Securitisation 2017: Spain

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1. Receivables Contracts

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

Although there are certain exceptions, in general, contracts in Spain do not need to be evidenced by a formal contract. This means that verbal contracts are valid and enforceable in Spain. Having said that, there are certain exceptions; for example, contracts entered into with consumers need to be in written form. In addition, under certain circumstances and pursuant to the relevant legislation, contracts need to be executed before a Public Notary.

That said, the sale of goods or services does not necessarily need to be evidenced by a formal receivables contract. In this regard, invoices may be sufficient to evidence the existence of the contractual relationship. On the other hand, a receivable contract may be deemed to exist as a result of the behaviour of the parties, since tacit contracts are generally accepted in Spain.

However, written form is advisable in order to evidence the conditions under such verbal and tacit contracts.

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?

Limits on interest rates. Spanish laws do not set out specific limits on interest rates other than a general criterion on which interest has to be deemed usurious.

The Act of 23 July 1908, on invalidity of usurious loan agreements, establishes that any loan setting out an interest rate significantly higher than what is considered to be the normal money-rate of interest and manifestly disproportionate according to the circumstances of the case will be invalid. The interpretation and application of this general parameter has recently been analysed in a Supreme Court's decision in relation to consumer-related transactions.

The court considered that in order to determine whether the interest rate was disproportionate, the annual percentage rate should be compared against the "normal money-rate". The latter refers to the statistics published by the Bank of Spain on interest rates applied by credit institutions in Spain. This decision provides objective criteria in determining whether an interest rate shall be deemed usurious.

Limits on late interest. The Spanish Civil Code states that the interest on late payments accrues when the non-defaulting creditor requires the other party to fulfil its payment obligation. The interest on late payments is a compensation for damages and prejudices, and consists of an amount agreed by the parties or, in the absence of an agreement, is equal to the legal interest rate set out by the government for that year. Notwithstanding the foregoing, there are several limitations to the principle of party autonomy. For example, the Decree of February 8, 1946, approving the new mortgage act ("**Mortgage Act**"), sets out that the late interest on loans for the acquisition of the main residence cannot exceed three (3) times the legal interest. On the other hand, Act 16/2011, of June 24, on Consumer Credit Agreements ("**Act 16/2011**") sets out that the maximum applicable rate for all current account overdrafts is 2.5 times the legal interest.

Furthermore, in light of a recent decision of the Supreme Court (April 22, 2015), the interest on late payments of consumers' personal loans shall be deemed usurious if it increases by more than two percentage points with respect to the interest rate agreed in the loan.

Pursuant to the most recent case law of the Court of Justice of the European Union, in case a national court considers that a particular provision under a contract shall be deemed null and void, the judge may not construe that provision by applying the default rule under the relevant national law. As an exception, in case such clause is required for the existence of the contract, which would not be the case with respect to late interest, the national court may apply the national default rule.

Mortgage loans. Additionally, regarding mortgage loans, the Spanish legislator has introduced urgent measures to protect low-income debtors by means of the Royal Decree-Law 6/2012, of March 9, as amended by Act 25/2015, July 28 ("**RDL 6/2012**"), of which the most relevant provisions are the following:

(a) A voluntary accession to a good practice code by credit institutions and professional lenders. The accession to such code involves the mandatory application of a number of provisions for the adhered institutions. At present, almost all Spanish credit institutions have adhered to such good practice code.
(b) A limitation to the maximum default interest applicable to any residential mortgage loans granted before the entry into force of RDL 6/2012 regarding low-income debtors. The cap interest is equal to the ordinary interest agreed in the loan plus 2%. This measure applies irrespective of whether the relevant institution has acceded to the above-mentioned good practice code.
(c) An indefinite derogation of any provision in loans and credit agreements limiting the effect of a reduction in the floating interest rate (i.e., the so-called "*cláusulas suelo*").

On the other hand, there has been much controversy on clauses affecting consumers. In this respect, Spanish courts are declaring null and void, for abusive, some clauses within mortgage loan agreements (e.g., the so-called "*cláusulas suelo*" and clauses regarding assumption of costs).

In particular, in May 2013, the Spanish Supreme Court ruled that in certain cases banks should refund the amounts perceived under those clauses from that date on. However, by the end of 2016, the European Court of Justice established that banks should refund the total amount received by way of application of those clauses over the whole life of the mortgage loan (i.e., not only for the time elapsed since May 2013).

Lastly, Act 1/2013, 14 May, on measures to protect mortgage debtors, debt restructuring and social rent ("**Act 1/2013**") establishes limitations on mortgage loans that finance the acquisition of a primary residence ("*vivienda habitual*"). This act prohibits the compounding of late interest (except under certain circumstances) and limits the cap on default interest up to three times the legal interest rate. These limitations apply to any Spanish residential mortgage loan (unlike the regime set forth in RDL 6/2012), regardless of whether the loan was granted before or after Act 1/2013 entered into force.

Aside from the general Spanish legislation on debtors' protection, some Spanish regions (e.g., Catalonia, the Basque Country and Andalusia), acting in their legislative capacity in the area of

consumer affairs, have enacted their own regional law in consumer protection. For example, by virtue of Act 24/2015, of July 29 on urgent measures to face emergency in relation to housing and energy poverty, in Catalonia a debtor under a mortgage loan may be released satisfying the assignee the assignment price. On the other hand, in October 1, 2013, the Andalusian Parliament enacted Law 4/2013 on measures to secure the proper fulfilment of the social function of housing. Under the Andalusian act, should the debtors be under special social emergency circumstances, houses may be expropriated right after the mortgage foreclosure has taken place.

Withdrawal right. Generally, Royal-Legislative Decree 1/2007, of 16 November, approving the consolidated text of the Act for the Protection of Consumers and Users sets out that when provided under the applicable sectoral legislation, or when agreed between the parties, consumers shall be entitled to cancel an agreement (and the receivables thereunder). This right of withdrawal is in force during 14 calendar days after the delivery of the goods or the execution of the agreement, as the case may be, unless a different cancellation period is set out in the applicable sectoral legislation. This term period will apply as long as the seller or provider of the services has duly informed the obligor-consumer of the existence and characteristics of the withdrawal right. Otherwise, the term shall be 14 working days since the seller has duly fulfilled this information obligation, up to a maximum of 12 months from the delivery of the goods or the execution of the service agreement.

Borrowers under consumer financing agreements and financial services customers of financial services following distance marketing activities by the financial institution are entitled to very similar withdrawal rights. Under Act 16/2011, borrowers may trigger the agreement without giving any reason within a period of 14 calendar days as from the later of the following dates: (i) the execution date of the credit agreement; and (ii) the date of delivery of certain financial information and terms by the lender to the consumer. The creditor shall not be entitled to any compensation other than payment of the principal and interest accrued from drawdown of the credit until full repayment.

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?

Sale. Except otherwise provided in the contract conditions ("*pliegos de condiciones*"), the transfer of the receivables will be enforceable against the Spanish governmental entity or company within the Spanish public sector once notice of transfer of such receivables has been duly served (with proof of delivery) upon the relevant debtor, in accordance with the Spanish Civil Code, the Spanish Commercial Code, and the Royal Legislative Decree 3/2011 on Contracts of the Public Sector. This includes the need of servicing a notice to the debtor (i.e. to the government entity or public company) in order to ensure that the assignment is enforceable *vis-à-vis* the same. Additionally, in case of assignment of future receivables, the consent of the government or government agency is required.

Collection. The collection of receivables arising from a contract signed with a governmental authority may be subject to the specific regulation applicable to such governmental entity. This regulation may provide for mandatory provisions of law, the application of which cannot be waived by agreement. This regulation may include:

a) the legal right of the governmental entity to claim for itself or for some of its assets (i.e. the assets allocated to, or used in, a public service) immunity from suit, execution, attachment or other legal processes in Spain;
b) the obligation of the governmental entity not to exceed certain limitations; and
c) the need for the payment of the receivable to be included in the relevant budget law of that entity for the relevant year.

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?

Regulation (EC) No.593/2008 ("**Rome I Regulation**"), which directly applies in Spain, sets out the law applicable to contractual obligations on civil and business matters.

Pursuant to article 3 of the Rome I Regulation, parties may choose the applicable law according to the principle of party autonomy. In the case that there is no explicit choice, the applicable law will be determined in light of the circumstances.

In the case of a sale of goods or the provision of services, when there is no explicit choice, the applicable law is the one of the country where the seller or the provider of services has its habitual residence. However, in case there is another country that is manifestly more closely connected, the law of the most closely connected country shall be deemed applicable instead.

Notwithstanding the above, there are certain exceptions under the Rome I Regulation to those general rules, in particular when there is a contractual asymmetry. For example, the applicable law will be the one of the country of habitual residence of the obligor in the case (i) the obligor qualifies as a consumer, and (ii) the seller or provider of services performs the contract's business activities in the country of the consumer, or the seller or provider of services directs its business activities that country.

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 reason why a court in Spain would not give effect to that 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?

Yes; since, pursuant to article 3 of the Rome I Regulation, the parties may choose a law not linked to the factual circumstances of the contract. In addition, the Rome I Regulation gives the possibility to choose different laws for different parts of the contract, and the possibility to change the applicable law during the contract's validity, if this does not affect third parties' rights.

