



# ICLG

The International Comparative Legal Guide to:

# Securitisation 2014

**7th Edition**

A practical cross-border insight into securitisation work

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## Group Publisher

Richard Firth

## Published by

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
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## EDITORIAL

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Welcome to the seventh edition of *The International Comparative Legal Guide to: Securitisation*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of securitisation.

It is divided into two main sections:

Seven general chapters. These are designed to provide readers with a comprehensive overview of key securitisation issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in securitisation laws and regulations in 32 jurisdictions.

All chapters are written by leading securitisation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Mark Nicolaides of Latham & Watkins LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

Alan Falach LL.M.  
Group Consulting Editor  
Global Legal Group  
[Alan.Falach@glgroup.co.uk](mailto:Alan.Falach@glgroup.co.uk)

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# Panama

Patton, Moreno & Asvat

Ivette Elisa Martínez Sáenz



Ana Isabel Díaz Vallejo



## 1 Receivables Contracts

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

a) Commercial contracts in general are not subject to special formalities for their validity. Whichever is the form and language of the contract, the parties shall be obligated in the manner and terms agreed upon between them. Good faith and the parties’ real intent prevail with respect to the letter of the agreement. Except for documents technologically filed, pursuant to article 1102 of the Civil Code, any commercial obligations exceeding US\$5,000 must be in writing and thus it is convenient to have the sale of goods or services evidenced in a written contract.

b) Invoices accepted by the obligor are one of the means of evidence of a commercial obligation (article 244 of the Code of Commerce) which rank below public documents, private documents and merchant’s minutes.

c) In the absence of a formal written agreement, a receivables contract may be deemed to exist as a result of historic relationships, if sufficient evidence is presented based on the general provisions of the Code of Commerce.

**1.2 Consumer Protections. Do Panama’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?**

a) Interest rates by banks and other financial entities are not regulated and there is no maximum legal rate. Maximum rates of interest on consumer credit, loans or other receivables applied by market agents to the general consumers may be determined by the Consumer Protection and Competition Authority, but to date such maximum rate has not been established. By means of Law No.81 of 31 December 2009 the rights of credit card holders are regulated, but no limits are imposed on rates of interest that may be charged by the credit card issuers. Law No.81 provides that the nominal interest rate may not be modified without prior notice given at least 30 calendar days in advance. The first increase cannot take place before the first year of the contract elapses.

b) The commercial statutory right that applies to interest on late payments is 10 per cent *per annum* (article 223 of the Code of Commerce) in the absence of a contractually agreed interest rate in the specific contract.

Consumer protection provisions prohibit the execution of blank documents by consumers and obligate providers to expressly state the interest rate effectively paid which may not exceed the maximum legal rate.

**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?**

As a general rule, all administrative contracts must be in writing and countersigned by the Comptroller General of the Republic and published in the Official Gazette for their validity and perfection. In addition, express authorisation by the Cabinet of Ministers and the favourable opinion of the National Economic Council may be required for governmental obligations that exceed US\$2,000,000. Pursuant to Law Decree No.7 of 2 July 1997, the issuance of bonds, promissory notes or any other State securities requires prior approval of the National Economic Council. Negotiability of government instruments is not restricted. On the other hand, credits against the government are regulated by certain provisions of the Tax Code and are deemed to be preferred credits with respect to other credits, except for credits on real property rights, salaries and indemnifications owed to workers, quotas owed to the Social Security Entity, to name a few. Under article 1072-A of the Tax Code, credits against the government accrue an interest rate (per each month or fraction) of two (2) percentage points over the market reference rate annually listed by the Superintendence of Banks. The reference rate of the market shall be fixed in attention to the rate charged by commercial banks during the preceding six (6) months in commercial banking financings.

Under our securities law (article 346 of Law Decree No.1 of 1999), the State and any autonomous, semi-autonomous and mixed capital entities may issue and place securities at a discount of their nominal value. These securities may also be repossessed pursuant to the procedure set forth in the Judicial Code, but the State and any State-owned entity shall not be obligated to replace securities that were initially issued to bearer. These entities may also issue certificated or uncertificated securities which may be deposited in clearing houses.

## 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 Panama that will determine the governing law of the contract?

Pursuant to the applicable international private law provisions of Law 15 of 1928 (also known as the Bustamante Code), the situation of any credit is determined by the place in which it will be enforced and if not expressly stated, at the obligor's domicile. If judicial enforcement is to be sought in Panama, there are specific provisions in the Judicial Code that govern the attribution of jurisdiction, such as; the domicile of the legal entity that is sued, and the place of enforcement of the obligation, among other rules.

