



Global Legal Group

The International Comparative Legal Guide to: Securitisation 2011

A practical cross-border insight into securitisation work

Published by Global Legal Group, with contributions from:

Arendt & Medernach
Ashurst LLP
Baker & McKenzie – CIS, Limited
Bizlink Lawyers & Consultants
Blake Dawson
BORENIUS / Švirinas & partners
Caspi & Co.
Cervantes Sainz
Chapman Tripp
Chiomenti Studio Legale
Cleary Gottlieb Steen & Hamilton LLP
Dave and Girish and Co.
Debariev, Dameski & Kelesoska attorneys at law
Delphi
Drew & Napier LLC
Estudio Beccar Varela
Eversheds
Fellner Wratzfeld & Partners
FenXun Partners
Freshfields Bruckhaus Deringer LLP
Gárdos Füredi Mosonyi Tomori
J.D. Sellier + Co.
Kim & Chang
Latham & Watkins LLP
Liepa, Skopina/BORENIUS
Loyens & Loeff N.V.
Luiga Mody Hääl Borenius
M. & P. Bernitsas Law Offices
Maric & Co
Morais Leitão, Galvão Teles, Soares da Silva & Associados
NautaDutilh
Nishimura & Asahi
Pachiú & Associates
Patton, Moreno & Asvat
Pestalozzi Attorneys at Law Ltd
Philip Law Firm
Roschier, Attorneys Ltd.
Schulte Roth & Zabel LLP
SNR Denton
Tonucci & Partners
Torys LLP
Uría Menéndez Abogados, S.L.P.
Weil, Gotshal & Manges

Trinidad and Tobago

J.D. Sellier + Co.

William David Clarke



Donna-Marie Johnson



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 behaviour of the parties?

Sale of Goods

- (a) Section 6 of the Sale of Goods Act, Chap. 82:30, provides that the sale of any goods of the value of TT\$100.00 or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.
- (b) The issue of an invoice by the seller is sufficient evidence of the contract, provided that the buyer has accepted at least part of the goods and actually receives them. Acceptance takes place: (a) if buyer examines the goods or takes a sample in order to confirm that they are in accordance with the contract; (b) if he marks the goods as goods to be delivered under a contract for sale; (c) if he resells or attempts to resell the goods or does some other act in relation to them which amounts to acceptance; or (d) the goods being at the time of contract in the possession of the buyer as the seller's bailee, the buyer acts in relation to them in a manner inconsistent with his former possession as bailee. Otherwise, there must be a written contract or memorandum signed by the buyer. A typical example of a written memorandum would be a purchase order signed by the buyer which is unconditionally accepted by the seller.

Contract for Services

It is not necessary that a contract for services be evidenced by writing. It may be made orally or in writing, or partly orally and partly in writing, or may be implied from the conduct of the parties. The issue of an invoice by the seller is sufficient evidence of the contract.

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

- (a) Section 12 of the Money Lenders Act, Chap. 84:04, provides that no person other than a money lender licensed under the

Act shall charge interest on loans in excess of 24% simple interest per annum. In practice this limit is also applied to consumer credit and other receivables transactions.

A money lender does not include any person *bona fide* carrying on the business of banking or insurance or *bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purpose of which he lends money.

- (b) There is no statutory right to interest on late payments prior to judgment. Interest on late payment would normally be a contractual term agreed between the parties. In the absence of a specific contract, the court will usually award interest on a commercial loan at normal overdraft rates up to judgment. Judgment creditors under a money judgment are entitled to interest at the statutory rate of 12% per annum from the date of judgment to date of payment.
- (c) There is no law which permits the cancellation of receivables for a specified period of time. It is to be noted however that pursuant to the Bankruptcy Act Chap 9:70 (“the Bankruptcy Act”), a debtor commits an act of bankruptcy if he gives notice to any of his creditors that he has suspended, or that he is about to suspend payment of his debts .
- (d) The Unfair Contract Terms Act, Chap. 82:37, provides certain rights to consumers with respect to debts owed by them; for example, certain liabilities for negligence of the seller/lender cannot be excluded under the terms of the contract.