However, according to article 9 of the Rome I Regulation, the principle of party autonomy has certain restrictions, such as restrictions due to the overriding mandatory provisions. In this regard, the Court of Justice of the European Union (C-369/96 and C-135/15) has deemed 'overriding mandatory provisions' as the rules that a country considers essential for safeguarding its public interest.

In this regard, the Spanish courts may refuse the application of the chosen law if the relevant provisions are clearly contrary to Spanish public policy. In this situation, the relevant Spanish court would apply the relevant provisions under Spanish law instead of those applicable under the chosen foreign law.

On the other hand, the principle of party autonomy may be limited when the chosen law is the law of a non-EU Member State and all the relevant elements in the contract are located in one or

more Member States. In this regard, the choice of the parties regarding the applicable law may not prejudice the application of mandatory provisions under EU law.

That said, this restriction would not normally apply in case of commercial relationships such as those between two professionals (the seller and the obligor under a receivables contract), taking into account the regular content of those agreements.

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

Yes, this Convention has been in force in Spain since August 1, 1991.

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)?

The sale of receivables does not need to be governed by the law applying to the receivable itself. The principle of party autonomy would apply herein pursuant to articles 3 and 14 of the Rome I Regulation, which allow the seller and the purchaser to apply to the sale contract a different law than that applying to the receivable itself.

In these cases, pursuant to article 14.2 of the Rome I Regulation, the law governing the receivable would rule: (a) its assignability; (b) the relationship between the assignee and the obligor; (c) the conditions under which the assignment or subrogation may be invoked against the obligor; and (d) whether the obligations of the obligor have been discharged.

However, the freedom of choice is subject to certain limits:

(i) All the relevant elements are located in another country. In case all the relevant elements of the situation are located in a country different from the one of the chosen law, the choice of the parties may not prejudice the application of mandatory provisions of that other country. Accordingly, the mandatory provisions of that other country will prevail over the parties' choice.

(ii) Payment instruments. In case of transfer of negotiable instruments executed and delivered in Spain, such as bills of exchange and promissory notes, the law applying to the rights and obligations of the parties shall be Spanish law.

(iii) Security interests. In case the obligations under the transferred receivables are secured by a security interest granted over an asset located in Spain (such as a real estate mortgage or a pledge over the shares of a Spanish company), mandatory Spanish law provisions shall apply on the perfection and enforceability of that security interest. Those provisions will govern, additionally, the assignment of that security interest for the benefit of third parties.

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)?

According to article 3 of the Rome I Regulation, in principle the chosen law (i.e., Spanish law) would apply to both the sale agreement and to the relationship with the obligor. Accordingly, provided that the transfer agreement complies with the requirements under Spanish law, as mentioned below in questions 4.1 and 4.4, a Spanish court would recognise that sale as being effective against the seller and the obligor.

Regarding the effects against other third parties (such as creditors or insolvency administrators of the seller and the obligor), the Rome I Regulation does not solve this question. In this regard,

article 27 of the mentioned regulation sets out that the Commission shall submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person, together, if appropriate, by a proposal to amend the Rome I Regulation. To this day, the envisaged report has not been submitted and, accordingly, the effectiveness of the assignment of the receivable against third parties and the priority of the assigned claim is still a controversial issue.

However, in Spain there is a reference to this issue on the local law governing financial guarantees, i.e. Royal-Legislative Decree 5/2005 ("RDL 5/2005"), dated 11 March, which transposes, amongst others, the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. This law expressly sets out that where credit rights constitute financial collateral, the effectiveness of such assignment against the obligor and against third parties shall be determined in light of the law governing the assigned receivable.

The majority of scholars consider that the solution adopted with respect to financial collateral in RDL 5/2005 should apply in other cases where a receivable is assigned by way of security or pledge, and by extension, to any kind of ordinary assignment.

In conclusion, it is likely that under the circumstances described in this question, a Spanish court would recognise the sale as being effective ***vis-à-vis*** third parties if the sale complies with the relevant requirements under Spanish law.

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?

Please refer to questions 3.1 and 3.2 above on the law applicable to the assignment agreement, to the conditions under which the assignment may be invoked against the obligor and the effectiveness of such assignment against third parties. Accordingly, a Spanish court would recognise that sale as being effective against the seller and the obligor in the case the legal requirements under Spanish law, as described in questions 4.1 and 4.4 below are met.

Notwithstanding the above, in the case where the obligor was not located in Spain, since Rome I Regulation has not been further developed, in order to ensure recognition in the country where the obligor is located it would be advisable to comply; additionally, with the requirements that the law of that country imposes for the enforceability of the transfer ***vis-à-vis*** third parties.

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?

Please refer to questions 3.1 and 3.2 above on the law applicable to the assignment agreement, to the conditions under which the assignment may be invoked against the obligor and the effectiveness of such assignment against third parties.

Provided that the transfer agreement complies with the chosen applicable law (the law of the country where the obligor is located), a Spanish court would recognise that sale as being effective against the seller. However, that foreign law should be evidenced to the Spanish court.

In addition, since the seller is located in Spain, it would be advisable, in order to ensure recognition by Spanish courts, to comply not only with the requirements under the law of the obligor's country but also with the requirements that Spanish law imposes regarding the enforceability of the transfer ***vis-à-vis*** third parties.

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?

Please refer to questions 3.1 and 3.2 above on the law applicable to the assignment agreement, to the conditions under which the assignment may be invoked against the obligor and the effectiveness of such assignment against third parties.

Provided that the transfer agreement complies with the chosen applicable law (the law of the country where the seller is located), a Spanish court would recognise that sale as being effective against the obligor. However, that foreign law should be evidenced to the Spanish court.

In addition, since the obligor is located in Spain, it would be advisable, in order to ensure recognition by Spanish courts, to comply not only with the requirements under the law of the seller's country but also with the requirements that Spanish law imposes regarding the enforceability of the transfer ***vis-à-vis*** third parties.

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)?

Please refer to questions 3.1 and 3.2 above on the law applicable to the assignment agreement, to the conditions under which the assignment may be invoked against the obligor and the effectiveness of such assignment against third parties.

Provided that the transfer agreement complies with the chosen applicable law (the law of the country where the purchaser is located), a Spanish court would recognise that sale as being effective against the seller. However, that foreign law should be evidenced to the Spanish court.

In addition, since the seller is located in Spain and the receivable is governed by Spanish law, it would be advisable, in order to ensure recognition by Spanish courts, to comply not only with the requirements under the law of the purchaser's country but also with the requirements that Spanish law imposes regarding the enforceability of the transfer *vis-à-vis* third parties.

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?

There are three different methods to assign receivables under Spanish law, depending on the characteristics of the assignor and the assignee:

(1) ordinary assignment pursuant to the Commercial Code and the Civil Code;
(2) assignment pursuant to the Third Additional Provision of Act 1/1999, of 5 January, on Capital-Risk Entities ("**Act 1/1999**"); and
(3) assignment to a Spanish securitisation fund ("**FT**") or to a "*Fondo de Activos Bancarios*" ("**FAB**").

Each of these assignments needs to be executed in an agreement setting out the transfer of the relevant receivables.

(1) **Ordinary assignment**. Pursuant to the Commercial Code and the Civil Code, the seller remains liable *vis-à-vis* the purchaser for the existence of the receivable and validity of the legal title of the seller. On the other hand, unless so expressly agreed in the assignment agreement between the parties, the purchaser will not have recourse against the seller, i.e., the seller will not be liable before the purchaser in case of insolvency of the obligor.

(2) **Special assignments**. As set out in question 6.3 below, assignments under the Third Additional Provision of Act 1/1999 shall be subject to a special regime for insolvency purposes. Although these assignments are normally structured as an ordinary assignment, in order to benefit from the mentioned special regime, assignments must meet the following conditions:

(i) the assignor shall be an entrepreneur and the assigned receivables shall arise from its business activity;
(ii) the assignee shall either be a credit institution or a securitisation fund;
(iii) the receivables to be assigned shall either (a) exist on the date that the assignment agreement is executed, or (b) arise from the business activity of the assignor within a maximum period of one year from the execution date of the assignment agreement (or, alternatively, the assignment agreement shall clearly identify the obligors under those receivables).
(iv) the assignee shall pay to the assignor the agreed price either upon closing or on a deferred basis, excluding the cost of the services provided; and
(v) in the case the assignment agreement does not envisage the recourse against the seller in case of insolvency of the obligor, it must be evidenced that the purchaser has paid to the seller, in whole or in part, the agreed price prior to the maturity of the assigned receivables.

(3) **FTs**. The Act 5/2015 on promoting business financing ("**Act 5/2015**") sets out the regime for Spanish securitisation funds, that is, special purpose vehicles which may purchase a portfolio of receivables and issue asset-backed notes. This kind of assignment is subject to a special tax and insolvency regime, set out in question 4.3 below. Spanish securitisation funds need the prior authorisation of and registration with the Spanish National Stock Market Commission (the "**CNMV**").

Pursuant to article 17 of Act 5/2015, the assignment of receivables to FTs is subject to the following requirements:

a. the assignor shall have audited annual accounts for the last two financial years;
b. the assignor shall set out in its annual reports the assignment transactions (whether regarding present or future receivables) it has performed;
c. assignment transactions shall be executed in a written document; and
d. any new incorporation of assets shall be informed to the CNMV.