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

No. The only exception would be the parties agreeing to settle the dispute by arbitration, in which case the court must decline competition in favour of the arbitration court.

### 2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Panama but the obligor is not, or if the obligor is resident in Panama 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 Panama 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, the principle of freedom of contracting governs contractual obligations between the parties. Therefore, it is possible for a Panamanian counterparty to submit to the laws of another country or jurisdiction provided that such foreign law does not violate domestic public policy (choice of law). In addition, the parties may also submit to the courts or tribunals of a jurisdiction different to that of the Republic of Panama (choice of jurisdiction).

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

No, Panama is not a party to this convention.

## 3 Choice of Law - Receivables Purchase Agreement

### 3.1 Base Case. Does Panamanian 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., Panama's laws or foreign laws)?

Under Panamanian law, the sale of receivables and the receivables

themselves may be governed by a foreign law, according to the principle of freedom of contracting. Nonetheless, enforcement in Panama would require certain formalities to be observed pursuant to Panamanian law, such as notice to the obligor of an assignment of the receivables duly acknowledged by notary public or any other authentic manner.

### 3.2 Example 1: If (a) the seller and the obligor are located in Panama, (b) the receivable is governed by the law of Panama, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Panama to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Panama, will a court in Panama recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

Yes. If the sale of the receivable complies with the requirements of Panamanian law, a Panamanian court would recognise the sale as being effective against the parties involved in the sale. The foreign purchaser would have to seek enforcement of the receivable in Panama. Any creditors of the obligor or the seller or any insolvency administrators of the seller and the obligor pursuant to a bankruptcy filing made in Panama are subject to the priority stated for the respective credit under the receivable.

### 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 Panama, will a court in Panama 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?

If the obligor of the receivable is not located in Panama, the foreign law requirements of the obligor's country must be taken into account. In the event there is enforcement in Panama, a Panamanian court would enforce these foreign law requirements to the extent they do not contravene public policy provisions governing the sale of the receivables.

### 3.4 Example 3: If (a) the seller is located in Panama 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 Panama 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 Panama own sale requirements?

If the obligor of the receivable is not located in Panama, the foreign law requirements of the obligor's country will apply to the sale. In the event there is enforcement in Panama, a Panamanian court would enforce these foreign law requirements to the extent they do not contravene public policy provisions governing the sale of the receivables. Any creditors of the obligor or the seller or any insolvency administrators of the seller and the obligor pursuant to a bankruptcy filing made in Panama are subject to the priority stated for the respective credit under the receivables.

**3.5 Example 4: If (a) the obligor is located in Panama 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 Panama 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 Panama own sale requirements?**

If the obligor of the receivable is located in Panama, he may agree to be subject to a foreign law. In the event there is enforcement in Panama, a Panamanian court would enforce the sale against the obligor to the extent these foreign law requirements do not contravene Panamanian public policy provisions. Any creditors of the obligor or the seller or any insolvency administrators of the seller and the obligor pursuant to a bankruptcy filing made in Panama are subject to the priority stated for the respective credit under the receivables.

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

The parties may agree that the purchase of the receivables be subject to a foreign law. In the event there is enforcement in Panama, a Panamanian court would enforce the sale to the extent these foreign law requirements do not contravene Panamanian public policy provisions. Any creditors of the seller or any insolvency administrators of the seller pursuant to a bankruptcy filing made in Panama are subject to the priority stated for the respective credit under the receivables.

## 4 Asset Sales

**4.1 Sale Methods Generally. In Panama 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?**

Under applicable Commerce Code provisions, any commercial document or title whereby its issuer recognises an obligation to pay a determined amount of money or a certain amount of fungible things, at a determined place and date, may be assigned by endorsement, if it was issued to the order of the issuer. If issued nominative or non-endorseable, general civil law provisions regarding assignment of credits would become applicable. Unless otherwise provided, the assignor of a commercial receivable is only responsible for the legitimacy of the credit and the legal capacity under which the assignment was executed. It is customary to structure it as an assignment of credits.

As an additional reference, please note that Panama has enacted Law 129 of 31 December 2013, "*which promotes access to credit and*

*modernizes the mobile collateral system through chattel mortgage and other provisions are issued*". The chattel mortgage is similar to a pledge, with the difference that in the pledge the asset is delivered to the creditor or a third party, while in the chattel mortgage, the asset remains in possession of the debtor. Law 129 widens the scope of assets that can be subject to collateral, including rights on existing and future assets, copyrights, industrial property rights, accounts receivable, inventories and other of similar nature.