- 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?**

Contracts by the State or Government entities requiring payment of money are normally subject to the consent of the Minister of Finance and/or the Minister having responsibility for the entity. There are also special provisions in statutes governing certain types of loan or financing transactions or specific Government entities as well as municipal and regional corporations. Under the State Liability and Proceedings Act, Chap. 8:02, there are restrictions on the remedies which may be granted in proceedings against the State and procedures for enforcement of such remedies.

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 Trinidad and Tobago that will determine the governing law of the contract?

If there is no express choice of law in a contract, the court will consider whether it can ascertain that there was an inferred or implied choice of law by the parties, or failing that the court will determine the applicable law by judicial determination of the system of law with which the transaction has the closest and most real connection. For example, if the parties agree that arbitration shall take place in a particular country or that the courts of a particular country will have jurisdiction over the contract, that is a strong inference that the parties have impliedly chosen the law of that country as the proper law. Where no such choice can be inferred, the court will hold the contract to be governed by the law of the country with which the transaction is most closely connected.

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

No, there is not.

- 2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor.** If the seller is resident in Trinidad and Tobago but the obligor is not, or if the obligor is resident in Trinidad and Tobago 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 Trinidad and Tobago 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 that between the seller and the obligor under the receivables contract?

Where the parties expressly stipulate that a contract is to be governed by a particular law, that law will be the proper law of the contract. This freedom of choice is subject to some limitations. The selection of a foreign law must be *bona fide* and legal (at least under Trinidad and Tobago law if a Trinidad court is required to adjudicate on this issue) and there must be no reason for avoiding the choice on the grounds of public policy. Express selection of a foreign law will not prevent the application of mandatory provisions of any local law which would normally have been applicable to the transaction but for the parties' choice of foreign law.

- 2.4 CISG.** Is the United Nations Convention on the International Sale of Goods in effect in Trinidad and Tobago?

No, it is not.

3 Choice of Law - Receivables Purchase Agreement

- 3.1 Base Case.** Does Trinidad and Tobago 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., Trinidad and Tobago's laws or foreign laws)? Are there any exceptions to this rule that would apply to receivables sale transactions?

No, it does not.

- 3.2 Freedom to Choose Other Law.** If (a) the receivables are governed by one country's laws (whether Trinidad and Tobago's laws or foreign laws), (b) the seller sells the receivables to a purchaser located in a third country, and (c) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, will a court in Trinidad and Tobago give effect to their choice of foreign law? Are there any exceptions to this rule that would apply to receivables sale transactions?

Yes. This freedom of choice is subject to the same limitations set out in our response to question 2.3 above.

- 3.3 Freedom to Choose Home Country Law.** Conversely, if (a) another country's law governs the receivables (e.g., a foreign obligor's country), and (b) the seller and purchaser are resident in Trinidad and Tobago, will a court in Trinidad and Tobago permit the seller and purchaser to choose the law of Trinidad and Tobago to govern the receivables sale? Will a court in Trinidad and Tobago permit the seller and purchaser to choose the law of Trinidad and Tobago to govern the receivables sale if only one of the seller or the purchaser are resident in Trinidad and Tobago? Are there any exceptions to this rule that would apply to receivables sale transactions?

The courts in Trinidad and Tobago will permit the purchaser and seller to choose the law of Trinidad and Tobago to govern the receivables sale, whether both the seller and the purchaser or only one of them or neither of them is resident in Trinidad and Tobago. This freedom of choice is subject to the same limitations set out in our response to question 2.3 above. There are no exceptions to this rule applicable to receivables sale transactions.

- 3.4 Recognition of Foreign Law Sales.** If (a) both the receivables contract and the receivables purchase agreement are governed by the same foreign law, and (b) the requirements for a true sale have been fully met under that foreign law, will a court in Trinidad and Tobago recognise that sale as being effective against the seller, the obligors and other third parties (such as creditors or insolvency administrators of the seller and the obligors) without the need to comply with Trinidad and Tobago own sale requirements? Are there any exceptions to this rule?