(4) **FABs**. Act 9/2012, November 14, on restructuring and resolutions of credit institutions ("**Act 9/2012**") sets out the regime of the FABs. FABs are special purpose vehicles, lacking legal personality, subject to a privileged legal and tax regime whose assets were originally bank assets. The assignor of the assets to be purchased by an FAB is exclusively the Company for the Management of Assets Proceeding from Restructuring of the Banking System ("**SAREB**"). SAREB is a partially government-owned company. In the context of the nationalisation and restructuring of certain Spanish credit institutions, SAREB purchased the problematic assets originated by those institutions. SAREB may divest such assets by transferring them to the mentioned special purpose vehicles (i.e., the FABs).

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?

There are no formalities generally required for perfecting a sale of receivables, regardless of whether it is an ordinary assignment, a special assignment or an assignment to a FT (except for those set forth in question 4.1 above) or to a FAB. Notwithstanding the foregoing, written form is standard in Spain.

Additionally, pursuant to article 1280 of the Spanish Civil Code, in case the receivables are executed in a public document, any party may legally require to the other party to execute the assignment of those receivables by means of a public document. However, in case that assignment is not executed in a public document, it will not affect the validity of the assignment between the parties.

In addition, pursuant to article 1526 of the Spanish Civil Code, the assignment of a receivable will be fully effective *vis-à-vis* third parties upon the date deemed certain. In this regard, articles 1218 and 1227 of the Spanish Civil Code set out that the execution date of a document will be deemed certain in case such document is executed before a Spanish Public Notary.

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?

Payment Instruments. In Spain, payment instruments ("**Payment Instruments**") include bills of exchange ("*letras de cambio*"), promissory notes ("*pagarés*") and other analogous instruments ("*efectos cambiarios*") included in Act 19/1985, July 16, of Exchange and Cheques ("**Act 19/1985**"), which regulates the issuance and transfer of such instruments. In general, Payment Instruments may be transferred by means of:

(i) ***Endorsement***. Endorsement ("*endoso*") is the expression that Act 19/1985 uses when referring to a written statement issued by the seller in the title itself. A Payment Instrument may be endorsed by placing the signature of the endorser on the back of the Payment Instrument and delivering it to the endorsee. The payee is the first possible endorser. The endorsee becomes the holder of the instrument and, thus, it has the right to claim payment of the Payment Instrument at the maturity date. An endorsee also has the right to endorse the instrument again. In the endorsement, the endorser may set out a particular endorsee or it may endorse the Payment Instrument in blank (i.e. by a mere signature on the back of the Payment Instrument).

(ii) ***Ordinary assignment***. The maker may include in a Payment Instrument the words "not to order", or an equivalent expression such as "not transferable" or "not negotiable". In this case, the instrument cannot be endorsed and it can only be transferred by ordinary assignment in a different contract by means of which the credit is transferred.

Although there is no risk of losing the fast-track proceedings that Spanish civil procedural law foresees to claim for the credit included in the Payment Instrument (i.e. "*procedimiento cambiario*"), transferring through endorsement brings more advantages than the ordinary assignment (no personal causes of opposition may be alleged by the debtor/to initiate an action the endorsee only needs the Payment Instrument to justify itself as a legitimate creditor).

Regarding the tax regime of the transfer of these "*efectos cambiarios*", please see question 9.3 below.

Mortgage loans. The requirements for the sale of a mortgage loan include the execution of the transfer in a public document executed before a Spanish Public Notary and the registration of that transfer within the relevant Land Registry. In case the sale of the mortgage loan does not meet the two mentioned conditions, the transfer of the loan will not be effective *vis-à-vis* third parties and the enforcement of the mortgage may be seriously hindered. On the other hand, in case the loan was secured by a mortgage or a non-possessory pledge over movable assets, the previous conditions (public document and registration) would apply as well. However, in such case the registration shall be within the Movable Assets Registry ("*Registro de Bienes Muebles*") instead of the Land Registry.

On the tax side, the transfer of a mortgage loan (either over a property or over a movable asset) in a public deed ("*escritura*") accrues stamp duty tax. Unlike mortgage loans, loans secured by non-possessory pledges may be transferred by means of a notarial document (i.e., the "*póliza*") before a Spanish Public Notary, different from the public deed. The execution of that agreement in a "*póliza*" would avoid the accrual of stamp duty tax.

In case mortgage loans are granted by a credit institution and secured by a mortgage over a property, Act 2/1981 on the Mortgage Market Act ("**Act 2/1981**") sets out a privileged regime for the transfer of

the credit rights arising from those mortgage loans through the issuance of a special type of transferable securities. In this regard, Act 2/1981 and its development regulation (Royal Decree 716/2009, of April 24, "**RD 716/2009**") set out the requirements mortgage loans shall meet so that the credit rights thereunder may be transferred by the issuance and subscription of those special transferable securities, the mortgage participations ("*participaciones hipotecarias*"), hereinafter, "**PH**". Mortgage loans may be transferred by means of the issuance by credit institutions and the subscription of PH if, among others, the following requirements are met:

- Loans shall be secured with first-ranking mortgages.
- The value of the secured loans shall not exceed 60% of the appraised value of the property (or 80% in case of residential property).
- Mortgaged properties need to be insured against damages.
- Loans cannot be secured by assets expressly excluded according to RD 716/2009; this includes loans secured with mortgages granted over usufruct rights, administrative concessions and surface rights.

Pursuant to the Fourth Additional Provision of Act 5/2015, in case the mortgage loans do not meet all the requirements set forth in Chapter II to Act 2/1981 and of RD 716/2009, the credit rights may be transferred by means of a different type of transferable security: mortgage transfer certificates ("*certificados de transmission de hipoteca*"), hereinafter, "**CTH**".

Both PH and CTH are subject to a privileged regime for registration, tax and insolvency purposes:

- *Registration with the land registry*. In case subscription and possession of PH and CTH are restricted to professional investors (such as FTs), pursuant to paragraph two of article 29.1 of RD 716/2009, the issuance of PH or CTH shall not be subject to a marginal notation with the Land Registry. However, in any event, the issuer of the PH and CTH remains the lender on record in the Land Registry, even though the holder of the CTH or the PH becomes the beneficial owner of those mortgage loans.
- *Tax regime*. The issuance and transfer of PH and CTH is a transaction exempt from stamp duty tax.
- *Insolvency regime*. In the case of insolvency of the credit institution, the issuance of the PH or the CTH would only be subject to the challenge by the insolvency authorities if they prove fraud.

Pursuant to Act 2/1981 and RD 716/2009, the issuer of the PH or CTH is required to provide custody and administration of the mortgage loans. Accordingly, the issuer shall transfer to the holders of the PH and the CTH any amounts received regarding the underlying loans, in the amount corresponding to the percentage of its participation in the mortgage loan. In the event the obligor fails to pay the mortgage loan, the holder of the PH or CTH has certain powers as holder of the credit rights regarding the underlying mortgage loan. For example, the holder of the PH or the CTH, as the case may be, may compel the issuer to commence foreclosure on the mortgage and has a subsidiary power to enforce the mortgage in the amount corresponding to the percentage of its participation inthe mortgage loan in the case the issuer of the PH or CTH does not commence the procedure within 60 days.

Consumer loans. There are no particular requirements for sale and perfection regarding consumer loans. However, pursuant to article 31 of Act 16/2011, in the case the original lender ceases to be the servicer under that loan, the assignment shall be notified to the consumer.

Debt securities. Debt securities represented in book-entry form shall be transmitted by accounts transfer in addition to the execution of the transfer agreement.

Debt securities represented in registered form shall be transferred either through endorsement of the relevant title or by means of an ordinary assignment.

Debt securities represented in bearer form shall be transmitted by physical delivery of the title.

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?

Consent of the obligor is not required to perfect a valid transfer of a receivable, unless otherwise agreed by the parties of the original contract. Where consent is required in accordance with the original contract, it is unclear under Spanish law whether a transfer made without such consent remains valid and enforceable against the obligor (who will have a legal action against the original creditor for breaching the contractual provision requiring the consent), or whether the lack of consent renders the transfer invalid and, therefore, not enforceable against the obligor. Case law has not provided a consistent answer to this question.

Notwithstanding the foregoing, the consent of the government (or the government agency, as the case may be) is required in case of transfer of future government receivables.

Notification is not required to perform a valid transfer of a receivable. However, an obligor will be deemed to have validly discharged its obligations under a receivable if it has made the payment to the original creditor before it is notified, or it becomes aware, of the transfer. An obligor may also set-off its obligations under a receivable against the original creditor until it is notified of the transfer. In both cases, the new creditor will not have any legal action against the obligor to claim the amount paid (or set-off), but it would be only entitled to claim from the original creditor the amount received by it from the obligor, or (as applicable) the amount set-off. Therefore, serving a notice of the transfer to the obligor is advisable and enhances the legal position of the new creditor.

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?

Spanish law does not require any specific formality in connection with servicing a notice of transfer. However, as a matter of practice, it is advisable to service notices in a manner that helps to evidence in court the date of the notice, the date of reception of the notice by the obligor and the consent of the same. Standard procedures for such purpose include requesting a Notary Public to service the notice or via a special mail system "burofax", which is offered by "Correos" (the Spanish Mail).

A notice may be served after the sale and no limitations apply. The parties may notify the transfer of all future receivables arising from an existing contract.

If the obligors are individuals and there is a transfer of personal data, the transfer and the notice must comply with the requirements under the Organic Act 15/1999, of December 13, on Personal Data Protection (basically, properly informing the affected individuals about their data being included in a new file as well as about other relevant circumstances – such as the responsible for that file, purposes of use, mention to the rights of access, amendment, cancellation and opposition, etc.).

