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

12th Edition

A practical cross-border insight into securitisation work

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PREFACE

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

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

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

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1 Receivables Contracts

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

A formal written contract is not necessary to create an enforceable debt obligation. However, such an obligation must be created as a matter of contract or deed. Contracts may be written, oral, or partly written and partly oral. An invoice alone may be sufficient to constitute a contract between the parties if it contains the required elements of a contract. The existence and terms of an oral contract may be evidenced by the conduct of the parties. Where enforceable obligations can be identified with sufficient certainty, a contract may 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?

Given the relatively small size of the consumer market and the nature of the financial services industry, there are no statutes or regulations to limit rates of interest, provide a statutory right to interest on late payments or other consumer rights. All such obligations would be governed by the relevant contract, including any obligations to pay default interest (subject to such interest not being so high as to constitute a penalty).

- 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?

No, although sovereign immunity laws may cause enforcement issues.

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?

Neither the Rome Convention (80/934/EEC) “Rome Convention I” nor Regulation 593/2008/EC (“Rome Convention II”) on the law applicable to contractual obligations have been extended to the Cayman Islands. In the absence of an express choice of law provision, the applicable law of a contract will be that of the country with which it has the closest connection, in light of all the material circumstances. Cayman Islands law recognises the English common law doctrine of *forum non conveniens* and it is necessary to ensure that, in commencing proceedings, the Cayman Islands court is best placed to deal with the dispute, that it will be the venue most convenient for the particular matter to be resolved and that Cayman Islands law is that 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?

No, there is not.

- 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?

The courts of the Cayman Islands will observe and give effect to the choice of the foreign law as the governing law of the receivables contract. The submission by a Cayman Islands obligor or seller in a

receivables contract to the laws of another jurisdiction will be legal, valid and binding on the Cayman Islands obligor/seller assuming that the same is true under the governing law of the contract. However, the courts of the Cayman Islands will not observe and give effect to a choice of the laws of a particular jurisdiction as the governing law of a document, if to do so would be contrary to the public policy of the Cayman Islands.

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)?

No, it does not. As noted in question 2.1 above, the Rome Conventions I and II have not been extended to the Cayman Islands.

- 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 will.

- 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?

Yes, it will.

- 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?

Yes, the courts of the Cayman Islands will give effect to the choice of the law of the obligor's country as the governing law of the

receivables purchase agreement. The courts would only decline to exercise jurisdiction in certain exceptional circumstances.

- 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 questions 3.1 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 questions 3.1 and 3.4 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?

The most common method of transferring receivables is by way of assignment (either equitable or legal). Alternatives to assignment include a novation (transfer of both the rights and obligations under the contract), a declaration of trust over the receivables or over the proceeds of the receivables (coupled with a power of attorney), and sub-participation (essentially a limited recourse loan to the seller in return for the economic interest in the receivables). An outright sale of receivables may be described as a "sale" or "true sale", a "transfer" or an "assignment". It is not possible, as a technical legal matter, to "assign" obligations and therefore any "assignment" should, if obligations are to be transferred, include a "novation" of those obligations.

- 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?

An assignment can be either legal or equitable, depending on the

circumstances. The key requirements of a legal assignment are that it must be an absolute assignment of the chosen receivables in action and the assignment must be in writing, signed by the assignor and, to perfect the legal assignment, it must be notified in writing to the obligor. If the sale of a receivable does not meet these requirements, it will take effect as an equitable assignment and any subsequent legal assignment to a good faith purchaser may trump the original assignment. A novation requires the written consent of the obligor as well as the transferor and transferee.

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 express terms of the underlying receivable must be considered, and any conditions met, and restrictions observed relating to the transfer and assignment of the receivable, including if consent is required of the obligor. The transfer requirements for promissory notes (as well as other negotiable instruments) are governed by the Bills of Exchange Law (1997 Revision) of the Cayman Islands, which provides that they are transferable by delivery (or delivery and endorsement). There are specific requirements and formalities in relation to the legal assignment of mortgages over real property in the Cayman Islands. Generally, notes and other debt securities issued by Cayman Islands issuers are typically governed by New York or English law. In relation to Cayman Islands law-governed debt securities, an instrument in bearer form would be transferable by delivery or delivery and endorsement, or if in registered form, the terms of the instrument will generally provide that the recording of the transfer on the note or securities register evidences the transfer.

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?

See questions 4.2 and 4.3 above. In addition to the risk that a third-party purchaser for value who gives notice to an obligor might be able to “trump” an earlier equitable assignment, there is a risk the obligor may be able to set off claims against the assignor prior to receiving notice of the assignment.

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?

Notice of a legal assignment must be given in writing. There is no time limit and notice can be delivered after sale and after insolvency

proceedings have commenced. However, until notice in writing is given, the assignment will only be an equitable assignment (see question 4.4 above for some adverse consequences of failure to give notice).

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)?

If a right (or the contract generally without specifying “rights and obligations”) is expressed as strictly non-assignable by contract without the consent of the obligor, specific consent must be sought from the obligor. If that consent is not obtained, any purported assignment is not valid against the obligor. As noted in question 4.1, obligations must be novated and all parties, including the obligor, must be party to a novation agreement.

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?

See question 4.6 above. Restrictions on assignment are generally enforceable under Cayman Islands law. There are certain limited situations where an assignment may occur by operation of law, e.g. transfer to a successor upon death of the holder of the receivable.

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 transfer document must sufficiently identify the receivable(s) to be sold. If there is an “other than” exclusion, the transfer instrument must be sufficiently clear to distinguish the receivables included in the transfer from those which are not.

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?

Generally, in the Cayman Islands, the sale and purchase of receivables under Cayman Islands law will be treated as an absolute assignment and transfer. There are no Cayman Islands authorities on whether the sale and purchase of an asset may be recharacterised as a loan secured by such asset or as some other transaction or set aside as a sham. However, based on the principles discussed in the English authorities, which would be persuasive, assuming that: (i) the transfer agreement contemplates the outright sale and the outright purchase of the receivable; and (ii) there is no indication that the intention of the parties is for the sale and purchase of the receivables to be treated as a transfer by way of security, then, absent anything else in the circumstances, it is unlikely to be recharacterised as such. Factors which a Cayman Islands court would likely consider are: (i) that the seller does not have the right to reacquire any of the receivables by repaying the price received on the sale; (ii) that there is no obligation on the buyer to account to the seller for any “profit” made on the realisation of the receivables; and (iii) the buyer has no specific right of recourse to the seller if a specific asset within the receivables realises an amount less than the price paid for it.

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, an assignment can provide for receivables to be automatically assigned to the purchaser as and when they come into existence. See the answer to question 6.5 below on the effect of an insolvency of the seller.

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

Yes, see questions 4.10 above and 6.4 below.

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?

Security for a receivable can usually be assigned in the same manner as the receivable itself; however, there may be additional formalities such as registration and payment of a filing fee depending upon the nature of the receivable. For example, the assignment of a mortgage or real property located in the Cayman Islands requires registration of the transfer and payment of a fee.

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?

If the right to set off a cross-debt arises after the obligor has received notice of the assignment, the obligor will generally be unable, from that point, to set off such cross-debt against the seller. In the absence of a breach of any contrary provision, it is unlikely that either the seller or the purchaser would be liable to the obligor for damages as a result of any of the obligor’s rights of set-off terminating.

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

There are a number of options available when structuring profit extraction which, as a purely legal matter, can be debt or equity. Profit participating notes or similar instruments are common or alternatively the use of preference shares that are structured to rank above ordinary shares of a company in respect of, among other things, the payment of dividends is a popular mechanism to achieve such profit extraction.

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)?

No, it is not customary to take a “back-up” security interest over the receivables. Generally, true sale opinions with respect to the sale of receivables where the governing law of the sale agreement is Cayman Islands law are commonly given and no additional security interest is required.

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?

This is not applicable.

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?

Formalities and perfection of such security interests will depend upon the nature of the underlying assets that are subject to the security interest (the “collateral”) and the applicable law of such collateral.

Special regimes apply to the taking of security over certain assets, including ships, aircraft and land.

The applicable law for receivables (being in the nature of intangible movables) is not entirely free from doubt. One view is that the applicable law is the *lex situs*. The alternative view is that the applicable law is the governing law of the security. Our view, based on English authorities and authoritative legal commentaries, is that the *lex situs* would determine proprietary issues in the case of intangible movables. This view does, however, require a fictional “*situs*” to be attributed to intangibles.

In the case of collateral in the form of general intangibles and contract rights, the *lex situs* would be the law of the place in which the rights are properly recoverable or can be enforced. This will depend upon the facts and circumstances but is usually where the obligor or debtor in respect of the relevant claim is located. The location of the obligor or debtor is not necessarily the place of its head office or registered office. For example, if the obligor or debtor incurs the relevant obligation through a branch, it is likely to be where the branch is located.

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?

Yes. No additional steps would be required; however, see also our response to question 5.3 with regard to the applicable law for perfection purposes.

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?

There are no specific additional formalities with respect to the taking of a security interest in such assets.

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?

Yes, the Cayman Islands, being a jurisdiction largely based on English law, does recognise both express and constructive trusts in a manner very similar to English law.

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?

Yes, the Cayman Islands does recognise escrow accounts and security can be taken over a bank account. The security taken is normally in the form of an equitable assignment by way of security over the bank account.

Generally, a Cayman Islands court would recognise a foreign law grant of security over a Cayman Islands bank account on the assumption that such a grant is valid, binding and enforceable as a matter of the governing law of the security interest.

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?

This is a matter to be determined by the terms of the security interest granted. There are no statutory provisions that would limit the ability of a secured party to be able to enforce or realise its security interest, provided of course, that such security interest is valid, binding and enforceable as a matter of the governing law of the security interest.

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?

Yes, although such control may affect whether the security interest would be treated as a fixed or floating charge. This is a fairly complex area of law but, at the most basic level, if the owner of the account is able to access the funds without the secured party having any control over the ability of the account owner to move cash in and out of the account, then such security interest is likely to be a floating charge. In an insolvency of a Cayman company or exempted limited partnership, this would mean that such security interest would rank behind any preferred debts. In the context of a securitisation transaction, however, such preferred debts are minimal and the main issue that normally arises is a question of ranking in that a subsequent fixed charge ranks ahead of 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?

No. There are no provisions under Cayman Islands law that provide for any form of automatic stay of action either with respect to a sale of receivables or if a security interest is created.

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)?

With respect to companies, which are the type of entities that one normally encounters in the context of a securitisation transaction, a liquidator of such entities in the Cayman Islands has no statutory right to disclaim onerous contracts or "cherry pick". This provision would also apply to exempted limited partnerships and limited liability companies that are occasionally used in such transactions.

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

The following provisions and suspect periods are potentially applicable in the context of a potential clawback claim in a securitisation transaction.

Voidable preference under the Companies Law – the entry by a company, a limited liability company or exempted limited partnership into a transaction at any time within the six months immediately preceding the commencement of its winding-up is, depending on the exact facts, theoretically capable of constituting a voidable preference if the pre-conditions for a voidable preference under Section 145(1) of the Companies Law were present. In accordance with Section 145(1), every conveyance or transfer of property or charge therein, every payment, every obligation and

every judicial proceeding made, incurred, taken or suffered by any company, limited liability company or exempted limited partnership, which is unable to pay its debts as they become due from its own monies in favour of any creditor with a view to giving such creditor a preference over the other creditors, will be invalid if made, incurred, taken or suffered within the six months immediately preceding the commencement of a liquidation.

Transactions at an undervalue under the Companies Law – in accordance with Section 146(2) of the Companies Law, every disposition of property made at an undervalue by or on behalf of a company, limited liability company or exempted limited partnership with intent to defraud its creditors, shall be voidable at the instance of its official liquidator. The burden of establishing an intent to defraud for the purposes of Section 146(2) shall be upon the official liquidator. The suspect period is six years after the date of the relevant disposition.

Intention to defraud – if, in the course of the winding-up of a company or a limited liability company, it appears that any business of the company or the limited liability company has been carried on with an intent to defraud creditors of the company or the limited liability company or creditors of any other person or for any fraudulent purpose, the liquidator may apply to the court for a declaration under Section 147(1) of the Companies Law. Section 147(1) also applies to exempted limited partnerships. There is no suspect period with respect to this provision.

The Fraudulent Dispositions Law (1996 Revision) may have the effect of making a transaction or a payment or transfer voidable (although it is not an insolvency-related provision as such, as it applies both pre- and post-insolvency). Under the Fraudulent Dispositions Law (1996 Revision), any disposition of property made with an intent to defraud (which means an intention to defeat wilfully an obligation owed to another creditor) and at an undervalue is voidable at the instance of the creditor thereby prejudiced. A creditor may only commence an action under this Law within six years of the relevant disposition.

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?

There is no established doctrine or statutory provision authorising substantive consolidation (whereby a court can agree to consolidate the assets and liabilities of separate legal entities within a group on bankruptcy, liquidation or other insolvency proceeding) under the insolvency laws of the Cayman Islands. However, the Cayman Islands Courts could approve a pooling arrangement in very limited and specific circumstances. Such jurisdiction exists pursuant to a Cayman Islands Court-appointed liquidator's power to make any compromise or arrangement with creditors with the sanction of the Court. This jurisdiction will only be exercised in exceptional circumstances where the affairs of two or more companies (or other entities) are so hopelessly intertwined that a pooling of their assets and liabilities is the only sensible way to proceed.

There is limited reported Cayman Islands authority on the circumstances in which a Cayman Islands court might ignore the separate legal personalities of a company and its shareholder in order to enable creditors of a shareholder of the company to proceed directly against the assets of the company as well as against those of the shareholder (which would include its shareholding in the company). Such authorities, as do exist, follow the principles

established under English common law, which the Cayman Islands court generally regards as persuasive (but not technically binding).

As a matter of English common law, it is only in exceptional circumstances that the principle of the separate legal personality of a company can be ignored, such that the court will “pierce the corporate veil”. Such circumstances may exist where a person is under an existing legal obligation or liability, or subject to an existing legal restriction which he deliberately evades, or whose enforcement he deliberately frustrates by interposing a company under his control. In those circumstances, the court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality.

Outside of piercing the corporate veil, the English courts have considered other circumstances in which a company may be liable for the acts of its shareholder and *vice versa*. These include where the device of incorporation is used for some illegal or improper purpose, cases of fraud or sham, certain trustee-beneficiary relationships, in certain circumstances of void or voidable transactions, and where the company can be regarded as acting simply as the agent of its shareholder. There may also be other exceptional cases in which the corporate veil may be pierced pursuant to specific foreign statutory provisions.

However, these decisions are founded on the principle that the separate legal personality is being ignored for limited purposes to fix a shareholder with a liability or responsibility or subject it to a restriction (or, in certain circumstances, giving the shareholder remedies it would not otherwise have). We can find no principle, and we are of the view that a Cayman Islands court would not find, that the separate legal personality of the company should be ignored simply to enable a third-party creditor of a shareholder or other affiliate of the company to proceed directly against assets of the company to satisfy liabilities owed by the shareholder or such other affiliate to such creditor, provided that the company has been properly established and operated as a special purpose issuer in the context of a securitisation transaction.

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?

Section 99 of the Companies Law provides, *inter alia*, that when a winding-up order has been made in respect of a company, any disposition of the company’s property after the commencement of the winding-up is, unless the court otherwise orders, void. This provision also applies to exempted limited partnerships and to limited liability companies.

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

No, provided that limited recourse provision is valid, binding and enforceable as a matter of the governing law of the relevant contract, including that the debt is extinguished.

7 Special Rules

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

There is no special securitisation law or related regulatory authority in the Cayman Islands due to the fact that the common law and general corporate statutes provide all the necessary legal structures and protections required for cross-border international securitisations. Cayman Islands law does not define what type of transaction constitutes a securitisation.

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?

There is no special securitisation entities law; however, certain provisions of the Companies Law have been adapted to make Cayman companies more attractive to use as the special purpose issuers (“SPVs”) in a securitisation transaction; for example, Section 95(2) (see question 7.5 below). The Cayman Islands is generally considered to be one of the leading jurisdictions for the formation of SPVs due to its creditor-friendly insolvency regime and flexible companies law specifically enhanced to assist in the provision of clean legal opinions with respect to bankruptcy remoteness or “ring fencing” and the clear absence of any stay or moratorium on enforcement of security interests.

The Limited Liability Companies Law (2018 Revision) of the Cayman Islands allows for the formation of limited liability companies (“LLCs”). An LLC is a body corporate with separate legal personality but without the constraint of having share capital. Members of an LLC may have capital accounts and make capital contributions, with profits and losses allocated amongst those members as provided in the LLC agreement (which does not need to be filed with the Cayman Islands government). The LLC offers a further structuring solution for securitisation and warehousing vehicles, in addition to the exempted company and the exempted limited partnership.

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?

Yes, the Cayman Islands jurisdiction is used extensively for the establishment of SPVs.

The Cayman Islands provides a tax neutral hub in a jurisdiction with a well-developed legal system for securitisation transactions, which is creditor-friendly and recognised by rating agencies. The jurisdiction has high-quality legal, professional and administrative service providers, is well known and understood by all market participants and is compliant with global regulatory standards.

The SPV will typically be a Cayman Islands exempted company. We also see the use of limited liability companies and, less frequently, exempted limited partnerships. The ordinary voting shares of the SPV would usually be owned by a licensed Cayman Islands trust company in its capacity as Share Trustee on trust for charitable purposes. The use of the charitable trust structure serves to take the SPV off the balance sheet of related transaction parties and, together with standard market structuring safeguards, serves to make the SPV bankruptcy remote.

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

Yes. A Cayman court will generally recognise a contractual limited recourse provision that, as a matter of its governing law, is valid, binding and enforceable. In the event that the contractual provision is governed by Cayman Islands law, although there is no precedent on point, we are of the view that a Cayman court would enforce such a provision that is clearly drafted to that effect based upon prior English case law which, although not binding, is strongly persuasive.

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?

Yes. The Cayman Islands specifically introduced Section 95(2) of the Companies Law to provide that a Cayman court shall dismiss a winding-up petition or adjourn the hearing of a winding-up petition on the ground that the petitioner is contractually bound not to present a petition against the company. This provision would also apply to an exempted limited partnership pursuant to the Exempted Limited Partnership Law. Further, Section 39 of the Limited Liability Companies Law has an equivalent provision with respect to limited liability companies.

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

A Cayman court will generally recognise a priority of payments "waterfall" provision that as a matter of its governing law is valid, binding and enforceable. In the event that the contractual provision is governed by Cayman Islands law, although there is no precedent

on point, we are of the view that a Cayman court would enforce such a provision that is clearly drafted to that effect.

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?

Although it is possible for the articles of association to be drafted to give the directors the power to resolve to place a Cayman company into liquidation, articles of association for SPVs do not generally contain such a provision and the power to place a Cayman company into liquidation remains a shareholder power. In order to ensure that such power is not exercised while a securitisation transaction is ongoing, the ordinary voting shares which carry such power are placed into an "orphan" charitable trust, the terms of which provide that the trustees cannot exercise such powers without the consent of a key transaction party (such as an indenture trustee) so long as the notes or other form of financial instruments issued in connection with the securitisation transaction remain outstanding. Accordingly, there is no requirement for an independent director. This has been specifically recognised by the rating agencies with respect to their rating criteria for Cayman SPVs.

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?

It is common for purchaser SPVs to be established in the Cayman Islands whether as an exempted limited company, exempted limited partnership or as a limited liability company (or a combination of any of the three depending on the transaction). There are a number of benefits of such establishment in structured deals, including the variety of vehicles that can be used, the various tax benefits (see section 9 below) and the creditor-friendly nature of the jurisdiction (see question 7.2 above).

8 Regulatory Issues

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

The purchaser SPV would only be subject to regulation if its activities are conducted pursuant to, or in connection with, a business carried on, from, in or within the Cayman Islands, i.e. regulation would not arise from the fact that the activities relate to an SPV domiciled in the Cayman Islands, but from the fact that the activities are being carried on in the Cayman Islands.

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?

See question 8.1 above.

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 Confidential Information Disclosure Law, 2016 (the “CIDL”) repealed the Confidential Relationships (Preservation) Law (2015 Revision) but retained its general restriction on the disclosure of confidential information. The CIDL defines “confidential information” broadly as information, arising in or brought into the Cayman Islands, concerning any property of a principal, to whom a duty of confidence is owed by the recipient of the information. There are certain exceptions under the CIDL to the disclosure of confidential information by such persons that owe a duty of confidence. These include disclosure of confidential information: (i) by compulsion under specific Cayman Islands law; (ii) in the normal course of business, with the implied or express consent of the principal; (iii) where such disclosure is compelled under law to a specific authority; and (iv) upon direction of the court pursuant to an application under the CIDL. The key difference between the CIDL and the prior legislation is that breach of the general restriction on the disclosure of confidential information is no longer a criminal offence under Cayman Islands law.

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?

See question 1.2 above. There are no specific consumer protection laws in the Cayman Islands.

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?

No, there are no exchange control laws or regulations under Cayman Islands law.

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?

No, there are no laws or regulations relating to “risk retention” under Cayman Islands law. Cayman Islands SPVs are, however, frequently used in securitisation transactions to satisfy US and/or EU risk retention requirements.

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?

No. While the Cayman Islands is an early adopter of regulations that comply with international standards to combat money laundering, terrorist financing and tax evasion, none of these regulations have had, or are expected to have, a material impact on securitisation transactions.

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?

No. The Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax. Accordingly, no taxes, fees or charges (other than stamp duty) are payable either by direct assessment or withholding to the government of another taxing authority in the Cayman Islands under the laws of the Cayman Islands. Trade receivables sold at a discount will not be recharacterised under the laws of the Cayman Islands in whole or in part as interest, nor in the case of deferred purchase price for trade receivables.

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

No, it does not.

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

No stamp duties or other similar taxes or charges are payable under the laws of the Cayman Islands in respect of the execution, transfer or delivery of documents or debt securities, or the performance or enforcement of any of them, unless they are executed in, or thereafter brought within, the jurisdiction of the Cayman Islands. Mortgages over property (real and movable) situated in the Cayman Islands are subject 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?

There is no VAT, sales tax or similar tax on goods and services, sales of receivables or on fees for collection agent services within the Cayman Islands. Import taxes are payable on goods arriving in the Cayman Islands.

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?

This is not applicable.

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?

This is not applicable; see question 9.1 above.

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

No. See the response to question 9.1.



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