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The International Comparative Legal Guide to:

Securitisation 2012

A practical cross-border insight into securitisation work

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1 Receivables Contracts

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

Under German law, it is not necessary for the creation of an enforceable debt obligation of the obligor that a sale of goods or the provision of services be evidenced by a formal receivables contract. It is sufficient if the parties agree orally on the sale of goods or the provision of services, or if the respective agreement is deemed to exist due to the facts and circumstances, including as a result of the behaviour of the parties. Of course, in such cases it may, as a practical matter, be difficult to prove the scope of the sale or the services concerned, as well as the consideration payable therefor. An invoice alone, if not backed by a formal or informal receivables contract, would not be sufficient to create an enforceable debt obligation.

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

There are no German laws that would specifically regulate permissible rates of interest on consumer credit, loans or other kinds of receivables. Under a general provision in the German Civil Code, however, a receivables contract that provides for a usurious rate of interest can be void. According to German case law, as a rule of thumb, the applicable limit in this regard is twice the market rate or, in periods of particularly high market rates, around 12% *p.a.* above the market rate. The application of the referenced code provision will, however, always be driven by the facts and circumstances.

If the obligor is in arrears (*Verzug*) in discharging the receivable of the seller, German statutory law provides that the receivable bears interest at the base interest rate (*Basiszinssatz*) published by Deutsche Bundesbank plus 5% *p.a.* or, if the obligor is not a consumer, 8% *p.a.* An obligor would generally be in arrears if it does not make payment when due and: (i) the payment was due on a specified date; (ii) the obligor has, after the payment became due, received a payment reminder (*Mahnung*); or (iii) the obligor has received an invoice and does not make payment within thirty days of the due date and the receipt of such invoice.

For loans to consumers (and transactions, such as hire-purchase transactions, that are closely linked to consumer loans), German law provides for special rules that are designed to protect borrower consumers. In order to be enforceable in accordance with their terms, any such loan agreements have to contain certain information on the loan (which should help the consumer to assess his or her future payment obligations) and need to be in writing. In addition, the lender is obligated to explain the features of the loan. In the case of real estate loans, the lender also has to inform the consumer borrower of any possibility to assign the loan without the borrower's consent. The borrower is entitled to rescind the loan agreement within two weeks from its execution. Furthermore, the lender is required to notify the borrower in advance of an interest reset and approaching maturity.

Borrowers may terminate loans as of the end of the period for which a fixed rate of interest was agreed if such period expires prior to the maturity of the loan and no new rate of interest is agreed. In any case, borrowers may terminate loans with six months' prior notice as of the end of the tenth year following the disbursement of the loan. Loans with a floating rate of interest may be terminated with three months' prior notice.

Other consumer protection laws become relevant in respect of contracts entered into at the place of abode of the obligor and contracts comprising standard business terms.

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?

Where the government or its agencies enter into receivables contracts for general commercial purposes, no special rules apply to the sale, assignment or collection of such receivables, except that any such assignment is valid, generally, even where there is a contractual prohibition on assignments (see question 4.4 below). Special assignment restrictions and notice requirements apply to tax reimbursement and similar claims. Tax authorities can enforce assessed taxes without the help of the courts. In securitisation transactions, due to enforceability concerns, public law receivables against government agencies are frequently considered ineligible.

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 Germany that will determine the governing law of the contract?

In principle, under Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) (the "Regulation"), in the absence of any (explicit or implicit) choice of law by the parties to the receivables contract, the laws of the country to which such receivables contract has the closest link govern the receivables contract. In this context, however, the Regulation contains several presumptions which help identify what country that is. If the specific presumptions do not apply, the laws of the country apply where the contractual party that has to perform the characteristic obligations under the contract is located. The presumptions and this general rule do not apply if a contract is manifestly more closely connected with another country, in which case such country's laws apply. Special rules apply to particular categories of contracts, namely consumer contracts, shipping contracts, insurance contracts and employment contracts.

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

No. A German court would give effect to the parties' choice of law.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Germany but the obligor is not, or if the obligor is resident in Germany 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 Germany 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 that between the seller and the obligor under the receivables contract?

As a general rule, the Regulation permits the parties to a receivables contract to choose the law governing that contract. Such a choice of law can be express or implied. A choice of law provision can also be added or modified after the original contract was entered into. However, where a receivables contract is exclusively connected with one or more EU Member States and the parties have chosen the law of a non-EU Member State, German courts would apply such provisions of EU law (as implemented in Germany) which cannot be derogated from by agreement, irrespective of the choice of law. In addition, German courts may give effect to overriding mandatory provisions of the law of the country where the obligations out of the contract have to be performed. Finally, any contractual choice of law is subject to the German *ordre public*.

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in Germany?

Yes, the CISG has been ratified and has been in effect in Germany since 1 January 1991.

3 Choice of Law - Receivables Purchase Agreement

3.1 Base Case. Does Germany'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., Germany's laws or foreign laws)?

As regards the relationship between the seller and the purchaser, German law (i.e., the Regulation) does not require the sale of receivables to be governed by the law governing the receivables. Accordingly, the seller and the purchaser may choose which law to apply to the sale, subject to the rules described in question 2.3 above. However, as regards (i) the receivables' assignability, (ii) the relationship between the purchaser and the obligor, and (iii) the question whether the assignment can be invoked against the obligor, the law governing the receivables applies. Furthermore, the Regulation is silent, and there is no other express rule in German law, as to what law applies to the enforceability of the sale *vis-à-vis* third parties. While we would expect German courts in light of past practice to apply the law governing the receivables in this respect, some commentators have taken the view that the laws of the seller's jurisdiction should govern the question whether a sale of receivables is effective *vis-à-vis* third parties.

3.2 Example 1: If (a) the seller and the obligor are located in Germany, (b) the receivable is governed by the law of Germany, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Germany to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Germany, will a court in Germany 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, because, under the rules described in question 3.1 above, German law would apply to the question of whether the sale is effective against the seller, the obligor and other third parties.

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 Germany, will a court in Germany 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 requirements of the obligor's country or the purchaser's country (or both) be taken into account?

As described in question 3.1 above, neither the obligor's, nor the purchaser's location, is relevant for the question what law applies to the effectiveness of sales of receivables. Accordingly, a German court would recognise the sale as being effective without regard to any requirements of the obligor's country or the purchaser's country (or both).