Finally, it is under debate whether certain regional regulations on residential mortgage lending require, in those cases, the delivery of a notice to the borrowers under those loans.

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)?

The effect of the three proposed clauses above would not be the same.

The first and the second clause may be interpreted as prohibiting the transfer of receivables under the Agreement as both would prevent the transfer of both rights and obligations.

On the other hand, the third clause would only prevent the transfer of obligations, but not rights. Hence, in accordance with the third clause, no consent of the obligor would be required to transfer receivables under the contract.

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?

Please refer to the answer to question 4.4 above.

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 haracteristics? 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?

Spanish law requires that an asset to be transferred (in this case, a receivable) is properly identified in the sale and purchase contract. However, no specific rule determines how a receivable should be identified. Hence, the identification of the receivable in the sale and purchase contract could be made in any manner that allows a court to be able to properly identify the receivable. As a matter of practice, receivables are normally identified by, at least, the name of the obligor and the invoice number or contract details.

The receivables to be sold do not have to share the same characteristics.

Where the receivables are to be transferred to a FT, Act 5/2015 sets out that a description of the assets to be transferred, setting out their characteristics, shall be provided. That said, Act 5/2015 does not specify which data would be deemed sufficient in order to comply with those requirements. On the other hand, article 22 of Act 5/2015 sets out that, amongst the requirements for the incorporation of an FT, an audit report on the securitised assets (issued either by the managing company or by an external audit) shall be provided. Pursuant to that requirement, in principle, a detailed description on the receivables (containing data such as outstanding balances, yields, financial flows, collection terms, amortisation schedule and maturity dates) should be provided.

In the case of a transfer of credit rights under a mortgage loan to the FT through the issuance and subscription of PH and CTH, RD 716/2009 sets out that the title representing those transferable securities shall set out, for each mortgage loan, the initial loan principal, its maturity date, its amortisation schedule, its financial flows, its maturity date and the data of its registration in the relevant Land Registry. Accordingly, in the case of a transfer of credit rights pursuant to the issuance of PH and CTH, the mentioned data will be required.

Finally, regarding the common objective characteristics regarding the receivables to be sold to an FT, unlike the former regulation applicable to those funds, Act 5/2015 does not provide that the assets must be of a homogeneous nature.

A global sale of all of its receivables (or of all of its receivables, but some) are generally valid under Spanish law, although the actual transfer of the ownership of a receivable arising from a contract entered after the date of the sale may require additional actions (please see the answer to question 4.10 below).

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?

A court may enquire into the economic characteristics of the transaction. Although the description of a contract as an outright sale could help a court to construe the contract as such, Spanish courts are not bound by the legal name given by the parties to a contract; instead, they could analyse the underlying real economics and nature of the transaction. Following that analysis, they may determine a different characterisation of the contract.

In performing that analysis, the court may take into consideration not only a single clause or declaration of the parties made in the contract, but also all the other provisions of that contract, the terms and conditions of ancillary contracts and even the behaviour of the parties when performing their obligations or legal rights under the same.

Credit risk and payment of the purchase price. Normally, without taking into account whether the transfer is agreed on a recourse or non-recourse basis, the courts have generally respected the true sale treatment of the transaction given by the parties as long as the purchase price is paid by the purchaser in full or in substantial part. Failure to advance any significant funds may lead to the courts considering that the risk attached to the receivables has not been transferred and, accordingly, the transfer may not be deemed a true sale. Equally, subjecting the obligation to pay the purchase price to the existence of sufficient collections may endanger the true sale objective.

Control of collections. The fact that the assignor and the assignee agree that the former retains collection responsibilities does not alter the above views. For example, in the case of a transfer of receivables to an FT, the assignor may retain collection responsibilities, either:

(i) under legal compulsion, in the case of credit rights arising under mortgage loans, since RD 716/2009 sets out that the issuer of the PH and CTH shall retain collection responsibilities; or

(ii) y agreement between the assignor and the FT, in case credit rights are not assigned by way of the PH and CTH. Under those circumstances, although pursuant to Act 5/2015 the managing company remains legally responsible for the collection tasks, it is customary that the assignor and the FT enter into a servicing agreement by virtue of which the assignor undertakes to perform such collection duties.

Credit risk and right of repurchase. In addition, regarding the FT, the former regulation expressly prohibited the assignor to grant any guarantee to the FT or underwrite the transaction. In contrast, Act 5/2015 expressly envisages in its article 17 that the assignor shall specify in its annual reports all the deals entered into in order to underwrite that particular assignment transaction. Accordingly, the new regulation applicable to FT permits more flexibility on the retention on credit risk and on the existence of a right of repurchase.

Interest rate risk. Regarding the interest rate risk, the assignor and the FT may enter into a hedging agreement by which the assignor retains that risk and, in exchange, the FT undertakes to satisfy to the assignor either a fixed interest rate or a floating rate different from that applicable to the credit rights assigned to the FT.

That said, under Spanish account and capital adequacy rules, the characterisation of the transfer transaction may not coincide with the legal characterisation or the effect of that particular transaction. In this regard, certain elements of the transaction (such as the credit risk retention) shall be taken into account in order to determine whether, under account and capital adequacy rules, the transaction may be considered a true sale and, therefore, whether a sale of receivables can benefit from off-balance sheet treatment.

Residual profits. Pursuant to article 1528 of the Civil Code, the assignment of the main obligation entails the transfer of any right ancillary to it, such as security interests. Accordingly, as long as residual profits are ancillary rights under the receivable (for example, interests due because of late payment under the receivable, or any compensation due by the obligor) they would be assigned, by operation of law, to the purchaser. However, it is possible for the parties to agree otherwise, i.e., the purchaser may retain any residual profit to the seller, without necessarily jeopardising the treatment as an outright sale.

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, the parties may agree to continuous sales of receivables. However, under Spanish law, it is arguable whether it is possible to effectively transfer legal title over a future receivable until the relevant receivable actually exists, or the contract from which the receivable will arise has been entered into. Therefore, such continuous sale would constitute a binding obligation of the parties to enter into future sales, but it may not have the legal effect of transferring legal title of future receivable unless an actual transfer is also signed after the future receivable (or the underlying contract) has come into existence (please see the answer to question 4.11 below for further reference). A continuous sale may survive a declaration of insolvency, but it will be subject to several restrictions in case of insolvency of the seller.

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

Ordinary assignment. As mentioned in the answer to question 4.10, a contract of sale of future receivable creates valid obligations binding upon the parties. However, the actual transfer of the title over future receivables may not occur until the future receivable, or the contract underlying to the future receivable, actually exists. Some scholars, as well as case law, have argued that the purchaser may be considered as the owner of a future receivable *ab initio*, as soon as the future receivable comes into life, and hence that the future receivable already arises as an asset of the purchaser and not as an asset of the seller. As a matter of practice, it is advisable to agree in connection with a sale and purchase of future receivables, from time-to-time, to enter into actual transfer documents of such future receivables (e.g. every month, at the end of every quarter, semi-annually or annually). This would help to prevent any legal debate on whether the original sale and purchase agreement actually transfers the receivables only existing at the time each transfer document is signed.

Special assignment. The Third Additional Provision of Act 1/1999 expressly envisages the assignment of future receivables. As referred to above in question 4.1, these receivables shall either:

(i) exist on the execution date of the assignment agreement; or

(ii) arise as a result of the business activity of the assignor within a maximum period of one year from the execution of the assignment agreement or, alternatively, shall be receivables whose future obligors are clearly identified in the assignment agreement.

FT. Article 16 of Act 5/2015 expressly envisages the assignment of future receivables to the FT. These receivables shall be collections of an already known or estimated amount. The assignment needs to be executed in a way that evidences, in a credible and unambiguous way, that the transfer of ownership has taken place. Act 5/2015 sets out examples of future receivables such as flows arising out of toll road projects or any other credit rights that CNMV determines by circular letter.

Please note that Act 5/2015, in its Eight Transitional Provision, envisages a new circular to be issued by CNMV replacing Order EHA/3536/2005, of 10 November. To this day, this new circular has not been enacted yet, and therefore Order EHA/3536 /2005 remains in force.

Order EHA/3536/2005 sets out that the transfer of future receivables shall meet certain requirements, such as that the assignment has to be full and unconditional ("*plena e incondicionada*") and that the incorporation deed of the FT shall specify:

(a) the terms or the activity under which those receivables will be generated;
(b) the powers of the assignor over those receivables;
(c) the conditions of that assignment; and
(d) the risk allocation between the assignor and the assignee.

Regarding the distinction between future receivables arising prior to or after the seller's insolvency please see questions 6.1 and 6.5 below.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Spanish law provides that *in rem* security interests are ancillary to the main secured obligation and, hence, the transfer of the main secured obligation automatically entails the transfer of the security interests ancillary to it.

However, it is advisable for enforcement purposes to notarise the assignment so that the assignee may evidence, for enforcement purposes, that it benefits from the security (otherwise, the assignee may not have access to direct enforcement proceedings). If the security is a mortgage, a chattel mortgage or a chattel pledge, it is necessary, for the same enforcement purposes, to register the transfer in the Land Registry or the Moveable Assets Registry (as appropriate). Finally, real estate law provides that (unless otherwise agreed) the transfer of an obligation secured by a real estate mortgage should be notified to the obligor.

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?

