in effect) which offer an Irish resident Section 110 SPV significant advantages over offshore locations.

(iv) Clear VAT rules. In general, the activities of a Section 110 SPV which is a "qualifying company" under Section 110 are exempt activities for VAT purposes. Management services provided to a Section 110 SPV are also exempt from VAT in Ireland.

(v) An exemption from Irish stamp duty. No Irish stamp duty is payable on the issue of transfer of the notes issued by an Irish Section 110 SPV, provided that the finance raised by the issue of the notes is used in the course of the business of the Section 110 SPV.

(vi) An efficient listing mechanism. The Irish Stock Exchange has extensive experience in the listing of specialist debt securities, and offers a turnaround time of maximum three working days.

(vii) A common law jurisdiction. The Irish legal system derives from the English legal system.

(viii) An infrastructure of experienced professionals: corporate administrators, lawyers, auditors and other service providers.

(ix) A European passport. Securities issued by an Irish Section 110 SPV can, once the prospectus has been approved by the CBI, be accepted throughout the EU for public offers and/or admission to trading on regulated markets under the EU Prospectus Directive.

(x) A public or private limited company structure. A private limited company can be used for most securitisation transactions, meaning that the Section 110 SPV can be incorporated with share capital of just EUR 1 and in just five days (as noted below, public limited companies are typically used for "public offers" of securities).

An Irish Section 110 SPV is usually incorporated under the Companies Act as one of the following:

(i) A private company limited by shares (**LTD**).

(ii) A "designated activity company", being a private company limited by shares (**DAC**).

(iii) A public limited company (**PLC**).

Depending on whether the Section 110 SPV will be listing notes/debentures, the typical structure under Irish law is now a LTD or a DAC. Section 110 SPVs are usually structured as orphan entities, the shares of which are usually held by a professional share trustee on trust for charitable purposes.

Each of the three types of Section 110 SPVs can be incorporated with just a single member.

An LTD has no objects stated in its constitution and can issue unlisted notes/debentures which fall within one of the "excluded offer" exemptions under Directive 2003/71/EC (as amended) to trading (**Prospectus Directive**), for example, where the debt securities the subject of the offer have a minimum denomination of EUR 100,000.

A DAC has specific objects stated in its constitution and can also issue and list notes/debentures which fall within an "excluded offer" under the Prospectus Directive. If the Section 110 SPV intends to list securities other than notes/debentures (such as shares), or to offer listed or unlisted notes/debentures to the public (that is, outside one of the "excluded offer" exemptions under the Prospectus Directive), it must be established as a PLC.

While an LTD is not required to have an authorised share capital, a DAC must have an authorised share capital (although there is no minimum capitalisation requirement). The minimum capitalisation of a PLC is EUR 25,000 of which a quarter must be paid up.

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?

A contractual provision limiting the recourse of the creditors of an entity to its available funds is likely to be valid under Irish law (whether the contract's governing law is Irish or the law of another country – see 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?

Although there is little authority in Irish law, it is likely that an Irish court would give effect to contractual provisions (whether governed by Irish law or the law of another country) prohibiting the parties to the relevant contract from taking legal action (or commencing an insolvency proceeding) against the purchaser or another person.

It is possible that an Irish court would consider an insolvency winding up petition even if it were presented in breach of a non-petition clause. A party may have statutory or constitutional rights to take legal action against the purchaser/another person, which may not be contractually disapplied and a court could hold that the non-petition clause was contrary to Irish public policy on the grounds referred to above (i.e. ousting of court jurisdiction and/or Irish insolvency laws).

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?

An Irish court should generally give effect to a contractual provision (whether the contract's governing law is Irish or the law of another country) distributing payments to an Irish company's creditors in a certain order. However, in an insolvency of an Irish company certain creditors are given preferential status by statute and so the contractual priority of payments provision could be altered.