3.4 Example 3: If (a) the seller is located in Germany 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 Germany 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 Germany's own sale requirements?

As described in question 3.1 above, a German court would generally apply the law selected by the parties as regards the relationship between the seller and the purchaser (subject to the rules described in question 2.3 above). Accordingly, a German court would recognise the sale as being effective as regards the relationship between the purchaser and the seller because the sale complies with the requirements of the law chosen by the parties to govern the receivables purchase contract. Furthermore, a German court would view the sale as being effective against the obligor because the sale complies with the laws governing the receivable. If a German court also applied, in light of past practice, the law governing the receivable to the question whether the sale is effective against third parties, there would be no need to comply with Germany's own sale requirements. If, however, the court applied the law of the seller's jurisdiction (see question 3.1 above) in this respect, it would consider the sale as being effective against the obligor only if the parties also complied with such requirements.

3.5 Example 4: If (a) the obligor is located in Germany 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 Germany 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 Germany's own sale requirements?

Yes, because, under the rules described in question 3.1 above, the law of the seller's country would apply to the question of whether the sale is effective against the seller, the obligor and other third parties.

3.6 Example 5: If (a) the seller is located in Germany (irrespective of the obligor's location), (b) the receivable is governed by the law of Germany, (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 Germany 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 Germany and any third party creditor or insolvency administrator of any such obligor)?

As described in question 3.1 above, a German court would recognise the sale as being effective against the seller because a German court would apply (subject to the rules described in question 2.3 above) the law chosen by the parties with regard to the relationship between purchaser and seller and the sale complies with the requirements of such law, provided that the receivable is assignable pursuant to the law governing it (i.e., German law). As regards the relationship between the purchaser and the obligor as well as third parties, a German court would apply German law (which is the law of the seller's location as well as the law governing the receivable) to the question whether the sale is effective.

4 Asset Sales

4.1 Sale Methods Generally. In Germany 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?

Although not legally required, for evidentiary purposes, receivables are generally sold and assigned under written sale and assignment agreements entered into between the seller and the purchaser. The customary terminology for the transfer of a receivable under German law is an "assignment" (*Abtretung*), while a "sale" (*Verkauf*) describes the contractual undertaking to assign. However, elsewhere in this chapter, the term "sale", in line with the definition of such term above, is used to describe a transfer.

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?

Under German law, generally, the only requirement for an effective sale of receivables is the existence of a corresponding assignment agreement between the seller and the purchaser. Giving notice of the assignment to the obligor is not required for the effectiveness of the sale. However, failure to give notice to the obligor results in the obligor retaining certain defences as described in question 4.4 below. Under German law, generally, there is no good faith acquisition of receivables.

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

In Germany, debt certificates (*Schuldscheine*) are frequently used instruments that are similar to promissory notes in other jurisdictions. Debt certificates, which evidence loan obligations, are not securities. No additional requirements apply to the assignment of debt certificates, although in practice the purchaser requires the seller to hand these over in connection with an assignment of the related loan.

Mortgage loans in Germany can take several forms. Liens on German real property can be granted in the form of an accessory mortgage (*Hypothek*) or a non-accessory land charge (*Grundschuld*). Both can be either in certificated or non-certificated form. A mortgage is accessory in that it cannot be transferred without the receivable that it secures, and that it is automatically transferred if such receivable is transferred. The assignment of a loan that is secured by a mortgage requires a written assignment of the loan and: (i) in the case of a certificated mortgage, delivery of the mortgage certificate; or (ii) in the case of a non-certificated mortgage, registration of the transfer with the competent land register. A loan secured by a land charge can be

assigned without the land charge, by way of a simple agreement between the seller and the purchaser. If the land charge is to be transferred as well, such transfer has to be by written assignment of the land charge and delivery of the certificate or registration of the transfer, as applicable. In addition, according to recent case law the purchaser has to assume the seller's obligations under the security purpose agreement setting forth the conditions under which the land charge may be enforced.

Transferring un-certificated mortgages and land charges (which make up the vast majority of mortgages and land charges in Germany) can, depending upon the values involved, trigger significant costs in connection with the required registration with the land register. In many cases, sellers express an interest in avoiding registration of the transfer in order to avoid having the obligor obtain knowledge of the assignment. For this purpose, the parties frequently agree that the seller shall hold the land charge as trustee for the purchaser. (This is not possible in the case of a mortgage.) However, it is unclear under German law whether such a trust relationship would be recognised in the insolvency of the seller, i.e., whether the purchaser would be entitled to request the seller's insolvency official to transfer the land charge.

In September 2005, the German Banking Act was amended to provide for, among other things, so-called "refinancing registers" (*Refinanzierungsregister*) to be maintained by banks in respect of receivables, including mortgages or land charges securing such receivables that such bank or a third party owns but is obligated to transfer to a securitisation vehicle. Effectively, without a perfected sale being effected at the outset of the transaction, such registration provides the purchaser with the same right to segregate the assets concerned from the seller's insolvency estate (thereby addressing the issues described above) as would apply if a perfected sale had occurred.

In the case of an assignment of consumer loans, the seller must notify the consumer of the assignment and the details of the purchaser without undue delay, unless the seller and the purchaser agree that the seller shall exclusively continue dealing with the consumer obligor. Also, an advance consent of the obligor (in particular a consumer) contained in standard business terms to an assumption of the entire loan contract by a purchaser is no longer effective, unless the purchaser is identified in the standard business terms or the obligor is given the right to terminate the loan in case the loan contract is transferred.

Additional requirements relating to the sale of debt securities under German law depend upon the type of securities involved. The transfer of bearer securities requires an agreement between the seller and the purchaser to transfer ownership and the delivery of the securities to the purchaser. Registered securities are transferred by way of assignment of the rights that they evidence. Instruments made out to order are transferred by way of agreement between the seller and the purchaser to transfer ownership, endorsement and delivery of the instrument to the purchaser. Where debt securities are certificated in global form and deposited with a clearing system, delivery of the securities is evidenced by way of book-entry.

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? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment? 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?

In principle, under German law, giving notice to the obligor is not required for an effective sale and assignment of a receivable, unless required by the receivables contract. The purchaser is generally entitled to enforce the receivable directly against the obligor (providing required evidence of the assignment), whether or not the obligor was previously notified of the assignment. However, the obligor may generally invoke against the purchaser all defences that it had against the seller at the time of the sale (see below). If the obligor is a consumer, the seller must notify it of the assignment and the details of the purchaser.

