

The International Comparative Legal Guide to: Securitisation 2007

A practical insight to cross-border Securitisation Law



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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the debtor 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 historic relationships?

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 the law (article 1102 of the Civil Code), any commercial obligations exceeding US\$5,000,000 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 debtor 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 your country’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; or (c) 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.

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

c) 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 of 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\$2,000,000.00. 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 worker’s, 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 272 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 debtor do not specify a choice of law in their receivables contract, what are the main principles in your country 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 these are to be enforced and if not expressly stated, at the debtor’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, the place of enforcement of the obligation, among other rules.

2.2 Base Case. If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, and the seller and the debtor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your country 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 Other Law. If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivables contract and the receivables?

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 from the Republic of Panama (choice of jurisdiction).

2.4 Seller Resident. If the seller is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes. 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.

2.5 Debtor Resident. If the debtor is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes, same principle as question 2.4.

3 Choice of Law - Receivables Purchase Agreement

3.1 Freedom to Choose Other Law. If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, and the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement, will a court in your country give effect to their choice of law?

Yes, the principle of freedom of contracting would govern such choice of law contractually agreed by and between the parties.

3.2 Other Advantages. Conversely, if another country's law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

If enforcement against debtor is to be sought in Panama, then it would be convenient to choose Panamanian law for purposes of facilitating collection, including the obtainment of any precautionary measures for purposes of attaching local assets.

3.3 Effectiveness. In either of the cases described in questions 3.1 or 3.2, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; and/or (iii) whether the sale is effective and enforceable against the debtors?

- (i) Yes, but only in the event that the parties agree that the sale is to be governed by Panamanian law.
- (ii) Same as (i).
- (iii) Same as (i).

4 Asset Sales

4.1 Sale Methods Generally. In your country what is (are) the customary method(s) for a seller to sell accounts receivables to a purchaser?

Under General Commercial Law, 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. If issued nominative or non-endorsable, general civil Law provisions regarding assignment of credits would become applicable.

Unless otherwise provided, the assignor of a commercial receivable only responds for the legitimacy of the credit and legal capacity at which assignment was executed.

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

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

Regarding titles that are not issued to bearer or endorsable, an assignment will be legally effective from the date it is notified to the debtor before two witnesses or by any other means that provides for authenticity. Shall the debtor refuse to acknowledge the assignee as the new creditor and wish to oppose exceptions not resulting from the assigned receivable, it 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 bearer is validly executed by delivery of document and 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 General Law provides for the legal requirement of inscription in the Public Registry and only deemed validly executed upon 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 assignor and 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 Debtor Notification.** Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be an effective sale against the debtors?

General Law provides that in regards to titles that are not issued to bearer or endorsable, an assignment will be legally effective from the date it is notified to the Debtor before two witnesses or by any other means that provides for authenticity as to the date that it is made. That is, it has to be made known to the debtor but not required to obtain his consent for perfecting the transaction. Shall the debtor refuse to acknowledge the assignee as the new creditor and wish to oppose exceptions not resulting from the assigned receivable, it must bring action against it within the next 24 hours, a term after which the assignment will be validly executed.

- 4.5 Debtor Consent.** Must the seller or the purchaser obtain the debtors' consent to the sale of receivables in order for the sale to be an effective sale against the debtors? 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?

General commercial law only imposes the obligation to notify the assigned debtor of the assignment, not to obtain his approval or consent. Therefore, it is required that the assignment is made known to the debtor by any means, even by a third party, and by a certain date.

The debtor who, before being notified of the assignment, satisfies the creditor will be released from the obligation.

- 4.6 Liability to Debtor.** If the seller sells receivables to the purchaser even though the receivables contract expressly prohibits assignment, will the seller be liable to the debtor for breach of contract?

It is our understanding of the general legal provisions that liability could arise on the part of the seller if it were to assign a receivable that expressly prohibited such a transaction. No particular legal provisions exist on the matter; therefore only general civil liability could apply upon legal action taken by the debtor.

- 4.7 Identification.** Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

The receivables subject to the assignment must be identified, subject to General Civil and Commercial Law. 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 must share certain objective characteristics. In local practice, securitisation schemes operate with blocks of receivables sharing homogeneous profiles.

- 4.8 Economic Effects on Sale.** What economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and (c) control of collections of receivables without jeopardising perfection?

Assignment of a receivable includes all accessory rights, such as mortgages, liens and other privileges. A seller in good faith will respond 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 respond for the price received, additionally reimbursing the purchaser for 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 responsible for payment of all expenses, plus damages caused.

- 4.9 Continuous Sales of Receivables.** Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables?

The local 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 in which the contracts are to be entered into from, which 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 written and will be enforceable against third parties as of the date of signature of the transferors is set thereunto or acknowledged before a Notary or as from its protocolisation in a public deed. The authentication of the signatures before a Notary or the protocolisation of the transfer contract of the future credits shall be equivalent to the delivery of the rest, if the contrary could not be clearly ascertained from said contract. The transfer of future credits shall be enforceable against the debtor of the credit transferred when served by written notice by whatever means. The transfer of future credit 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 Future Receivables. Can the seller commit in an enforceable manner (both prior to and after its insolvency) to sell receivables to the purchaser that come into existence after the date of the sale contract (as in a “future flow” securitisation)?

Yes, in the context of the securities market it is possible, see answer to question 4.9 above.

4.11 Related Security. What additional formalities must be fulfilled for the concurrent transfer of related security to be enforceable? 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 exist 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 a policy with an insurance company, pledging of other assets would require acknowledgement of assignment, and others similarly.

5 Security Interests

5.1 Back-up Security. Is it customary in your country 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 of 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 your country, 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. What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of your country, and for such security interest to be perfected?

There are no specific legal formalities provided for in local legislation. If the purchaser was 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 the receivables under the laws of the purchaser’s country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

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 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.

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 country’s insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (“automatic stay”)? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected?

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

Our Code of Commerce regulates the bankruptcy of companies or natural persons engaged in business activities and its effects, but there are not 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. All the estate of the business is bound to pay up the credits that stand against it, and all creditors have a part against the common debtor.

A petition requesting the declaration of bankruptcy may be filed before a court by the debtor himself, whenever he fails to pay a commercial obligation within the next two days after the obligation is due. The declaration of bankruptcy may also be requested by any creditor of the debtor. 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 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 the 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 debtor 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 debtor offers no plan, the curator shall proceed to sell the assets. Once the debtor 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 debtor, among others:

- The court must order the seizure (embargo) of any assets owned by the debtor.
- The debtor 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 proceeding.
- Unless the credits are guaranteed with a pledge or mortgage, as of the bankruptcy declaration, the interests on the bankruptcy estate cease to accrue.
- All civil and commercial debts of the debtor are enforceable as of the bankruptcy declaration with a discount of the applicable interests.
- Payments and any other transfer and administration legal transactions undertaken by the debtor 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 and liquidate damages as the 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.

6.2 Insolvency Official's Powers. If there is no automatic stay, 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)?

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

- The curator must undertake an inventory of assets of the debtor.
- The curator is entitled to act on behalf of the debtor throughout the proceedings.
- The curator also acts on behalf of the creditors' meetings in all proceedings against the debtor in bankruptcy.
- The curator manages the assets of the debtor.
- The curator collects and receives all credits and rents and pays the debtor's expenses.
- The curator undertakes the sale of the assets of the debtor.
- 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.

6.3 Suspect Period. 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?

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, any gratuitous acts or contracts carried out or entered into by the bankrupt during the 4 years preceding the bankruptcy declaration or its retroactive effects, in favour of the bankrupt's spouse, children, parents, brothers/sisters or in-laws.

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?

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

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

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 law, the sales of receivables that have not yet occurred or have not yet come into existence 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 a pledge or mortgage.

7 Special Rules

7.1 Securitisation Law. Does your country have laws specifically providing for securitisation transactions? If so, what are the basics?

The local Securities Law entitles the National Securities Commission 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 150 of said Law expressly refers to securitisation of receivables, including securitisation of future rights (see answer to question 4.9 above).

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

7.2 Securitisation Entities. Does your country 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 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 in regards 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 Non-Recourse Clause.** Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

It is likely that such a limited-recourse clause would be considered valid by a court. Shall the governing Law of the contract subject to judicial dispute be that of another country, it is likely that no action would be possible for the parties before local courts.

- 7.4 Non-Petition Clause.** Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) prohibiting the parties from (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

A non-petition clause would most likely be valid; however, a clause preventing one of the parties -having sufficient cause - to initiate an insolvency proceeding by any person whose circumstances fit the relevant legal standards may not be considered valid in a court. Shall the governing Law of the contract subject to judicial dispute be that of another country, it is likely that no action would be possible for the parties before local courts.

- 7.5 Independent Director.** Will a court in your country give effect to a contractual provision (even if the contract's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

In general, Directors of corporations may be limited or subject to specific provisions (typically in the organisational documents or the By-Laws) from taking action against the company and such a provision is most likely to be valid before a local court. However, a provision preventing or limiting the Director from initiating insolvency proceedings when circumstances of the company meet the legal standards for such proceedings, might compromise the Director's fulfilment of legal duties in that capacity and would most likely be invalid.

8 Regulatory Issues

- 8.1 Required Authorisations, etc.** Assuming that the purchaser does no other business in your country, 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 license or its being subject to regulation as a financial institution in your country? Does the answer to the preceding question change if the purchaser does business with other sellers in your country?

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 Data Protection.** Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors or also to enterprises?

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

- 8.3 Consumer Protection.** If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? 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 on-going information duties with clients and fulfilment of such information duties will typically rely on the party acting as administrator of the receivables.

- 8.4 Currency Restrictions.** Does your country have laws restricting the exchange of your country's currency for other currencies or the making of payments in your country'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 may be subject to certain withholding taxes.

9 Taxation

- 9.1 Withholding Taxes.** Will any part of payments on receivables by the debtors to the seller or the purchaser be subject to withholding taxes in your country? 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?

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 Republic of Panama has not entered into any double-taxation treaties or agreements or covenants providing for the exchange of taxpayers' confidential information. 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 said business within Panama, whenever said merchandise or products do not physically enter Panama.
- Supervision from an office within Panama of business transactions performed, completed, or having effect abroad (offshore operations).
- Distribution of 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 receives income from both Panamanian and non-Panamanian sources, tax is liable only against that portion obtained from a Panamanian source.

By means of Law No.18 of June 19, 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%: (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 if the sale is executed in or outside of Panama, is considered Panamanian-source income and is thus taxable.

The buyer of the shares has the obligation to withhold from payment to the seller 5% 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 for the sum withheld 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 buyer (5%) 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% 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 applicable to the income tax levied in the same fiscal period in which the transaction was completed. The sums obtained from the transfer are not cumulated to the taxpayer's taxable income. The tax authorities are currently preparing the regulations of Law No.18 of 2006, but these have not been adopted yet.

9.2 Seller Tax Accounting. Does your country 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 recent regulations issued by the Internal Revenue Director now provides that as of 2007 the accounting standards of the International Accounting Standard Board (IASB) must be applied to companies that bill over US\$1MM.

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

As a general principle, stamp taxes are collected via revenue stamps, stamped tickets, 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 via revenue stamps should affix them to the relevant document at the time of its execution, either on the original or on his file copy. Alternatively, he 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 values on them, and the amount of corresponding tax payable.

The face value of revenue stamps ranges from US\$0.01 to US\$20.00. Documents such as checks, promissory notes, letters of exchange, bills of lading, receipts, invoices, among others, must bear revenue stamps in an amount that will vary with the face value of the document. Contracts and acts valued at over US\$100.00 must be stamped at the rate of US\$0.10 for each US\$100.00 of face value. Sealed paper has a cost of US\$4.00 per page. Any applications to the Administration, and official certifications and documents for notarisation bear affixed the appropriate revenue stamps. The general tax provision that establishes the stamp tax indicates that the tax is US\$0.10 per each US\$100.00 as a fraction of the value of the document or transaction, which equals to US\$1.00 per each US\$1,000.00. 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 National Securities Commission, as well as any document, contract or agreement related to their issuance, subscription, sale, payment, swap or redemption are not subject to stamp taxes.

9.4 Value Added Taxes. Does your country 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?

A 5% 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 National Securities Commission or that are negotiated through a stock exchange or any other organised market is exempt from capital gains taxes in Panama.

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 against the purchaser or on the receivables or collections for the unpaid tax?

The withholding obligation imposed by law on the seller with respect to the value added tax of 5% solves this issue. There is no express obligation either on buyer or 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 your country, 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 debtors, make it liable to tax in your country?

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



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With an ongoing vision to develop new businesses and to offer an 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 Brett Patton, Carlos Raúl Moreno and Ebrahim Asvat 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.

PATTON, MORENO & ASVAT is characterised for being a Firm that offers legal services of the highest quality and for truly committing to its clients around the world.

The head office of the practice is situated at the heart of the business centre in Panama City, while the European office, which was opened in 1986, is located in Old Bond Street in London's West End. In 1988, an affiliated office was established in Tortola in the British Virgin Islands under the company name of Patton, Moreno & Asvat (BVI) Ltd. In 1994, an affiliated office was established in Nassau, The Bahamas under the company name of Patton, Moreno & Asvat (Bahamas) Ltd. In 2002, an office was established in Montevideo, Uruguay under the company name of Patton, Moreno & Asvat (South America), S.A.

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