**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?**

Regular endorsement of a receivable made in good faith will convey to the assignee all rights incorporated in the document.

Regarding titles that are not issued to the bearer or endorsable, an assignment will be legally effective from the date it is notified to the obligor before two witnesses or by any other means that provides for authenticity. Should the obligor refuse to acknowledge an assignee as a new creditor and wish to oppose exceptions not resulting from the assigned receivable; he must raise action against it within the next 24 hours, a term after which the assignment will be validly executed.

Assignment of a receivable issued to a bearer is validly executed by delivery of the document and the holder of such receivable is entitled to sufficient title to claim incorporated rights.

**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?**

Mortgage loans may be assigned but applicable legal provisions require registration at the Public Registry. Assignment would only be deemed to be validly executed from the registration date. Local entities have successfully carried out securitisation of mortgage loans, thus complying with the requirement of registration.

Consumer loans and promissory notes may typically include contractual clauses expressly permitting assignment of credit and would, in practice, be assigned by means of a written agreement between the assignor and the assignee.

Marketable debt securities admitted for public trading would be transferred in the books of issuers through the facilities of the clearing and settlement entity acting as such in the relevant organised market. Transfer of publicly traded securities is also regulated by Decree Law 1 of 1999 (the Securities Law).

**4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Does the answer to this question vary if: (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment? Whether or not notice is required to perfect a sale, are there any benefits to giving notice - such as cutting off obligor set-off rights and other obligor defences?**

Applicable Code of Commerce provisions state that with regard to

titles that are not issued to the bearer (registered form) or endorsable, an assignment will be legally effective from the date it is notified to the obligor before two (2) witnesses or by any other means that provides for authenticity as to the date that it is made. This means that it has to be made known to the obligor but it is not necessary to obtain his consent to perfect the transaction. Should the obligor refuse to acknowledge the assignee as the new creditor and should he wish to oppose exceptions not resulting from the assigned receivable; the obligor must bring action against the assignee within the next 24 hours, a term after which the assignment will be validly executed.

**4.5 Notice Mechanics.** If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective - for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings against the obligor or the seller have commenced? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

General commercial law only imposes the obligation to notify the assigned obligor of the assignment at the time of execution or shortly thereafter. There is no requirement for approval or consent of the obligor. It is required that the assignment is made known to the obligor by any authentic means at a certain date. The obligor that, before being notified of the assignment, satisfies the creditor will be released from the obligation. Should the obligor refuse to acknowledge the assignee as the new creditor and wish to oppose exceptions not resulting from the assigned receivable the obligor must bring action against the assignee within the next 24 hours, a term after which the assignment will be validly executed. The notice can apply only to specific receivables or to any, and all (including future), receivables.

After insolvency proceedings against the obligor or the seller have commenced, the notice cannot be delivered since all commercial obligations are terminated from the bankruptcy declaration.

**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)?

Such a clause should not be considered a prohibition of transfer of rights or obligations by the seller to purchase, but a provision agreed between the parties within the freedom of contracting that Panamanian laws allow, as stated in our answer to question 2.3. The result is the same if the restriction says: "*This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor].*"

**4.7 Restrictions on Assignment; Liability to Obligor.** If either or both of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables under the receivables contract, are such restrictions generally enforceable in Panama? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Panama recognises restrictions on sale or assignment and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or on any other basis?

Yes, such restrictions are generally enforceable in Panama. If the seller nevertheless sells receivables to the purchaser in spite of the contractual restriction, the seller may be found liable to the obligor for breach of contract.

**4.8 Identification.** Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

The receivables subject to the assignment must be identified, subject to general provisions of the Civil and Commerce Codes. There are no legal specifications as to the information that would be required in the assignment contract, but in practice it would at least contain the following information: debtor's name; debtor's ID number; document's number; date; and outstanding balance. There is no legal requirement that the receivables being sold share certain objective characteristics. In local practice, securitisation schemes operate with blocks of receivables sharing homogeneous profiles.

If the seller sells *all* of its receivables to the purchaser, or if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, the same comments apply.

Assignment of a receivable includes all accessory rights, such as mortgages, liens and other privileges. A seller in good faith will be liable for the existence and legitimacy of the credit at the time of sale, unless it was sold as dubious, but not of the debtor's solvency, unless it was expressly agreed otherwise, or that the insolvency was pre-existent and public. Even in these cases, the seller will only be liable for the price received, additionally reimbursing the purchaser of the expenses associated with the execution of the contract and expenses generated by the asset that was sold. A seller not acting in good faith will always be liable for payment of all expenses, plus damages caused.

