International Comparative Legal Guides

Securitisation 2021

A practical cross-border insight into securitisation work

14th Edition

Featuring contributions from:

Allen & Overy LLP
Bernitsas Law
Brodies LLP
Cuatrecasas
Freshfields Bruckhaus Deringer LLP
GSK Stockmann
King & Wood Mallesons
Loyens & Loeff Luxembourg S.à r.l.
Macfarlanes LLP
Maples Group
Mayer Brown
McMillan LLP
Nishimura & Asahi
Orrick, Herrington & Sutcliffe (Europe) LLP
Roschier Advokatbyrå AB
Schulte Roth & Zabel LLP
Shearman & Sterling LLP
Sidley Austin LLP
VdA
Walder Wyss Ltd.
Waselius & Wist

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Switzerland

Lukas Wyss

Maurus Winzap

Walder Wyss Ltd.

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?

Subject to specific contracts or areas of law, Swiss law does not generally require a specific form for entering into contracts. Accordingly, in order to create an enforceable debt obligation of the obligor to the seller, (a) it is not necessary that the sales of goods or services are evidenced by a formal contract, (b) invoices are sufficient (but not necessarily required), and (c) a binding contract can arise by oral agreement or even as a result of the behaviour of the parties. However, certain contracts require written form by law (e.g., consumer credit agreements). In addition, as a matter of fact and for evidence purposes, it is standard to enter into agreements in written form only and relying on oral or even conclusive contracts is highly unusual.

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?

Credit agreements with private persons that are not business-related with a loan amount between CHF 500 and CHF 80,000 are subject to the Swiss Consumer Credit Act (CCA). Under the CCA and the related ordinances, rates of interest on consumer credit loans are limited: for overdraft facilities on current accounts and credit cards (with a credit option), the limit is 12% plus CHF 3m LIBOR *p.a.*; and for other general consumer credit products governed by the CCA, the limit is 10% plus CHF 3m LIBOR *p.a.* (thus, maximum interest rates are currently 12% *p.a.* and 10% *p.a.*). It can be expected that the legislator will address the transition away from LIBOR by referring to the Swiss Average Rate Overnight (SARON), even though this has not been communicated yet. Outside of the scope of the CCA, case law provides for a limitation of 18% *p.a.* under the rules on usury. Late payments are subject to a default interest of 5% *p.a.* unless the contractual interest is higher, in which case such contractual interest will continue to apply. It should be noted that an obligor who is in default with the payment of interest must only pay default interest (*Verzugszinsen*) thereon from the day of the demand for official debt enforcement or the filing of a legal action. An agreement to the contrary is to be considered by a Swiss court in accordance with the principles on liquidated damages (*Konventionalstrafe*). Further, no default interest (*Verzugszinsen*) shall be calculated on default interest. The borrower under a consumer credit agreement (subject to the CCA) may withdraw from the contract within 14 days following it having received its original counterpart of the contract. This concern is normally addressed by designing the eligibility criteria to ensure that only receivables, for which the withdrawal period has lapsed, are eligible. Consumers have the benefit of further rights, such as special set-off rights (if relevant) or increased standards for contractual waivers (e.g., on banking secrecy, data protection, etc.). In addition, mandatory place of jurisdictions applies.

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?

This depends on the role under which the government is acting. Whilst the general legal framework for those receivables is the same as for any other receivable, enforcement of receivables relating to public assets (*Verwaltungsvermögen*) is limited.

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?

To the extent only Swiss parties are involved and absent specific circumstances, Swiss law will apply. In cross-border scenarios, the governing law is to be determined under the Swiss Private International Law Act (PILA). Absent a choice of law clause, a contract will be governed by the laws of the country, with which the contract is "most closely connected". Generally, this is the place of jurisdiction of the party providing the typical consideration for a contract (e.g., sale of assets, the seller, rendering of services, the service provider, etc.). Specific rules apply with regard to real estate, consumer contracts, employment contracts to property and contracts on movable goods.

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 no obvious reason (absent abuse of rights and similar circumstances) why a court in Switzerland should not give effect to the choice of law.

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

Under the PILA, parties are generally free to agree in relation to the choice of law. A choice of law must be explicit or, if implicit, be obvious. Swiss courts would give effect to such choice of law, subject to the following limitations:

- a free choice of law is only possible in international matters; and
- a Swiss court: (i) will not apply a provision of foreign law if and to the extent that this would, in the court's or authority's view, lead to a result violating Swiss public policy (*ordre public*) or similar general principle; (ii) will apply, notwithstanding a valid choice of law by the parties, any provisions of Swiss law (and, subject to further conditions, of another foreign law) that, in the court's or authority's view, imperatively demand application in view of their specific purpose (*lois d'application immédiate*); (iii) can find that provisions of a law other than the law chosen by the parties are applicable if important reasons call for such applicability and if the facts are closely linked to such other law; and (iv) will apply Swiss procedural rules; furthermore, a choice of law may not extend to non-contractual obligations.

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)?

Generally, parties to a receivables purchase and sale agreement are free with regard to the choice of law. The sale of receivables can be governed by a law other than the governing law of the receivable. However, the sale and purchase always entails the assignment of the receivable and, according to Swiss conflict of law rules, the choice of law made by an assignor and an assignee under an assignment agreement with respect to the assignment of claims or receivables under a contract may not be ascertained against the obligor without such obligor's consent (article 145 para. 1 PILA). Hence, from a Swiss perspective and as a basic rule, it is standard that the sale of receivables is governed by the same law as the law governing the receivable.