Unless the obligor has been notified or has otherwise obtained knowledge of the assignment, it may validly discharge its obligation by making a payment to the seller, and the purchaser is bound by any amendment to the receivables contract agreed by the seller and the obligor. The same applies if the seller and the obligor enter into any other transaction relating to the receivable, such as a waiver of the receivable by the seller or a deferral of payments.

In addition, the obligor continues to be able to discharge its obligation under the assigned receivable by offsetting it against a payable of the seller unless (i) the obligor knew of the assignment when it acquired the payable, or (ii) the payable becomes due only after the obligor has obtained knowledge of the assignment *and* after the assigned receivable has become due. In other words, even if the obligor has obtained knowledge of the assignment, it may continue to offset the assigned receivable against a payable of the seller if (i) it acquired the payable before it obtained such knowledge, or (ii) the payable has become due before the receivable becomes due.

Accordingly, as described above, notification of the obligor is not required for an effective sale of a receivable under German law, but giving notice of the assignment to the obligor is beneficial in order to cut off certain defences of the obligor.

As a general rule, a receivable that is governed by German law can be freely sold and assigned without the obligor's consent if the underlying agreement does not contain any prohibition on assignments. A prohibition on assignments would usually be explicit, but can also be implied in a receivables contract. Until 2007, it has been disputed among German courts and commentators whether the assignment of a receivable in violation of German data protection laws or contractual general bank secrecy obligations should result in an implied prohibition on assignments. However, a decision of the German Supreme Court settled the issue in 2007 such that generally neither contractual general bank secrecy obligations nor German data protection laws result in implied prohibitions on assignments. It should be noted that it is not fully clear whether this would be equally applied to an assignment of receivables involving the transfer of data whose confidentiality is protected by German criminal law (e.g., in respect of a doctor's patient data, in respect of which a 2005 Court of Appeals decision considered an assignment void).

Where a receivables contract contains a prohibition on assignments, the seller can still undertake to assign the receivable, but it cannot effect a valid assignment *in rem*. The seller is liable for any damages incurred by the obligor in connection with an assignment that failed on this basis.

As an exception to the foregoing rule, a seller can validly assign a receivable (with the exception of loan claims of credit institutions) in spite of a contractual prohibition on assignments where both the seller and the obligor are corporate entities, partnerships or individual merchants and the receivables contract constitutes a commercial transaction, or where the obligor is a government agency. However, it is not fully clear whether any such assignment constitutes a breach of contract that can result in liability for damages or for the payment of any contractual penalty. In any event, in such a case the obligor can still discharge the receivable by making a payment to the seller (or by way of set-off), even where the obligor has been notified of the assignment. The resulting risks, which can be eliminated only by obtaining the obligor's consent, generally lead rating agencies to conclude that the highest rating categories cannot be applied where the effectiveness of the assignment is based upon this exception.

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 against the obligor have commenced? 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?

As described in question 4.4 above, under German law, generally, the obligor need not be notified of the assignment to make the assignment effective, unless required by the receivables contract. However, notification is required to cut off certain defences of the obligor. If a receivables contract requires notification, the notice must comply with the applicable contractual requirements. Where a notice of assignment is specifically required under statutory law, the notice must comply with the applicable statutory requirements, e.g., be given in writing or contain certain information. Generally, if more than one receivable or future receivables are assigned, the assignment notice may be given for all receivables concerned.

4.6 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Germany? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Germany recognises prohibitions on sale or assignment 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 on any other basis?

As described in question 4.4 above, parties other than, generally, merchants in respect of commercial transactions, can enter into binding prohibitions on assignments. Prohibitions to sell receivables (i.e., an undertaking not to enter into a receivables purchase agreement) would also be enforceable, but are not common because they do not prevent the assignment from being effective. If a seller sells a receivable in violation of a prohibition to sell or assign the receivable, it would be liable, generally, to the obligor for any financial damages incurred. Such liability for breach of contract is not fully clear in respect of commercial transactions among merchants and receivables against government agencies.

4.7 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?

It is not necessary to specifically identify each of the receivables to be sold in order to provide for an effective sale and assignment of German law-governed receivables. It is sufficient if the receivables are identifiable, e.g., by reference to the initial letters of the obligor names, or if all of the seller's receivables are sold.

4.8 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and/or (c) control of collections of receivables without jeopardising perfection?

A German court would not automatically respect the parties' denomination of their transaction as a sale, but also take into account the economic characteristics of the transaction. Furthermore, the economic characteristics have no bearing under German law as to whether the sale is being "perfected". However, such characteristics could be relevant for determining whether the sold receivables no longer form part of the seller's insolvency estate, or whether the transaction must be re-characterised as a secured loan. Given that there is no case law on point and limited other guidance in published form in this respect, the exact circumstances in which a purported sale must be re-characterised as a secured loan are not fully clear.

The general view in the market is as follows. Any true sale of receivables requires an effective assignment of legal ownership as described in question 4.2 above. In connection with any such assignment, the mere retention by the seller of the risk that the receivables exist and are legal, valid, binding and enforceable does not result in the true sale character of the transaction being jeopardised, and neither does the continued servicing of the receivables by the seller. The possible re-characterisation of the transaction rests, in particular, on the seller's retaining an excessive portion of the credit risk from the receivables sold, including through representations and warranties, repurchase obligations/automatic re-assignments, variable purchase prices, liquidity/credit enhancement provided by or on behalf of the seller or the acquisition by the seller of a first loss tranche of the securities issued. The seller may retain some portion of the credit risk in line with historical default rates and taking into account enforcement costs.

Where the sale of receivables is re-characterised as a secured loan for insolvency law purposes, upon the opening of a German insolvency proceeding with respect to the seller, the seller's insolvency official and not the purchaser is entitled to collect the receivables. In addition, the insolvency official is entitled to retain from the collection proceeds a flat fee (haircut) of, generally, 9% for

the benefit of the insolvency estate. The amount of this fee may be adjusted where the actual enforcement costs are significantly higher or lower. A 4% fee applies where the insolvency official permits the purchaser to collect the receivables. Upon a collection by the insolvency official, the collection proceeds (after deduction of these fees) are to be transferred to the purchaser. As a practical matter, secured creditors frequently enter into agreements with insolvency officials providing for higher haircuts.

4.9 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables (i.e., sales of receivables as and when they arise)?

