

## SECURITISATION 2007

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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) Under Maltese Law contracts are created by mere agreement between the parties as long as the essential conditions for the validity of the contract are present. Evidence in writing is not generally required to enforce the debt obligation unless the subject matter of the contract requires the obligation to be evidenced in writing (such as the transfer of immovable property). Moreover, special rules exist in the context of credit agreements whereby a creditor grants to a consumer credit in the form of differed payment, loan or other similar financial accommodation.

(b) Generally invoices constitute evidence of the obligation but not the contract *per se*.

(c) A historic relationship may in certain cases constitute evidence of the existence of the contract and may constitute a guide as to the interpretation of the contract. Moreover, payment presumes the existence of a debt.

**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) Legal Notice 84 of 2005 (Consumer Credit Regulations) transposing Council Directive 87/102/EEC of 22 December 1986 as amended, limits the "total cost of the credit to the consumer" which means all the costs, including interest, commissions and any other kind of charge, howsoever described or to whomsoever it is paid, which the consumer has to pay for the credit. These rules however do not apply in a number of cases such as for credit agreements under which no interest is charged provided the consumer agrees to repay the credit in a single payment.

(b) The Civil Code provides that that interest may not be charged at more than 8% per annum. Where the obligation is of a commercial nature, or the law provides that interest is to run *ipso jure*, interest is due as from the day on which the obligation should have been performed. In any other case, interest is due as from the day of an intimation by a judicial act, even though a time shall have been fixed in the agreement for the performance of the obligation. Where the subject-matter of the obligation is limited to the payment of a determinate sum, the damages arising from the delay in the performance thereof can only consist in the interests on the sum due at the rate of eight per cent *per annum*.

(c) The Consumer Credit Regulations offer various rights to consumers with respect to receivables owing by them. In particular, the credit agreement entered with the consumers cannot prejudice the rights of the consumer against the trader who has supplied goods or services purchased by means of such an agreement where such goods or services are not supplied or are otherwise not in conformity with the contract for their supply entered into between the consumer and the trader.

The Securitisation Act (Cap. 484 of the laws of Malta) disapplies the provisions of the Civil Code or any other law insofar as they limit or restrict the charging of interest and compound interest. Moreover in the context of a securitisation transaction it is lawful for the amount of interest due in respect of a debt or obligation to exceed the amount of capital due in respect of any such debt or obligation.

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**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?**

In general the requirements are the same. The sale may however be subjected to the prohibitions relating to State Aid in terms of European Union law.

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**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?**

The principles followed by Maltese courts emanate from the Rome Convention on Contractual Obligations, as implemented by means of the Rome Convention on Contractual Obligations (Ratification) Act (Cap.482 of the Laws of Malta). In the event that no proper law is specified, the Maltese courts would refer to the law of the country with which the contract is most closely connected.

Nevertheless, a separable part of the contract which has a closer connection with another country may, by way of exception be governed by the law of that other country. Special rules apply in this regard.

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**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?**

The Maltese courts would give effect to the choice of law of the parties principally due to the principle of freedom of parties to contract and to determine the terms thereof as the law between them and also pursuant to Article 2 of the Rome Convention.

**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?

Pursuant to the Rome Convention and to the general principles of Maltese law, parties to a contract are free to decide what the proper law of their contract is to be. This applies even when both parties are located in Malta and the transactions giving rise to the receivable and the payment of the receivables takes place in Malta. This may, however be set aside insofar as the proper law is in contravention to an issue of Maltese public policy, in which case, the Maltese courts would adopt Maltese law on that particular issue.

**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?

In such a case, the Maltese Courts will give effect to the choice of law of the parties provided that in the case of mandatory rules Maltese law would prevail. Some of these mandatory rules are specifically catered for in the Rome Convention and include *inter alia* certain consumer contracts.

**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?

Refer to question 2.4 above.

## 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?

The parties to a contract for the sale of receivables are free to choose which country's law is to govern that contract irrespective of the law which governs the receivables themselves. This applies irrespective of whether the parties are in different countries and irrespective of whether the parties choose a jurisdiction different from that in which one of them is located. Nevertheless, certain issues regarding perfection and transfer of the receivables may be determined by the law of the receivables irrespective of the law governing the contract of sale.