Spanish law allows an obligor to set-off against amounts it owes to a creditor if both the amounts owed by, and to, the creditor are due and payable ("*deudas líquidas, vencidas y exigibles*"). Set-off occurs automatically and without the need of any notice by any of the parties to the other. If the requirements for setting-off have been fulfilled before an obligor is served with the notice of an assignment, such obligor would be entitled to oppose to the purchaser any set-off already occurred before such notice. After the notice of assignment, an obligor would be entitled to oppose set-off against any amount it may owe to the purchaser. The above assumes that the assignment is not prohibited by the original contract. If the assignment is prohibited, an obligor (in addition to any claim that the obligor may have as result of an assignment made in breach of the prohibition) may continue setting-off against any amount owed to the original seller.

Regarding the last question, in case a receivables contract does not waive set-off rights neither the seller nor the purchaser are liable to the obligor for damages caused by the termination of set-off rights.

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

Ordinary and special assignment. The assignment agreement may envisage that the purchaser shall transfer to the seller any residual profit (for example, any fee due by the obligor) with immediate effect.

FTs. In case the portfolio is assigned to a FT pursuant to Act 5/2015, since the fair value of the FT shall be zero, it is customary to envisage the payment to the seller of the residual profits on the last position of the cash flow waterfall. That is, once the claims of each and every creditor have been satisfied, the FT transfers to the seller the residual profits arising under the transaction. This amount is typically referred to as the intermediation margin ("*margen de intermediación*").

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)?

This is not usual under Spanish practice.

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 (please see the answer to question 5.1 above).

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

Under Spanish law, receivables can be attached to three different types of security interests: (i) possessory pledges; (ii) non-possessory pledges; and (iii) subject to certain limitations, financial collaterals.

Perfection of possessory pledges require that the pledgor "transfers the possession" of the receivable to the pledgee or to a third party (as appointed by pledgor and pledgee (e.g. a security agent)). Spanish law is not clear as to how this transfer of possession should be made in connection with a receivable, as Spanish general security interest regulation only foresees the transfer of tangible assets. As a matter of practice, it is generally accepted that the notarisation of the pledge, plus serving a notice of the creation of the pledge to the obligor is sufficient to perfect a possessory pledge. When the parties prefer to avoid serving a notice to the obligors due to commercial reasons (e.g. due to confidentiality or reputational issues, etc.), alternative manners of transferring the possession of the receivable could be available.

Non-possessory pledges must be registered with the relevant Movable Assets Registry ("*Registro de Bienes Muebles*"). For these purposes, non-possessory pledges are signed in front of a Spanish Notary Public and are notarised in the form of a public document (as a matter of practice, in this case a "*póliza intervenida*").

Certain types of receivables could be also attached to financial collateral (as provided by RDL 5/2005). RDL 5/2005 provides that financial collateral must be in written form and no additional formality should be required to perfect financial collaterals. RDL 5/2005 also provides that the delivery by a pledgor to the pledgee of a list of receivables in writing is sufficient to consider the

receivables transferred to the pledgee. As a matter of practice, it is customary to perform the same perfection requirements explained for possessory pledges when creating a financial collateral (i.e. notarial document and notice to the obligor).

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?

A security interest validly created over a receivable and governed by a law other than Spanish law could be recognised as valid by a Spanish court on the basis of article 14.3 of the Rome I Regulation.

According to the Rome I Regulation, Spanish law would govern the assignability of the receivables, the relationship between the pledgee and the debtor of the receivable, the conditions under which the pledge can be invoked against the debtor, and the conditions under which the debtor's obligations could be discharged. This entails that it would be advisable to comply with the perfection requirements, in the same terms and in the same conditions as if it was a Spanish law governed pledge. Therefore, it would be advisable to have the foreign law governed pledge notarised in Spain, and the debtor notified of the creation of the pledge (please see the answer to question 5.3 above).

It remains unclear to what extent a pledge created over Spanish law governed receivables would be fully recognised *vis-à-vis* third creditors of the pledgor (for example, in the case of an insolvency proceeding) if the pledge is governed by a law different from Spanish law. Common opinion, however, suggests that if the Spanish perfection requirements have been met, a Spanish insolvency court may not reject the recognition of that pledge, even in case of insolvency.

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?

Except for certain limited cases, no requirements in addition to those generally applicable to security over receivables apply in connection with the perfection of pledges over insurance policies, mortgage loans or consumer loans.

Security interests over promissory notes could require the endorsement by way of security over the same to perfect the security interest (if the promissory note has been issued in registered form), or the delivery of the same to the pledgee (if the promissory note has been issued in bearer form).

Security interests over marketable debt securities could require the following additional perfection requirements: (i) if the marketable debt securities is represented by book entries, the registration of the security interest in the relevant registry is required; (ii) if marketable debt securities has been issued in registered form, it is required that the pledgor endorses as security the relevant debt certificate; and (iii) if marketable debt securities has been issued in bearer form, the pledgor must deliver the relevant debt certificate to the pledgee.

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?

Spanish law is not familiar with the concept of "trust", and it does not recognise the creation of a dual ownership (beneficial owner and legal owner). Therefore, trusts are not used in the Spanish practice. Although it would not have the same effects as a "trust", it is possible (and usual in Spanish practice) to create a pledge in favour of the purchaser over the bank account/s of the seller where the collections are credited. This pledge would confer upon the buyer a legal preference over the amount standing to the credit in such bank account in case of default or insolvency of the seller. This mechanism, however, may not be useful for collections received by the seller after a declaration of insolvency, as there are cases where insolvency courts have taken the view that a pledge over a bank

account only attaches the balance standing to the credit in such bank account as of the date the insolvency is declared. Irrevocable instructions given by the seller to the obligors, or the account bank, may not survive the declaration of insolvency of the seller.

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

Escrow accounts are customary in Spanish practice. Security can be taken over a bank account located in Spain under Spanish law, in the form of a possessory pledge or, eventually, a financial collateral (please see the answer to question 5.3 above).

Although it is not usual in practice, a security interest validly created under English law over a bank account located in Spain could be recognised by a Spanish court on the basis of article 14 of the Rome I Regulation. In that case, Spanish law would govern the assignability of the bank account receivables, the relationship between the pledgee and the account bank, the conditions under which the pledge can be invoked against the account bank, and the conditions under which the account bank's obligations could be discharged (please see the answer to question 5.3 above).

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

Except as provided below, generally, no limitations apply. The pledgee would, upon enforcement of the pledge, be entitled to appropriate (or to set-off, as applicable) the balance standing to the credit in the bank account from time-to-time.

The above assumes that the pledgor has not been declared insolvent. If the pledgor has been declared insolvent under a Spanish insolvency proceeding, the pledgee may not be entitled to funds flowing into the bank account after the declaration of insolvency. If the pledgor has been declared insolvent under a law different than Spain, the rules governing the main insolvency proceeding may also limit the legal rights of the pledgee.

Regarding security interests created over a bank account as a financial collateral, a recent judgement from the European Court of Justice has ruled that in order to benefit from the privileged regime envisaged in the Financial Collateral Directive (Directive 2202/47/ EC, transposed by RDL 5/2005 in Spain), funds under the bank account must not be available for the pledgor.

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, the parties may agree that the owner of the account shall have access to the funds in the account prior to the enforcement. This would not affect the security. The parties would normally agree that a minimum balance should be left in the bank account at all times (e.g. 100 Euros, or a similar amount), as some scholars have argued that a pledge over a bank account could be considered extinguished if the balance standing to the credit of such bank account is, or becomes, zero, or if the account is overdrawn.

It is also usual to agree in project finance facilities agreements, restrictions on the use of the funds deposited into the account of the borrower/s from time-to-time. These restrictions are contractual undertakings of the borrower/s, which would not be binding upon the account bank unless the account bank, the pledgor and the pledgee enter into a direct agreement. Finally, unlike other jurisdictions, it is not usual under Spanish law to vest the pledgee (nor the security agent) with signing rights over the account of the pledgor, as this could be considered by a court evidence that the pledge is, or acts as, a *de facto* director of the owner of the account.

Notwithstanding the foregoing, as referred to in question 5.8 above, a recent judgement from the European Court of Justice has ruled that in order to benefit from the privileged regime envisaged in the Financial Collateral Directive, the owner of the account must not have access to the funds.

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?

To the extent that the sale of receivables is a true sale and is otherwise perfected and executed before bankruptcy declaration, the purchaser would have a right to carve out the receivables from the estate. However, if seller acts as servicer, there is a risk of the proceeds being commingled with the estate.

On the other hand, if the contract is executory for both parties at bankruptcy declaration, the debtor or the bankruptcy officer (depending on the degree of intervention) could reject the contract, in which case the purchaser would hold a damages claim, which would earn the treatment of administrative expenses (pre-deduction from the estate).

Subsequent purchase and sale contracts would be subject to the bankruptcy officer's authorisation (or direct consent, depending on the degree of intervention on the debtor's managing abilities). Court approval may be also required, insofar as the scope of the transaction exceeds the ordinary course of business.

Regarding security interests over receivables, the pledge shall vest the lender with secured treatment, so long as the receivables stem from a contract that has been perfected prior to bankruptcy declaration. The pledge shall not be effective, on the other hand, with respect to contracts entered into after bankruptcy declaration. Besides, if the receivables are deemed to be an asset needed for the ordinary course of business, the enforcement shall be stayed for one year, unless the debtor approves a plan of reorganisation or liquidation starts first. The only exception thereof is that the pledge is subject to special regime on financial collateral (in which case it is exempt from the application of the general insolvency provisions) or that the receivables are deemed to be located in a foreign state (in which case foreign law may apply).