The courts in Trinidad and Tobago will recognise a true sale, the requirements of which have been fully met under foreign law as being effective against the seller, the obligors and other third parties, without the need to comply with Trinidad and Tobago's own requirements. There are no exceptions to this rule.

4 Asset Sales

4.1 Sale Methods Generally. In Trinidad and Tobago what are the customary methods for a seller to sell receivables to a purchaser?

The sale of receivables is generally effected by way of a Factoring Agreement or an Assignment Agreement so as to vest in the assignee the legal right to the debt and all the remedies therefor with power to give a good discharge without the concurrence of the seller.

4.2 Perfection Generally. What formalities are required generally for perfecting (i.e., making enforceable against other creditors of the seller) 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?

(i) Notice is necessary to make the obligor liable to the assignment. Accordingly notice of the assignment must be given to the obligor by the purchaser. (ii) Stamp duty is chargeable and payable in respect of the sale of the receivables (see our response to question 9.3 below for details).

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?

Promissory Notes

A promissory note is a negotiable instrument and is transferable by endorsement of the note.

Mortgage Loans

The sale would be effected by way of a Deed of Assignment whereby the debt and the real property securing same are transferred to the purchaser. Stamp duty is chargeable and payable on the deed at the rate of 0.05% of the consideration. The Deed of Assignment must be registered in the Deeds Registry.

Consumer Loans

Same as the response to question 4.2.

Marketable Debt Securities

The sale would be effected by the seller and purchaser executing a standard form transfer and seller delivering the certificate to the purchaser. Upon delivery of these documents to the Registrar or Trustee, a new certificate is issued in the name of the purchaser and his name will be recorded as holder of the security.

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? Are there any limitations regarding the purchaser notifying the obligor of the sale of receivables even after the insolvency of the seller or the obligor?

Yes. With respect to both a legal and equitable assignment, in order

to make the assignee's title effective against the obligor, notice of the assignment must be given to the obligor though no assent or acquiescence on the part of the obligor is necessary. The assignee takes subject to all equities existing between the assignor and the obligor up to the date of giving notice of the assignment.

- (a) The answer to the question does not vary if the receivables contract does not prohibit assignment but does not expressly permit assignment.
- (b) If the receivables contract expressly prohibits assignment by the party entitled to the benefit thereof, then an assignment thereof without the obligor's consent is ineffective to vest the contractual rights in the assignee even after notice of the assignment is given to the obligor. The obligor remains liable to the assignor and obtains a good discharge by payment to him. Further, the assignee takes subject to all equities between the assignor and the obligor arising at any time, e.g. a right of set-off arising after notice of assignment is given. Accordingly, the consent of the obligor must be obtained for assignment of the contractual rights. However, unless by the terms of contract the restriction clearly extends to the debt arising from performance of the contract, the debt is assignable without the obligor's consent and is enforceable by the assignee once notice has been given to the obligor.

4.5 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Trinidad and Tobago? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Trinidad and Tobago 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 in receivables contracts prohibiting sale or assignment of the contract are generally enforceable in Trinidad and Tobago. A sale by the seller in breach of the prohibition is invalid against the obligor. The obligor remains liable to the original seller. Any notice that the assignee gives to the obligor will have no effect. The obligor would be entitled to terminate the contact on account of the seller's breach and to recover damages for any loss that he has suffered as a consequence.

4.6 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?

The sale document must contain sufficient information so as to identify clearly each of the debts to be sold. The information required would normally include the name of the obligor and details of the invoice or another document evidencing the debt, i.e. invoice number, invoice date, payment date, the amount of the indebtedness thereunder and a brief description of the goods or services provided by the seller.

The receivables sold do not have to share objective characteristics but may be a mixed basket of different types of debts. However, to the extent that stamp duty is payable on the sale document it may be advantageous to group the receivables into different categories according to the rate or rates of duty applicable to each category and apportion the consideration appropriately.

In a “whole turnover agreement” where the seller agrees to sell and the purchaser agrees to buy all the seller’s receivables, the sale by the seller of “all” of its debts to the purchaser, is sufficient identification of the receivables.