**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?**

Choosing Maltese law to govern the contract when the receivables themselves would be governed by Maltese law will ensure that if seized with the issue, Maltese courts would not have to interpret an agreement in accordance with foreign law. This will have the result of solving perfection issues if any. Also, this might result in less costs being incurred by the parties given that experts to advise the courts on foreign law would not need to be appointed. The onus of proving that the foreign law is different to the local one, and of proving what the foreign law is, lies upon the party who pleads the benefit of the foreign law.

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**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) Subject to the application of mandatory rules, the law governing the contract of sale will apply to determine the effectiveness of the sale between the seller and the purchaser. This will however be limited to determine the personal rights and responsibilities between the seller and the purchaser. Moreover, a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be

reasonable to determine the effect of his conduct in accordance with the law chosen by the parties (Rome Convention on Contractual Obligations).

(ii) The requirements to perfect the sale are likely to be governed by the law of the receivables.

(iii) The rights and obligations of the purchaser and the debtors are likely to be governed by the law of the receivables.

## 4 Asset Sales

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**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?**

The customary method for a seller to sell accounts receivable to a purchaser is by way of assignment or sale, even though this may also take place through other means such as novation and declaration of trust.

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**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?**

Generally, the assignment or sale of a debt is complete, and the ownership is *ipso jure* acquired by the assignee as soon as the debt and the price have been agreed upon, and,

except in the case of a right transferable by the delivery of the respective document of title, the deed of assignment is made. The assignment will not be valid unless made in writing. Moreover the assignment of debts arising from public deeds is void unless made by a public deed.

Special rules apply in the context of securitisation transactions. The Securitisation Act (Cap. 484 of the Laws of Malta) disapplies the general rules (as stated above) in the case of an assignment of a securitisation asset (defined as any asset, whether existing or future, whether movable or immovable, and whether tangible or intangible, and where the context so allows, includes risk) to a securitisation vehicle. An assignment in favour of a securitisation vehicle is not valid unless it is evidenced in writing. The assignment of assets to a securitisation vehicle is complete and the ownership of the assets is *ipso jure* acquired by the securitisation vehicle as soon as the assignment is reduced to writing. Moreover, the debtor will be deemed to be notified of the assignment upon one of the following events taking place at the option of the assignor or assignee:

- (a) on notification to the debtor in writing by any means; or
- (b) on the publication of a notice in a newspaper.

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### **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?**

(a) The transfer of promissory notes and bills of exchange requires the endorsement of the notes or bills in favour of the purchaser. The endorsement transfers any rights deriving from the promissory notes or bills of exchange in favour of the transferee.

(b) Consumer loans are generally treated as normal debts and for the perfection of the assignment the rules described in question 4.2 apply. Where the rights of the creditor under a credit agreement are assigned to a third party, the consumer is entitled to raise against that third party any defence available to him against the original creditor. It is arguable however, whether this rule also applies in the case of securitisation transactions, given that article 10(5) of the Securitisation Act provides that “the underlying debtor shall have no right or claim against the securitisation vehicle in connection with any obligation relating to securitisation assets. The underlying debtor shall continue to enjoy all rights under the assigned contract against the originator who shall remain solely responsible for the performance of all the obligations thereunder.”

(c) The sale of marketable debt securities requires different formalities depending on the nature of the debt securities. Transfer of bearer securities is made by delivery. The holder of a bearer security is entitled to exercise the right incorporated therein by showing the security. Transfers of order securities are made by endorsement and delivery of the certificate. Transfer of

registered securities is made by entering the name of the transferee on the book entry register.

A transfer of instruments falling within the purport of Directive 2002/47 EC of 6 June 2002 on Financial Collateral Arrangement (as implemented by the Financial Collateral Arrangements Regulations, 2004, LN 177 of 2004) (“**FC Regulations**”) may be carried out without any formal act as defined therein and further on in this guide.

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#### **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?**

Notification is a pre-requisite for the sale to be an effective sale against the debtors. In default of such notice (the notice is not necessary if the debtor has acknowledged the assignment), or until such notice is given-

(a) the debtor may not set up the assignment against his creditor, and if he pays the debt to him he is thereby discharged;

(b) if the creditor, after having assigned the debt to one person, makes a second assignment thereof to another person who is in good faith, such other person, if he has given notice of the assignment made in his favour, shall be preferred to the former assignee;

(c) if the creditors of the assignor shall sue out a garnishee order attaching the sum due in the hands of the debtor, they shall be preferred to the assignee, even though they

have become creditors only after the assignment; and

(d) the debtor is entitled to set off any sum which may become due to him by the assignor; but the assignee may not set off the debt assigned to him against any sum owing by him to the debtor.

