



# ICLG

The International Comparative Legal Guide to:

# Securitisation 2013

**6th Edition**

A practical cross-border insight into securitisation work

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

## GLG Cover Design

F&F Studio Design

## GLG Cover Image Source

iStock Photo

## Printed by

Ashford Colour Press Ltd.  
April 2013

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ISBN 978-1-908070-58-6

ISSN 1745-7661

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## EDITORIAL

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

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

It is divided into two main sections:

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

Country question and answer chapters. These provide a broad overview of common issues in securitisation laws and regulations in 36 jurisdictions.

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

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

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

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

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# Austria

Fellner Wratzfeld & Partners

Markus Fellner



### 1 Receivables Contracts

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

Austrian law does not require the fulfilment of any special formalities for receivable contracts. Such contracts can be entered into orally, in written form or even be implied based on the conduct of the parties, whereby written contracts are to be recommended for reasons of proof. An invoice alone does not constitute a contract but may evidence its existence. Behaviour of the parties can indicate intent of the parties to conclude a contract, but must indeed show a mutual intent to do so.

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

There are no specific limit rates of interest on consumer credit, loans or other kinds of receivables stipulated by law. However, there is a general limit resulting from the prohibition against contracts violating public policy. Under Austrian law, under which circumstances high interest rates violate public policy is a case-by case analysis. Austrian law provides for a right of the creditor to claim interest on late payments. Unless agreed otherwise between the parties, the applicable interest rate stipulated by law applies. The statutory interest rate generally is four per cent *p.a.* for contracts and eight per cent *p.a.* over the base rate in case of claims arising out of contracts between companies in business transactions. There are no special legal entitlements allowing consumers to cancel receivables for a specified period of time. The legal venue for claims against consumers is always the competent court of their residence. Moreover, Austrian law has special consumer protection provisions concerning the permissible content of general terms and conditions, which are mandatory in nature.

- 1.3 Government Receivables.** Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

There is no special law regulating the sale or collection of receivables from governmental entities. Such entities, however, are treated differently than private sector firms with regard to non-assignment clauses. Under the Austrian General Civil Code (which includes governmental entities) (ABGB), non-assignment clauses in contracts between a public law corporate body or its subsidiaries on the one hand and an applicant for subsidies on the other are enforceable, whereas such clauses in agreements between private sector firms are not.

### 2 Choice of Law - Receivables Contracts

- 2.1 No Law Specified.** If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in Austria that will determine the governing law of the contract?

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation), which entered into force in all EU Member States, except for Denmark, on 17 December 2009, governs the choice of law in the European Union. It is based upon and replaces the Convention on the Law Applicable to Contractual Obligations 1980. Chapter I Article 4 of the Rome I Regulation regulates which law applies in case the parties to an agreement have not agreed on the applicable law. Depending on the kind of contract, different connecting factors are decisive. If a contract is not listed in clause 1 of Article 4, it is governed by the law of the country where the party required to effect the characteristic performance of the contract has its habitual residence, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, in which case the law of such country applies. If the applicable law cannot be determined according to the aforementioned principles, as a fall-back rule a contract is governed by the law of the country with which it is most closely connected. If the parties to a receivable contract have not agreed which law applies, since receivable contracts are not listed in clause 1 of Article 4, the contract is governed by the national law according to the principles outlined above. In most cases this is the law of the obligor’s home country.

If the obligor is a customer within the meaning of the Consumer Protection Act (*Konsumentenschutzgesetz*), the choice of the law of a country that is not a European Economic Area Member State in some respects only applies to the extent it is more advantageous to the customer than the law of the European Economic Area Member State which would have applied without this choice of law. The restrictions on the permissible content of general terms and conditions apply to consumer contracts irrespective of the choice of law of the parties to such contract.

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

No, there is no such reason.

**2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Austria but the obligor is not, or if the obligor is resident in Austria but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in Austria give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?**

In general, the parties to a receivable contract are free to choose the applicable law. This freedom is restricted in cases where all parties to the receivable contract are resident in Austria and Austria is the place of performance. In such constellation, the mandatory provisions of Austrian laws must be applied to a receivable contract. In addition, foreign law will not be recognised to the extent it violates Austrian public policy. Furthermore, for contracts with Austrian consumers, see question 2.1.

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

Yes, it has been in force since 1 January 1989.

### 3 Choice of Law - Receivables Purchase Agreement

**3.1 Base Case. Does Austria's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., Austria's laws or foreign laws)?**

The receivable contract and the contract out of which the receivables arise can be governed by different laws, irrespective of which law governs the receivables. The enforcement of receivables governed by Austrian law is subject to Austrian law.