- 4.7 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; and/or (c) control of collections of receivables without jeopardising perfection?

The authorities suggest that documents drawn up by the parties to record a sale transaction have almost always been accepted as such where the court has been satisfied that they genuinely reflected the intention of the parties, even though the terms used in operating the agreement were such as would ordinarily suggest a loan on security rather than a purchase. The authorities further suggest that the courts are inclined to recognise the right of business men to use the business language they understand without having this interpreted as if it were a legal dictionary. This does not prevent the court from investigating the transaction to determine whether it is truly a sale.

- (a) The seller may retain credit risk by providing in the sale agreement for a right of recourse by the purchaser against the seller in the event of default by the obligor.
- (b) The seller may retain interest rate risk by indemnifying the purchaser against any decline in the interest rate.
- (c) The seller may retain control of collection of the receivables by collecting same as agent for the purchaser.

- 4.8 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, it can.

- 4.9 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)? In that regard, is there a distinction between receivables that arise prior to or after the seller’s insolvency?

Yes. In a “whole turnover agreement”, there is no distinction between receivables that arise prior to or after the seller’s insolvency since the transfer of the debts occurs at the date of the agreement and is effective without a further transfer document as soon as the debt comes into existence. In a facultative agreement, the seller periodically offers his debts for sale to the purchaser and the purchaser may either accept or decline the offer. The transfer of the debt occurs only when the seller’s offer is accepted by the purchaser. Therefore, in the event of the seller’s insolvency a fixed charge over his debts in favour of a third party subsequent to the date of the facultative agreement will have priority over a later assignment made in furtherance of the facultative agreement.

- 4.10 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?

The Assignment document will normally provide for the transfer of the receivables together with all rights and remedies relating to or for enforcing same including any related security. Once there is related security the assignment must be effected by Deed. If the related security is real property or an interest in real property the Deed of Assignment must be registered in the Deeds Registry.

5 Security Issues

- 5.1 Back-up Security.** Is it customary in Trinidad and Tobago 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?

No. However, it is open to the purchaser out of an abundance of caution to take a security interest in the receivables.

- 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 Trinidad and Tobago, and for such security interest to be perfected?

The security interest may normally be effected by (i) an assignment by way of charge or (ii) a fixed equitable charge on the receivables made by the seller in favour of the purchaser. The Deed of Assignment or Deed of Charge is subject to stamp duty at the rate of 0.4% of the amount secured.

If the seller is a company, the purchaser must, within 30 days after the creation of the security interest, register with the Registrar of Companies a statement of charge which sets out certain statutory particulars regarding the security interest together with a copy of the instrument by which the security interest is created. The statement of charge is registered in the official file of the seller.

- 5.3 Purchaser Security.** What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of Trinidad and Tobago, and for such security interest to be perfected?

We assume that this question relates to a security interest granted by the purchaser to a third party of his rights under the transactions with the seller, including any security interest he holds from the seller. In that case the same security documents and formalities as set out in the response to question 5.2 above will apply. Assuming that the purchaser is a Trinidad and Tobago company the statement of charge is registered in the official file of the purchaser. Notice of any further assignment must be given to the obligor.

- 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 Trinidad and Tobago or must additional steps be taken in Trinidad and Tobago?

Yes. If the purchaser is an overseas company no formalities are

required in Trinidad and Tobago except that notice of any further assignment must be given to the obligor. If the purchaser is a Trinidad and Tobago company a statement of charge must be registered in the official file of the purchaser and notice of any further assignment given to the obligor.

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

No additional or different requirements apply except in the case of a loan secured by a mortgage of real property. In that case the Deed of Mortgage or Deed of Assignment of Mortgage must be registered in the Deeds Registry.

5.6 Trusts. Does Trinidad and Tobago 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?

Trinidad and Tobago law recognises the concept of trusts.

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

Trinidad and Tobago recognises escrow accounts. Security can be taken over a bank account located in Trinidad and Tobago. The creation of the security over the bank account is effected by the account holder granting a Fixed Charge over the account. The Trinidad and Tobago courts will recognise a foreign law grant of security over a bank account in Trinidad provided that (i) the Trinidad bank has acknowledged the rights of the foreign security holder with respect to the account and (ii) where the account holder is a Trinidad company, a statement of charge with respect to the said security interest is registered with the Registrar of Companies as set out in the response to question 5.2.