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. The parties are free to choose any law and, given that in this example the receivable is governed by the same law, such choice of law may also be asserted against the obligor.

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. The parties are free to choose any law and, given that in this example the receivable is governed by the same law, such choice of law may also be asserted against the obligor. From a Swiss perspective, any foreign law requirements of the obligor's country or the purchaser's country would be irrelevant.

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, subject to the general principles outlined in the answer to question 2.3. The parties are free to choose any law and given that the receivable is governed by the same law, such choice of law may also be asserted against the obligor.

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, subject to the general principles outlined in the answer to question 2.3. The parties are free to choose any law and given that the receivable is governed by the same law, such choice of law may also be asserted against the obligor.

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)?

Legally yes, subject to the general principles outlined in the answer to question 2.3. However, the choice of law may not be asserted against the obligor, unless the obligor consented to such choice of law. Accordingly, in such cases, it is preferable to choose the law governing the receivable as the governing law of the receivables purchase agreement. Alternatively, the requirements of Swiss law could be complied with or the consent of the obligor could be obtained.

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 seller and purchaser typically enter into a written receivables purchase agreement under which the seller agrees to sell and assign and the purchaser agrees to purchase and assume the assignment of the receivables. The actual "assignment" is performed by the seller assigning the receivables in written form. The assignment declaration can be embedded in an assignment clause in the receivables purchase agreement. Depending on the nature of the receivables, receivables purchase agreements sometimes foresee that separate offer letters are provided, containing the actual assignment clause.

In terms of terminology, the agreement is normally called the "receivables purchase agreement". Contractually, it is a "sale" and "purchase" and the actual transfer of the receivables is called the "assignment".

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

The agreement on the sale and assignment of a receivable must be in writing and must bear the signature of the seller/assignor; however, it is standard practice that the receivables purchase agreement is signed by both parties.

In order for the assignment to be valid, the receivable must be assignable. In case the underlying agreement relating to the receivable is silent on the question of the assignability and does not contain a ban on assignment, the receivable is freely assignable. Even though not required by law, underlying agreements (e.g., in the general terms and conditions) often contain clauses confirming the assignability of the receivables. In case the underlying agreement does contain a ban on assignment, no assignment of the receivables is possible without consent of the underlying obligor. In addition, an assignment can be prohibited by law or the nature of the receivables. However, this is only the case in rather exceptional cases (e.g., claims relating to alimonies, etc.). Also, future receivables can be assigned, provided that the receivables are identifiable when coming into existence (see also question 4.8). Finally, conditional receivables are assignable as well. Generally, a notification of the obligor is not required for purposes of perfecting the assignment, but please refer to question 4.4.

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?

Promissory notes: As for the assignment of any other receivable, a valid assignment in writing is required. Whilst some legal scholars claim that the promissory note (*einfacher Schuldschein*) would have to be physically transferred by the assignor to the assignee, a (what seems to be) majority takes a different approach.

Mortgage loans: The assignment of mortgage loans receivables as such requires an assignment in writing. Essentially, all mortgage loans are secured by mortgage notes (*Schuldbriefe*); whilst the concept of a mortgage (*Grundpfandverschreibung*) still exists, the volume of mortgage loans secured by a mortgage is rather limited. The assignment of the security provided by way of mortgage note requires the physical delivery of the mortgage notes (in case of the registered mortgage notes, duly endorsed to the assignee (or any formal nominee, acting on its behalf)) or, in the case of register mortgage notes, the registration of the assignee (or any formal nominee, acting on its behalf) as creditor in the land register. Whilst challenging, there are structures involving the fiduciary holding of mortgage notes on behalf of the assignee. Such structures will have to be looked at on a case-by-case basis. There are strong arguments to say that in the case of a pledge over the mortgage notes (rather than a transfer for security purposes), the pledge security would be transferred even without physical transfer on the basis of the concept of accessoriness. However, the factual relevance is rather limited, given that essentially all standard terms and conditions of banks provide for a transfer for security purposes over mortgage notes.

Consumer loans: Unless debt securities or promissory notes have been issued with regard to consumer loans, no specific requirements apply to consumer loans (see also questions 4.2 and 4.3 above).

Marketable debt securities: A transfer of the debt securities is required by either physical delivery (in the case of registered debt securities, duly endorsed in blank or to the assignee) and, in the case of intermediated book-entry securities, a proper transfer or instruction to the custodian.

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?

Provided that the underlying agreements between the obligors and the seller allow for the free assignment and transfer of the receivables, the obligors do not need to be informed of the assignment and sale. However, prior to notification, the obligors may validly discharge their obligations by paying to the seller (acting on an undisclosed basis as servicer) and in the event of bankruptcy of the seller, such payments to the seller that are received after opening of bankruptcy are likely to form part of the bankrupt estate of the seller, until the obligors are notified. Also, a valid and unconditional assignment and transfer to the purchaser requires that the purchaser is given the right to notify the obligors at any point in time, even when it is the general understanding of the parties that obligors shall only be notified upon the occurrence of a specific notification event. Whilst not a strict legal requirement, the purchaser is factually only in a position to notify the obligors in case the purchaser is provided with names and addresses of obligors by the seller.

In case the underlying agreement does contain a ban on assignment, obligors' consent must be obtained.

A notification of an obligor is required to cut off obligors' set-off rights and defences. The obligor may also raise any defence it has against the seller against the purchaser, in case such defence was available already upon the obligor being notified of the assignment. A similar analysis applies to set-off (see also question 4.13).