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

A court in Austria will recognise the seller's and the purchaser's choice of the law of Austria irrespective of where the purchaser is resident.

**3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside Austria, will a court in Austria recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?**

Since there are no formal requirements for the transfer of receivables, an Austrian court will give effect to the parties' choice of law.

**3.4 Example 3: If (a) the seller is located in Austria but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in Austria recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with Austria's own sale requirements?**

An Austrian court will recognise such sale as being effective because under Austrian law there are no formal requirements for the transfer of receivables.

**3.5 Example 4: If (a) the obligor is located in Austria but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in Austria recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with Austria's own sale requirements?**

An Austrian court will recognise such sale as being effective because, under Austrian law, there are no formal requirements for the transfer of receivables.

**3.6 Example 5: If (a) the seller is located in Austria (irrespective of the obligor's location), (b) the receivable is governed by the law of Austria, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in Austria recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in Austria and any third party creditor or insolvency administrator of any such obligor)?**

An Austrian court will recognise such sale as being effective because, under Austrian law, there are no formal requirements for the transfer of receivables.

## 4 Asset Sales

**4.1 Sale Methods Generally. In Austria what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology - is it called a sale, transfer, assignment or something else?**

There are no special formalities for the sale of receivables. The sole requirement is a mutual agreement between the seller and purchaser on the sale of the respective receivables. For reasons of proof, this agreement will normally be entered into in written form, which, however, is not mandatory under Austrian law. Furthermore, it is not necessary, for the effectiveness of the sale of the receivables, to inform the obligor of the sale. The obligor, however, is entitled to pay its debt to the seller and thereby discharge the debt until it has received notification of the sale. The customary terminology is that a seller sells receivables under a receivables purchase agreement to a purchaser, whereas in such agreements also the term assignment and corresponding terms are customary.

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

As outlined in question 4.1, there are no specific formal requirements for the sale of receivables. A subsequent sale of receivables already sold is impossible under Austrian law since they have already been transferred to the first purchaser. For this reason, an acquisition in good faith generally is not possible although there are exceptions for sham transactions, acceptance bills and cheques. Nevertheless, if the obligor has not been informed of the first valid sale but only of the second invalid sale, it can pay to the second purchaser with a debt discharging effect. In such case, the first purchaser is entitled to a claim based on unjust enrichment against the second purchaser.

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

In Austria, promissory notes as certificates of debt are not securities and generally only document obligations arising out of a loan. There are no additional requirements for the assignment of such

promissory notes, but they are usually delivered physically in the course of the sale of the receivables.

Mortgage loans are a form of security frequently used in Austria. Mortgages are accessory to the debt they secure and cannot be transferred without it. Mortgages must be registered with the land register to be legally valid. A mortgage can either be registered for a maximum amount or for the actual amount of a debt. In order to be registered with the land register, a mortgage for a maximum amount can only be transferred by notarised written agreement under acceptance of the obligor, which is why a receivable purchase contract, pursuant to which such mortgage shall be transferred, must comply with these formal requirements. Agreements on the transfer of other mortgages do not have to comply with these formal requirements.

Under the Consumer Credit Act (*Verbraucherkreditgesetz*), which implemented EU Directive 2008/48/EG into Austrian law, the consumer has to be informed if the consumer credit agreement itself or claims of the creditor arising therefrom are transferred to a third party, unless the original creditor, with the consent of the assignee, continuously acts as creditor in relation to the consumer. Although this provision is mandatory, its violation does not lead to the invalidity of the assignment.

The additional requirements for the sale and perfection of marketable securities differ depending on the type of security. Each transfer of ownership of securities requires a corresponding agreement between the seller and the purchaser. The transfer of bearer securities additionally requires either handing over of the securities to the purchaser or, as the case may be, instruction to the possessor to hold them in the future for the purchaser. Registered securities are transferred by way of assignment of the rights they certify. Endorsed securities have to be endorsed by the purchaser and transferred to its possession.

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

Under Austrian law, generally sales of receivables need not be notified to obligors nor be approved by them. To the contrary, sales of receivables between entrepreneurs concluded in the course of their business activities are valid even if the receivable contract between the seller and the obligor contains a non-assignment clause (for the exception concerning governmental entities, see question 1.3 above). Breach of a non-assignment clause, however, will subject the assignor to possible damage claims of the obligor. Such damage claims may not be set off against the assigned receivables and an assignee will not be liable only because it knew that a non-assignment clause had been in place between the seller and the obligor.