Yes. However, as a technical matter, in factoring or securitisation transactions involving continuous or periodic sales and transfers of receivables, the seller and the purchaser generally enter into a framework agreement that governs the terms and conditions for each future sale and transfer of receivables. The actual sale and transfer in respect of individual receivables is then evidenced (in the case of continuous sales) or effected (in the case of periodic sales) on the basis an exchange of data on the transferred receivables by which the latter are identified. However, such arrangements would not prevail in an insolvency of the seller for sales not consummated prior to the insolvency. See also question 6.5.

4.10 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 or after the seller's insolvency?

Under German law, it is possible to sell and assign receivables arising in the future, provided that such receivables are sufficiently identified (or at least identifiable, see question 4.7 above). German law does not require any specific sale structure for the sale of future receivables being valid and enforceable beyond the requirements applicable to receivable sales generally. In principle, the sale of future receivables requires the existence of a corresponding assignment agreement between the seller and the purchaser (see question 4.2 above). The purchaser then obtains ownership of such receivables at the time when they arise, unless at such time other prerequisites of a valid assignment have ceased to exist, in which case the assignment fails. The latter applies, in particular, where an insolvency proceeding has been opened with respect to the seller prior to the receivable coming into existence because in such a case the seller is no longer able to dispose of its assets. It should be noted that, in certain circumstances, it is difficult to determine whether a receivable is in fact a "future" receivable to which these rules apply (such as a claim for future rental payments) or an existing receivable that is not yet due (such as the repayment claim under a loan agreement). See also question 6.5.

4.11 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?

See question 4.3 above in respect of transferring collateral of the type of instruments described therein. Related security consisting of receivables assigned by way of security assignment (*Sicherungsabtretung*) as well as guarantees (*Garantien*) is transferred by way of assignment, requiring an agreement between the seller and the purchaser to assign the relevant security. Insurance claims are also assigned, usually requiring notification to, and sometimes the prior consent of, the insurer. If the collateral comprises security over inventory and other movable assets in the form of a security transfer (*Sicherungsübereignung*), the purchaser needs to obtain (indirect) possession of the inventory concerned. If the sold receivable is secured by a pledge (*Pfandrecht*) or surety (*Bürgschaft*), no additional arrangements are necessary to transfer such collateral.

See also question 5.3 below.

5 Security Issues

5.1 Back-up Security. Is it customary in Germany to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

No, this is not customary.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of Germany, and for such security interest to be perfected?

This is not applicable in Germany (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 Germany to grant and perfect a security interest in purchased receivables governed by the laws of Germany and the related security?

Under German law, if the purchaser wants to grant security over all of its assets, it must individually charge such assets in accordance with applicable law, i.e., German law does not know the concept of a floating charge over all assets of the chargor. Generally, a German law security interest in a receivable or related security, as well as other assets of the purchaser, can be granted in the form of a formal pledge or a security assignment.

To become effective, a formal pledge of a receivable (including guarantees) requires the execution of a pledge agreement and notification of the obligor. A security assignment, which results in the transfer of legal ownership of the receivables concerned, subject to the assignee's undertaking to foreclose only upon a default and to re-assign the receivables to the assignor upon the performance in full of the secured obligations, becomes effective on the basis of the same requirements as described above in respect of assignments of receivables generally. Accordingly, a security assignment generally does not require notification of the obligor. (However, failure to notify results in the obligor retaining set-off rights and other defences as described in question 4.4 above.) Due to the fact that assignors frequently seek to avoid such notification, security assignments are far more common than formal pledges of receivables. Exceptions to this rule apply where the notification of the obligor is not an issue, including in respect of inter-company receivables and bank accounts. There have been a few German securitisation transactions that have relied on pledges of

receivables, but this continues to be a very uncommon form of security in Germany.

Security over inventory and other movable assets is usually granted in the form of a security transfer because a formal pledge would require the pledgee to obtain actual possession of the assets, whereas indirect possession is sufficient for a security transfer. For security over the types of instruments described in question 4.3 please see question 4.3. The additional requirements described therein generally also apply to the grant of security over such types of instruments.

See also question 4.11 above.

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

The conflict of laws rules described in question 3.1 above in respect of assignments of receivables generally also apply to the grant of security interests, whether in the form of a formal pledge or a security assignment. Accordingly, as between the purchaser and the secured party, the security interest would be considered valid and perfected if the requirements of the law chosen to govern the security agreement were met, provided that the receivables are assignable pursuant to the law governing them (i.e., German law). Whether the security interest is valid and perfected with respect to the obligor depends on the law governing the receivables. Where the receivables are governed by the laws of Germany, the purchaser and the secured party need to take such additional steps, if any, as German law might require to validly grant and perfect the security interest *vis-à-vis* the obligor. The same applies in respect of the question whether the security is valid and perfected *vis-à-vis* third parties if a German court in that respect applied the law governing the receivables (and not the laws of the purchaser's country, see question 3.1 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?

Under German law, security over insurance policies, promissory notes, mortgage loans, consumer loans and marketable debt securities can also be granted in the form of a formal pledge or by way of security assignment. (In the case of debt securities, the most common form of security is a formal pledge.) As a general matter, the additional requirements described in question 4.3 above also apply to the grant of security over these types of instruments. Security over insurance policies generally requires notification of the insurance company to be effective.

5.6 Trusts. Does Germany 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 until turned over to the purchaser?

German law concepts of fiduciary relationships or trusts are in many respects different from Anglo-American trust concepts. In particular, solely agreeing on a trust over an asset such as collections of receivables or bank accounts would not suffice to separate such collections or bank accounts from the seller's estate and would not be upheld in an insolvency of the seller. Neither would an economic or equitable interest of the purchaser in an asset, as such, be sufficient to so segregate assets from the estate of the seller. (Under certain circumstances, a trust over non-German assets might be recognised by German courts and have the effect of segregating the trust assets, but this depends on the law governing the trust, the effects of such law, and whether such effects can be reconciled with German law concepts.)

In order to segregate collections from the estate of the seller, several structure alternatives exist. The safest way is to notify the obligors of the assignment and collect the receivables in an account of the purchaser. Alternatively, because the parties sometimes do not wish to notify the obligors of the assignment or if the notification is too cumbersome, the seller could continue to collect the receivables in one or more accounts set up specifically for such purpose. Such accounts could be either pledged to the purchaser or established as escrow accounts which are, generally, recognised under German law. (Please note that the preference periods described in question 6.3 below might apply to the collections or disbursements thereof to the purchaser, unless such periods had already lapsed with respect to the acquisition of the collected receivable.)

Where it is not feasible to collect the receivables in a special account (whether pledged or in the form of an escrow account), the seller could pledge such "general" collection account to the purchaser, but this would in most cases not offer sufficient protection to the purchaser in respect of collections received prior to the opening of an insolvency proceeding. Also, such pledge might conflict with prior-ranking standard pledges of the account bank (which are customary in Germany). In such case, the purchaser would have to rely on the (automatic) termination of the seller's entitlement to collect the receivable upon certain triggers and a swift redirection of the collections to minimise losses, usually coupled with frequent sweeps from the general account.

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

As regards the recognition of escrow accounts, see question 5.6 above. Security over bank accounts located in Germany customarily takes the form of a formal pledge (see question 5.3). Taking foreign law security over bank accounts located in Germany is not customary, and there is a substantial risk that German courts would not recognise such security, in particular if the requirements of a formal pledge (including notification of the account bank) were not met.

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 Germany's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "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?

Before rendering a decision on whether or not to open a formal

insolvency proceeding and to appoint an insolvency official, German insolvency courts frequently appoint a so-called "preliminary insolvency official" for the time period (generally one to three months – a so-called "preliminary insolvency proceeding") during which they assess whether the insolvent company's assets cover the costs of the insolvency proceeding. As a general matter, there is no stay of action on the purchaser's right to collect, transfer and otherwise exercise ownership rights over receivables that were sold to it, neither before nor after the opening of an insolvency proceeding. Recent amendments to the German Insolvency Code that took effect on 1 March 2012 did not result in any changes in this regard. German insolvency courts, however, may prohibit persons owning assets not belonging to the insolvency estate (such as purchasers of receivables in true sale transactions) or holding security based on a security assignment over receivables from collecting or otherwise exercising their rights over the receivables during the preliminary insolvency proceeding. After the opening of an insolvency proceeding with respect to the seller, the purchaser would be entitled to collect the receivables only if the transaction constituted a true sale. Where the transaction is re-characterised as a secured loan, the assignment *in rem* of the receivables is regarded as a security assignment, which results in the insolvency official, rather than the purchaser, being entitled to collect the receivables concerned (and to deduct a haircut from the collection proceeds, all as described in question 4.8 above). See also question 6.2 below.

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 rights (by means of injunction, stay order or other action)?

As described in question 6.1 above, German insolvency courts may prohibit persons owning assets not belonging to the insolvency estate (such as purchasers of receivables in true sale transactions) or holding security based on a security assignment over receivables from collecting or otherwise exercising their rights over the receivables during the preliminary insolvency proceeding. In addition, insolvency courts have the right to issue an order permitting a preliminary insolvency official to collect receivables that were assigned by way of security.

Upon the opening of an insolvency proceeding with respect to the seller, no injunctions, stay orders or similar court orders may be issued where there was a true sale, and there is no need for any such orders (because the insolvency official in any event has the exclusive right to collect) where the transaction is re-characterised as a secured loan. However, as a practical matter, where the insolvency official seeks to determine whether the transaction constituted a true sale or has to be re-characterised as a secured loan and meanwhile prevent the purchaser from collecting the receivables, the insolvency official will simply notify the obligors accordingly. This generally has the effect that obligors cease making payments.

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 insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in Germany for (a) transactions between unrelated parties and (b) transactions between related parties?

Upon the opening of an insolvency proceeding in Germany, the insolvency official is entitled to rescind acts of the seller (including assignments of receivables) that prejudice third party creditors, provided that certain additional requirements are met. These requirements are set out in statutory rules. German insolvency courts do not have the same discretion in this respect that insolvency courts have in other jurisdictions. Preference periods range from one month to ten years prior to the filing of the application for the opening of the insolvency proceeding.

In particular, the insolvency official has the right to challenge acts that granted a creditor collateral or satisfaction if the act was performed (i) during the last three months prior to the filing of the application for the opening of an insolvency proceeding, provided that at such time the debtor was unable to pay its debts as they became due and the creditor knew of such inability, or (ii) after such filing, provided that at such time the creditor knew of the debtor's inability to pay its debts or the filing.

The insolvency official can also challenge acts that granted a creditor collateral or satisfaction to which such creditor was not entitled – or not in such a way or not at such time – if the act was performed (i) during the last month prior to the filing of the application for the opening of an insolvency proceeding or after such filing, (ii) during the second or third month prior to the filing of the application and the debtor was illiquid at such time, or (iii) during the second or third month prior to the filing of the application and the creditor knew at the time such act was performed that such act was detrimental to the debtor's third party creditors.

Furthermore, the insolvency official has the right to challenge acts performed with the intention – as known to the creditor – to prejudice the debtor's third-party creditors if the act was performed within ten years prior to the filing of the application for the opening of an insolvency proceeding or after such filing.

Finally, the German Insolvency Code contains a number of presumptions that make it easier for an insolvency official to challenge transactions between the debtor and its related parties. E.g., the insolvency official may challenge any transaction between the debtor and a related party if the transaction was (i) entered into for consideration during the two years preceding the filing of the application to open an insolvency proceeding, (ii) directly detrimental to the debtor's third party creditors, and (iii) performed by the debtor with the intention to prejudice the debtor's third-party creditors, unless the related party can prove that it did not know of such intention.

Where the assignment of receivables constitutes a so-called "cash transaction" (*Bargeschäft*), the insolvency official is entitled to rescind the transaction only if it can be shown: (i) that the assignment was effected with an intention to prejudice creditors and the purchaser knew of such intention; or (ii) that the purchaser was not entitled to the receivables assigned. An assignment of receivables generally constitutes a "cash transaction" if the seller, at or about the same time as the assignment was effected, received adequate consideration. In this respect, depending on the type of receivables involved, an assignment may qualify as a "cash transaction" even where the purchase price paid reflects some discount from the nominal value of the assigned receivables. A large discount, a significant time lag between assignment and payment of the consideration, or a deferred purchase price arrangement, however, disqualify the transaction as a "cash transaction".

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?

German insolvency law does not contemplate the substantive

consolidation of assets and liabilities of sellers and purchasers or their affiliates. Under general corporate law principles, there may be liability under piercing the corporate veil principles, but this does not result in any consolidation of assets and liabilities.

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?

German insolvency law gives an insolvency official the right to elect whether to perform or reject performance of executory contracts, i.e., contracts that have not been fully performed by at least one party. The application of this general rule affects future sales of receivables as well as mutually unperformed contracts underlying the (existing) receivables sold and the assignment of receivables that have not yet come into existence (i.e., future receivables). Where the insolvency official's election right does not apply in respect of a contract underlying receivables, the contract concerned continues to bind the insolvency estate and the counterparty, but as explained below this does not always result in the enforceability of the sale and assignment of resulting receivables.

The receivables purchase agreement itself may be subject to the insolvency official's election right if the agreement has not been fully performed by at least one party, in particular if it addresses future sales. If properly drafted, however, receivables purchase agreements pertaining to term deals are generally not subject to the election right because the seller (by assigning the receivables) has fully performed its relevant obligations. In the case of a receivables purchase agreement in a revolving securitisation transaction which provides for a series of sales under a single master agreement, any election by the insolvency official to reject performance may also pertain to sales that were consummated in the past. To avoid this risk, each sale under the master agreement must be structured as an independent transaction.

In the case of mutually unperformed contracts underlying the receivables sold, where the insolvency official has an election right and elects performance, any future payments by the obligors are due to the insolvency estate, not to the purchaser. Where the insolvency official elects to reject performance, the receivables do not become due at all. Consequently, unless the cash flows required to service the asset-backed securities are otherwise ensured, a successful securitisation generally requires that the insolvency official's election right does not apply to the underlying receivables contracts. In addition, an assignment of "future receivables" that come into existence after the opening of the insolvency proceeding (as opposed to the assignment of previously existing receivables that become due after the opening of the insolvency proceeding) is not enforceable.

- Upon the insolvency of the seller/lessor, leases and leasing contracts pertaining to movables are not subject to the insolvency official's election right if the acquisition of the leased objects was financed by a third party and that third party has obtained security in the form of a security transfer of the leased objects. (Legal uncertainty exists in this regard where the lessor is not identical to the owner of the leased objects, which is not uncommon in the German leasing market.) It is a question of the applicable facts and circumstances (i.e., in particular the terms of the applicable lease or leasing contract) whether the receivables under such contracts are, for German insolvency law purposes, "future receivables". In general, instalments due under so-called "financial leasing" contracts are considered not to constitute "future receivables", but to come into existence upon the conclusion of the leasing agreement and to become due from time to time.
- Leases pertaining to real estate are not subject to the insolvency official's election right but may be terminated by the insolvency official (subject to statutory notice periods) irrespective of the agreed term of the lease. Furthermore, lease receivables under real estate leases constitute "future receivables" and cannot be validly assigned with effect for the seller's/lessor's insolvency estate to the extent that they pertain to the period after the month in which the insolvency proceeding is opened (or, where the opening date is later than the 15th day of a month, the next following month). Nevertheless, any such lease receivables can be (and customarily are) covered by a mortgage or land charge over the relevant real estate that can be enforced by the mortgagee in the seller's/lessor's insolvency.

By contrast, as regards the securitisation of fully disbursed bank loans, that the insolvency official's election right does not apply, given that the relevant loan agreements no longer constitute executory contracts. This was clarified by a legislative amendment in 2007. Also, receivables becoming payable from time-to-time under a bank loan do not constitute "future receivables".

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in Germany establishing a legal framework for securitisation transactions? If so, what are the basics?

Germany has no laws containing a comprehensive set of rules applicable to securitisation transactions. However, certain typical aspects of securitisations are addressed in special statutes. In particular, Germany has introduced, in the context of transposing directive 2009/111/EC (also called CRD II) into German law, a set of rules applicable to credit institutions (*Kreditinstitute*) and financial services institutions (*Finanzdienstleistungsinstitute*) investing in, sponsoring or originating securitisation transactions. Most importantly, such institutions are prohibited from investing in securitisation transactions where the originator does not retain, on an ongoing basis, a net economic interest in the transaction of at least 5%, which amount will be increased to 10% from 2015 onwards. Moreover, institutions investing in securitisation transactions must have a comprehensive and thorough understanding of the positions (and their underlying assets) they are investing in, and establish formal procedures in order to ensure such understanding and monitor the positions they have invested in. Similar rules are expected to be enacted with respect to insurance companies and pension funds investing in securitisation transactions. Although the rules are aimed at institutions, they indirectly affect other originators as well because such originators need to structure their securitisation transactions accordingly (by retention of an economic interest as well as reporting obligations) in order to allow institutions to invest in their securitisation transactions.

7.2 Securitisation Entities. Does Germany 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?

Germany does not have any such laws. It should be noted that, until some years ago, no German entities were used as purchaser vehicles in securitisation transactions. This has mainly been due to the trade

tax issue described in question 9.6 below. Following the introduction, in 2003, of a trade tax exemption for certain purchaser vehicles in bank loan securitisation transactions, there have been a number of transactions involving German purchaser vehicles, including transactions under the German True Sale Initiative.

7.3 Non-Recourse Clause. Will a court in Germany give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

See question 7.4.

7.4 Non-Petition Clause. Will a court in Germany give effect to a contractual provision (even if the contract'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?

The predominant view is that such non-recourse clauses and non-petition clauses are valid and enforceable under German law, except to the extent that the relevant underlying claim is based upon the purchaser's wilful misconduct or gross negligence. But see question 7.5 regarding the obligation of the management of certain types of companies organised under German law to file for insolvency upon illiquidity or over-indebtedness.

7.5 Independent Director. Will a court in Germany give effect to a contractual provision (even if the contract'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?

In the case of German SPEs (which are generally in the form of limited liability companies (*GmbH*)), such a provision would be generally given effect to. However, the statutory obligation to file for the opening of an insolvency proceeding where the company is either unable to pay its debts as they become due or over-indebted, and the incurrence by management of personal liability for damages and criminal liability upon a breach of such obligation, would remain unaffected by any non-petition clause in the transaction documents or the GmbH's organisational documents.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in Germany, 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 Germany? Does the answer to the preceding question change if the purchaser does business with other sellers in Germany?

The general view in the market is that, as a securitisation transaction does not involve the transfer of any undrawn commitments, the purchase and ownership of receivables by the purchaser, and its collection and enforcement of receivables owned by itself, do not trigger any licensing requirements in Germany. The German bank regulator has confirmed this view for revolving securitisations in connection with the introduction of a new licensing requirement for factoring services providers.

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

The collection and enforcement of the sold receivables by the purchaser itself does not trigger any licensing requirements in Germany. However, where the receivables are serviced by a third party on behalf of the purchaser, such party generally must be registered under the German Legal Services Act. An exception from the registration requirement applies where the seller continues servicing the sold receivables that were originated by itself. Consequently, as a practical matter, this registration requirement becomes relevant only in the case of a transfer of the servicing to a replacement servicer. In addition, any servicer must comply with German data protection laws.

8.3 Data Protection. Does Germany 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?

Germany has data protection laws, the most important of which is the Federal Data Protection Act, that restrict the use and dissemination of data about or provided by obligors. This law applies only to personal data relating to individuals (including individuals in their capacity as merchants or employees) and, in the view of some commentators, partnerships that have individuals as partners. The law provides that, where the affected individual has not consented to the transfer of personal data, such transfer is permissible only if the transferor's interest in transferring the data outweighs the affected individual's interest in avoiding such transfer. The predominant view is that, in a typically structured securitisation transaction, this analysis generally results in the permissibility of the transfer of data. The argument in favour of this conclusion is even stronger where a securitisation transaction is structured so that it involves a data trustee as referred to in the German bank regulator's securitisation release described below (which is, however, not always the case where non-bank assets are being sold).

Independently of data protection laws, banks are subject to bank secrecy restrictions *vis-à-vis* their customers (individuals or other customers). These restrictions are considered to be of a contractual nature. The standard business terms of German banks generally address these expressly, but even where there is no such express provision, German courts consider banks to be bound by an implicit restriction. In 1997, the German bank regulator issued a release on the securitisation of German bank assets, which also addressed bank secrecy requirements. The regulator took the position that bank secrecy is complied with as long as the seller bank continues to service the bank loans sold because no transfer of obligor-related information to the purchaser is required. Where a back-up servicer is appointed, the regulator generally requires it to be a credit institution based within the EU or the European Economic Area. In any event, the regulator considers disclosure of information permissible: (i) to the extent required for an effective assignment, if the purchaser receives obligor-related information in anonymised form, with the complete set of information being deposited with an independent data trustee; and (ii) to the extent that information is "strictly technically required" to be passed on, and passed on in anonymised form, to third parties (such as rating agencies, auditing firms or security trustees) that are also bound by a confidentiality obligation. Although the views expressed by the German bank

regulator are not binding upon German courts, they are generally considered to be of persuasive value. The general view in the German market is that bank secrecy is not violated in a securitisation transaction that is structured so as to comply with the requirements set out in the 1997 release. In addition, the German bank regulator stated in a release in 2007 that it will consider, in light of the court decision described in question 4.4, whether the requirements set forth in the 1997 release have to be revised.

Neither data protection nor bank secrecy is an issue where the obligor has approved the transfer of the relevant data. Such approval may be contained in a general consent to a sale and assignment of receivables for refinancing purposes. Some German banks have recently amended their standard business terms to that effect. However, such consent is probably invalid if contained in standard business terms permitting the assumption of the entire loan contract by a purchaser, unless the purchaser is identified in the standard business terms or the obligor is given the right to terminate the loan in case the loan contract is transferred (see question 4.3 above).

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 Germany? Briefly, what is required?

As a general rule, the originator of the receivables (i.e., the seller) is primarily responsible for compliance with German consumer protection laws. Non-compliance may affect the validity of the receivables contracts or give the obligor a rescission right. Consequently, the purchaser needs to review whether the seller has been in compliance with these laws. In addition, it is customary for the seller to give the purchaser corresponding representation and warranties. Consumer protection laws become particularly relevant in respect of loan agreements, receivables contracts entered into at the place of abode of the obligor, and receivables contracts that are based upon the seller's standard business terms.

The following recent changes to German consumer protection laws relating to consumer loans should be noted: a lender must notify its consumer obligor three months before an agreed interest rate expires or the loan matures, stating whether it is willing to agree on a new interest rate or to extend the loan. This obligation also applies to a purchaser of the loan, unless the seller and the purchaser agreed that the seller shall exclusively continue dealing with the consumer obligor. Furthermore, a lender (and a purchaser of a loan) may accelerate an annuity loan in case of a payment default only if the consumer obligor is in default with at least two consecutive amortisation instalments and if the aggregate amount of arrears totals at least 2.5 to 10 % of the principal amount of the loan (depending on the loan's term and whether it is secured by real estate).

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

Germany has no such laws (with the exception of those implementing United Nations, EU or other international sanctions in respect of transactions with certain countries and persons). Where a German resident receives from, or makes payments to, non-German residents, the German resident must in certain circumstances notify such payments to Deutsche Bundesbank. However, such notification serves for statistical purposes only, and failure to notify does not affect the payment or the underlying obligation.

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 Germany? 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?

Payments on receivables (including interest payments) are generally not subject to withholding taxes in Germany. Some exceptions apply based on the nature of the receivables.

If the receivables qualify as hybrid debt instruments (i.e., participating loans, profit-contingent or convertible bonds, jouissance rights and silent partnership interests), a German resident obligor would be obligated to withholding tax (*Kapitalertragsteuer*) at a rate of 26.375% on interest paid on such instruments. The issuer's obligation to withhold on these hybrid debt instruments does not depend on the location of the seller or the purchaser (i.e., the economic owner of the receivables).

A participating relationship is characterised by the fact that the remuneration does not – or not solely – consist of a fixed periodic amount but of a share in the success generated by the obligor. Payment obligations that are contingent on the obligor's liquidity (availability of funds) may be sufficient to characterise a loan arrangement as participating.

Furthermore, German tax authorities have the power to instruct a German resident obligor to withhold tax at a rate of 26.375% on payments to a purchaser (economic owner) located outside Germany when this appears appropriate to safeguard Germany's taxation right. This only applies in limited circumstances where the purchaser is subject to taxation in Germany on its income from such receivables; this may be the case, for example, with respect to interest payments on loans that are secured by German *situs* real estate (with an exception being applicable to bonds and claims which are recorded in a public register or which are represented by global securities or securities representing part of a securities issue (*Teilschuldverschreibungen*)).

Finally, withholding tax at a rate of 26.375% is also levied when a bank or financial services institution in Germany (i) pays interest (e.g., on customer deposits) or, under certain circumstances, capital gain in its capacity as obligor, or (ii) pays out interest or capital gain on securities in its capacity as custodian, to a purchaser (economic owner) located in Germany. No such tax is withheld when the purchaser (economic owner) itself is a bank or financial services institution. In addition, this tax is not withheld when the purchaser (economic owner) is outside Germany unless the income is allocable to a permanent establishment in Germany.

Tax withheld is credited or refunded if the underlying income is included in the purchaser's German income tax assessment. If the income is not included in such assessment (e.g., because the purchaser is not subject to net income tax with respect to such income in Germany), the purchaser may nevertheless be able to claim a full or partial refund of the withholding tax when the purchaser is eligible for an exemption from, or a reduction in the rate of, such withholding tax under German domestic law (e.g., corporate holders of hybrid debt are generally entitled to a reduced withholding tax rate of 15.825%) or an applicable income tax treaty.

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

Germany has not adopted any specific accounting policy for tax

purposes in the context of a securitisation. German tax law generally follows German GAAP. The concept of economic ownership under German GAAP and German tax law is essentially the same. The answer to the question of whether the seller or the purchaser has to show the assigned receivables in its tax balance sheet depends on whether the sale of the receivables can be considered a true sale or a secured loan, i.e., whether economic ownership in the receivables has been transferred. Economic ownership of the receivables generally remains with the seller if the seller continues to bear the credit risk associated with the receivables. This is the case, for example, where the amounts retained by the purchaser to cover credit risk (e.g., purchase price discounts) significantly exceed the expectable default rate and are refundable (if the credit risk does not materialise). The treatment under IFRS or US GAAP is not decisive for German tax purposes.

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

Germany does not impose a stamp duty or other documentary taxes on sales of receivables.

9.4 Value Added Taxes ("VAT"). Does Germany impose VAT, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Germany generally imposes VAT at a rate of 19% on sales of goods or services. The sale of receivables is exempt from VAT (but the seller can generally elect to waive this exemption).

In general, Germany also imposes VAT on fees for collection agent services. In consequence of the MKG-Kraftfahrzeuge-Factoring GmbH decision of the European Court of Justice (ECJ) of 26 June 2003 (the "MKG decision"), the German tax authorities consider the purchaser of receivables to be rendering taxable collection services (also referred to as "factoring services") to the seller when the purchaser assumes the actual collection of the receivable. The VAT for such factoring services is generally assessed on the difference between the nominal value of the receivables assigned and the purchase price for such receivables, less the VAT included in such difference. The German tax administration applies special rules to determine the assessment basis with respect to distressed receivables. Upon referral by the German Federal Tax Court, the ECJ decided, on 27 October 2011, that the purchase of distressed receivables does not constitute a service by the purchaser to the seller and, consequently, is not subject to VAT, provided that the difference between the nominal value of the distressed receivables and the purchase price reflects the decreased economic value. It remains to be seen how the German tax administration will interpret this ECJ decision.

In view of the German tax authorities, no taxable collection services are being rendered by the purchaser where the seller continues to collect the receivables after the sale, as is typically the case in securitisation transactions. In this case, the collection of the receivables by the seller is not treated as a separate service to the purchaser, provided that, in collecting the receivables, the seller acts in its own interest and on the basis of its own, retained right. Even when the seller's activity is based on a separate agreement, such activity is viewed as a supplementary service to a tax-exempt transaction and therefore the fees for such collection agent services are also exempt from VAT. The predominant view among market participants is that, due to the aforementioned interpretation, the issues created by the MKG decision have been resolved for typical German securitisation transactions.

9.5 Purchaser Liability. If the seller is required to pay VAT, 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?

The tax authorities are able to make claims against the purchaser for unpaid VAT, when the seller was required to pay such VAT on a sale of goods or services that gave rise to the receivables. The tax authorities may only make claims against the purchaser if and to the extent the purchaser collects the receivables.

The purchaser is deemed to have collected the receivables in full if the purchaser grants a second assignment (or pledge) of the receivables to a third person (including a security assignment or pledge of the purchased receivables to a security trustee). This also applies when the purchaser receives no consideration for this second assignment.

Pursuant to guidance issued by the German tax authorities, the receivables are "deemed not to have been collected by the purchaser" (so that no liability arises) if and to the extent the purchaser pays consideration for the receivables to the free disposition of the seller. On this basis, the risk of the purchaser becoming liable for VAT in a typical securitisation transaction is generally limited to the VAT contained in the difference between the nominal amount of the receivables sold and the purchase price delivered by the seller, e.g., due to discounts and cash reserves.

9.6 Doing Business. Assuming that the purchaser conducts no other business in Germany, 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 Germany?

In general, the purchase of receivables would not make a purchaser that conducts no other business in Germany liable to tax in Germany. Exceptions may apply if the receivables give rise to income from German sources (as defined in German tax law). In some cases (e.g., interest payments on hybrid debt instruments), the purchaser's liability to tax in Germany is then satisfied through withholding (see question 9.1 above). In other cases, the purchaser's (corporate) income tax liability is assessed on the basis of its net income from German sources. For example, interest payments on loans secured by German *situs* real estate give rise to a tax liability and a filing obligation in Germany under domestic law (see question 9.1 above). In many of its income tax treaties, Germany waives the right to tax interest on loans secured by German *situs* real estate.

The appointment of the seller as the purchaser's service and collection agent, or the purchaser's enforcement of the receivables against the obligors, should not ordinarily make the purchaser liable to tax in Germany. However, the German tax authorities have in the past indicated that they may treat the purchaser as a resident of Germany for tax purposes if the purchaser is an entity that has no substantial presence outside of Germany. In this case, the purchaser may be treated as having its effective place of management in Germany because the seller in its capacity as servicer and collection agent makes the decisions relating to the day-to-day management of the purchaser's business (in particular, the enforcement of the receivables against the obligors) in Germany. As a result, the purchaser would be subject to German (corporate) income tax and trade tax.

Even where it can be established that a purchaser is effectively managed from outside of Germany, the purchaser may still have a taxable presence in Germany if the tax authorities consider the seller as a dependent agent in Germany due to its collection services for the purchaser. This mainly depends on whether the seller is bound by the instructions of the purchaser. If the purchaser agrees that the seller can continue the collection on its own terms and the purchaser has no possibility to intervene, a point can be made that the seller is not acting as a dependent agent.

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