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 Trinidad and Tobago'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? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

Neither the Companies Act, Chap. 81:01, ("Companies Act") nor the Bankruptcy Act provide for an "automatic stay". Under section 436 of the Companies Act certain transactions relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, or a fraudulent conveyance, assignment, transfer, sale or disposition, shall if made

or done by or against a company, be deemed, in the event of its being wound up, a fraudulent conveyance, assignment, transfer, sale or disposition, as the case may be and be invalid accordingly. Section 48 (1) of the Bankruptcy Act provides that every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.

The Insolvency Official does not have any inherent power to stay collection and enforcement actions but must seek assistance from the court as provided in the response to question 6.2 below.

The provisions relating to fraudulent preferences apply to sales and charges. Therefore, the transaction may be set aside as a fraudulent preference whether deemed a sale or a security.

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

The Insolvency Official may apply to the court for an injunction to prohibit or stay the purchaser's exercise of rights on the ground that the transaction is a fraudulent preference. The purchaser will be entitled to contest the application. The court has the discretion whether or not to grant the injunction, stay or any other appropriate relief. In urgent cases interim injunctions may be granted.

The insolvency official may subject to the provisions of the Companies Act, also disclaim the agreement as an unprofitable contract.

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 Trinidad and Tobago for (a) transactions between unrelated parties and (b) transactions between related parties?

The following conditions must be fulfilled:

- 1 The seller must at the date of the transaction be unable to pay from his own money his debts as they fall due.
- 2 The transaction must be in favour of a creditor, or some person in trust for a creditor.
- 3 The seller must have acted with the view of giving such creditor or a surety or guarantor for the debt due to such creditor a preference over his other creditors.
- 4 The seller must be adjudged insolvent on a petition presented within 3 calendar months after the date of the transaction sought to be impeached.

Pursuant to section 48 of the Bankruptcy Act, the "suspect" or "preference period" is 3 months before the commencement of the insolvency proceedings of the company. There is no distinction made in the legislation between related and unrelated parties with respect to the preference period. For the purposes of this section,

the commencement of the winding up is deemed to correspond with the presentation of the bankruptcy petition in the case of an individual.

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 provision for the consolidation of assets and liabilities of the purchaser with those of the seller or its affiliates in insolvency proceedings by the insolvency official.

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?

In a facultative agreement (discussed at question 4.9 above), the transfer of the future receivables occurs when the seller's offer to sell is accepted by the purchaser. Hence the purchaser's rights to the future receivables arises only at the time of the sale of the debts in furtherance of the facultative agreement. Therefore, where the sale of the receivables has not occurred on the initiation of insolvency proceedings, the receivables remain the property of the seller and will on application by the liquidator, vest in the liquidator.

In a "whole turnover agreement" the purchaser is entitled to the ownership of the debts vesting in him at the time of the order or resolution for insolvency. These debts will include, not only those debts notified to him, but also all those debts specified in the agreement and earned by the performance of the relevant contract of sale or service by the company. Debts earned by performance by the liquidator in compulsory or creditors' voluntary liquidation will not vest in the purchaser even if they arise under contracts in existence before the liquidator's appointment.

7 Special Rules

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

No. However, some provisions of the Securities Industry Act, 1995 ("Securities Act") may be applicable to securitisation transactions to the extent that any such transaction involves the sale or offer for sale of securities (as defined in the Securities Act). The Securities Act provides for registration of reporting issuers (where offers are made to the public), issue of prospectuses, regulation of dealings, and reporting to the Securities and Exchange Commission.

7.2 Securitisation Entities. Does Trinidad and Tobago 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, it does not.

7.3 Non-Recourse Clause. Will a court in Trinidad and Tobago 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?

The Trinidad and Tobago courts will enforce a contract governed by foreign law limiting the recourse of parties to available funds once they are satisfied that the relevant provisions are valid and enforceable under the foreign law and such enforcement would not be illegal under Trinidad and Tobago law or contrary to local public policy. In that context such a non-recourse provision will be enforced.