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

Under Austrian law, there is no need to give notice to obligors about a sale of receivables (see question 4.4).

**4.6 Restrictions on Assignment; Liability to Obligor.** Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Austria? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Austria recognises prohibitions on sale or assignment and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or on any other basis?

Restrictions on assignment and sale stipulated in receivable contracts between entrepreneurs and consumers are enforceable and effective even against third parties. Non-assignment clauses in contracts between entrepreneurs concluded in the course of their business activities are not enforceable (see question 4.4).

The seller will be liable to the obligor for the breach of an enforceable non-assignment clause and the obligor might withdraw from the contract or claim damages. A claim against the assignee is only possible in case of fraudulent conduct.

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

Under Austrian law, it is not necessary to specify the object of sale in detail, but it must be at least definable. For the specification of a concrete object of sale of a receivable purchase agreement, it is, however, advisable to give further details to avoid disputes between the seller and purchaser. Receivables to be sold in one receivable purchase agreement can originate from different kinds of contracts. The assignment of all existing and future receivables or the assignment of all of them with some explicitly mentioned exemptions is possible if the receivables are capable of being identified.

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

None of these characteristics will hinder a sale's perfection but the concrete form of the receivable contract defines whether only the economical ownership or both the economical and the legal ownership are transferred to the purchaser.

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

Yes, a seller can sell future receivables (see question 4.7) if the receivables are capable of being identified.

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

A seller in principle can sell future receivables that are capable of being identified (see question 4.9). With respect to an obligor's insolvency, see question 6.5.

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

Depending on the type of security, additional formalities for their transfer might be necessary (see question 4.3). To ensure that no security becomes invalid by divergence of ownership of a security from the claim secured by it, receivable purchase agreements usually provide for the assignor to hold the securities in trust for the assignee until they can be legally effectively transferred to the assignee.

## 5 Security Issues

**5.1 Back-up Security.** Is it customary in Austria 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?

Taking a "back-up" security interest is not customary.

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

See question 5.1.

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

The purchaser and seller have to enter into an assignment agreement on the granting of a security interest in receivables. To give legal effect to the granting of a security interest, it has to be shown in a way that enables third parties to take notice. This is usually effected via annotation in the purchaser's books, whereas the security interest has to be shown in the respective customer account (*Kundenkonto*), as well as in the list of open invoices (*Offene-Posten-Liste*).

As long as the concrete amount of future receivables is not known to the purchaser, the remark in its books can be of a general nature, but it has to be individualised after the origination of a specific receivable. To ensure the correct entry in the seller's books, the purchaser should require inspection rights to avoid diverging annotations in the seller's and the purchaser's books. Failure to make correct entries results in the security interest not being perfected.

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

Unlike contractual undertakings, a transfer *in rem* has to fulfil the formal requirements stipulated by Austrian law. The rules concerning the creation of a pledge, which is a right *in rem*, apply analogously to the granting of a security interest.

**5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?**

See question 4.3.

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

Yes, Austrian law recognises trusts.

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

Escrow accounts in Austria or in a foreign country are recognised

under Austrian law. Security over an Austrian bank account can be taken and is a customary form of collateralisation for banks. Under the general terms and conditions of banks, the borrower grants the bank a lien on all its objects and rights which enter into the bank's possession, which in particular includes the credit on the borrowers' bank account. An Austrian court would recognise a foreign grant of security over an Austrian bank account only if the formalities required by Austrian law are met.

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

According to Austrian law, only the balance of the account as at the time of receipt of the third party notice by the garnishee can form the basis of enforcement. Cash flowing into the bank account after this point in time is not encumbered by the initial pledge of the bank account.

The secured party may only access the account's balance by filing a petition to the court for pay-out of the balance.

**5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?**

The pledge is created with the service of the garnishment order to the garnishee. At this point in time, the owner of the pledged bank account has no access to the funds therein. As of the date of the creation of the pledge, the garnishee is not allowed to pay-out money from the pledged account to the owner (*Zahlungsverbot*) and the owner is not allowed to give instructions to the garnishee that interfere with the lien (*Verfügungsverbot*).

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

There is no automatic stay under Austrian insolvency laws. Purchased receivables for which the purchase price has been fully paid and which have already been fully recovered cannot be claimed back by an insolvency administrator. If the receivables have not been sold to the purchaser, but it has a security interest in the receivables, the purchaser has a right of separate satisfaction in case of a seller's insolvency.