Whilst it is beneficial to notify obligors as early as possible, we note that under transactions involving the securitisation of a granular portfolio with a larger number of obligors, obligors are normally not notified prior to a predefined trigger event.

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?

No specific requirements as to form apply to notices to the obligors. However, for evidence purposes, it is highly recommended to send out notices by registered mail or courier; ideally, the purchaser is provided with an acknowledgment of receipt. Notices may be sent out at any point in time.

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)?

Yes, the assignment of receivables stemming from any receivables contract containing such type of restrictions is not possible without the obligor's consent. Depending on the specific transaction structure, a deemed consent concept might also work. Indeed, it could be argued that a restriction to "transfer an agreement" was not meant to restrict the "assignment of a receivable". The interpretation must be done on a case-by-case basis and is also quite factual. However, such analysis would be rather vague and hardly acceptable to investors or rating agencies.

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?

Yes, such restrictions are valid and enforceable in Switzerland. It should be noted that a ban on assignment contained in the underlying agreement results in the assignment simply not being effective. Only when the purchaser has been provided with a written acknowledgment of debt by the obligor, not containing a reference to any ban on assignment, may the purchaser rely on the free assignability of the receivable. The seller might, subject to other requirements, become subject to contractual liability or liable on the basis of tort.

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?

For an assignment to be valid under Swiss law, it is not required that the sale document specifically identifies each single receivable, but the description of the current and future receivables must be drafted such that each relevant receivable is identifiable (in the case of future receivables only upon it coming into existence). Whether or not the description is sufficient for the receivables to be identifiable must be determined on a case-by-case basis. Excluding specific obligors is unlikely to cut across the analysis as to whether or not a receivable is identifiable. However, generally speaking, a receivable is considered to be identifiable in case the obligor, the underlying legal basis and the amount of the receivable can be determined. Consequently, it is a prudent approach to request receivables lists (containing

the relevant information) prior to a sale of the receivables or to request periodic delivery of receivables lists.

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?

There are no statutory or case law-based tests as to when a securitisation transaction qualifies as an effective sale or as a secured loan. The sole designation of a transaction as a true sale does not help, as courts would always analyse the actual mutual intent of the parties.

Whilst no statutory or case law exists, the following elements should be considered, even though each of these elements itself is unlikely to be a decisive element:

- courts are likely to look at the at arm's-length analysis of each sale of a receivable;
- the credit risk as such should be transferred to the purchaser;
- the control of collections by the seller does not cut across the true-sale analysis, provided the purchaser has notification rights and redirection rights;
- a right of the seller to repurchase certain receivables does not cut across the true-sale analysis; however, any obligation to repurchase receivables (to the extent it would go beyond a standard repurchase obligation of ineligible receivables) would have to be analysed on a case-by-case basis; and
- the retention of the right to the residual profit does not cut across the true-sale analysis.

It should be noted that a standard has been established in Swiss transactions in the last couple of years that was never subject to challenges. Also, true sale legal opinions have been issued in a form that is satisfactory to investors and rating agencies.

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, under Swiss law, a seller can agree in an enforceable manner to continuous sales of receivables. In fact, given that essentially all Swiss ABS transactions are revolving transactions, this technique is often used. Whilst such an agreement would generally survive the seller's insolvency, it is fair to assume that receivables coming into existence following the opening of bankruptcy over the seller would no longer be assigned to the purchaser (see also question 4.11).

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

Yes, a seller may commit in an enforceable manner to sell and assign future receivables to the purchaser. Provided the receivables are identifiable (see question 4.8), the assignment is valid and enforceable. However, there is risk that future claims, which have been assigned but have come into existence only after the opening of bankruptcy proceedings or a moratorium against the seller, would not fall into the seller's bankrupt estate and would not pass over to the purchaser.

Accordingly, the key question is whether or not a receivable qualifies as a future receivable. Receivables for repayment of principal loan amounts are not considered to be future receivables, but rather existing receivables becoming due in the future. Whilst the analysis around interest is less clear, there are still very strong arguments to say that interest receivables can be assigned in a bankruptcy-remote way and legal opinions provided have been acceptable to investors and rating agencies. Given the uncertainty around the analysis of leasing instalments, securitisation transactions involving the securitisations of lease assets normally feature the transfer of the entire lease agreement so that any lease instalment would directly arise with the purchaser.

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?

This depends on the relevant secured asset and the basis under which security has been created over such asset. To the extent security rights qualify as accessory ancillary rights, such rights are assigned together with the receivable. Other security rights require an explicit transfer clause. To the extent a secured asset is evidenced by a securities instrument, such instrument will have to be transferred as well. For mortgage loans, please refer to question 4.3.

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?

Under Swiss substantive law, the purchaser as assignee only acquires such rights as the seller as assignor possesses; in particular, all defences to the receivables available to an obligor may also be used by that obligor against the purchaser if they were already in existence at the time when the obligor obtained knowledge of the assignment, and if a counterclaim of the obligor was not yet due at this time, the obligor may still set off the counterclaim if it does not become due later than the receivable. Consequently, such set-off rights indeed terminate upon the obligor being notified, but only in relation to counterclaims and defences arising after the notification.

In case the obligor is able to set off its claim against the seller with the receivable held by the purchaser on the basis of the

mechanics described above, the seller would normally be liable towards the purchaser under the receivables purchase agreement and have to pay the corresponding amount either as a deemed collection or as a damage. In case the obligor would be precluded from setting off its claim against the receivable, neither the seller nor the purchaser would be liable towards the obligor, but the obligor may still collect and enforce the claim it holds against the seller.