Nevertheless, special rules apply in the context of securitisation transactions (vide question 4.2 above).

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#### **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?**

Generally, the debtor's consent is not required for the sale of the receivables to be an effective sale against the debtors.

(a) The right to assign need not be expressly provided for in the receivables contract. If this right is not provided for the sale can still take place without debtor consent.

(b) The default position is that if the receivables contract expressly prohibits assignment the contract between the parties would prevail and the sale cannot take place without the debtor's consent. Nevertheless, by virtue of the Securitisation Act (Cap. 484 of the Laws of Malta) when a securitisation asset is assigned to a securitisation vehicle, such



assignment is treated as final, absolute and binding on the originator, the securitisation vehicle and on all third parties. Moreover, the assignment will not be subject to:

- (i) annulment, rescission, revocation or termination, variation or abatement by any person and for any reason whatsoever;
- (ii) any rights of the creditors of the originator for any reason whatsoever; or
- (iii) any rights of a liquidator, provisional administrator, receiver, curator, controller, special controller of the originator or other similar officer of the originator for any reason whatsoever.

These rules apply notwithstanding any underlying contractual or statutory prohibition or restriction on the originator to assign in whole or in part the securitisation asset to any third party.

These special rules do not apply in the case of fraud on the part of the securitisation vehicle or in respect of an assignment entered into at a time when the insolvency of the vehicle was pending.

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**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 likely that the seller will be liable for breach of contract and if requested in the court application to damages sustained by virtue of the breach.

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**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?**

An assignment of existing assets in the context of a securitisation transaction needs to identify at least two of the following features of the class of receivables being subject to the assignment:

- a) the type of debt or asset or contract giving rise to the debt;
- b) the class or type of debtors; and/or
- c) the repayment period when the debts fall due;

so as to enable any interested party to reasonably determine which receivables are included in the assignment and it is not necessary to specify the name of the debtor or debtors, the date or the amount of any particular debt.

An assignment of future receivables must identify one of the features of the class of the receivables being subject to the assignments from each of the Features A and Features B listed hereunder in order to enable any interested party to reasonably determine which receivables are included in the assignment and it will not be necessary to specify the name of the debtor or debtors, the date or the amount of any particular debt.

Features A

- (a) the type of debt or asset or contract giving rise to the debt;
- (b) the class or type of debtors; and
- (c) the assets, including future assets, which give rise to the receivables.

#### Features B

- (a) the time period during which the debt may arise; and
- (b) the repayment period during when the debts may fall due.

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#### **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 jeopardizing perfection?**

In terms of Maltese general law, for the sale to be perfected it must avoid being classified as a simulated sale. For this to take place there must be a common intention of the parties to conceal the actual assignment. The courts will look at the description of the agreement and determine whether the actual rights and obligations of the parties created by the agreement are consistent with the description.

The Securitisation Act (Cap. 484 of the Laws of Malta) provides that a transfer of securitisation assets from an originator to a securitisation vehicle made in accordance with the terms of the Securitisation Act is valid and enforceable in accordance with its terms and with the Securitisation Act and will not be

subject to re-characterisation for any reason whatsoever. The Securitisation Vehicle can thus agree to assume obligations (including risks) without affecting the re-characterisation of the securitisation transaction. Moreover, in the case of an assignment in favour of a securitisation vehicle the assignment need not have an agreed/fixed/determinate price.

The securitisation vehicle may delegate the management responsibility for the day to day administration of the securitisation vehicle or of the assets or risk thereof, including collection of any claims, to any third party, including the originator.

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#### **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?**

In a securitisation transaction an assignment is deemed to be effective at the time of the conclusion of the original contract without the need of an act of transfer being required to assign each continuous receivable on it coming into existence.

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#### **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)?**

Securitisation assets under the Securitisation Act include any asset whether existing or future as mentioned in question 4.9.

Refer to question 6.1.