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

The Panamanian Securities Law provides that receivables and other future rights or intangibles may be assigned for the purpose of being

securitised. Said credits may be assigned even prior to the date from which the contracts are to be entered into, the securities or titles represented thereby will emerge or be granted. Future credits which are the object of the transfer must be identified or ascertainable in the transfer contract. In order to be ascertainable it will suffice that they be identified in the future by means of parameters, formulas, descriptions or other proceedings established in the assignment contract, even though they are not individualised in the latter. A contract of assignment of future receivables shall be in writing and will be enforceable against third parties from the date the transferors set their signature thereunto, or from the date it is acknowledged before a notary, or as from its protocolisation in a public deed. It may include repurchase or redemption provisions. The authentication of the signatures before a notary or the protocolisation of the transfer contract of the futures credits shall be equivalent to the delivery of the *res*, if the contrary could not be clearly ascertained from said contract. The transfer of futures credits shall be enforceable against the obligor of the credit transferred when served by written notice by whatever means. The transfer of futures credits is enforceable against the bankruptcy of the assignor from the date on which the contract is enforceable against third parties, but subject to other general provisions regarding bankruptcy.

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

The seller can agree to continuous sales of receivables prior to insolvency, but the effects of the bankruptcy declaration will apply to such agreement as to any other contractual obligation that will be terminated as of such date.

**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 or after the seller's insolvency?**

Yes, in the context of the securities market it is possible; see the answer to question 4.8 above.

**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?**

If related security exists over the receivables, each of those would most likely require separate formalities in order to be concurrently transferred with the underlying credit. For instance, an insurance policy over the lives of debtors would require endorsement of the policy with the insurance company, the pledging of other assets would require acknowledgment of assignment, etc.

**4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?**

If the receivables contract does not contain an express provision whereby the obligor waives its right to set-off against amounts it owes to the seller, the obligor's set-off rights would not terminate upon its receipt of notice of a sale, because the contractual relationship is still ongoing. 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, the seller or the purchaser would not be liable to the obligor for damages caused by such termination, provided that such termination was validly invoked under the contract.

## 5 Security Issues

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

It is not customary, but nothing would prevent the parties from entering into such an agreement.

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

There are no specific legal formalities provided for in local legislation. If the seller was to grant some kind of collateral upon sale of receivables, general legal provisions regarding the relevant contract would apply (mortgage, insurance, other liens, or charges).

**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 Panama to grant and perfect a security interest in purchased receivables governed by the laws of Panama and the related security?**

There are no specific legal formalities provided for in Panamanian legislation. If the purchaser wants to grant some kind of collateral, general legal provisions regarding the relevant contract would apply (mortgage, insurance, other liens or charges).

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

If the issue at stake is the enforceability of such security interest, a local court would decline making any interpretation or judgment

regarding the validity of a contract construed and governed by foreign legislation.

**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?**

No different or specific provisions or formalities exist, other than general provisions applicable to the perfection of collaterals.

**5.6 Trusts. Does Panama recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets until turned over to the purchaser?**

Yes, trusts are regulated in Panama by means of Law No.1 of 1984. Trusts are widely used since trust companies are supervised and overseen by the Superintendence of Banks. Therefore, a trust structure whereby collections are allocated to the trust and held in property by the trustee for the benefit of the creditor is quite a standard transaction.

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

Escrow accounts are contracts that are subject to the terms and conditions agreed to by the parties under the freedom of contracting principles. A bank account may be pledged in favour of a creditor. Escrow accounts are also common in the marketplace. Panamanian courts would apply public policy principles with regard to the execution of foreign judgments. In this regard the concept of public policy and what it comprises is subject to the criteria of the court on a case-by-case basis.

**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?**

A collateral pledge of cash deposited in a bank account is permitted under Panamanian law. The secured party shall have a lien on the amount guaranteed by the pledge until paid in full, but not necessarily on all cash flowing into the bank account, as it is unlikely that the pledgor will continue to make deposits after knowing the enforcement of the pledge.

**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 owner can have such access.

## 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 Panama's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?**

Yes, under article 1564 of the Panamanian Code of Commerce, one of the effects of the bankruptcy declaration against the obligor is that, by operation of law, the obligor is inhibited or separated from the management or disposition of its assets and of any acquired during the proceedings.

The Panamanian Code of Commerce regulates the bankruptcy of companies or natural persons engaged in business activities and its effects, but there are no specific provisions to regulate insolvency. Bankruptcy proceedings under Panamanian law aim at distributing the assets of a business among its creditors due to non-payment of one or more liquid commercial obligations. The estate of the business is bound to pay the credits that stand against it, and all creditors have a part against the common obligor.

A petition requesting the declaration of bankruptcy may be filed before a court by the obligor himself, whenever he fails to pay a commercial obligation within the next two (2) days after the obligation is due. The declaration of bankruptcy may also be requested by any creditor of the obligor. To this effect, a request for bankruptcy must be filed, together with evidence of the credit. Once the bankruptcy request is filed, the court issues an order for: the embargo and deposit of the assets, the books, and other documents of the company; the appointment of a curator for the meeting of creditors; the summons of all interested parties to the proceedings within the next ten (10) days; and the summons of the creditors to a general meeting. The general meeting of creditors gathers together every creditor who may have presented his claim within term, and has the object of establishing the amount and type of each credit. The curator must be a lawyer, and is charged with the management of the assets, including the company's books, the safekeeping and collection of credits, and the sale of all assets with the approval of either the meeting of creditors or the court. Once the credits have been evaluated and recognised by every creditor, the obligor may present the meeting of creditors with a payment plan. If the plan is accepted, the curator shall supervise its execution. If the plan is not accepted or the obligor offers no plan, the curator shall proceed to sell the assets. Once the obligor fulfils the terms of the plan of payments or the full amount of outstanding credits is paid for, a request can be filed before the court to declare his discharge in order to put an end to the effects of the bankruptcy. Once the court declares the bankruptcy, it has the following effects on the obligor, among others:

- The court must order the seizure (embargo) of any assets owned by the obligor.
- The obligor may not manage or dispose of his current assets and those acquired while the state of bankruptcy is in force.
- The credits guaranteed with pledge or mortgage may be enforced in a separate proceedings.
- Unless the credits are guaranteed with pledge or mortgage, as of the bankruptcy declaration, the interests on the bankruptcy estate cease to accrue.

- All civil and commercial debts of the obligor are enforceable as of the bankruptcy declaration with discount of the applicable interests.
- Payments and any other transfer and administration legal transactions undertaken by the obligor after the bankruptcy declaration shall be null and void.
- Any bilateral contracts that have not been totally performed or have been partially performed at the time of the bankruptcy declaration shall be terminated by operation of law. In this case, the other contracting party may only claim liquidated damages as creditor of the bankruptcy estate, except if the credit is guaranteed by a pledge or mortgage.

Finally, the granting of a mortgage or pledge or any other act or provision aimed at ensuring credits previously contracted or to give them preference upon other credits, shall also be null and void in the benefit of the mass of creditors, if such acts were carried out after the existence of a legal condition of bankruptcy under article 1545 of the Code of Commerce or in the 30 previous days.

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

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The bankruptcy's curator has the following powers and attributions:

- The curator must undertake an inventory of assets of the obligor.
- The curator is entitled to act on behalf of the obligor throughout the proceedings.
- The curator also acts on behalf of the creditors' meetings in all proceedings against the obligor in bankruptcy.
- The curator manages the assets of the obligor.
- The curator collects and receives all credits and rents and pays the obligor's expenses.
- The curator undertakes the sale of assets of the obligor.
- The curator reviews the titles of credit presented by the creditors and submits said credits to the Creditors' Meeting for their acknowledgment.
- The curator promotes the celebration of the Creditors' General Meeting.
- The curator renders accounts of its management to the Creditors' General Meeting.

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#### **6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in Panama for (a) transactions between unrelated parties, and (b) transactions between related parties?**

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In connection with fraudulent conveyance issues, under our Code of Commerce, any payments or other legal acts of transfer of title or administration carried out by the bankrupt after the bankruptcy has been declared shall be null and void without any special declaration. This also applies to any payments made to the bankrupt after the bankruptcy declaration has been published. In addition, it applies to any gratuitous acts or contracts carried out, or entered into, by the bankrupt during the four years preceding the bankruptcy declaration or its retroactive effects, in favour of the bankrupt's spouse, children, parents, brothers/sisters or in-laws.

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#### **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?**

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Only to the extent the assets and liabilities of the seller and its affiliates are deemed to be credits of the obligor's bankruptcy estate.

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#### **6.5 Effect of Proceedings on Future Receivables. If insolvency proceedings are commenced against the seller in Panama, 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?**

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Since one of the effects of the bankruptcy declaration is that any bilateral contracts that have not been totally performed or have been partially performed at the time of such declaration shall be terminated by operation of the law, the sales of receivables that have not yet occurred or have not yet come into existence or that only come into existence after the commencement of such proceedings would be terminated by operation of law. In these situations, the other contracting party may only claim and liquidate damages as creditor of the bankruptcy estate, except if the credit is guaranteed by pledge or mortgage.

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#### **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?**

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Such provision would not be enforceable in the context of a Panamanian bankruptcy proceeding.

## **7 Special Rules**

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

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Panamanian Securities Law entitles the Superintendence of the Securities Market to issue regulations regarding the registration, disclosure and reporting requirements of public issue of securities through securitisation schemes.

Regulations have been issued regarding registration of issuers that publicly offer securities, as well as the disclosure and periodic reporting requirements, but no specific regulation has been issued on the subject of securitisation vehicles. Article 197 of said Law expressly refers to securitisation of receivables, including securitisation of future rights (see the answer to question 4.8 above).

Therefore, a local public issue of securities made through securitisation schemes, has been registered under the regulations issued in general for the registration of securities subject to public offerings.

- 7.2 Securitisation Entities.** Does Panama have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

No laws have been passed with regard to the creation of entities or financial intermediaries specialised in structuring securitisation vehicles or engaged in the business of securitisation at their account and risk. Those who engage in the business do it under general commercial legal provisions.

- 7.3 Limited-Recourse Clause.** Will a court in Panama 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?

Such provision would not be enforceable under Panamanian law.

- 7.4 Non-Petition Clause.** Will a court in Panama 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?

Such provision would not be enforceable under Panamanian law.

- 7.5 Priority of Payments "Waterfall".** Will a court in Panama 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?

Such provision would be enforceable under Panamanian law (except within the context of bankruptcy proceedings).

- 7.6 Independent Director.** Will a court in Panama 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?

Such provision would not be enforceable under Panamanian law. Furthermore, independent directors are not mandatory in commercial companies, only in companies subject to regulation in securities, insurance and banking activities.

## 8 Regulatory Issues

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

It is our understanding that if the purchaser is not actively engaged in financial activities that are subject to public regulation and/or supervision, such as taking deposits, conducting intermediation in the securities markets or otherwise, the mere activity of acquiring and/or investing in receivables originated by other entities, would not trigger the obligation of obtaining licensing or authorisation from a public authority.

The answer would not vary if the purchaser does business with other sellers in the country.

- 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?

Enforcement and collection of receivables in Panama by a party not doing business in Panama does not require a licence.

- 8.3 Data Protection.** Does Panama 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?

Law 24 of 2002 regulates the information service of credit history of consumers and it applies to both individual obligors and enterprises.

- 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 Panama? Briefly, what is required?

Applicable consumer protection provisions would most likely be relevant at the time of origination of credit. Banking and other lending institutions would be subject to ongoing information duties with clients and fulfilment of such information duties will typically rely on the party acting as administrator of the receivables.

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

At present, there are no laws or regulations restricting the exchange of currency. Payment to persons outside the country is subject to withholding taxes at a rate of 12.5 per cent if the service rendered by the foreign party to the Panamanian taxpayer affects the preservation or generation of Panamanian-source income.

## 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 Panama? 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?**

Tax legality is among the fundamental rights enshrined in the Political Constitution of the Republic of Panama, which means that all taxes and revenue schemes must be enacted into law. The Tax Code (Law No.8 of 1956 plus its successive reforms) is the principal body of law governing the country's taxation system. The hallmark of Panamanian taxation is strict adherence to the principle of tax territoriality. Thus, article 694 of the Fiscal Code specifies that only "taxable income generated from any source within the territory of the Republic of Panama regardless of where it is received" is subject to income tax. Said article clearly envisions certain activities as not taxable within the Panamanian territory by not considering them to be income:

- Invoicing from a business within Panama for the sale of merchandise or products for an amount greater than that for which such items had been invoiced to a business within Panama, whenever said merchandise or products do not physically enter Panama.
- Supervise, from an office within Panama, business transactions performed, completed, or having effect abroad (offshore operations).
- Distribute dividends or shares of juridical persons, when these originate from income not produced within the territory of the Republic of Panama, including that generated by activities listed under a. and b. above.

If a natural or juridical person perceives income from both Panamanian and non-Panamanian sources, tax is liable only against that portion obtained from a Panamanian source.

Any natural or legal entity that must remit to a natural or legal entity not residing in Panama sums derived from income of any kind produced in Panamanian territory, except for dividends or participations, must deduct and withhold, at the time of remittance, the amount established in Articles 699 or 700 of the Tax Code and shall pay the withheld sums to the tax authorities within ten (10) calendar days from the date of withholding.

To calculate the withholding amount, the sums paid, drawn, credited or advanced to the taxpayer during the year must be added to the amount paid, drawn, credited or advanced and to **50 per cent of this sum** from the rate of articles 699 or 700 shall be applied. From the amount so established the withholdings already made in the taxable year shall be deducted. Currently, the withholding rate is 12.5 per cent.

By means of Law No.18 of 19 June 2006, certain provisions of the Tax Code were amended, including article 701, which establishes new rules for the application of capital gains tax derived from the sale of bonds, shares, participation quotas and other securities issued by legal persons, as well as capital gains arising from the transfer of other movable properties. Except for shares registered with the National Securities Commission and if transfer (i) is made

through a stock exchange or other organised market, or (ii) results from a merger or corporate reorganisation or consolidation and the shareholder only receives other shares in the surviving entity or its affiliate, which are exempt from capital gains tax, the following events are now subject to income tax, at a fixed rate of 10 per cent: (1) capital gains resulting from the transfer of bonds, shares, participation quotas and other securities issued by Panamanian companies; (2) capital gains derived from the transfer or sale of other movable assets; and (3) capital gains derived from the transfer of securities resulting from the acceptance of a public offer for the purchase of shares, pursuant to the Securities Law.

Income produced by capitals or securities that are economically invested in the territory of Panama, regardless of whether the sale is executed in or outside of Panama is considered Panamanian-source income and thus, taxable.

The buyer of the shares has the obligation to withhold, from the payment to the seller, 5 per cent of the total amount of the transfer, on account of income tax payable on the seller's capital gains. The buyer has the obligation to send payment to the Tax Authorities within 10 days following the date the obligation to pay arose. If there is a breach of this obligation, the issuer company is jointly liable for the payment of the unpaid tax.

The seller has the option to consider the sum withheld by the buyer (5 per cent) as the definitive income tax to pay for the capital gains. If the sum withheld exceeds the amount resulting from the application of the 10 per cent rate to the gain obtained from the sale, the seller may file a special tax return to credit the sum retained and claim the excess resulting as a credit in his favour. This credit may be assigned to other taxpayers. The sums obtained from the transfer are not cumulated to the taxpayer's taxable income.

In case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, we find that the risk that the deferred purchase price will be recharacterised in whole or in part as interest is remote.

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

Panama has traditionally adopted US GAAP, but regulations issued by the Internal Revenue Director now provide that the accounting standards of the International Accounting Standards Board (IASB) must be applied to companies that bill over US\$1 MM.

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

As a general principle, stamp taxes are collected via sworn statements or by any other means authorised by the Revenue Directorate General of the Ministry of Economy and Finance. The person obligated to pay this tax should submit to the Revenue Directorate General sworn statements attesting to the number of executed documents liable for tax, the total amount of the face value on them, and the amount of corresponding tax payable.

The stamp tax ranges from US\$0.01 to US\$20. The general tax provision that establishes the stamp tax indicates that the tax is US\$0.10 per US\$100 fraction of value of the document or transaction, which equals to US\$1 per US\$1,000.

This provision states that all contracts that do not have a special tax and that refer to acts that are subject to the Panamanian jurisdiction must be stamped. The general provision contains certain exceptions: documents that refer to matters that do not generate

taxable income in Panama are exempt from the stamp tax, unless the documents must be used or filed before Panamanian courts or administrative authorities, in which case, the stamp tax must be paid in order when the documents will be presented/used/filed in Panama. This means that if the contract refers to a transaction that does not generate taxable income, then the stamp tax is paid only when, and if, the document is enforced in Panama or if any registration is required.

Under our securities laws, any securities listed with the Superintendence of the Securities Market, as well as any document, contract or agreement related to their issuance, subscription, sale, payment, swap or redemption are not subject to stamp taxes.

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**9.4 Value Added Taxes. Does Panama 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?**

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A 7 per cent value added tax is levied on the transfer of movable assets in the Republic of Panama and the rendering of services by merchants, manufacturers, professionals, lessors and other service providers. The sale of receivables would not trigger the tax, since these are considered intangible rights. In addition, the transfer and negotiation of securities listed in the Superintendence of the Securities Market or that are negotiated through a stock exchange or any other organised market is exempt from capital gains taxes in Panama.

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**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?**

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The withholding obligation imposed by law on the seller with respect to the value added tax of 7 per cent solves this issue. There is no express obligation either on the buyer or the seller to pay the stamp tax; generally this is agreed to in the contract, but in the absence of any provision imposing the obligation, the authorities may enforce the payment on either party.

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

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No, it would not be considered doing business in Panama.



### Ivette Elisa Martínez Sáenz

Patton, Moreno & Asvat  
Costa del Este, Capital Plaza, 8th floor  
Panama City  
Republic of Panama

Tel: +507 306 9600  
Fax: +507 263 7887  
Email: [imartinez@pmlawyers.com](mailto:imartinez@pmlawyers.com)  
URL: [www.pmlawyers.com](http://www.pmlawyers.com)

**IVETTE ELISA MARTINEZ SAENZ**, admitted 1993, Panama.  
**Education:** University of Panama (Licentiate in Law and Political Sciences - J.D. equivalent- *Magna Cum Laude*, 1993).  
**Author:** "La Sustitución del Empleador", Graduate Thesis, University of Panama, 1993. "A Comparative Study of Panamanian and U.S. Private Interest Foundations", LL.M. Thesis, Fordham University, 1996.  
"Panama-New Private 'Anstalt'" - International Lawyers' Newsletter, September/October 1995. "The Responsibility of Bankers, Lawyers and Auditors in Merger and Acquisition Transactions", XLI Congress of the Commission of Banking Right of the Union of International Lawyers (UIA), September 1997. "Bank Credit and Consumer Protection", XLII Congress of the Banking Law Commission of the Union of International Lawyers, August 1998. Authorised Public Interpreter of the Spanish and English languages and Certified Examiner of Interpreters, (1994).  
**Memberships:** Panama Bar Association; Union of International Lawyers (UIA); Association of Fulbright Scholars of Panama; Director and Past President of the American Chamber of Commerce and Industry of Panama (AmCham), Junior Achievement Advisor (since 2002); Arbitrator appointed by the Centre of Conciliation and Arbitration of the Chamber of Commerce and Industries of Panama (since 2002); and Director of the National Concerts Association. Biography included in *Who's Who in American Law's* 13th edition (2003-2004).  
**Practice Areas:** Corporate; Commercial; and Administrative Law (Banking, Insurance, Securities, Mergers and Acquisitions, Government Contracting, Telecommunications and Energy).



### Ana Isabel Díaz Vallejo

Patton, Moreno & Asvat Group  
c/o Assets Trust & Corporate Services  
Samuel Lewis Ave., Comosa Bldg., 6th floor  
Panama City  
Republic of Panama

Tel: +507 264 2338  
Fax: +507 264 8475  
Email: [ana\\_diaz@assetstrust.com](mailto:ana_diaz@assetstrust.com)  
URL: [www.assetstrust.com](http://www.assetstrust.com)

**ANA ISABEL DÍAZ VALLEJO**, born in Panama, Republic of Panama.  
Vice-President/Legal Department of Assets Trust & Corporate Services, an affiliate of the Patton Moreno & Asvat Group. University of Panama, 1992 (Licentiate in Law and Political Sciences - J.D. equivalent). Master of Laws in Commercial Law from Externado de Colombia University, 1994. Legal counsel of the Superintendence of Banks, 1999. Director of Securities Registration (2000-2002), Director of Legal Affairs (2002-2005) and Director of Market Surveillance (2005-2006) of the National Securities Commission.



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With an ongoing vision to develop new businesses and to offer integrated legal counseling oriented to the establishment, promotion and development of international business relationships, three young entrepreneurs decided, in 1981, to establish an efficient and modern law firm in the Republic of Panama. This is how the founding partners joined their efforts to accomplish their common goals, which in turn gave birth to the successful reputation that the firm maintains not only in Panama, but in other countries where the firm has an important presence.

The *Patton, Moreno & Asvat* Group is comprised of 21 attorneys and close to 150 employees worldwide. Our staff of lawyers has successfully achieved graduate, post graduate, master's and doctorate degrees in well-recognised universities such as Duke University, Tulane University, Harvard University, Boston University, University of Pennsylvania, Cardiff University and Fordham University, among others.

The firm strongly believes in the constant update and international projection of its lawyers and personnel, promoting their participation in local and international conferences and seminars.

Our lawyers have also participated in the drafting of laws, thus contributing with the legislative work of our country.

*Patton, Moreno & Asvat's* areas of practice include: Corporate; Maritime; Contracts and Commercial Transactions; Real Estate; Public Procurement; Telecommunications; Energy; M&A; Intellectual Property; Banking Law; and Aeronautical Law, among others.

Our affiliates include: **ACE Funds Services Inc.**, based in the British Virgin Islands, engaged in investment funds advisory services; **Assets Trust & Corporate Services**, which provides local and offshore fiduciary services, tax planning and structuring and back-office services; **HPA Lawyers**, our own law firm in the BVI; and **Xperta Corporate Limited Services**, our incorporation services company for the European market.

## Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
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- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)