7.4 Non-Petition Clause. Will a court in Trinidad and Tobago 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?

In the context of enforcement of foreign law contracts discussed at question 7.3 above a provision prohibiting the parties from taking legal action against the purchaser or another person will be enforced by the Trinidad and Tobago courts. There may be some doubt as to enforceability of a provision prohibiting commencement of an insolvency proceeding against the purchaser or another person (see our response to question 7.5 below).

7.5 Independent Director. Will a court in Trinidad and Tobago 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?

Yes. A Trinidad and Tobago court will normally enforce 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 without the affirmative vote of an independent director. However, an undertaking not to commence or a restriction against commencement of insolvency proceedings may be unenforceable. Firstly, directors may incur personal liability to creditors and shareholders if an insolvent entity continues trading so that a court is unlikely to prevent them from instituting insolvency proceedings in a proper case. Secondly such an undertaking or restriction may be considered to be against public policy.

8 Regulatory Issues

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

Except for entities that by reason of the nature of their business are subject to licensing or minimum capitalisation requirements there are no qualification criteria for an entity to do business in Trinidad and Tobago.

and Tobago. A single transaction involving the purchase and ownership of specific receivables by a non-resident purchaser who has no other business in Trinidad and Tobago, will not be deemed as carrying on business in Trinidad and Tobago, nor will the purchaser be subject to regulation as a financial institution. If the non-resident purchaser engages in several similar transactions with different sellers or enters into a transaction for continuous purchase of receivables for an extended period from the same seller, it is likely that he would be deemed to be carrying on (i) business in Trinidad and Tobago for tax purposes and (ii) business of a financial nature under the Financial Institutions Act which requires a licence under that act.

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?

No licence is required by the seller under Trinidad and Tobago law. Once notice of assignment has been given to the obligor the seller is not entitled to collect or enforce in his own right and would have to be acting as an agent of the purchaser.

8.3 Data Protection. Does Trinidad and Tobago 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?

One of the fundamental rights under the Constitution of Trinidad and Tobago is an individual's right to privacy. There are some limited privacy rights under common law. The banker/client relationship also gives rise to obligations of confidentiality on the part of the bank. There are no laws in Trinidad and Tobago which specifically deal with the use or dissemination of data provided by obligors. It is to be noted however that the Data Protection Bill 2011 (which deals with the use and dissemination of information) has been drafted and is currently before the Parliament of Trinidad and Tobago for debate. The Bill provides *inter alia* for the protection of personal data by the private sector and the government and public authorities. It is expected that this bill will be made law shortly.

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 Trinidad and Tobago? Briefly, what is required?

There are no applicable laws in Trinidad and Tobago except that local bankers have adopted a Code of Banking Practice for dealings with customers that includes some provision for a general duty of confidentiality towards their customers.

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

There are no exchange control restrictions in Trinidad and Tobago. Payments in Trinidad and Tobago currency are made locally and payments to persons outside the country are made in foreign currency.

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 Trinidad and Tobago? 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?

Yes. Interest paid by a resident obligor to a non-resident purchaser is subject to withholding tax which is required to be deducted at source by the payer and paid to the revenue authority. The standard rate of withholding tax is 15% or such lower rate as may be provided in any double taxation treaty between Trinidad and Tobago and the purchaser's country of residence. The receivables contract will often provide for grossing up payments that are subject to withholding tax so that after deduction of withholding tax at the applicable rate the payee will receive the specified amount of interest. In the absence of a grossing up provision the payee will receive the specified amount less the tax. Where there is a double taxation treaty the payee may be entitled to a tax credit in his country of residence for the tax deducted and paid in Trinidad and Tobago.

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

No, it does not.