**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?**

The Securitisation Act provides that unless the assignment expressly provides otherwise, the assignment of a debt also includes every suretyship, warrant or indemnity for the payment of the debt. Moreover, the assignment of a debt also includes every suretyship, warrant or indemnity, accessory to the debt and this notwithstanding any contractual prohibition or restriction against such assignment of the debt. All notices of assignment made to a debtor or class of debtors in accordance with the Securitisation Act will have effect in relation to all persons granting any suretyship, guarantee or indemnity without the needs of further notice or other formalities in their regard.

## 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?**

In view of the only recent enactment of the Securitisation Act, customary practices have not as yet been developed. However in view of the minimal risk of re-characterisation of

securitisation transaction carried out in terms of the said Act it is not envisaged that back-up security will be customary.

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

Under general Maltese law a pledge is constituted by the delivery to the pledgee or to a custodian of the thing pledged or of the document conferring the exclusive right to the disposal of the thing. A pledge will create a privileged right only if (a) the thing over which the pledge is created is delivered to the pledgee or a custodian; or (b) where the thing pledged is a debt or other right in respect of which no document of title exists, if the pledge results from a public deed or a private writing and the debtor is duly notified of the existence of the pledge by a judicial act or the debtor otherwise acknowledges the existence of such pledge.

However in accordance with regulation 5 of the FC Regulations and subject to the requirements specified therein (namely that the FC Regulations relate largely to wholesale players), the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement is not dependent on the performance of any formal act (including any judicial act, registration, notification, note in any public registry, acknowledgment, advertisement, or any

similar act upon which the creation, validity, perfection, enforceability or admissibility in evidence of the provision of financial collateral under a financial collateral may be dependent). Provided that any act required by law as a condition for effecting the transfer or creation of a security interest, including endorsement in the case of credit instruments, or any recording on the issuer's register in the case of registered instruments, shall not be considered a formal act.

In terms of the pledge of securitisation assets, the terms described in question 4.2 hereof apply *mutatis mutandis*.

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**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?

Refer to question 5.2.

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**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?

The Maltese courts would treat the security interest as being valid and perfected,

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**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?

There are no additional formalities in addition to those described herein.

## 6 Insolvency Laws

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**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?

The Securitisation Act provides that no proceedings taken in relation to the originator under the Companies Act (Cap. 386 of the Laws of Malta) or any other law, including any dissolution and winding-up proceedings, any company recovery procedure, any company reconstruction and any proceedings affecting creditors' rights generally shall have any effect on:

- (a) the securitisation vehicle;
- (b) any securitisation assets acquired or risks assumed by the securitisation vehicle, as well as any cash flow or other asset of the securitised vehicle; or

(c) any payments due to the underlying debtors in connection with the securitised assets.

Moreover, no court or arbitral tribunal may grant or sanction any moratorium or stay whatsoever in connection with a securitisation vehicle.

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**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)?

Refer to question 6.1.

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**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?

Refer to question 6.1.

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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?

There is no general principle of Maltese insolvency law which gives the courts the power to consider the assets and liabilities of one company as though they were assets and liabilities of any other for the purposes of a

liquidation or administration ('substantive consolidation').

It is only in very limited circumstances that the piercing of the corporate veil will take place and the separate legal personality of a company ignored. This usually happens where the limited liability of a company is used for the purpose of fraud or some other illegal or improper purpose.

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**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?

An assignment of future receivables is deemed to be effective at the time of conclusion of the original contract. Once the seller enters into insolvency proceedings, a previous agreement to assign future receivables will continue automatically to transfer receivables as they arise.

Given that a securitisation asset includes an asset whether existing or future couple with para (c) in question 6.1 above, the initiation of insolvency proceedings should not have an effect on the sale thereof.

## 7 Special Rules

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

The Securitisation Act (Cap. 484 of the Laws of Malta) was recently introduced into the Maltese legislation. The Act is aimed at attracting securitisation programmes at an international level by providing the necessary legal implements whilst at the same time facilitating the process by avoiding the cumbersome procedures synonymous with civil law jurisdictions.

The legal framework provides for the possibility of three forms of securitisation:

1. Asset Securitisation;
2. Synthetic Securitisation; and
3. Whole Business/Loan Securitisation.

### 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?

In terms of the Securitisation Act, a securitisation vehicle may be:

1. a company, including an investment company;

2. a commercial partnership;
3. a trust created by a written instrument; and
4. any other legal structure which the competent authority may, by notice, permit to be used for a securitisation transaction

established under the laws of Malta or those of a jurisdiction recognised by the competent authority.