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

If contracts are not mutually fulfilled on or before the date insolvency proceedings are started, the insolvency administrator can choose between performance or non-performance of the contract. There are special rules for leases and employment contracts.

Certain transactions can be declared void as regards the creditors where a successful challenge is made by the administrator either by legal challenge or defence under the Insolvency Act. The grounds for voidability are:

- Discriminatory intent (*Benachteiligungsabsicht*). This applies if the debtor acted with the intent to create a disadvantage for its creditors and the other contracting party: (i) either knew of this intent (up to ten years preceding the initiation of insolvency proceedings); or (ii) should have known of this intent (up to two years preceding the initiation of insolvency proceedings).
- Squandering of assets (*Vermögensverschleuderung*). A transaction can be challenged if it is seen as squandering the company's assets. The other party to the transaction must have known or should have known that this was the case (up to one year preceding the initiation of insolvency proceedings).
- Gifts made by the company (*Schenkung*). Gifts made by the company can be challenged if made in the two years before the start of insolvency proceedings.
- Preferential treatment of creditors (*Begünstigungsabsicht*). Acts that favour one creditor over another can be set aside if they occurred in the 60 days before insolvency or after the start of insolvency proceedings.
- Post-insolvency transaction. Transactions taking place after insolvency can be declared void if the creditor knew or should have known about the insolvency (*Kenntnis der Zahlungsunfähigkeit*).

Any disposition of a company's property by the debtor made after bankruptcy proceedings have started is void in proceedings without a debtor in possession since in such cases only the administrator is authorised to represent the debtor. In reorganisation proceedings with a debtor in possession, the debtor is entitled to carry on ordinary business activities, but needs the approval of the reorganisation administrator for extraordinary business activities.

Any impermissible divestment of the debtor's property must be repaid to the insolvency estate. In case this is impossible, damages must be paid.

If third parties have become incontestably entitled to property which is to be restituted, the person, during whose possession the incontestable encumbrance of rights has taken place, must pay damages to the insolvency estate in case such person's acquisition is contestable. In addition, the *bona fide* transferee of a gratuitous conveyance must provide for a restitution of assets only to the extent such transferee is enriched thereby; provided, however, that where such transferee's acquisition of ownership also would be contestable in case of a non-gratuitous acquisition, the entirety of the assets that are the subject of the conveyance must be restituted.

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

See question 6.2.

**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?**

See question 6.2.

**6.5 Effect of Proceedings on Future Receivables. If insolvency proceedings are commenced against the seller in Austria, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings or (b) on sales of receivables that only come into existence after the commencement of such proceedings?**

In Austria, both cases are treated the same but the consequences depend on the action taken by the insolvency administrator, as the administrator has the right to terminate the receivables purchase agreement.

If the administrator terminates the agreement and the receivables come into existence after the commencement of the insolvency proceedings, the purchaser has no valid title to the receivables and such receivables remain in the insolvency estate. If the administrator does not terminate the agreement, the consequences for the receivables are controversial under Austrian legal doctrines. It is not resolved whether the purchaser has the right to single out the receivables from the insolvency estate or whether the purchaser is only regarded as an unsecured creditor of the insolvency estate.

## 7 Special Rules

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

In Austria, there is no special securitisation law, but there are rules for special securitisation companies (*Verbriefungsspezialgesellschaften*) which can be established solely for the purpose of securitisation.

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

No, special securitisation companies under Austrian law do not differ from other companies except for the restriction that their sole business objective must be the execution of securitisation transactions. The company has to be structured in a way to allow

the separation of its own obligations from those of the originator, the legal and beneficial owners of which must be able to pledge and sell the rights connected therewith without restriction.

**7.3 Non-Recourse Clause.** Will a court in Austria 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?

A non-recourse clause is effective unless agreed with a consumer.

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

Except for cases of wilful misconduct or gross negligence, a clause prohibiting parties from taking legal actions against the purchaser or another person is legally effective.

**7.5 Priority of Payments "Waterfall".** Will a court in Austria give effect to a contractual provision (even if the contract's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Yes, an Austrian court will give effect to a contractual provision distribution payment to parties in a certain order specified in the contract, even where foreign law is applicable.

**7.6 Independent Director.** Will a court in Austria 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?

Such provision could only be effective between the parties but not in relation to third parties generally. A breach of a director's contractual obligation not to commence an insolvency proceeding, however, is justified by mandatory law and therefore does not justify any claim for damages.

## 8 Regulatory Issues

**8.1 Required Authorisations, etc.** Assuming that the purchaser does no other business in Austria, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in Austria? Does the answer to the preceding question change if the purchaser does business with other sellers in Austria?

A purchaser which only collects, enforces and securitises receivables will be qualified as a special securitisation company under Austrian law; such special securitisation companies cannot pursue banking activities, which would require a banking licence or other licences. If the purchaser on the other hand also provides other banking services, it would have to obtain a banking licence and to comply with the provisions concerning financial institutions.

The qualification as a special securitisation company solely depends on the purpose and organisation of a company but not on the number of its business partners.

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

The business of collecting third parties' receivables requires a business licence for the business of a debt collection agency. Debt collection agencies are not permitted to enforce third party claims before a court or to have claims assigned to them even if such assignment is only undertaken for the purpose of collection of the claims. Collecting agencies are only allowed to collect third party claims arising from claims in tort if the claims are undisputed. The acquisition of receivables from the delivery of goods or provision of services and the assumption of the risk of the collectability of such receivables and in connection therewith the collection of such receivables is a banking business with the meaning of the Banking Act (*Bankwesengesetz*) for which a banking licence is required.

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

In Austria, the EU Data Protection Directive (95/46/EC) was implemented in the Data Protection Act 2000 (DSG), according to which the use of personal data of persons and companies is subject to several restrictions aimed at the protection of such data. As a general principle, the use of personal data is only permitted with the explicit consent of the concerned person. However, there is also a weighing of interests of the transferor of data and of the person whose data is affected. This weighing usually allows for the transfer of data in the course of securitisation transactions.

In addition, there is a stricter protection of data of bank customers under bank secrecy provisions stipulated in the Banking Act. As with general data protection, banking secrecy can also be breached if the transferor's interest in disclosing data outweighs the banking customer's non-disclosure interest.

Both the general data protection rules and banking secrecy apply to the purchase of bank loans by special securitisation companies. Because of the weighing of interests, the disclosure of data to the extent absolutely necessary is generally viewed as permitted for the purpose of securitisation.

**8.4 Consumer Protection.** If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of Austria? Briefly, what is required?

Under the Consumer Protection Act (*Verbraucherschutzgesetz*) compliance with provisions of consumer protection is the sole responsibility of the seller. Since the validity of a receivable purchase contract may be affected by non-compliance with mandatory provisions of data protection, it is advisable for the purchaser to assure that these provisions are complied with, which typically is part of the representations and warranties package given by the seller.

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

Generally, there are no such rules under Austrian law, but the exchange into certain currencies can be restricted by resolutions of the United Nations or the European Union or by decree of the National Bank of Austria (*Österreichische Nationalbank*). Moreover, the exchange of currencies in certain circumstances must be notified to the National Bank of Austria for statistical purposes.

## 9 Taxation

**9.1 Withholding Taxes.** Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in Austria? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located?

Payments on receivables are generally not subject to withholding taxes in Austria.

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

In Austria, there are no special accounting provisions concerning the securitisation of receivables.

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

Austria imposes stamp duty in different amounts on various types of written contracts. On assignment contracts, a stamp duty in the amount of 0.8 per cent of the consideration is imposed. Assignments between financial institutions and special securitisation companies are exempt from stamp duty. In some other cases (but not all), stamp duty may be able to be avoided by either concluding a contract in the form of an offer and its implied acceptance or, where one of the parties is a foreigner, by signing the document abroad and assuring that it is not brought into Austria.

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

In Austria, value added tax is imposed on the sale of goods and provision of services in the amount of 20 per cent of the consideration. In case of a sale of receivables, the seller undertakes a tax-free turnover with monetary claims. Subject to provision of services by the purchaser to the seller, the purchaser has to pay value added tax, whereas the calculation basis is the difference between the purchase price for the receivables and the economic value of the receivables. This economic value is in particular in case of the sale of non-performing loans lower than the book value. The European Court of Justice decided in its decision C-93/10 of 27 October 2011 that the purchaser of receivables does not have to pay any value added tax in case he does not provide services to the seller since in such cases there is no taxable turnover.

If the purchaser is not situated in Austria, the obligation to pay the value added tax is shifted to the seller.

**9.5 Purchaser Liability.** If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

All parties to an agreement are liable for the payment of stamp duty, if any. For value added tax, see question 9.4.

**9.6 Doing Business.** Assuming that the purchaser conducts no other business in Austria, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in Austria?

The purchase of receivables by a foreigner alone generally would not trigger any tax obligation of the purchaser except for stamp duty, if such arises.



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