9.3 Stamp Duty, etc. Does Trinidad and Tobago impose stamp duty or other documentary taxes on sales of receivables?

Yes. A Deed of Assignment is chargeable with stamp duty as a Conveyance on Sale at rates varying between 2%, 5% and 7% of the consideration. Some receivables may be exempt from stamp duty, e.g. promissory notes or debt instruments or securities of specifically exempted entities, and others, e.g. mortgage loans or bonds, may be subject to a different rate of 0.5%. In such cases it is recommended that separate considerations for each different type of security be stated in the assignment in order to take advantage of such exemptions or lower rate.

9.4 Value Added Taxes. Does Trinidad and Tobago 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?

The Value Added Tax Act ("the Act") imposes value added tax ("VAT") at the rate of 15% on the sale of goods and services by a registered supplier. A supplier in receipt of gross sales or income in excess of \$200,000.00 in a twelve-month period is required to register under the Act. The sale of receivables is deemed a "financial service" under the Act and is VAT exempt. The services of the collection agent are subject to VAT once he is registered under the Act.

- 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?

VAT is not chargeable.

Stamp duty is payable by the purchaser. The taxing authority will not make claims for the unpaid duty against the purchaser or the sold receivables or collections but the Deed of Assignment cannot be received, filed, used or admitted into evidence in a Trinidad court until it is properly stamped. Therefore, in the event of a dispute the purchaser will have difficulty in establishing his title to the receivables or collections if the Deed of Assignment or other applicable transaction documents are unstamped.

- 9.6 Doing Business.** Assuming that the purchaser conducts no other business in Trinidad and Tobago, 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 Trinidad and Tobago?

The sale of receivables constitutes the sale of an asset in Trinidad and Tobago. No income tax or corporation tax is payable by the purchaser on transaction gains so long as the purchaser is not deemed to be carrying on business here. We have discussed the issue of the payment of withholding tax above.



William David Clarke

J.D. Sellier + Co.
129-131 Abercromby Street
Port of Spain
Trinidad

Tel: +1 868 623 4283
Fax: +1 868 625 2984
Email: wclarke@jdsellier.com
URL: www.jdsellier.com

David Clarke joined the firm in 1969 upon his admission to practice in Trinidad and Tobago and became a partner in 1971. He is head of J.D. Sellier & Co.'s corporate and commercial team. He engages in a wide range of commercial transactions in particular the establishment of large commercial or industrial projects including preparation and approval of material project contracts on behalf of project parties, project financing through both local and international lenders, mergers and acquisitions, joint ventures, takeovers, land development projects, insurance, corporate governance and corporate matters of all kinds. He also acts for both lenders and borrowers in a range of facilities in the practice area of banking and finance.

Practice Areas: Banking & Finance. Mergers & Acquisitions. Joint Ventures. Land Development projects.



Donna-Marie Johnson

J.D. Sellier + Co.
129-131 Abercromby Street
Port of Spain
Trinidad

Tel: +1 868 623 4283
Fax: +1 868 625 2984
Email: djohnson@jdsellier.com
URL: www.jdsellier.com

Practice Areas: Banking + Finance; Corporate + Commercial; Energy + Regulated Industries; Mergers + Acquisitions.

Experience: Donna-Marie joined the Corporate + Commercial department of J.D. Sellier + Co. in March 2008 as a Senior Associate and offers years of valuable commercial experience. Having worked in various organisations for most of her career, she has a clear understanding of an organisation's needs and the Corporate Attorney's deliverables to the corporate client.



J.D. Sellier + Co.

J.D. Sellier + Co. is a general service law firm specialising in four areas of civil practice, namely, Corporate + Commercial, Real Estate, Intellectual Property and Litigation + Dispute Resolution. Our clients include industrial and commercial enterprises, domestic and foreign, public and private, ranging in size and complexity from small single location business enterprises to large diverse, multinational corporations.

Employees at J.D. Sellier + Co. are committed to creating superior client value and to maintaining service excellence in an atmosphere of mutual respect and trust.

The International Comparative Legal Guide to: Securitisation 2011

Other titles in the ICLG series include:

- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Gas Regulation
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Product Liability
- Public Procurement
- Real Estate
- Telecommunication Laws and Regulations

To order a copy of a publication, please contact:

Global Legal Group
59 Tanner Street
London SE1 3PL
United Kingdom
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk