

**International
Comparative
Legal Guides**



Securitisation

2024

17th Edition

Contributing Editor:
Rupert Wall
Sidley Austin LLP

afme /
Finance for Europe

**STRUCTURED
FINANCE
ASSOCIATION**



APSA
亚太结构融资公会
Asia-Pacific Structured Finance Association

glg Global Legal Group

Expert Analysis Chapters

- 1** **Securitisation: Financing the Green Transition**
Netanya Clixby, Arash Dashtgard & Megan Cox, Sidley Austin LLP
- 7** **U.S. and EU CLOs: Market Trends and Recent Regulatory Developments**
Craig Stein, Phillip Azzollini, Daniel Oshinsky & Martin Sharkey, Schulte Roth & Zabel LLP
- 14** **Regulatory Developments in Securitisation in the EU, the UK and the USA**
Merryn Craske, Eileen J. Ho & Karl Horvath, Morgan Lewis
- 21** **Securitisation Funds – a Surging Instrument in the Luxembourg Structured Finance Ecosystem**
Vassiliyan Zanev & Tina Fettes, Loyens & Loeff Luxembourg S.à r.l.
- 26** **Resolution of Disputes in Financial Contracts: Arbitration vs Litigation**
Kingsley Ong, The Asia-Pacific Structured Finance Association Limited (APSA)

Q&A Chapters

- 32** **Brazil**
Levy & Salomão Advogados: Luiz Roberto de Assis & Fernando de Azevedo Perazzoli
- 45** **Bulgaria**
Tsvetkova Bebov & Partners, member of Eversheds Sutherland: Nikolay Bebov, Konstantin Mladenov & Petar Ivanov
- 58** **Canada**
McMillan LLP: Don Waters, Yonatan (Yoni) Petel & Michael Burns
- 71** **Cayman Islands**
Maples Group: James Reeve, Amanda Lazier & Alicia Thompson
- 82** **England & Wales**
Sidley Austin LLP: Rupert Wall & Simon Nikolov
- 105** **Finland**
Waselius Attorneys Ltd: Maria Lehtimäki & Ann-Marie Eklund
- 116** **France**
Orrick, Herrington & Sutcliffe (Europe) LLP: Hervé Touraine & Olivier Bernard
- 131** **Germany**
Allen Overy Shearman Sterling LLP: Dr. Stefan Henkelmann & Martin Scharnke
- 148** **Greece**
Bernitsas Law: Athanasia Tsene
- 162** **Ireland**
Mason Hayes & Curran LLP: Daragh O'Shea, Andrew Gill, Eoin Traynor & Jamie Macdonald
- 176** **Jersey**
Maples Group: Paul Burton & Amy Black
- 189** **Luxembourg**
GSK Stockmann: Andreas Heinzmann & Katharina Schramm
- 207** **Netherlands**
Freshfields Bruckhaus Deringer LLP: Mandeep Lotay & Dámaris Engelschman
- 223** **Norway**
Advokatfirmaet Thommessen AS: Kristoffer Hegdahl, Morten Emil Bergan, Markus Kjelløkken & Helge Aanensen Kleven
- 235** **Portugal**
VdA: Paula Gomes Freire, Benedita Aires & Sebastião Nogueira
- 252** **Scotland**
Brodies LLP: Marion MacInnes, Bruce Stephen, Peter Brading & Craig Henry
- 266** **Singapore**
Oon & Bazul LLP: Oon Thian Seng, Angeline Woo Mei Yi, Kwong Wen Ying & Loh Su Hean
- 281** **Spain**
Cuatrecasas: Héctor Bros & Arnau Pastor
- 301** **Sweden**
Roschier Advokatbyrå AB: Johan Häger, Carl Brodén & Dan Hanqvist
- 313** **Switzerland**
Walder Wyss Ltd: Lukas Wyss & Maurus Winzap
- 326** **USA**
Sidley Austin LLP: T.J. Gordon & Pietro Fontana

Jersey

Maples Group



Paul Burton



Amy Black

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 create an enforceable debt obligation of an obligor to a seller:

- it is not necessary that the sale of goods or services is evidenced by a formal receivables contract. An enforceable debt obligation may be created orally or in writing;
- an invoice alone may operate as sufficient evidence of an enforceable debt obligation if it contains the required elements of a contract; and
- the behaviour of parties (referred to as a course of dealing) might be used to determine the existence of a contract implied on the basis of dealings between 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?

With the exception of the recognition of the concept of usury, there are currently no laws or regulations that specifically limit rates of interest or 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).

Although there are some protections in place, lending money to people is not currently regulated in Jersey, except:

- against money laundering and the financing and carrying out of terrorism;
- against unfair commercial practices towards consumers and aggressive selling techniques and misinforming or misleading people about products or services; and
- for banks whose deposit-taking is already supervised by the Jersey Financial Services Commission (JFSC).

There is a voluntary Consumer Lending Code of Practice and a voluntary Debt collectors' code of conduct, but neither are compulsory, and compliance is not currently overseen by a regulator.

In 2023, the States of Jersey consulted on implementing a new regime for supervision and regulation of consumer credit

in Jersey. The intention is for the proposed regime to protect people who borrow money by establishing regulatory standards that people who lend money will be required to follow.

The proposed regime is wide-ranging and includes:

- personal loans (including from banks);
- credit extended by debt collection agencies;
- mortgages over Jersey properties that are the consumer's primary residence;
- credit provided as part of debt-adjusting and debt administration services;
- business loans to small businesses up to £30,000;
- personal contract purchase financing/balloon loan (typically used for car finance); and
- store credit, linked credit, hire purchase, pay day loans, overdrafts and buy-now pay-later loans.

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?

In the absence of any express choice of law clause, a Jersey court would apply private international law principles to establish and determine the governing law of a contract. The most relevant consideration will be the *lex situs* of the asset or subject matter of the receivables contract. The law that would be regarded as the governing law of the contract by any court of competent jurisdiction will be the law and legal system that has the closest and most real connection with the underlying asset/contract subject matter. For example, where the receivables contract is not express as to its governing law, the *lex situs* or jurisdiction of incorporation of the debtor under the receivables contract will be considered relevant in determining the *situs* of the debt and, therefore, the governing law of the receivables contract. The jurisdiction of incorporation and *situs* of other receivables contract counterparties will also be pertinent to this consideration.

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 Jersey courts will observe and give effect to the choice of the foreign law as the governing law of the receivables contract.

The submission by a Jersey obligor or seller in a receivables contract to the laws of another jurisdiction will be legal, valid and binding on the Jersey obligor/seller, assuming that the same is true under the governing law of the contract. However, the Jersey courts 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 Jersey.

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.

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. See questions 3.1 and 3.2 above. A Jersey court would respect the parties' choice of law to govern the receivables purchase agreement, subject to the restrictions noted in question 2.3 above.

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 Jersey 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, such as where to do so would be contrary to the public policy of Jersey or where it is established that the governing law of the receivables purchase contract does not have the closest and most real connection with the sale of receivables.

When considering the perfection of the sale under the receivables purchase agreement, the Jersey court would apply the governing law of the underlying receivables and consider relevant rules upon such perfection as a matter of evidence (expert evidence may not be used in each case).

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. The Jersey court would recognise the sale as effective against the obligor as it complies with the requirements of the law governing the receivable (upon proof of the relevant legal principles of the governing law, usually by expert evidence as to same being adduced).

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. The sale would be effective against the seller, provided it complied with the perfection requirements of the governing law of the receivables.

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 receivables that constitute the chose in action, the assignment must be in writing and 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. There are specific requirements and formalities in relation to the legal assignment of mortgages over real property in Jersey. Generally, notes and other debt securities issued by Jersey issuers are typically governed by New York law or English law. In relation to Jersey 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. The assignment of receivables by way of security and as outright assignments in other circumstances is governed by the Security Interests (Jersey) Law 2012.

Transfers of marketable securities in bearer form will be achieved by delivery or delivery and endorsement and, if in registered form, by registration of the transferee in the relevant register. Dematerialised marketable securities held in a clearing system and represented by book entries may be transferred by debiting the clearing system account of the relevant seller and crediting the clearing system account of the relevant purchaser (or, in each case, its custodian or intermediary). It is worth noting that relevant clearing systems are situated outside of Jersey.

Specific statutory requirements may also apply for assignments of specific receivables, such as intellectual property rights and certain policies of insurance.

Please see our response to question 1.2 above in relation to consumer loans.

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.

Where the receivable does not fall into a select category of contractual rights that are incapable of assignment (e.g. as a matter of public policy or because the rights are of a personal nature) then, in the absence of an express contractual prohibition or restriction on assignment, receivables may be assigned without notification to, or consent of, the obligor.

The absence of notice has certain implications in Jersey that may be (non-exhaustively) summarised as follows:

- obligors may continue to discharge their debts by making payments to the seller (being the lender of record);
- obligors may set off claims against the seller arising prior to receipt by the obligors of the notice of assignment;
- a subsequent assignee of a receivable without notice of the prior assignment by the seller would take priority over the claims of the initial assignee; and
- the seller may amend the agreement governing the terms of the receivable without the purchaser's consent.

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 above, 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 as a matter of Jersey 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. If a contract is silent on assignability, then such contract and the receivables arising thereunder will be freely assignable (with certain limited exceptions related to: (i) personal contracts where the specific identity of a contracting party goes to the heart of the contract, such as contracts of service; and (ii) assignments prohibited as a matter of public policy).

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 that are not. Capturing future acquired property in general terms is possible – for example, the subject matter of an assignment can be described in general terms, such as “all present and future book debts”.

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?

As a matter of Jersey law, the sale and purchase of receivables under Jersey law will be treated as an absolute assignment and transfer unless it is structured as an assignment by way of security in accordance with the provisions of the Security Interests (Jersey) Law 2012. There are no Jersey 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 that a Jersey 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.

In addition to recharacterisation, sale transactions are also vulnerable under certain sections of Jersey bankruptcy laws such as those relating to transactions at an undervalue and preferences.

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, 6.4 and 6.5.

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 are additional formalities, such as registration and payment of a filing fee depending upon the nature of the receivable. These additional formalities exist under the regime in Jersey for creating security interests in respect of intangible movable property under the Security Interests (Jersey) Law 2012 and also under immovable property statutory and customary law where, for example, the assignment is of a mortgage or immovable property located in Jersey.

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. Broadly speaking, an assignee will take the benefit of a receivables contract subject to any rights of set-off in existence between the obligor and seller at the time the obligor receives notice of the sale.

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 that, 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. Other methods of extracting value in the form of profits from the purchaser would include: paying seller fees; paying deferred consideration; paying subordinated loans (principal and interest); and holding subordinated equity securities.

Precisely how profit can be extracted in a securitisation in run-off will depend on a range of matters such as the terms of the charitable/share trust orphaning the Jersey special purpose vehicle (SPV) issuer vehicle, the nature of the assets in the securitised pool, the types of credit enhancement used, rating agency and timing considerations and the consequences for accounting, regulatory capital and tax treatment.

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 Jersey 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?

See question 5.1 above.

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

When determining the law that governs the creation and attachment of a security interest in the various forms of assets, the Jersey courts will refer to the *situs* of the assets, which in turn will be determined by the Jersey courts in accordance with the principles of private international law.

Where the assets are situated in Jersey, any security interest created will need to have complied with the provisions of the Security Interests (Jersey) Law 2012 (Security Interests Law) to be validly created and capable of enforcement as security. The Security Interests Law applies to Jersey law security interests over intangible movable property. The Security Interests Law distinguishes between attachment, which is the creation of a security interest enforceable against the grantor, and perfection, which ensures that the security interest is binding upon third parties and insolvency officials.

The general requirements for attachment are as follows:

- (a) value (i.e. money or money's worth sufficient to support an onerous contract) has been given in respect of the security agreement;
- (b) the grantor has rights in the assets (or the power to grant rights in the assets to a secured party); and
- (c) (i) the secured party has possession or control of the assets; and/or
(ii) the security agreement is in writing signed by the grantor and contains a description of the assets that is sufficient to enable it to be identified.

The Security Interests Law permits perfection of a security interest by possession, control or registration. Perfection of a security interest by possession, control or registration continues only while such possession, control or registration is maintained (unless continuously perfected by another one of these methods). A Jersey law security interest that attaches by description only must be perfected by registration of a financing statement on the Jersey Security Interests Register established under Part 8 of the Security Interests Law. The financing statement will contain basic details of the grantor, secured party, collateral and the duration of the registration (in practice, this is often the maximum period of 99 years). The security interest is perfected by registration from the time and date at which the financing statement is filed on the Jersey Security Interests Register.

Where the assets are not situated in Jersey, a Jersey entity has capacity (as a matter of Jersey law) to grant security governed by non-Jersey law over assets situated outside Jersey. Assuming that the security interest over the assets is valid and enforceable as a matter of its governing law (and, if different, the law of the jurisdiction where the assets are situated), no particular Jersey law issues arise and the validity of the non-Jersey law security interest would be recognised by the Jersey courts.

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?

Additional steps must be taken. See question 5.3 above.

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, Jersey 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 taken over a bank account located in your jurisdiction?

Yes, Jersey does recognise escrow accounts, whether founded in legal principles of contract, trust or agency. Security can be taken over a Jersey bank account, which would be in the form of a Jersey law governed security interest agreement. Generally speaking, a non-Jersey law governed security agreement over a Jersey bank account would not operate to secure the Jersey *situs* assets (i.e. a Jersey security agreement would be required). As part of perfection formalities, and in addition to registration as mentioned at question 5.3 above, a notice of the security is provided to the account bank and an acknowledgment is provided by the account bank.

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 does depend on the terms of the security interest agreement; however, generally in the notice provided to the account bank (and accompanying acknowledgment from the account bank) stating the creation of security over the account, the notice would provide that upon an account bank being notified of pre-enforcement or enforcement action, the account bank will act in accordance with the instructions of the secured party. Where a secured party subsequently enforces its security, the account bank is bound to follow the instructions of the secured party with respect to all cash standing to the credit of (or flowing into) the secured account until the secured obligations are fully discharged and the bank has been notified that the account is no longer encumbered.

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?

As noted in question 5.8 above, this does depend on the terms of the security interest agreement; however, generally, the notice and acknowledgment would state prior to enforcement that either (a) the owner of the account has access to the funds in the account, or (b) the owner of the account does not have access to the funds. Either option is possible without affecting the Jersey security over the account.

6 Insolvency Laws

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

A true sale of receivables is generally not affected by the

subsequent insolvency of the seller, as the receivables are no longer part of the seller's estate and are not available to the seller's creditors. However, a true sale of receivables may be challenged or set aside by a liquidator, other insolvency official or the creditors of the seller if it is proven to be a vulnerable transaction (see further at question 6.3 below) or a fraudulent transaction, or if the transaction contravenes any statutory or common law rules or principles that apply to the sale of receivables in Jersey.

Where the purchaser is deemed to only be a secured party rather than the owner of the receivables, the Jersey law intangible movable property security interest regime under the Security Interests (Jersey) Law 2012 will apply. Jersey law recognises the concept of a quasi-sale of receivables, whereby the seller transfers the legal title but not the beneficial ownership of the receivables to the purchaser, and the purchaser holds the receivables on trust for the seller, subject to the seller's obligation to repay the purchase price or a portion thereof. Such a quasi-sale of receivables is generally treated as a secured loan rather than a true sale, and the purchaser is deemed to be a secured creditor rather than the owner of the receivables. A quasi-sale of receivables is therefore subject to the same rules and principles as a security interest over receivables, as discussed above, and may be affected by the insolvency of the seller, depending on the terms of the sale agreement, the perfection and priority of the security interest, and the powers and discretion of the insolvency official and the court. Where a Jersey law security interest exists over the relevant receivable in favour of the purchaser/secured party, where the seller/grantor of a security interest becomes bankrupt or the seller or the seller's property is subjected – whether in Jersey or elsewhere – to any other judicial arrangement or proceeding consequent upon insolvency, it shall not (as a matter of Jersey law) affect the power of a secured party to appropriate or sell collateral, or otherwise act in relation to collateral under the Security Interests (Jersey) Law 2012.

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 questions 6.1 and 6.3. In addition, where the receivable rights have not passed to a purchaser pursuant to an absolute assignment/true sale transaction and they remain with the seller, in a Jersey insolvency of the seller, the title to such receivables will vest in the Jersey insolvency official (the Viscount) and will form part of the seller's estate to be liquidated. The usual kind of interlocutory/interim and final injunctive relief is available in Jersey and the principles to be applied to such applications are very similar to those that exist under English law.

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. These are also known as vulnerable transaction provisions.

The liquidator or the Viscount in Jersey (as applicable) have the power to challenge transactions entered into by a Jersey company. The court, on application of the liquidator or the Viscount, has wide powers to unwind transactions at an undervalue and preferences, or to make third parties pay a fair value for a particular benefit they might have received pursuant to a particular transaction.

Under Article 176 of the Companies (Jersey) Law 1991 and Article 17 of the Bankruptcy (Désastre) (Jersey) Law 1990, if a company enters into a transaction at an undervalue (i.e. a gift or sale of assets for significantly less than market value) within five years of the commencement of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound, provided that the company was insolvent at the time or became insolvent as a result of the transaction. However, the court shall not make any order in respect of a transaction at an undervalue if it is satisfied that the company entered into the transaction in good faith for the purpose of carrying on its business and that, at the time it entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

Under Article 176A of the Companies (Jersey) Law 1991 and Article 17A of the Bankruptcy (Désastre) (Jersey) Law 1990, if a company gives preference to a person within 12 months of the commencement of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound, provided that the company was insolvent at the time or became insolvent as a result of the transaction. A preference is any act done by a company that has the effect of putting one of the company's creditors into a better position than it otherwise would have occupied in the event of the company's insolvency (i.e. providing new security or repaying one creditor in advance of other creditors). However, the court shall not make any order in respect of a preference unless the company when giving the preference was influenced by a desire to put the beneficiary into a better position than it otherwise would have occupied in the event of the company's insolvency. Unless the contrary is shown, such influence is presumed in the case of a beneficiary that is an associate of or connected with the company (otherwise than by reason only of being the company's employee).

Certain other transactions may be set aside by the liquidator or the Viscount (as applicable), including:

- (a) onerous property, so as to release the company from all liability in respect of the onerous property from the date of commencement of insolvency proceedings ("onerous property" includes movable property, immovable property situated outside Jersey, contract leases and unprofitable contracts); and
- (b) extortionate credit transactions, which may be set aside or varied on the basis that the company was provided with credit on grossly exorbitant terms within three years of the commencement of insolvency proceedings.

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 regarding substantive consolidation (whereby a court can agree to consolidate the assets and liabilities of separate legal entities within a group on bankruptcy, liquidation or another insolvency proceeding) under the insolvency laws of Jersey. However, the Jersey courts could approve a pooling arrangement in very limited and specific circumstances. This 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 Jersey authority on the circumstances in which a Jersey 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 Jersey court generally regards as persuasive (but not technically binding).

We understand that, 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 so 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 that 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, we understand 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 are of the view that the Jersey 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?

If the sale of the receivables had been concluded and the purchase price had been received by the seller, the insolvency proceedings related to the seller would have no impact on such transfer; subject to our answer at question 6.3 above regarding vulnerable transactions.

If the sale had not been concluded and the purchase price not received by the seller, the purchaser would be an unsecured creditor of the seller (depending on how indebted the seller had become to the purchaser and assuming no Jersey law security interest had been put in place in favour of the quasi-purchaser in relation to the receivables).

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?

Provided that the limited recourse provisions are valid, binding and enforceable as a matter of the governing law of the relevant contract, limited recourse provisions will be enforceable as a matter of Jersey law in accordance with their terms. The debtor’s contract should also contain standard non-petition provisions. Whilst the risk of the insolvency of a Jersey debtor that is cashflow-insolvent cannot be completely excluded where relevant contracts contain market standard limited recourse and non-petition provisions, Jersey practitioners regularly opine that the possibility of such an insolvency is remote/theoretical.

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?

Notwithstanding that Jersey has not put its securitisation regime on a statutory footing, the jurisdiction has a modern and sophisticated securities issuance regulatory regime. There is a single regulatory authority, the JFSC, with an experienced team dealing specifically with securitisations and structured debt transactions.

Issue of securities

To issue securities other than shares, a Jersey SPV will generally be required to obtain the consent of the JFSC under Article 4 of the Control of Borrowing (Jersey) Order 1958 (COBO Consent), except in very limited circumstances. The JFSC largely takes a “hands-off” approach to the regulation of securities issues and will undertake a review of the information document, together with a checklist setting out certain matters relating to the Jersey SPV issuer and the securities issue. The checklist is prepared in accordance with guidance on Securities Issues by Jersey Companies published by the JFSC. The terms of the

COBO Consent may cover one or more securities issues and will generally contain certain conditions, such as minimum board composition requirements, a maximum aggregate principal amount to be issued and no change to key parties to the transaction or ownership of the Jersey SPV issuer.

Circulation of offer

No prospectus filing requirements exist in Jersey, provided the terms of the offer fall within certain exemptive “safe harbours” that exclude certain categories of debt and equity invitations from being a prospectus for Jersey law purposes. The main benefit of this is that such invitations do not therefore require approval from the JFSC and do not give rise to any public prospectus “filing” obligations.

The safe harbours include offers not being considered to be made to the public where they are made: to sophisticated investors; with a minimum denomination of EUR100,000 (or currency equivalent); with a minimum subscription of EUR100,000 (or currency equivalent); or to a restricted circle of persons (other than qualified investors and professional investors, as defined) (that is, 50 in Jersey and 150 outside of Jersey). The safe harbours apply in the alternative.

Insurance business

In relation to credit default swap obligation structures, it is important from a Jersey perspective to analyse how the Jersey SPV is giving protection to the bank and, in particular, whether or not this may amount to carrying on insurance business in Jersey thereby requiring the SPV to be regulated as an insurer under the Insurance Business (Jersey) Law 1996. The relevant credit default swap or financial guarantee will typically be governed by a law other than that of Jersey and therefore how that contract is regarded in Jersey (contract of insurance or not) will require a determination of how it is treated under its proper law. If the contract is not regarded as a contract of insurance under its governing law, then it will not constitute the carrying on of insurance business under Jersey law and accordingly no licence for the Company would be required under the Insurance Business (Jersey) Law 1996.

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?

Jersey does not have a statutory regime that specifically provides for the establishment of special purpose entities designated for securitisation. However, it is worth noting that:

- There is no minimum capitalisation requirement; a company’s issued share capital can be entirely nominal.
- Shares may be par value or no par value (but a company cannot have both). The memorandum of association must simply state the maximum number of shares the company is authorised to issue or (for a no par value company only) that it may issue an unlimited number.
- A Jersey company is required to have its registered office at an address in Jersey.
- Jersey private companies must have at least one director. The board of directors may comprise such number of persons as may be desired, although it is usual for the board to consist of at least two persons. Corporate directors are permitted. The directors of a company are usually authorised to manage its business generally and to exercise the company’s powers in accordance with the provisions of the memorandum and articles of association and applicable company law.

- There is no Jersey legal requirement to appoint Jersey resident directors, however:
 - For the purposes of the COBO Consent, the JFSC requires that at least one Jersey resident director with appropriate experience and acceptable to the JFSC be appointed to the Jersey SPV board.
 - Consideration may also need to be given as to how economic substance requirements will be met for Jersey tax-resident issuers.
- There is no Jersey legal requirement that any meetings of the board of directors be held in Jersey, however:
 - It is often important that the meetings of the directors are held offshore from an onshore structuring perspective.
 - Consideration may also need to be given as to how economic substance requirements will be met for Jersey tax-resident issuers.

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?

Jersey entities provide a neutral base in which to combine investors from a number of jurisdictions investing in assets located in the same or other jurisdictions. This means that investors are not subject to double taxation by virtue of the Jersey SPV adding extra layers of taxation at different levels of the structure in addition to the investors’ home country tax. This neutrality is important because it provides a level playing field for all investors. It avoids creating a vehicle in a jurisdiction that may provide more benefits to some investors over others. Jersey offers the opportunity to do this without foreign exchange controls and without significant restrictions on the payment of interest or dividends, the repayment of capital or the ability to repurchase shares or redeem or repurchase debt.

Specific practical reasons for the extensive use of Jersey companies by institutions, governments and major corporations include:

- Speed and ease of establishment.
- Relatively low cost, particularly in the context of typical transaction sizes.
- Bankruptcy remoteness analysis on par with onshore analysis.
- Creditor/investor-friendly security regime.
- Flexible and practical business statutes.
- Appropriate levels of compliance regulation.
- Ease of ownership transfer and tax status.
- Denomination of share capital in any currency and optionality regarding share capital maintenance and flexibility regarding share capital extraction.
- English-based legal system, established judiciary and absence of political or sovereign concerns. Company law in Jersey is based on English corporate law and principles. It contains the concepts of separate legal personality and limited liability and so will provide an environment and framework that is familiar to investors. This gives the Jersey law and legal system a common origin with those of many of the jurisdictions of its users, including the United States.
- Jersey meets international standards on anti-money laundering and counter-terrorist financing, tax

transparency, fair taxation, anti-base erosion and profit shifting (BEPS) measures, legal/economic substance and taxation information exchange.

Jersey SPVs are generally established as Jersey incorporated (limited liability) companies, but they can also be trusts, unit trusts, limited partnerships and (from 1 September 2022) limited liability companies (LLCs). It is a usual rating agency requirement for a rated structured finance transaction that the Jersey company be bankruptcy-remote, hence the incorporation of the company as an “orphan”. For this to be achieved, the shares of the company are held by a corporate services provider share trustee under a declaration of trust for the benefit of a charitable institution or for charitable purposes. Generally, a small profit, in the form of a corporate benefit fee, needs to be generated at the Jersey SPV level to give effect to these arrangements.

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, Jersey courts recognise, and will hold as valid in accordance with their terms, limited recourse provisions in contracts entered into by Jersey SPV issuers. That is, limited recourse language that limits the recourse of creditors to the underlying assets supporting the transaction. More generally, in structured finance transactions, rating agencies and other counterparties will require non-petition provisions to be included in any agreement between a Jersey SPV issuer and its creditors. Under these provisions, the creditors agree not to petition for the insolvency of the company nor to join any proceedings.

The effect of limited recourse and non-petition provisions are that, in the event that the Jersey SPV issuer’s assets are insufficient to meet its creditor’s claims in full, the Jersey SPV issuer has no further obligations to those creditors and the claims are extinguished.

The concepts of contractual limited recourse and non-petition, as well as subordination and netting, are recognised and enforceable in accordance with their terms by the Jersey courts (contractual subordination, non-petition and netting are expressly catered for in Jersey statute: Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005.

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?

Please see question 7.4 above.

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?

The Jersey court will generally recognise a priority of payments “waterfall” provision that as a matter of its governing law is valid, binding and enforceable.

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?

Whilst the inherent (equitable) jurisdiction and power of the Jersey court is wide, it would be highly unlikely that a Jersey court would give effect to a contractual provision in an agreement or in a Jersey SPV’s organisational documents prohibiting directors from taking specified actions without the affirmative vote of an independent director.

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?

Jersey entities are used for a broad range of securitisation, structure note issuance and structured finance transactions. Investors globally are familiar with purchasing instruments issued by Jersey entities. 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 and the creditor-friendly nature of the jurisdiction (see question 7.3 above).

8 Regulatory Issues

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

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 Jersey, i.e. regulation would not arise from the fact that the activities relate to an SPV domiciled in Jersey, but from the fact that the activities are being carried on in Jersey. A Jersey SPV issuer may need to be supervised and regulated by the Jersey regulator for anti-money laundering purposes or engage a local AML service provider to assist it in discharging its obligations in this regard.

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 Data Protection (Jersey) Law, 2018 and Data Protection Authority (Jersey) Law, 2018 (together the “DPL”) are the principal legislation regulating general data privacy in Jersey and are based on internationally accepted principles of data privacy. The DPL is based on and is broadly similar to laws such as the EU’s General Data Protection Regulation. The DPL applies to both the public sector and the full range of industries in the private sector and, among other things: places limits on how personal data (defined below) may be used or shared with third parties; grants specific rights to individuals, including the rights to gain access to information about themselves, ensure that information is accurate and demand that use of the information be stopped; prescribes for actions to be taken in the event of personal data breaches and penalties for non-compliance; and includes specific provisions concerning the protection of particularly sensitive personal data.

The DPL contains certain technical definitions and concepts. The important ones can be summarised as follows:

- (a) “controller” is defined as “the natural or legal person, public authority, agency or other body that, whether alone or jointly with others, determines the purposes and means of the processing of personal data, and where those purposes and means are determined by the relevant law, the controller or the specific criteria for its nomination may be provided for by such law”. In practice, this means that a person who dictates what personal data should be handled, and why and how it should be handled, will be considered a data controller for the purposes of the DPL;
- (b) “processor” is defined as “a natural or legal person, public authority, agency or other body that processes personal data on behalf of the controller, but does not include an employee of the controller”. In practice, this means that a person who handles personal data on behalf of someone else by following instruction (and without deciding what, why and how such personal data should be handled) will be considered a data processor for the purposes of the DPL;
- (c) “Personal data” is defined as “any data relating to a data subject”;
- (d) “Data subject” is defined as “an identified or identifiable, natural, living person who can be identified, directly or indirectly, by reference to (but not limited to) an identifier such as (i) a name, an identification number or location data; (ii) an online identifier; or (iii) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the person”;
- (e) “data” is defined as “information that (i) is being processed by means of equipment operating automatically in response to instructions given for that purpose; (ii) is recorded with the intention that it should be processed by means of such equipment; (iii) is recorded as part of a filing system or with the intention that it should form part of a filing system; or (iv) is recorded information held by a scheduled public authority and does not fall within any of sub-paragraphs (i) to (iii)”;
- (f) “special category data” is defined as “(i) data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership; (ii) genetic or biometric data that is processed for the purpose of uniquely identifying a natural person; (iii) data concerning health; (iv) data concerning a natural person’s sex life or sexual orientation; or (v) data relating to a natural person’s criminal record or alleged criminal activity”.

The compliance obligations under the DPL are imposed on controllers and, amongst other things, the DPL requires controllers to ensure that the personal data they process is processed in accordance with the data protection principles set out in the DPL. A controller based in Jersey must be able to demonstrate the steps they have taken to comply with the data protection principles. This will include, but is not limited to, the development and implementation of policies and procedures in relation to all aspects of data handling. For example, policies and procedures for data security and confidentiality, subject access requests, privacy, retention and destruction.

Generally speaking, a controller will be subject to the DPL if it is established in Jersey and processes personal data. Each of the following shall be treated as established in Jersey: (a) a natural person who is ordinarily resident in Jersey; (b) a body incorporated under the law of Jersey; (c) a partnership or other unincorporated association formed under the law of Jersey; (d) any person who does not fall within sub-paragraph (a), (b) or (c) but maintains in Jersey (i) an office, branch or agency through which the person carries on any processing of personal data, or (ii) a regular practice that carries on any processing of personal data; or (e) any person engaging in effective and real processing activities through stable arrangements in Jersey.

A controller that is not established in Jersey could still be subject to the Jersey Data Protection Laws if the controller uses equipment in Jersey for processing data other than for the purposes of transit through Jersey. Such an entity would need to nominate a representative established in Jersey for the purposes of the DPL.

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 current specific consumer lending protection laws in Jersey. This is presently on the legislative agenda and is under review by the Government of Jersey.

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 in Jersey.

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 specific laws or regulations relating to “risk retention” under Jersey law. However, please see question 7.1 above, which sets out various Jersey regulatory requirements that apply to securities issuances in general. Jersey SPVs are 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, there have been no particular regulatory developments

in Jersey. However, Jersey meets international standards on anti-money laundering and counter-terrorist financing, tax transparency, fair taxation, anti-BEPS measures, legal/economic substance and taxation information exchange. The European Union Code of Conduct Group on Business Taxation has confirmed Jersey as a cooperative tax jurisdiction, and it has been placed on the Economic and Financial Affairs Council “whitelist”. European and UK regulatory changes do not directly impact Jersey and, despite these being evolving landscapes, there are no proposed regulatory changes that we believe would significantly affect the use of a Jersey SPV.

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 zero-rated tax regime in Jersey operates by making all Jersey registered companies (and non-Jersey companies managed and controlled in Jersey) chargeable to Jersey income tax at the general corporate income tax rate of 0%.

Jersey companies may be exclusively tax-resident in jurisdictions outside Jersey provided that:

- The company is centrally managed and controlled in another jurisdiction outside Jersey.
- The company is tax-resident in that other jurisdiction.
- The highest rate of corporation tax in that other jurisdiction is 10% or more.

It is common for Jersey companies to be UK managed and controlled if they satisfy the above criteria.

There is no corporation or capital gains tax in Jersey. There is no stamp duty payable on the transfer of shares in a Jersey company. There are also no annual taxes or charges by reference to a company’s authorised or issued share capital.

Any investors who are not tax-resident in Jersey who are holders of notes or other debt securities issued by a Jersey SPV will not be liable to any Jersey income, stamp duty, registration/transfer or other taxes by reason of their holding notes.

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, it does not.

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?

Although there is a 5% goods and services (consumption) tax (GST) in Jersey, companies beneficially owned outside of Jersey that do not supply goods or services in Jersey will generally qualify for “international service entity” (ISE) status. ISE status effectively puts a Jersey company outside the scope of the GST regime, provided it pays an annual fee. Any investors who are not tax-resident in Jersey who are holders of notes or other debt securities issued by a Jersey SPV will not be liable to any Jersey income, stamp duty, registration/transfer or other taxes by reason of their holding notes.

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 question 9.1 above.



Paul Burton is a partner of Maples and Calder's Corporate and Finance teams in the Maples Group's Jersey office. Paul has extensive knowledge and experience of corporate and finance matters, including M&A, public markets, debt capital markets, high yield, and leveraged and structured finance, including securitisation. He also advises on listing services, including The International Stock Exchange (TISE), the Cayman Islands Stock Exchange and high-yield listings.

Maples Group

2nd Floor, Sir Walter Raleigh House
48–50 Esplanade
St. Helier, JE2 3QB
Jersey

Tel: +44 1534 671 312

Email: Paul.Burton@maples.com

LinkedIn: www.linkedin.com/in/paulmburton



Amy Black is of counsel of Maples and Calder's Finance and Corporate teams in the Maples Group's Jersey office. Amy has knowledge and experience of a wide range of corporate and finance matters, including M&A, restructurings, joint ventures, structuring/establishment/operation of acquisition and holding structures, corporate and financing downstream private equity transactions, lender and borrower side financings and leveraged/structured financings. She also advises on listing services on TISE.

Maples Group

2nd Floor, Sir Walter Raleigh House
48–50 Esplanade
St. Helier, JE2 3QB
Jersey

Tel: +44 1534 671 317

Email: Amy.Black@maples.com

LinkedIn: www.linkedin.com/in/amy-black-corporate-lawyer

The Maples Group is a leading service provider offering clients a comprehensive range of legal services on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg and is an independent provider of fiduciary, fund services, regulatory and compliance, and entity formation and management services. The Maples Group distinguishes itself with a client-focused approach, providing solutions tailored to their specific needs. Its global network of lawyers and industry professionals are strategically located in the Americas, Europe, Asia and the Middle East to ensure that clients gain immediate access to expert advice and bespoke support, within convenient time zones.

www.maples.com



MAPLES GROUP

International Comparative Legal Guides

The **International Comparative Legal Guide (ICLG)** series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

Securitisation 2024 features five expert analysis chapters and 21 Q&A jurisdiction chapters covering key issues, including:

- Receivables Contracts
- Receivables Purchase Agreements
- Asset Sales
- Security Issues
- Insolvency Laws
- Special Rules
- Regulatory Issues
- Taxation