When a securitisation vehicle is established under the Securitisation Act, the objects and purposes of the vehicle need to be limited to such matters which are necessary to carry out all or any transactions intended or required to implement or participate in a securitisation transaction and all related and ancillary acts.

A special regulatory regime applies to securitisation vehicles which issue or which are desirous of issuing financial instruments to the public on a continuous basis.

A trust offers flexibility whereas a company may offer particular fiscal advantages through the operation of the refund and Malta's full imputation system of taxation. Moreover, the Securitisation Act gives wider scope of application for limited liability companies in securitisation transactions and this reflects the current market practices, given the wider use and application of limited liability companies.

There are no special rules for shareholder or director status.

**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?**

This clause should be upheld by a Maltese court especially in view of the fact that Maltese courts would generally recognise the general principle of the freedom of contracting parties to enter into contracts and to determine the terms thereof as the law between them. In reinforcing this principle, the Securitisation Act provides that any contract entered into in connection with a securitisation transaction shall be valid and enforceable in accordance with its terms, and where the parties agree in writing as to the effects that will arise on the occurrence of a specified event, it shall not be necessary for either party to obtain any court judgment or declaration confirming that the specified event has occurred or otherwise.

**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?**

Refer to question 7.3.

In terms of the Securitisation Act, a securitisation vehicle is permitted to enter into any agreement which contains provisions by which securitisation creditors or any shareholder of the securitisation vehicle,

including the originator, accept to restrict or waive their right to commence the process leading to dissolution and consequential winding-up proceedings, company recovery procedure, company reconstruction or any proceedings affecting the rights pertaining to creditors generally in connection with the securitisation vehicle, or to transfer such a right to any person.

Furthermore the constitutive documents of the securitisation vehicle may also make provision for the above.

**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?**

Refer to questions 7.3 and 7.4.

The affirmative vote of an independent director is not required in this case.

## 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?**

The general rule under the Securitisation Act is that no vehicle established under the laws of Malta can commence business as a securitisation vehicle in or from within Malta unless it has given notice to the Malta Financial Services Authority.

Registration requirements could also be applicable under the Data Protection Act (Cap. 440 of the Laws of Malta). Special rules also apply to public securitisation vehicles (i.e. a securitisation vehicle which issues or which is desirous of issuing financial instrument to the public on a continuous basis). It does not appear to alter our views should the purchasers do business with other sellers in Malta.

It would however be advisable to discuss the business to be undertaken in Malta with the local regulator, the Malta Financial Services Authority to ensure that the purchaser does not require any written exemption with respect to any other licensing requirements, namely in terms of the Investment Services Act, Cap. 370 of the laws of Malta, the Banking Act, Cap. 371 of the laws of Malta and the Financial Institutions Act, Cap. 376 of the laws of Malta.

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**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?**

Any data or information which is transferred between persons within the context of a securitisation transaction is transferable without any restriction or limitation, although such data or information retains its secret or confidential status for other effects and purposes. The Data Protection Act (Cap.440 of the Laws of Malta) regulates the use or dissemination of data about or provided by debtors. These laws apply only to individual debtors, called "data subjects". A registration requirement is also present under this said Act.

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**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?**

In view of question 4.3, paragraph (b) above it is doubtful whether the purchaser will have to comply with consumer protection laws even though there is no clear cut answer since to our knowledge this has never been tested by the Maltese courts.

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**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?**

These restrictions do not exist.



## 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?**

The answer to this question depends on a number of issues, e.g. whether the receivables bear interest, where the seller or purchaser is located and similar considerations.

Persons who are both domiciled and ordinarily resident in Malta are chargeable to tax on their worldwide chargeable income and capital gains, whilst persons who are either not domiciled or not ordinarily resident in Malta are chargeable to tax only on income arising in Malta and on foreign source income which is received in Malta (so however that non-residents are typically chargeable only on Malta-source income). Provisions contained in double taxation treaties may also be relevant.

If non-residents earn foreign source income, the expectation is that this should not be taxable in Malta, whilst if such non-residents earn Malta-source income, the assumption is that it should be taxable in Malta, subject to the terms of any applicable double taxation treaty or any applicable tax exemption under domestic law.

In respect of repayment of principal at cost, the expectation is that such repayment would not attract Maltese tax liability. Interest

income earned by Maltese domiciled and ordinarily resident persons is subject to tax. Certain withholding tax provisions exist in respect of payment by Maltese companies or Maltese-resident companies of debenture interest or interest on any loan advanced for a capital purpose (excluding interest on customer's deposits and current accounts). An exemption exists in respect of interest accruing to or derived by a non-Maltese-resident person, as long as certain statutory conditions are satisfied.

**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?**

Maltese GAAP is IFRS and this would constitute the point of departure in terms of calculation of tax liability, so, however, certain adjustments may need to be made for tax purposes where required by the Income Tax Acts.

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

A document subject to duty under the Duty on Documents and Transfers Act (Cap. 364 of the Laws of Malta) becomes so subject either from its origin if it is executed in Malta or by reason of its use if it is executed outside Malta.

Stamp duty is not chargeable on a sale of receivables. Stamp duty may however be relevant on a sale of a receivable that falls within the definition of "marketable securities" (for example, a debenture or a bond). (Other

chargeable transfers include among others immovable property and emphyteutical grants and transfers in auction sales.)

There are various reliefs and exemptions available, including for qualifying transfers within a group of companies and for acquisitions or disposals of marketable securities by certain companies engaged in international activities.

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**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?**

VAT is chargeable on every supply of goods and services made in Malta for a consideration in the course or furtherance of an economic activity, intra-Community acquisitions, and on taxable importation of goods.

The standard rate of VAT is 18%, with a rate of 5% applying in limited cases, such as to accommodation in hotels and licensed premises. Certain supplies are either exempt with credit (zero-rated, i.e. VAT is not charged on the supply, but the supplier has the right to recover input VAT incurred) or exempt without credit (i.e. VAT is not charged on the supply, but the supplier has no right to recover input VAT incurred).

The exempt without credit supplies referred to in the Value Added Tax Act which may be relevant in the circumstances include the following:

- (a) the granting and the negotiation of credit and the management of credit by the person granting it;
- (b) the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person granting the credit;
- (c) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring; and
- (d) transactions, including negotiation, excluding management and safekeeping, in shares, interest in companies or associations, debentures and other securities, excluding certain specified transactions.

Supplies of such services in circumstances in which the customer is established outside the EU or when these operations are directly linked with goods to be exported to a country outside the EU can give rise to recovery of input tax for the supplier.

Debt collection services are not exempt and should attract VAT at the rate of 18% if they are considered to be supplied in Malta.

**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?

Stamp duty, is generally paid by the purchaser. Except in very limited circumstances, the Commissioner of Inland Revenue cannot enforce stamp duty by suing to recover it as a debt.

Although in terms of contractual arrangements stamp duty liability is typically imposed on the purchaser, in terms of law, liability for payment of stamp duty is imposed jointly and severally on both the transferor and the transferee and where the transfer is effected by public deed, on the notary publishing the relative deed. Therefore in such cases, it is possible that claims may be made against the purchaser for unpaid stamp duty.

As noted above, a number of exemptions exist from a VAT perspective which could be relevant in these circumstances. However in case of taxable supplies, the general rule is that the supplier of the particular goods or services is required to account for the VAT to the Commissioner of VAT – certain exceptions exist, e.g. in the case where the acquirer of services is required to make a reverse charge relative to the particular services, in the case of intra-community supplies, importations etc. Due to the exemptions referred to above and to the general liability of suppliers for VAT, it is

considered unlikely that the Commissioner of VAT would make claims for unpaid VAT against the purchaser.

**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?

A non-resident purchaser is taxable in Malta on income arising in Malta; in the absence of such local source income, such non-resident purchaser should not be taxable here. In general, the mere purchase of receivables by a non-resident purchaser, appointment of another person as services and collection agent and enforcement of receivables against the debtors by a non-resident trader which carries on its income earning activity exclusively outside Malta and does not have a presence in Malta should not give to an expectation of the purchaser becoming liable to tax in Malta, although the precise circumstances of the particular case would need to be examined in order to determine the matter in a conclusive manner.

Acknowledgment

The authors would like to acknowledge the assistance of PricewaterhouseCoopers Malta in the preparation of Section 9 (“Taxation”).

**This article appeared in the 2007 edition of The International Comparative Legal Guide to: Securitisation; published by Global Legal Group Ltd, London – [www.iclg.co.uk](http://www.iclg.co.uk).**