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

In addition to fees that might be payable to the seller (such as servicing fees, administration fees, etc.), residual profit extractions can be structured as a payment of (i) deferred purchase price, (ii) disbursement on any subordinated loan or other instrument held by the seller, (iii) any other form of fee against providing credit enhancement by the seller, and (iv) payment of profit on the equity held by the seller. The key point is to structure such profit extraction in a tax-neutral manner. Hence, the amount of profit extracted as a return on equity should normally be as low as possible.

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)?

In Swiss securitisation transactions, it is not customary to take a back-up security interest. In the unlikely event of a recharacterisation, the sale of the receivables is very likely to be requalified as a security interest.

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?

Security granted by the purchaser over the receivables held by it is normally provided by way of assignment for security purposes (*Sicherungszession*). Whilst the right of the providers of funding to exercise rights under the receivables so assigned is contractually limited, such assignment still qualifies as a full-title assignment and accordingly, the analysis around the assignment of the receivable from the seller to the purchaser applies equally to the assignment for security purposes. The same holds true for the assignment of any security rights or other ancillary rights. In addition, to the extent that security securing receivables has been transferred and assigned to the purchaser, the granting of security over such security interest by the purchaser must be carefully structured and analysed on a case-by-case basis.

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?

Please refer to the answers to the questions raised under section 3. On that basis, it is standard practice that the law governing the security agreement follows the governing law of the receivables.

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?

Please refer to our answer to question 4.3.

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?

Swiss law does not provide for the concept of trusts. However, given that the Hague Trust Convention has been recognised by Switzerland, foreign trusts are, subject to certain limitations, enforceable in Switzerland.

However, we would note that it is not standard in Swiss transactions that a trust is declared over collections held by the seller. Rather, the commingling risk is addressed by:

- directing obligors to pay directly into an account of the purchaser;
- introducing short intervals for sweeping collections to the purchaser (ideally daily);
- introducing rating triggers or other notification triggers; if triggered, obligors would be instructed to pay directly into an account of the purchaser; and
- limiting the redirection period by instructing a third-party service provider to send out notices to obligors upon the occurrence of a certain trigger event; for purposes of limiting the period for sending out notices, the seller would have to send updated lists of receivables to the third-party service provider, preferably through an automated interface.

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?

Escrow accounts are recognised in Switzerland. Also, security can be taken over Swiss bank accounts either by way of security assignment or by way of pledge. Legally speaking, security is taken over the claim the account holder holds against the account bank. Again, parties are free to choose the governing

law of such security agreement, but the choice of law may not be asserted against the account bank. Hence, it is standard that security agreements relating to Swiss bank accounts are governed by Swiss law. Even though not a perfection requirement, it is standard to request a control agreement with the account bank in securitisation transactions to agree on blocking mechanics and other relevant matters.

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

The security is validly created over cash standing to the credit of the bank account or is transferred to the bank account prior to the opening of bankruptcy. However, whilst there are arguments to say that cash also flowing to the bank account after the opening of bankruptcy over the security provider would be captured under the security interest, it is prudent to assume that such cash would form part of the bankrupt estate of the security provider.

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, this is possible and standard. This requires authority to be granted by the secured party to the holder of the bank account. Such authority is subject to revocation by the secured party.

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, subject to clawbacks (see question 6.3) or other challenges, the perfected assignment of existing receivables is valid and binding and receivables already assigned would not form part of the bankrupt estate of the seller. Accordingly, there is neither an automatic prohibition of collecting, transferring or otherwise exercising ownership rights over the purchased receivables, nor would the seller's insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected. However, the seller's insolvency official may try to obtain an injunctive relief prohibiting the purchaser to dispose of the receivables, but this would require a valid plausibility check with regard to the merits of the case.

The situation is different for future receivables, and on the basis of the analysis made under questions 4.8 and 4.11, it can be expected that the insolvency official will ensure that all such receivables will be registered in the inventory as assets belonging to the bankrupt estate.

The answer would be the same in case of a recharacterisation of the transaction as a secured financing.

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)?

Upon the opening of bankruptcy over the seller, the insolvency official will identify all of the seller's assets as such assets form part of the bankrupt estate. This includes any receivables not properly sold and assigned to the purchaser upon the opening of bankruptcy. Thus, there is a risk that any receivable arising after the opening of bankruptcy will no longer be assigned to the purchaser (see question 4.11) and the insolvency official may dispose of such receivables.

However, an insolvency official does not have the power to prohibit the purchaser's exercise of its ownership rights over the receivables as such, but an insolvency official might try to argue that a receivable has not been validly assigned to the purchaser on the basis of defect in the underlying agreement, clawback or similar mechanics.

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?

In case of the seller and/or the purchaser being adjudicated bankrupt, the insolvency official or, under certain conditions, creditors of the seller and/or the purchaser, may challenge the sale and assignment of receivables to the purchaser and/or the subsequent creation of any security interest by the purchaser, subject to the conditions of articles 285 *et seq.* Swiss Debt Enforcement and Bankruptcy Act (DEBA) being satisfied. Articles 285 *et seq.* DEBA provide that a transaction may be subject to challenge if no, or no equivalent, consideration is given ("transaction at an undervalue" as described in article 286 DEBA), if the party granting security or discharging a debt was over-indebted ("voidability for over-indebtedness" as described in article 287 DEBA), or if the seller and/or the purchaser (as applicable) had the intention to disfavour or favour certain of its creditors or should reasonably have foreseen such result and this intention was or must have been known to the purchaser ("preference" as described in article 288 DEBA).