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 CLS has full and unlimited capacity under its constitution i.e. no provision in its constitution can restrict the directors from taking specified actions. On the other hand, the constitution of a DAC has an objects clause by which the directors can be restricted from taking specified actions. An Irish court should give effect to such a provision in a DAC's constitution.

The Irish courts should give effect to a contractual provision which prohibits the directors from taking specified actions.

However, any provision which purports to restrict or limit the directors' ability to bring insolvency proceedings may be invalid on public policy grounds or as incompatible with the directors' statutory duties.

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?

Typically where the underlying assets being securitised are situated in Ireland, the purchaser will be incorporated in Ireland. This is subject to any specific legal, commercial, regulatory, tax or administrative reasons and/or any structural practicalities which could require a purchaser to be incorporated outside Ireland.

As specified in question 7.3 above, the purchaser is often incorporated in Ireland (as opposed to other jurisdictions) because investors and market participants are familiar with the established legal framework and largely tax neutral treatment of profits arising in the purchaser established as a Section 110 qualifying company.

See question 7.3 above for a list of the main benefits/advantages.

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?

If the underlying obligors are consumers, the CCA (and the other consumer protection legislation and codes discussed in question 1.2 above and question 8.4 below) may be applicable (irrespective of whether the purchaser is dealing with one or more sellers in Ireland). The CCA provides for the licensing of three categories of activity, acting as: (i) a moneylender; (ii) a credit intermediary; or (iii) a mortgage intermediary. If the underlying obligors are natural persons and there is any form of credit being provided, consideration should be had to the retail credit firm authorisation requirements of the CBI under the Central Bank Acts 1942 to 2015 (the **CBA**). In addition, under current Irish data protection legislation, the purchaser might need to register with the Irish Data Protection Commissioner as a "data controller" or a "data processor". This requirement will, however, fall away once the EU General Data Protection Regulation (EU) 2016/679 (**GDPR**) becomes effective on 25th May 2018. See the response below at question 8.7.

If a purchaser holds the legal title to a credit and (i) where that credit was advanced by an Irish bank or a EU regulated entity authorised to provide credit in Ireland, (ii) is advanced to one or more natural persons within the state or with certain micro, small or medium-sized enterprises, and (iii) chooses to service the loan itself, it may be required to be authorised as a "credit servicing firm" as defined in the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the **Credit Servicing Act**) by the CBI and will be subject to the CBI's various codes (as discussed in question 1.2 above and question 8.4 below). If, however, the relevant purchaser appoints a credit servicer who is either (i) a regulated financial services provider authorised to provide credit in Ireland, or (ii) an authorised "credit servicing firm" itself (whether incorporated in Ireland or elsewhere within the EEA) to service the loans/credit, the purchaser will not be required to be authorised under the Credit Servicing Act.

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 need a licence in order to continue to enforce and collect receivables following their sale to the purchaser, as debt collection is not a specifically licensed activity in Ireland. However, with respect to any credit agreement it continues to service, it will be required to be authorised as a "credit servicing firm" as defined in the Credit Servicing Act (see question 8.1 above) and comply with applicable Irish consumer protection legislation (e.g. the CPC). Up until 25th May 2018, the seller would also need to be registered with the Data Protection Commissioner. Where the seller continues to act as servicer with respect to residential mortgage loans, it will need to be authorised to perform such role by the CBI. Any standby or replacement servicer would require the same licences and authorisations.

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?

The Irish Data Protection Act, 1988 and the Irish Data Protection (Amendment) Act 2003 (the **DPAs**) restrict the use and dissemination of personal data in relation to "data subjects", which are "individuals" (i.e. natural persons and not corporate entities).

The DPAs regulate the collection, processing, use and disclosure of data and provide, *inter alia*, that such data must be kept for one or more specified and lawful purposes only, that it must be used and disclosed only in ways compatible with those purposes, and be kept safe and secure.

The GDPR will come into force on the 25th May 2018, replacing the existing data protection framework under the EU Data Protection Directive. Data subjects will have more control over the processing of their personal data once GDPR comes into force. The GDPR imposes direct statutory obligations on data processors, which means they will be subject to direct enforcement by supervisory authorities, fines, and compensation claims by data subjects. Data transfers to countries outside the EEA continue to be prohibited unless that country ensures an adequate level of protection. The GDPR retains existing transfer mechanisms, and provides for additional mechanisms, including approved codes of conduct and certification schemes. The GDPR prohibits any non-EU court, tribunal or regulator from ordering the disclosure of personal data from EU companies unless it requests such disclosure under an international agreement, such as a mutual legal assistance treaty. See question 8.7 below.

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?

If the obligors are "consumers" then a bank acting as purchaser will need to comply with the terms of its authorisation and the applicable codes of conduct/advertising rules (e.g. the CPC) or other Irish consumer protection laws, including the CCA, the CCA Regulations and the UTCCR Regulations.

The CCA imposes a number of obligations on credit intermediaries and also provides protections to consumers (e.g. by regulating the advertising of consumer credit, and by bestowing a "cooling-off" period in favour of the consumer after signing an agreement).

The CCA Regulations apply to loans to consumers where the amount lent is between EUR 200 and EUR 75,000. The main provisions of the CCA relate to, *inter alia*: (i) standardisation of the information to be contained in a credit agreement; (ii) standardisation of pre-contractual information; and (iii) a full 14-day "right of withdrawal" for consumers from the relevant credit agreement.

Where there is a significant imbalance in the parties' rights and obligations under a consumer contract to the detriment of the consumer, the UTCCR Regulations may apply. The UTCCR Regulations contain a non-exhaustive list of terms which will be deemed "unfair" and the list includes terms which attempt to exclude or limit the legal liability of a seller in the event of the death of, or personal injury to, a consumer due to an act or omission by the seller, or, require any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation. If a term is unfair it will not be binding on the consumer. However, the contract should continue to bind the parties, if it is capable of continuing in existence without the unfair term.

The CPC imposes general obligations on "regulated entities" dealing with "customers" in Ireland (primarily "consumers"), to act honestly, fairly and professionally and with due skill, care and diligence in the best interests of their customers and to avoid conflicts of interest.

If there is no obligation on a non-bank purchaser to provide any funding to a consumer, then it should not need to be licensed, but might still need to comply with the CCA, the UTCCR Regulations, the CPC and the CCA Regulations (if applicable).

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?

Ireland does not have any exchange control laws. Certain financial transfer orders in place from time to time may restrict payments to certain countries, groups and individuals subject to UN sanctions.

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?

The European-wide regime for risk retention is set out in:

- Articles 404 to 410 of Regulation (EU) No. 575/2013 (the **CRR**), the associated regulatory technical standards (**RTS**) and implementing technical standards.
- Corresponding provisions in Directive 2011/61/EU, the Alternative Investment Fund Managers (**AIFM Directive**) and Commission Delegated Regulation (EU) No 231/2013 referred to as the Alternative Investment Fund Manager Regulation (the **AIFMR**).
- Commission Delegated Regulation (EU) 2015/35 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (**Solvency II**).

The CRR is directly applicable in Ireland but the European Union (Capital Requirements) (No. 2) Regulations 2014 give effect to a number of technical requirements to ensure the CRR operates effectively in Irish law.

The CRR prohibits an institution, other than when acting as an originator, a sponsor or original lender, from becoming exposed to the credit risk of a securitisation position unless the originator, sponsor or original lender has explicitly disclosed to the institution that it will retain, on an ongoing basis, a material net economic interest in the credit risk of the securitisation position which, in any event, must be at least 5%.

Often such interest will be comprised of an interest in the first loss tranche, as contemplated by each of Article 405(1)(d) of the CRR, Article 51(1)(d) of AIFMR and paragraph 2(d) of Article 254 of the Solvency II.

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?

(i) The GDPR is a directly effective regulation which will be immediately effective across the EU from 25 May 2018. The GDPR significantly changes data protection law in Europe. The GDPR will strengthen the rights of individuals in relation to their personal information and increase the obligations of organisations which hold that information. It aims to give control to EU citizens over their personal data and simplify the regulatory environment for international business by unifying regulation within the EU. Data subjects will have more control over the processing of their personal data. The GDPR applies to both controllers and processors established in the EU, and those outside the EU, who offer goods or services to, or monitor EU data subjects. As of 25 May 2018, the DPA's will be replaced by GDPR as the new data protection legislation applicable in Ireland.

(ii) The legal developments arising from regulation affecting the securitisation market generally in Europe will be relevant to securitisations in Ireland. In January 2018 two regulations, namely Regulation (EU) 2017/2042 (the **STS Regulation**) and the associated Regulation (EU) 2017/2401 (the **Securitisation Prudential Regulation**, and together with the STS Regulation, the **Securitisation Regulations**) came into force establishing a new framework for European securitisations. The majority of the Securitisation Regulations will apply to securitisations on or after 1 January 2019.

(iii) The Irish Parliament (the **Oireachtas**) is currently considering a proposed bill entitled 'Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2018' (the **Bill**). The proposed Bill seeks to amend the Credit Servicing Act, the Central Bank (Supervision and Enforcement) Act 2013, the Central Bank Act 1942 and the Central Bank Act 1997. The Bill is at an early stage of consideration and there is no clarity on when, and in what form, the Bill will be enacted into law and how it will co-exist with the regime introduced under the Credit Servicing Act. The purpose of the Bill is to (i) extend the requirement to being regulated to "credit agreement owners" of mortgage loans and SME loans and (ii) introduce certain other protections for the borrowers under such credit agreements. The current draft of the Bill helpfully seeks to carve out entities which purchase credit agreements where such purchase "is made by way of securitisation" from its application but "securitisation" is not currently defined in the Bill. The Bill is expected to be subject to amendments at committee stage before coming before the Oireachtas again. It is expected that any amendments will seek to clarify, amongst other things, that the provisions will not adversely affect securitisation special purpose entities involved in certain securitisation transactions.

(iv) As noted above, the "true sale" principles set out in the English cases of *Re: George Inglefield and Welsh Development Agency* have been confirmed by the Irish High Court in *Bank of Ireland v. Eteams International Ltd [2017] IEHC 393*.

(v) The Credit Reporting Act 2013 (the **CRA**) imposes certain reporting obligations on lenders in respect of the provision of credit in circumstances in which the CRA applies. The CRA establishes a central database for credit information, which will enable the Central Bank to create a complete credit report for relevant borrowers. It will also provide lenders with a greater level of information to assist them in assessing credit applications. Key provisions of the CRA have taken effect from 30 June 2017. From this date, most lenders will begin submitting information to the new Central Credit Register (the **Register**) operated by the CBI. The information collection will be implemented on a phased basis between 2017 and 2018, with an initial focus on collecting information relating to consumer lending, followed by obtaining information relating to business lending.

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?

It is usually possible to structure a securitisation (especially when using a Section 110 SPV) so that payments on receivables are not subject to Irish withholding tax.

There is a general obligation to withhold tax from any payment of yearly interest made by an Irish company. The rate of withholding is currently 20%. Therefore, in principle, if the debtor is an Irish person and the receivable has a maturity of more than one year it is likely this withholding obligation will arise. Interest paid by Irish debtors to a Section 110 SPV should come within an exemption from interest withholding tax.

Exemptions also exist for interest payments made by a Section 110 SPV. There is an exemption for interest paid by a Section 110 SPV to a person who is resident for the purpose of tax in an EU Member State (other than Ireland) or in a country with which Ireland has a double tax treaty (except in a case where the person is a company where such interest is paid to the company in connection with a trade or a business which is carried on in Ireland by the company through a branch or agency).

There is also an exemption for interest paid on a quoted eurobond, where either:

(a) the person by or through whom the payment is made is not in Ireland, i.e. non-Irish paying agent; or

(b) the payment is made by or through a person in Ireland, and either:

(i) the quoted eurobond is held in a recognised clearing system (Euroclear and Clearstream SA are so recognised); or

(ii) the person who is a beneficial owner of the quoted eurobond and who is beneficially entitled to the interest is not resident in Ireland and has made a declaration to this effect.

A quoted eurobond means a security which:

(a) is issued by a company;

(b) is quoted on a recognised stock exchange; and

(c) carries a right to interest.

In the case of a sale of trade receivables, deferred purchase price should not be recharacterised in whole, or in part, as interest. It should be considered to be a payment made for the acquisition of the receivables, and not a payment of interest. Likewise, a sale of receivables at a discount should not of itself result in amounts subsequently paid on the receivables being treated as annual interest subject to withholding tax.

Given extensive domestic tax exemptions, withholding tax is unlikely to apply. However, where one of the above-mentioned exemptions does not apply in relation to payments of interest by a Section 110 SPV, it may be possible to still avoid Irish withholding tax if the securities issued by the Section 110 SPV can be constituted as wholesale debt instruments (broadly being debt instruments recognising an obligation to pay a stated amount which are interest bearing (or issued at a premium or discount) and which mature within two years of issue).

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?

A company qualifying for the favourable Irish tax treatment provided for by Section 110 of the TCA will be, subject to certain adjustments required by law, subject to Irish corporation tax on its profit according to its profit and loss account prepared in accordance with generally accepted commercial accounting principles in Ireland as at 31 December 2004 (i.e. before the introduction of IFRS), unless it elects otherwise.

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

An agreement for the sale of, or an instrument effecting the sale of, debt having an Irish legal *situs* may be chargeable to Irish stamp duty absent an exemption. An instrument effecting the transfer of debt having a non-Irish *situs* may also be chargeable to Irish stamp duty, absent an exemption, if it is executed in Ireland or if it relates to something done or to be done in Ireland. There are certain exemptions from Irish stamp duty that may be relevant, such as the debt factoring exemption or loan capital exemption. A transfer by way of novation should not give rise to stamp duty.

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?

Ireland does apply VAT on the sale of goods and services. The standard rate of VAT is 23%.

A purchaser will be required to register and account, on a reverse charge basis, for Irish VAT at the rate of 23% on the receipt by it of vatable services from persons established outside Ireland. These services would include legal, accounting, consultancy and rating agency services and also financial services to the extent that those financial services are not exempt from Irish VAT.

The sale of receivables should be exempt from VAT. The services of a collection agent would normally qualify for exemption.

Where a purchaser would not be engaged in making VAT taxable supplies in the course of its business, it would not be able to recover VAT (1) payable by it in respect of the receipt of services outlined in the paragraph above, or (2) charged to it by suppliers of VAT-taxable services (e.g. the provision of legal, accounting and audit services).

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?

Regarding VAT, if the supply is made by an Irish supplier, the supplier is the party responsible for payment of the VAT liability to the VAT authority, and the VAT authorities cannot pursue the liability from the purchaser or any other. However, in the case of reverse charge, VAT liabilities in respect of the receipt of rateable services from outside of Ireland the purchaser is the party responsible for payment of the VAT liability to the VAT authorities. In an arm's length transaction, stamp duty should be for the account of the purchaser only.

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?

Liability to Irish corporation tax may arise if the purchaser is "carrying on a trade" in Ireland. The term "trade" is a case law-derived concept and there is no useful statutory definition of the term. However, in general, the purchase, collection and enforcement of the receivable should not be considered as "trading" under Irish law and the purchaser should not incur any Irish tax liabilities.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.3 above), is that debt relief liable to tax in your jurisdiction?

The purchaser should be able to claim a tax deduction in respect of a debt which is proven to the satisfaction of the Irish tax authorities to be bad. A tax deduction is not available for general provisions for bad debt. If the purchaser claims a tax deduction for a bad debt, which is subsequently recovered, that amount will be treated as taxable income of the purchaser.

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