6.2 Insolvency Official's Powers. If there is no stay of action, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of its ownership rights over the receivables (by means of injunction, stay order or other action)?

See question 6.1 above. Furthermore, the purchase and sale agreement of receivables could be subject to clawback (see question 6.3 below).

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

Under Spanish law, acts and transactions entered into within two years prior to bankruptcy declaration, may be subject to clawback (and thus avoided), so long as:

(i) the debtor does not receive reasonably equivalent value in exchange at the time the transaction is perfected – or there is not a sound business reason for the detriment caused to the estate; or

(ii) certain creditors are preferred to others when the company is already insolvent (i.e., unable to pay regularly its debts as they come due).

Hence, Act 22/2003 on Insolvency (the "**Insolvency Act**") does not distinguish between voidable preferences and fraudulent transfers. There is one action only, whereby the regime is the same for both purposes. The reach-back period is two years. The clawback action can only be filed once there is a bankruptcy proceeding in place.

The standing to bring a clawback action corresponds to the bankruptcy officer. Creditors (any creditor – no threshold is required) have only alternative standing if they prompt the filing of a clawback action and the bankruptcy officer does not bring it within two months. In such a case, creditors litigate at their own account. However, they may demand reimbursement of expenses up to the amount of the proceeds in case of success. This alternative standing does not apply to certain ring-fenced out-of-court workouts.

The Insolvency Act sets forth certain safe harbours, as well as rebuttable and non-rebuttable presumptions of acts and transactions that are preferential or detrimental to the estate (and hence avoidable).

Safe harbours are fundamentally: (i) acts and transactions done within the ordinary course of business according to standard conditions; and (ii) certain ring-fenced out-of-court workouts. In our experience, courts' construction of the ordinary course of business is restrictive.

Rebuttable presumptions (i.e., admitting evidence to the contrary, whose proof corresponds to the defendant) are: (i) onerous acts and transactions entered into with insiders (specially related persons or connected parties); (ii) the perfection of security interests in favour of antecedent debt (except for certain public claims); and (iii) early payment of secured claims with maturity subsequent to bankruptcy declaration.

Hence, whilst the length of the suspect period is the same, "related party transactions" are rebuttably presumed to be detrimental to the estate. Should the seller file for bankruptcy, the fact that its parent company were to guarantee its obligations *vis-à-vis* the purchaser would not turn the assignment agreement into a "related party transaction" (however, the guarantee would be deemed a related party transaction in the event that the parent company commenced bankruptcy proceedings in Spain).

Non-rebuttablepresumptions are (i) gifts and other acts ortransactions without consideration, and (ii) early payment of unsecured claims with maturity subsequent to bankruptcy declaration.

Actual intent or fraud is not required to bring a clawback action successfully (except as to security interests subject to the special financial collateral regulation). The only requisite thereof is (i) lack of reasonably equivalent value or sound business reason when the transaction is perfected, or (ii) preferential payments when the company is already insolvent.

Yet in case of actual fraud, the reach-back period to bring a fraudulent conveyance action is four years. Acts and transactions without consideration are presumed to be fraudulent. This action, which cannot be filed if there are other available recovery mechanisms, can be brought even if the insolvency proceeding has not been declared yet.

Causation-in-fact is also not required to successfully bring a clawback action. Likewise, preferential payments may be avoided even if the creditor demonstrates that the recovery does not exceed what it would obtain in liquidation. The link between the clawed back act or transaction and the generation or aggravation or insolvency may be significant though for classification purposes as per directors (e.g., potential liability for the impaired claims) or third parties (potential liability for aiding and abetting).

As per the outcome of a clawback action, the general rule (as per bilateral contracts with reciprocal obligations) is that creditor obtains an administrative expense in exchange for the returning obligation, unless there is bad faith (i.e., actual or constructive knowledge that the act or transaction would be detrimental to the estate), in which case the claim is subordinated. If the creditor has transferred the collateral to a third party acting with good faith, there is an obligation to return the asset's value at the avoided transaction's time plus legal interests (and damages in case of bad faith).

Under European and Spanish insolvency conflicts of laws rules, the Insolvency Act would apply to a clawback action filed by a company whose bankruptcy proceeding is declared in Spain (because of the location of its centre of main interests therein). However, creditors can object to the filing of the clawback action subject to Spanish law by showing that the act or transaction would not be avoidable under the applicable law. More precisely, creditors can challenge the filing of the clawback action in the answer, by demonstrating:

(i) that the act or transaction is subject to foreign law (i.e., non-Spanish); and
(ii) that the act or transaction would be ring-fenced under such foreign law.

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?

In the case of debtors belonging to the same group of companies (which would be the case of the purchaser owned by the seller or by an affiliate controlled by the seller), Spanish law establishes (i) the possibility of filing a joint petition, and (ii) procedural coordination of the proceedings, although the assets and claims of each company are not commingled with those of the remaining companies. Hence, the default rule is that there is no substantive consolidation. The proceeds of the assets of each company are only applied to settle such company's claims. Substantive consolidation may only take place when the estates are so blended that it renders unfeasible to carve out debtors' claims and estates, without incurring unjustifiable delay and cost.

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?

With regards to (a), to the extent that the contract is executory for both parties, there is risk of rejection (see question 6.1).

With regard to (b), consent of the bankruptcy officer and, so long as the transaction exceeds the ordinary course of business, court approval, would be required.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

Yes, it can.

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?

Although envisaging in certain aspects a subsequent regulatory development, Act 5/2015, enacted in April 2015, sets out a unified legal regime for securitisation transactions in Spain, repealing former regulation on securitisation funds, which until April 2015 was set out in different laws and regulations.

The vehicle used in Spain and ruled by Act 5/2015 is the FT, as defined in question 4.1 above. FTs are separate pools of assets lacking legal personality, which fair value is zero. Managing companies of these FTs, which shall act in the best interest of the FT's creditors and bondholders, subscribe on behalf of the FT any agreement to which the FT is a party, such as the servicing agreement on the underlying assets, or the loans and credit facilities agreements granted to the FT.

In addition to the general case, the Spanish legislation also permits the incorporation of "private" funds, that is, FTs whose bonds will not be listed in the Spanish official secondary markets and whose holding will be restricted to qualified investors. In such cases, a prospectus will not be legally required (only the deed of incorporation of the FT).

Please find below a summary of the main aspects applying to the legal regime of the FTs:

1. Assignment of receivables to an FT

The assignment of receivables to an FT is analysed in questions 4.1, 4.2 and 4.11 above.

2. Types of FT

FTs may be incorporated either as closed funds or as open funds, depending on whether additional assets or liabilities may be incorporated to the FT:

(i) **Closed FTs**: In case the FT is incorporated as a closed fund, the deed of incorporation of the FT will not envisage the inclusion of additional assets or liabilities after the creation of the FT. However, the deed of incorporation may set out a four-month ramp-up period during which additional assets and liabilities may be transferred to the FT up to a certain limit. Additionally, replacements may take place in certain cases, such as in the case of non-eligible assets.

(ii) **Open FTs**: In case the FT is designed as an open fund, its assets, its liabilities, or both of them, may be modified (renewed) and/or extended after the incorporation of the FT. For instance, the FT may issue new securities, new credit facilities may be granted to the FT, or new assets may be assigned to the FT. In addition, and as an innovation of Act 5/2015, the public deed of incorporation of the FT and the relevant prospectus, when applicable (in case the FT is not private), may envisage that the assets of the FT may be actively managed. That is, the terms in which those assets can be modified in order to maximise the profitability of the FT, safeguard the quality of its assets, perform a proper risk treatment or keep the initial conditions of the FT set out in the incorporation deed.

3. Funding of the FTs

The liabilities side of the FT comprises the fixed income securities issued by the FT and the facilities granted by third parties to the FT.

(i) **Fixed income securities**. The incorporation deed of the FT sets out the terms of the issuance of the securitisation bonds ("*bonos de titulización*"), dividing them into different series with different levels of seniority. The securitisation bonds may be traded in an official secondary market (public FT) or in a multilateral trading facility (private FT).

The incorporation deed of the FT normally sets out a pass-through model for the repayment of the securitisation bonds. Accordingly, the cash flow generated by the underlying assets included in the FT repays according to the order or priority, simultaneously and by the same amount, the interests and principal that corresponds to the bondholders.

(ii) **Other liabilities**. Aside from the securitisation bonds, liabilities of the FTs may include loans and facilities granted by any third party (Act 5/2015 does not impose any restriction on the characteristics of the FT's creditor).

With respect to the interests of bondholders and creditors of the FT, unlike other jurisdictions, the Spanish legislation does not envisage the creation of a trust. Instead, Act 5/2015 sets out that the managing company shall act in the best interest of both bondholders and creditors, being accountable for its responsibilities (whether under the relevant contracts or legal duties) *vis-à-vis* them.

In addition to this role of the managing company, the incorporation deed of the FT may envisage the creation of a creditors' meeting ("*junta de acreedores*"), setting out its powers and the terms under which it may operate. The creditors' meeting represents the interests of both bondholders and creditors, although the incorporation deed may set out different participation terms depending on the type of creditor or bondholder.

4. Incorporation of an FT

The incorporation of an FT is subject to the prior compliance of the following requirements:

- Written authorisation request to CNMV.
- Approval and registration by CNMV of a prospectus. The prospectus will not be required in case of private funds, that is, in case the securitisation bonds (i) are exclusively addressed to qualified investors, and (ii) are not intended to be listed in the Spanish official secondary markets.
- An audit report on the securitised assets shall be issued either by the managing company or by an external audit.
- Approval and registration by CNMV of (i) the draft of the incorporation deed, (ii) supporting documentation on the assets to be assigned to the FT, and (iii) any other supporting documentation required by CNMV.

  With the adoption of Act 5/2015, the granting of a credit rating to the securitisation bonds with respect to a public FT has ceased to be a requirement in order to incorporate the FT.

5. Managing Company

The managing company of an FT ("*Sociedad Gestora de Fondos de Titulización*") shall be a public limited company duly authorised by CNMV for these purposes. They are entitled to manage not only Spanish FTs (and FABs) but also foreign analogous vehicles. The managing company is responsible for the incorporation, management and representation of the FT. On the other hand, the managing company acts on behalf of the FT and has the duty to safeguard the interests of the bondholders and the other creditors of the FT, as mentioned above. As an innovation of the new legal regime of Spanish securitisations, Act 5/2015 expressly sets out that the managing company is responsible for the management of the securitised portfolio of assets. However, regarding the PHs and/ or CTHs assigned to the FT, as referred to above in question 4.3, the responsibility for the management of the underlying assets (mortgage loans) remains in the issuer of the PH/CTH.

6. Compartments

As an innovation of Act 5/2015, independent compartments may be created within the same FT. Each of those compartments may have its own issuance of bonds and its own independent obligations. That is, each compartment will be liable of its own costs, expenses and debts. On the other hand, the incorporation deed of the FT may envisage the separate liquidation of each of those compartments.

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?

On the requirements for establishment and management of such entities, please see question 7.1 above for the regime applicable to the securitisation funds incorporated in Spain (FT) and the managing companies entitled to manage such vehicles.

On the other hand, FTs are subject to a privileged tax and insolvency regime, as referred to in the answer to question 4.3 above.

Since FTs are not legal entities, they do not have any directors or shareholders, so no specific requirements apply in this regard.

However, the companies managing those FTs are regulated entities, subject to CNMV's surveillance. In order to grant the relevant authorisation to a managing company, CNMV examines the suitability of the directors and significant shareholders (i.e., those holding at least 10% of the share capital of the company or voting rights) of the managing company.

7.3 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; in principle, a court in Spain would give effect to that contractual provision.

7.4 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?

Spanish law contemplates the waiving of rights, to the extent that it is not detriment to a third party or contrary to public order. Having said that, the waiver of the right to seek insolvency relief or the right to take any legal action against the purchaser is unlikely to be upheld by a court (particularly in the context of an insolvent seller), notwithstanding any remedy (damages) corresponding to the non-breaching party.

7.5 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?

In principle, a court in Spain would give effect to a contractual provision on payment waterfall, if that provision does not conflict with compulsory rules.

The Insolvency Act does not recognise subordination agreements unless *vis-à-vis* all creditors of the debtor. As such, the most likely outcome in a bankruptcy proceeding is that the officer and the court distribute the proceeds pursuant to compulsory priority rules, notwithstanding the enforceability of the subordination agreement as a turn-over provision in a separate proceeding.

7.6 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?

The Insolvency Act sets forth the duty to file for bankruptcy within two months as from debtor's insolvency situation (inability to regularly pay debts as they come due), with the exception of the so-called "5 *bis*" notice, which provides an extra four-month period to negotiate with creditors out-of-court. Otherwise, directors may be held liable for the accrued claims as from the onset of insolvency that turn out to be impaired if the company is liquidated.

If, however, the articles of incorporation do require a majority of directors to petition for bankruptcy (for instance, three joint directors), there is case law on the dismissal of bankruptcy petitions if the internal corporate resolution are not valid (only two out of three joint directors adopt the decision).

7.7 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?

Commercial receivables. In case of commercial receivables or nonperforming loans, it is customary that the purchaser is established in an EU Member State, such as Luxembourg, Netherlands or Ireland, for operational, commercial, tax, regulatory and other business reasons.

Financial assets. In case the portfolio has a financial nature (especially in case of mortgage loans), it is customary to establish the purchaser in Spain by means of the incorporation of a FT, a special purpose vehicle subject to the prior authorisation of and registration with the CNMV. As referred to in question 4.1 above, assignments to these special purpose vehicles are subject to a special tax and insolvency regime.

In particular, the assignment of the portfolio to a FT has a competitive edge with respect to ordinary assignments, where ordinary clawback regime (as referred to in question 6.3 below) applies. In contrast, in case of assignment to a FT the insolvency official shall prove fraud in order to challenge the assignment, and any good faith third party's rights would not be affected.

Additionally, as mentioned in question 4.3 above, when a credit institution sells mortgage loans and certain requirements under Act 2/1981 and RD 716/2009 are met, credit rights under that portfolio may be transferred by the issuance and subscription of PH and CTH. Such transfers are subject to a privileged regime for registration, tax (the issuance is exempt from stamp duty tax) and insolvency purposes (the assignment may only be challenged in case the insolvency official proves fraud).

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?

As referred to above in the preceding section, securitisation funds incorporated in Spain (FTs) and their managing companies are subject to the Spanish capital markets regulation, to the prior administrative authorisation of the CNMV and to surveillance of the mentioned supervisor.

Aside from these two entities, which special regime has been analysed in the preceding section, in general, the purchase of portfolios of receivables does not require any prior licence in Spain, regardless of whether the purchaser does business with other sellers in Spain.

However, in case the purchaser of a consumer loan portfolio subrogates itself into the lender's position, there is a risk that Spanish consumer authorities and/or Spanish courts consider that Act 2/2009, March 31, on mortgage loans and mortgage credits granted to consumers and on intermediary services regarding mortgage loans and mortgage credits ("**Act 2/2009**") should apply likewise in these circumstances, although article 1 of Act 2/2009 sets out that it shall apply to professionals "granting" such mortgage loans and credits (which, strictly speaking, would not be the case).

In case Spanish consumer authorities and/or Spanish courts held the interpretation mentioned in the preceding paragraph, this would involve, essentially, (i) the mandatory registration of the purchaser of the loans within the special registry held by the Spanish consumer authorities, which should be prior to the purchase of the relevant portfolio, and (ii) the need to comply with certain consumers' regulations, which basically relate to the information obligations to be fulfilled at the time of the granting of the loan or credit. In any case, it should be noted that the application of Act 2/2009 does not involve being subject to regulation as a financial institution in Spain.

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?

Neither the seller nor any third party performing collection tasks regarding the assigned portfolio of receivables are subject to any prior licence in order to collect those receivables. As an exception to the foregoing, a prior licence will be required when the administration activities are, because of their nature, subject to that prior requirement. For example, in the case of collection of receivables

under a portfolio of mortgage loans, when the administration activities necessarily involve holding the obligors' bank accounts, the servicing activity will be indirectly subject to prior authorisation since the gathering of reimbursable funds from the public is activity reserved to financial institutions.

On the enforceability of such receivables, in order to appear in court on behalf of the assignee:

- In the case of a third party replacement, the third party will need the relevant power of attorney granted by the purchaser in order to appear in court on behalf of the purchaser.
- In case that, despite serving notification of the assignment to the obligor, the seller remains responsible for the collection tasks, in order to appear in court on behalf of the purchaser, the seller will need a power of attorney granted by the purchaser.

  In addition to the foregoing and regardless of who is performing the servicing activities, in order to appear in court, the assistance of a court agent ("*procurador*") is required in Spain.

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?

Yes. The Organic Act 15/1999, of December 13, on Personal Data Protection ("**Organic Act 15/1999**") and the regulation developing this act, approved by Royal Decree 1720/2007, of December 21, set out restrictions on the processing and transfer of personal data. For these purposes, personal data is any information relating to an identified or identifiable natural person (the data subject), therefore affecting obligors who are individuals (consumer obligors and sole traders).

In general, data subjects' consent is required to process their data, although there are exceptions to this rule, such as when the personal data refers to the parties of an administrative, employment or business relationship contract or pre-contract, and it is necessary for its maintenance of fulfilment. Consent must be informed and, depending on the circumstances, it may be implicit, express or written.

In order to transfer personal data to a third party, the data controller (i.e., any natural or legal person, whether public or private, or administrative body that makes decisions on the purposes, content and use of personal data processing) must have previously informed the data subject of the transfer, identifying the data recipients and specifying the purpose of the transfer. In addition, the data controller must obtain the data subject's consent, unless an exception provided by law applies, for example:

- when the transfer is authorised by law;
- when the transfer results from the free and legitimate acceptance of a legal relationship whose development, fulfilment and control implies such transfer; and
- when the transfer satisfies a legitimate interest of the controller or the party to whom the personal data is transferred, provided that such interest is not overridden by the data subject's interests or fundamental rights and freedoms.

The requirements above do not apply when the data recipient acts as the data processor, processing the personal data exclusively on behalf of the data controller and under its instructions to render a service to the data controller. In this case, the data processing must be regulated in a contract specifying the conditions established under article 12 of the Organic Act 15/1999.

Additionally, when the data is transferred to a country whose level of protection has not been declared adequate by the relevant authorities (any country outside the European Economic Area, with some exceptions), the transfer must be notified to the Spanish Data Protection Agency ("*Agencia Española de Protección de Datos*") and authorised by the the director of that agency. Article 34 of the Organic Act 15/1999 establishes specific exceptions to the authorisation requirement. Amongst these exceptions, when the data subject has unequivocally given consent to the data transfer, and when the transfer is necessary for the performance of a contract between the data subject and the data controller, or to adopt pre-contractual measures at the data subject's request.

Note that the above-described regime will remain in force until May 28, 2018. At that date, the EU General Data Protection Regulation will fully enter into force, setting forth a more flexible regime for this type of international transfer of personal data (where no authorisation will be required if model clauses are used for covering such transfers).Although these rules only apply to individuals' personal data, other regulations (e.g., on banking secrecy) may also impose restrictions on the use and dissemination of sole traders and enterprises' data.

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?

According to the first paragraph of article 31 of Act 16/2011, in case the lender under a consumer loan agreement assigns the credit rights thereunder, the borrower (consumer) shall be entitled to raise before the assignee the same defences that would have corresponded to that obligor *vis-à-vis* the original lender, including set-off, in case those credit rights had not been assigned.

In addition, the second paragraph of article 31 of Act 16/2011 sets out that the assignment shall be notified to the borrower except when the original lender continues providing servicing services. In any case, as referred above, the borrower will be entitled to raise before the assignee any exception the consumer had *vis-à-vis* the original lender, including set-off.

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

No, there are no restrictions on the exchange of the Euro for other currencies or the making of payments in Euros to persons outside of Spain.

On the other hand, although not being a currency restriction, Spanish residents are subject to certain reporting obligations before the Bank of Spain regarding their cross-border positions. In particular, Spanish residents shall inform the Bank of Spain (monthly, quarterly or annually, depending on the amount of those transactions during the preceding year) on their payment transactions and the amount of the balance of assets and liabilities abroad.

In any case, the breach of this information obligation by the Spanish resident on a particular transaction will not deem that transaction invalid, regardless of any other implication from an administrative perspective.

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?

Whether any part of the payments on receivables made to the purchaser by Spanish obligors would be subject to withholding taxes in Spain depends on: (i) the characterisation, for tax purposes, of the income received by the purchaser; and (ii) the jurisdiction where the purchaser resides for tax purposes.

Although the characterisation of the income obtained by the non-Spanish tax resident purchaser is not clearly defined, in our opinion it would be deemed to be either (a) interest income, or (b) capital gains.

According to the Spanish Non-Resident Income Tax Act, regardless of whether the referred income is characterised as interest or capital gains, such income would be tax exempt in Spain to the

extent the purchaser: (i) is resident for tax purposes in an EU Member State, other than a tax haven territory; and (ii) does not act, in regards to the purchase of the receivables, through a permanent establishment located in Spain or outside the EU.

Residence for tax purposes in an EU Member State must be accredited through a certificate of tax residency issued by the relevant tax authorities. Tax residency certificates are valid for a one-year period.

In case the purchaser is resident for tax purposes in a non-EU Member State, it may be subject to withholding tax in Spain in accordance with the provisions set forth in the relevant convention for the avoidance of double taxation.

Residency in a particular jurisdiction for the purposes of the application of a reduced or a nil withholding tax in accordance with a specific convention must be accredited through a certificate of tax residency, issued by the relevant tax authorities. These certificates are valid for a one-year period.

In case the purchaser can neither accredit to be tax resident in an EU Member State nor in a jurisdiction with which Spain has a convention for the avoidance of double taxation in force, the purchaser would be subject to withholding tax on the income derived from the transaction at the general current tax rate of 19%.

Whether any part of the payments made by the obligor to the seller is subject to withholding tax in Spain depends, in the case the seller is a Spanish company, on the nature of such payments. In principle, payments made in remuneration of a delivery of goods or of the rendering of services are not subject to withholding tax in Spain. However, interest paid as remuneration of the deferral on the payment of a commercial transaction would be subject to withholding tax in Spain at the general tax rate of 19%.

Withholding taxes cannot be eliminated or reduced other than through the domestic law exemption or the relevant convention for the avoidance of double taxation – and provided that the purchaser is entitled to benefit from any of them.

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?

The seller would be subject to the provisions set forth in the Spanish General Accounting Plan and the General Accepted Accounting Principles ("GAAP") with regards to (i) the initial recognition of a credit against the obligor, and (ii) the recognition of the transfer of such credit to the purchaser. Note that the Spanish General Accounting Plan regulation is aligned, in general terms, with the provisions set forth in the International Financial Reporting Standards ("IFRS").

Generally, the seller would recognise, for accounting purposes, the transfer of the receivable at the time of the transfer of the risks and benefits inherent to the creditor position against the obligor.

Spanish tax legislation does not establish any speciality in this regard; rather it follows the regulations foreseen under the Spanish General Accounting Plan and the GAAP.

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

According to the Spanish tax legislation, the issuance of bills of exchange (*letras de cambio*) and documents issued with the purpose of transferring funds (*título valor, documento cambiario or documentos que realicen la función de giro*), are subject to stamp duty. Promissory notes (*pagarés*) and any other analogous instruments issued in series with a maturity shorter than 18 months are subject to stamp duty but exempt.

The tax due depends on (i) the total amount represented on such document, and (ii) the maturity. The taxpayer would be the issuer of these instruments or, in case such instruments are issued abroad, the first holder in the Spanish territory of such instruments.

In addition, anyone intervening in the negotiation or collection of these instruments would be joint and severally liable for the payment of the tax due and not paid by the issuer.

Transfer Tax would not apply to the extent the seller is a VAT taxpayer and the transfer of the receivables is subject to VAT.

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?

Under Spanish Value Added Tax legislation, the transfer of the creditor position would be VAT exempt to the extent the seller fully transfers the risks and benefits which would derive from an eventual insolvency of the obligor. Similarly, transactions relating to bills of exchanges, documents issued with the purposes of transferring funds, promissory notes and any other analogous instruments would also be VAT exempt.

Note that the services rendered by the seller to the purchaser, consisting of the collection of the payments on receivables made by the obligors, would represent an independent transaction to the transfer of the creditor position and/or to the transfer of any documents issued with the purpose of transferring funds.

According to the Spanish general VAT location rules, those collection services would be deemed to be located in the jurisdiction where the purchaser is established for VAT purposes. Therefore, to the extent that the purchaser: (i) is not established, for VAT purposes, within the Spanish VAT territory; and (ii) does not have a permanent establishment within the Spanish VAT territory to which the service is supplied, collection services would not be subject to VAT in Spain.

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?

Under the Spanish General Taxation Act, any entity or individual causing or actively collaborating with any tax infringement would be joint and severally liable for the payment of any tax debts derived from the transactions.

Likewise, any entity or individual causing or collaborating on the occultation or transfer of assets and rights belonging to the tax debtor would also be joint and severally liable for the payment of the tax debts of such debtor.

Entities or individuals not attending attachment orders issued over assets or rights, issued by the Spanish tax authorities, would also be joint and severally liable for the payment of the unpaid tax debts as a consequence of such inattention. This may be the case if the purchaser receives communication from the Spanish tax authorities informing that any payments to the seller must be made, instead, to the tax authorities for the payment of unpaid tax debts of the seller and the purchaser neglects the order.

In addition to the above, Spanish Value Added Tax legislation regulates specific scenarios of tax responsibility.

In particular, the recipient of a supply of goods and/or services would be joint and severally liable for the payment of VAT chargeable in the transaction if, as a result of a wilful or negligent act or omission, the correct application of the tax is prevented.

Furthermore, a recipient of a supply of goods and/or services acting as an entrepreneur or professional for the purposes of such supply would be liable for the payment of the VAT chargeable in a transaction, if such recipient should have reasonably presumed that the supplier was not going to pay the VAT to the Spanish tax authorities. Spanish Value Added Tax legislation considers that an individual should reasonably presume that the VAT charged in a supply of goods or services is

not going to be paid to the relevant tax authorities if the price paid is notoriously below what could be considered a normal price.

Note that, in principle, the above-mentioned VAT responsibility would not be applicable on the proposed transaction to the extent the purchase of receivables would be VAT exempt and the collection services would not be located within the Spanish VAT territory in the terms described in question 9.4 above.

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?

In general terms, a non-Spanish tax resident would be deemed to have a permanent establishment in Spain if such non-Spanish resident has empowered a Spanish tax resident individual to enter into agreements with third parties on its behalf.

Note that the appointment of the seller as the collection agent of the purchaser would require the granting certain powers to the seller for the purposes of rendering such collection services.

In principle, the empowerment to the seller for the purposes of acting as a mere collection agent should not imply that such seller acts as a dependant agent of the purchaser. Therefore, in principle, the seller, acting as a collection agent of the purchaser, would not be deemed to constitute a permanent establishment of the purchaser in Spain.

In any case, in order to ensure that the seller is not deemed to be a Spanish dependant agent of the purchaser, special attention must be paid to the content and nature of the authorities granted to the seller in the particular power of attorney. Only administrative faculties related to the mere cash collection of the receivables and not others related to the core business of the purchaser should be granted to the seller.

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

Debt relief to a Spanish tax resident purchaser would trigger taxable income in Spain to that purchaser. However, if the debt forgiveness is granted by an affiliate to the purchaser, it may be treated as an equity contribution or a dividend distribution, as the case may be.