Every transaction at an undervalue may be challenged if it has been consummated during a suspect period of one year before the adjudication of bankruptcy. The same one-year suspect period is applicable to an avoidance action for over-indebtedness. For a preference, the suspect period is five years prior to the adjudication of bankruptcy. In cases where there has been a prior

restructuring proceeding or a decree of protective measures, the duration of the previous restructuring proceeding or the period since the decree of protective measures does not count towards the calculation of the respective suspect period. For the suspect period, it is irrelevant whether the transaction is among affiliates or between independent third parties.

In connection with a challenge under article 286 DEBA ("transaction at an undervalue") that aims to challenge a transaction among affiliates, the burden of proof to show that there was no undervalue is with the affiliated counterparty to the insolvent company.

In connection with a challenge under article 288 DEBA ("preference") that aims to challenge a transaction among affiliates, the burden of proof, to show that the intention to disfavour or favour certain creditors was not or should not have been known to the counterparty to the insolvent party, will be on said counterparty.

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?

A consolidation of the assets and liabilities with the seller would only be possible in extraordinary circumstances involving the challenge of the true sale or fraudulent behaviour of the parties involved. There is no concept of substantive consolidation under Swiss law even in cases where the purchaser is wholly owned by the seller (subject to extraordinary cases, such as fraud and abuse of rights) and a bankruptcy of the seller as the sole shareholder of the purchaser would, as a matter of Swiss law, not result in a consolidation of its assets and/or liabilities with those of the purchaser.

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?

Following the opening of bankruptcy over the seller, the seller may no longer dispose of its assets, and any sale and assignment that would otherwise occur after such opening would no longer be consummated. Also, future receivables sold and assigned prior to the opening of bankruptcy that come into existence only after the opening of bankruptcy would possibly not be validly assigned to the purchaser, and there is a risk that such receivables would become part of the seller's bankrupt estate.

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?

Limited recourse provisions are generally enforceable under Swiss law, subject to the standard limitations applying to enforceability more generally, even though we note that we are not aware of any relevant judicial precedent dealing with limited recourse provisions. In any event, the debtor will, in case of relevant steps initiated by a person in violation of the limited recourse undertaking entered into by it, have to take appropriate legal steps (such as obtaining an injunctive relief) to enforce the undertaking.

In addition, it should be noted that there might be creditors of the debtor that are not a party to an agreement and that have not agreed to limited recourse, such as tax authorities, the statutory auditors, and non-contractual creditors of the debtor, who are not subject to limited recourse. With regard to the relevant Swiss tax administration, it must be noted that tax rulings are normally issued confirming the tax treatment of a transaction and will prevent them from making any claim outside the tax rulings.

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?

Securitisation has developed in Switzerland without specific supporting legislation, and there is no regulatory authority for securitisation transactions. Accordingly, the general legal framework is relevant as for any other financing transaction, such as the Swiss Code of Obligations, in particular in relation to matters relating to the formation of the special purpose entity and the transfer of the receivables and the asset as such, as well as general capital markets regulations and regulatory regulations.

Also, the major Swiss stock exchange (SIX Swiss Exchange) generally applies the same listing rules to securitisation transactions as for bond transaction. There are only limited securitisation-related rules issued by the SIX Swiss Exchange that relate to securitisation transactions. These rules aim at addressing the particularities of issuing purchasers. In addition, the prospectus regime of the Swiss Financial Services Act (FINSA) and the related Swiss Financial Services Ordinance list a number of special disclosure requirements that relate to securitisation transactions.

Whilst there is no specific regulatory authority for securitisation transactions, various regulatory authorities are relevant in the context of Swiss securitisation transactions, such as the SIX Exchange Regulation of the SIX Swiss Exchange for listing-related matters, the prospectus review body as contemplated by the FINSA to approve the prospectus, the Swiss Financial Market Supervisory Authority (FINMA) for certain regulatory matters (i.e., confirmation of non-licensing requirements, non-consolidation in bankruptcy, non-application of anti-money laundering considerations (depending on the structure of the transaction and the underlying asset category), in each case as relevant), and cantonal regulators for consumer credit licensing, if relevant. In addition, transactions are typically presented and signed off by relevant tax authorities by way of tax ruling.

Finally, the jurisdictional scope of the EU Securitisation Regulation 2017/2402, which became applicable in January 2019, is not entirely clear. It is the general view that transactions involving Swiss sellers, Swiss purchasers and Swiss investors are out of scope of the EU Securitisation Regulation, but there is still some uncertainty if (and if so, to what extent) an EU investor base would get a Swiss securitisation transaction in scope.

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?

No, there are no such specific laws in Switzerland and special purposes entities are generally established within the general Swiss corporate legal framework (see questions 7.1 and 7.3).

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?

In Swiss securitisation transactions, we see both special purpose entities formed in Switzerland and abroad. Various considerations should be made, depending on the underlying asset.

Generally, it will be very difficult to use non-Swiss special purpose entities where the underlying asset relates to real estate located in Switzerland, given that cantonal withholding taxes may be incurred on any interest payment secured by Swiss real estate.

Also, it might be the case that the transfer of a receivable abroad is not desirable for other reasons, such as data protection considerations, in particular where the underlying documentation does not provide for a proper waiver of data protection.

On the other hand, it should be noted that interest payments on debt instruments issued by a Swiss special purpose entity to multiple investors attract Swiss withholding tax at a rate of 35%. While Swiss withholding tax is generally recoverable, the process for doing so might be burdensome for non-Swiss investors, and even a Swiss investor would suffer a delay in recovering the withholding tax. In case an investor is located in a jurisdiction that does not benefit from favourable double tax treaties or does not otherwise benefit from treaty protection (typically such as tax-transparent funds), Swiss withholding tax might not be fully recoverable or recoverable at all. Swiss withholding tax can be structured away if a non-Swiss vehicle is used. However, this adds a lot of complexity to the structuring process given that there will also be a strong focus on the true-sale analysis from a tax perspective. Also, Swiss originators that do not form a presence abroad normally have the inclination to go with a Swiss special purpose entity for cost-efficiency and organisational purposes.

On 11 September 2020, the Swiss Federal Council requested that Parliament abolish withholding tax on interest in its entirety on bonds. The Federal Council is expected to present its dispatch to Parliament in the second quarter of 2021. This fundamental change of the Swiss withholding tax regime is expected to come into force on 1 January 2022 and will facilitate the use of Swiss securitisation entities.

Finally, whilst a pure Swiss securitisation transaction should be out of scope of the EU Securitisation Regulation, using a special purpose entity in the EU would bring the transaction definitively in scope. Therefore, to the extent that this is a realistic option, using a Swiss special purpose entity and keeping the investor base in Switzerland is currently considered an efficient alternative.

In Switzerland, a special purpose entity may take the form of a limited liability stock corporation AG or a limited liability company GmbH.

In some transactions, special purpose entities held by independent shareholders have been used. However, wholly owned subsidiary structures under Swiss law have also been acceptable to rating agencies in the past, but it is always a requirement that there is an independent board member with certain veto rights in relation to certain reserved matters. Some transactions feature for golden shareholder structures.

Whilst acceptable to rating agencies in light of the bankruptcy remoteness analysis, wholly owned subsidiary structures should also be careful in relation to assets from accounting and regulatory capital relief perspectives (where relevant).

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, limited recourse provisions are generally enforceable under Swiss law, subject to the standard limitations applying to enforceability more generally, even though we would note that we are not aware of any relevant judicial precedent dealing with limited recourse provisions. In any event, the debtor will, in case of relevant steps initiated by a person in violation of the limited recourse undertaking entered into by it, have to take appropriate legal steps (such as obtaining an injunctive relief) to enforce the undertaking.

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, non-petition provisions are generally enforceable under Swiss law, subject to the standard limitations applying to enforceability more generally, even though we would note that we are not aware of any relevant judicial precedent dealing with non-petition provisions as typically set out in securitisation transactions. In any event, the debtor will, in case of relevant steps initiated by a person in violation of the non-petition undertaking entered into by it, have to take appropriate legal steps (such as obtaining an injunctive relief) to enforce the undertaking.

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?

Yes, priority-of-payments provisions are generally enforceable under Swiss law, subject to the standard limitations applying to enforceability more generally. However, to the extent unsecured claims exist, we note that pursuant to article 219 DEBA, all non-secured creditors of a Swiss entity would be part of the same (third) class of creditors in an insolvency. While we are not aware of any relevant judicial precedents, agreements governing the relevant priority of payments among creditors belonging to the same (third) class of creditors are binding on an insolvency official of an estate. Should, however, a Swiss entity become insolvent, it cannot be excluded that the insolvency official

would treat all non-secured creditors indiscriminately as third-class creditors and consider the priority of payments as a mere arrangement among creditors of the estate in relation to their respective claims *vis-à-vis* the estate and pay them out on a *pro rata* and *pari passu* basis, in which case the parties to the relevant agreements may have to rely on the redistribution by the creditors among each of them.

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?

Subject to general qualifications on enforceability, such provisions would be valid and enforceable in Switzerland. However, to the extent such provisions are only reflected in an agreement (rather than the organisational corporate documents), taking a specified action without the affirmative vote of the independent director would still be valid from a corporate law perspective, even though this would be in breach of such contractual agreement. Accordingly, a relevant counterparty would have to take appropriate legal steps (such as obtaining an injunctive relief) to enforce the undertaking. To the extent such provisions are reflected in the corporate documents of a Swiss entity, taking a specified action without the affirmative vote of the independent director would result in such action not being covered by the appropriate corporate authorisation, and any director (other than the independent director) would be in breach of its duties, which could ultimately result in director liability.

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?

Please refer to question 7.3.

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?

Generally, the mere purchase, ownership and collection and enforcement of receivables by a Swiss purchaser will not result in any licensing requirement or it being subject to regulations as a financial institution. However, given the level of uncertainty around those questions, it is standard for some transaction structures to seek negative confirmations from relevant authorities, such as FINMA (e.g., (i) confirmation of non-licensing requirements as a bank, collective investment scheme or otherwise, (ii) non-consolidation in bankruptcy, and (iii) non-application of anti-money laundering considerations) or the cantonal regulators for consumer credit licensing questions, where relevant.

Doing business with more than one seller would not change the analysis, provided the structure as such remains unchanged (in particular with regard to the fact that the purchaser does not have the ability to make an active investment decision in relation to receivables to be purchased).

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?

Generally, the mere servicing of a receivable will not result in any licensing requirements or it being subject to regulations as a financial institution. The same holds true for any third-party successor servicer.

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?

Third-party obligors' rights are protected under the Swiss Federal Data Protection Act and other secrecy rights (such as under the Swiss Federal Banking Act, if relevant). Whilst the Swiss legal framework is less restrictive than in other jurisdictions, it is generally considered to be a requirement that data protection and other secrecy rights are addressed by obtaining relevant waivers in the underlying agreements or otherwise. While it is important to address such third-party obligors' rights, a breach of these rights in itself would not jeopardise a valid assignment of the relevant receivable, although it would create other issues. In addition, it should be noted that an amendment of the Swiss Federal Data Protection Act is currently ongoing and is expected to enter into force in 2021, even though that timing is not confirmed. There is a general attempt to align the Swiss Federal Data Protection Act with European standards. Sellers and purchasers should carefully monitor the legislative process.

Whilst rights of any party are protected in the Swiss legal framework, the standard is more relaxed in case no personal data are involved.

Also, sellers and purchasers should carefully assess whether they are subject to the EU General Data Protection Regulation (GDPR) or not. Whilst GDPR as such is not applicable in Switzerland, parties located in Switzerland should still consider whether the collection of data, the processing of data or any other data-related aspects might change the analysis.

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?

The CCA imposes a highly regulated framework with regard to consumer lending. Regulations include rules on credit check, form requirements on the underlying documentation, withdrawal rights of the borrower, maximum interest, a ban on aggressive advertisement, etc. However, on the basis that the obligations of the seller as lender have been fully performed (which is a reasonable assumption), the purchaser as lender, whilst still being subject to the legal framework of the CCA, would factually have hardly any further obligation to be complied with. Of course, the obligors would still have the benefit of their rights

under the CCA. However, these have always been properly addressed by structuring the transactions accordingly.

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?

There are no currency exchange restrictions in Switzerland, except that a hard cash transfer of sums in excess of CHF 10,000 will have to be declared and will be registered.

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?

There are no risk retention rules in Switzerland. However, in the past, European risk retention rules have normally been complied with.

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?

There are no reforms pending in Switzerland that would be specifically addressed to securitisation transactions in Switzerland. However, a significant development in the Swiss financial industry in general, and the Swiss debt capital market in particular, is the contemplated overhaul of the Swiss financial markets regulatory framework. The Financial Market Infrastructure Act (FinMIA) entered into force on 1 January 2016 in a general attempt to bring the Swiss regulatory framework in line with international regulations such as:

- Directive 2014/65/EU on markets in financial instruments (MiFID II).
- Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive).

On 1 January 2020, the Federal Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) entered into force and replaced major portions of the Swiss financial market regulatory framework, with the aim to:

- Strengthen client protection.
- Promote the competitiveness of the Swiss financial centre.
- Minimise competitive distortions between providers by creating a level playing field.

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?

As a general rule, arm's-length payments on receivables, including payment of interest and late interest, are not subject to withholding taxes in Switzerland. As an exception, the following interest payments might be subject to Swiss withholding tax:

- interest on Swiss "bank deposits";
- interest on Swiss "bonds" (defined as a fixed term instrument if it cannot be ruled out that it is held at any time by more than 10 creditors that are not banks);
- interest on any funds raised by a Swiss borrower with more than 20 non-banks; and
- interest paid to non-Swiss lenders on any debt secured by mortgages in Swiss real estate.

Securitisation transactions (with a special purposes securitisation entity) in Switzerland will regularly be seen, from a Swiss tax perspective, as an issuance of bonds and will thus trigger Swiss withholding tax (of currently 35%) on any interest payments to the investors (irrespective of the underlying receivables). While Swiss withholding tax is generally recoverable, the process of doing so can be burdensome for non-Swiss investors and even Swiss investors suffer a delay in recovering these amounts. For investors located in a jurisdiction that does not benefit from favourable double tax treaties, or that do not otherwise benefit from treaty protection, even in case a favourable double tax treaty was in place (such as tax-transparent funds), Swiss withholding tax might not be fully recoverable or not recoverable at all. Swiss withholding tax can be avoided (on the level of the securitisation vehicle) by careful structuring if a non-Swiss securitisation vehicle is used, but this adds a lot of complexity to the structuring process given that there will be, among other things, a strong focus on the true-sale analysis from a tax perspective.

As discussed in the answer to question 7.3, on 11 September 2020, the Swiss Federal Council requested that Parliament abolish withholding tax on interest in its entirety on bonds. The Federal Council is expected to present its dispatch to Parliament in the second quarter of 2021. This fundamental change of the Swiss withholding tax regime is expected to come into force on 1 January 2022 and will facilitate the use of Swiss securitisation entities.

As mentioned, interest payments made to non-Swiss lenders are subject to Swiss withholding tax if the debt is secured by mortgages in Swiss real estate. This causes serious concerns in light of CMBS/RMBS transactions where the instruments are traded. In practice, this concern has been addressed by setting up structures that are unsecured (i.e., the transaction would fully rely on the bankruptcy remoteness of the Swiss special purpose entity, which has been acceptable to investors and rating agencies in the past).

Last but not least, a deferred purchase price or any other kind of premium might indeed be recharacterised as an interest component. To avoid the risk of a recharacterisation, it is standard practice to approach the tax authorities and seek a tax ruling confirmation ahead of the closing of the transaction.

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

A Swiss company is, by law, obliged to use its statutory accounts issued pursuant to the Swiss Code of Obligations for Swiss tax purposes. The Swiss Code of Obligations does, however, not provide for any specific accounting rules in the context of a securitisation.

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

No stamp duty is payable on sales of receivables unless such receivables are regarded as bonds, debentures or money market papers and are transferred by, or via, a "securities dealer" (as defined for tax purposes in Swiss stamp tax law).

More generally, from a seller's overall corporate income tax perspective, it is, among other things, absolutely imperative that both:

- the relevant receivables can be transferred to the purchaser without accelerating or triggering any corporate income taxes; and
- the profit and loss potential associated with the underlying business remains with the seller.

If the transaction involves a Swiss purchaser, the additional (purchaser) entity level corporate income and net equity taxes are typically kept at a (negligible) minimum (of a few thousand CHF *p.a.*). Although there are no specific tax legislation and/or tax guidelines, securitisation transactions must be presented and signed off by the relevant tax authorities by way of advance tax rulings.

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?

The supply of goods and services for consideration within the Swiss territory, for VAT purposes, is subject to VAT. The sale and purchase of receivables is regarded as a VAT-exempt financial service without credit for input tax. The services of collection agents, if deemed to take place within the Swiss territory according to the applicable VAT place of supply rules, attract VAT at the standard current rate of 7.7%.

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?

As a general rule, the taxing authority will not be able to make such claims. Under certain conditions, however, the taxing authority has a secondary liability claim against the purchaser with regard to the VAT included in receivables sold/assigned and remaining unpaid in the insolvency of the seller. Yet, given that amounts at stake are limited and the likelihood of such a scenario materialising is low, such risk has been considered immaterial in most transactions.

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

The mere act of the purchaser's purchase of the receivables, the appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, does not give rise to a Swiss income tax nexus for the purchaser (assuming that it is not already resident for tax purposes in Switzerland or conducting business here via a Swiss permanent establishment).

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

If structured correctly from a legal perspective and reflected accordingly in the statutory accounts of the respective entity, a debt relief (or similar arrangement) as the result of a limited recourse clause will not trigger any income tax in Switzerland.

Lukas Wyss is a partner in Walder Wyss' Banking & Finance Team. He advises banks, insurers and other companies in connection with finance transactions, capital market transactions and more generally in regulatory and securities law matters. In finance, he focuses on structured finance and securitisation (including ABS, RMBS, CMBS, CDO, CLOs and covered bonds). In past years, he has been involved in essentially all Swiss auto lease ABS transactions and Swiss credit card ABS transactions.
Born in 1975, Lukas Wyss was educated at the University of Zurich and the University of Lausanne (*lic. iur.* 2000) and Columbia University, New York, USA (LL.M. 2006, James Kent Scholar). He was admitted to the Zurich Bar in 2002. He gained work experience as a District Court law clerk (Meilen, ZH) and as an attorney at major law firms in Zurich and New York. Lukas Wyss is a member of the board of the Zurich Bar Association.

Walder Wyss Ltd.
Seefeldstrasse 123
8034 Zurich
Switzerland

Tel: +41 58 658 56 01
Email: lukas.wyss@walderwyss.com
URL: www.walderwyss.com

Maurus Winzap is a partner and heads the Tax Team. Maurus Winzap's practice covers all areas of domestic and international corporate taxation. He acts for a broad range of corporate and financial clients, and has developed significant expertise in planning and advising on M&A and private equity transactions, structured financings, securitisations (including ABS, RMBS, CMBS, CDO, CLOs and covered bonds), corporate restructurings, relocations, capital market transactions, collective investment schemes and management incentive programmes. Maurus Winzap is a member of the Executive Committee of the International Fiscal Association (IFA) and a member of the Executive Board of the Swiss Tax Law Association (Swiss branch of IFA). He regularly lectures and publishes in his areas of practice.
Born in 1972, Maurus Winzap received his degree in law from the University of Zurich in 1997 and his Master of Laws from the University of Virginia in 2002. He was admitted to the Zurich Bar in 1999 and became a Swiss Certified Tax Expert in 2004.

Walder Wyss Ltd.
Seefeldstrasse 123
8034 Zurich
Switzerland

Tel: +41 58 658 56 05
Email: maurus.winzap@walderwyss.com
URL: www.walderwyss.com

Walder Wyss is one of Switzerland's foremost law firms. We have established a leading position in specific sectors and product areas, including, among others, financial services, healthcare & life sciences, energy & infrastructure, industry & commerce, information technology & telecommunications, media & communications and real estate.
Walder Wyss is fortunate to have six fully integrated offices located in all three language regions of Switzerland. Our partner structure is young and diverse, and our dynamic nature attracts new talent. With almost 240 fee earners, we are one of the largest law firms in Switzerland.
Walder Wyss advises in all areas of Banking & Finance and Capital Markets and areas of expertise include finance, funds, regulatory, investigation and M&A in the financial industry.
Walder Wyss is the frontrunner for Swiss structured finance transactions and is involved in essentially all public and private ABS transactions, synthetic transactions, covered bond transactions and other securitisations. In particular, in auto lease ABS (and consumer lending more generally) and mortgage loan transactions, Walder Wyss has extensive industry expertise. Walder Wyss advised Lloyds Bank on the first ever Swiss (private) auto lease ABS transaction and UBS in the establishment of its CHF 15bn covered bond programme. In addition, Walder Wyss advised Valiant Bank on the first ever Swiss domestic covered bond transaction. Further clients include Swisscard, Cembra Money Bank, AMAG Leasing, Multilease and others.

www.walderwyss.com

walderwyss

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

@ICLG_GLG

The International Comparative Legal Guides are published by: global legal group