



ICLG

The International Comparative Legal Guide to:

Securitisation 2015

8th Edition

A practical cross-border insight into securitisation work

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EDITORIAL

Welcome to the eighth 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 38 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.

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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?

Under Romanian law, unless specifically provided otherwise, contracts for the sale of movable assets or services can be validly concluded by consent of the parties, with no specific formalities. However, financial services agreements generally require written form. In the absence of a written agreement, it would be difficult to enforce the contract, as documentary evidence is required for obligations in excess of RON 250 (approx. EUR 55), as well as in any situation where a written agreement is mandatory.

Invoices may constitute incipient written evidence; however, by themselves they would generally not be considered sufficient proof for a contractual relationship.

The contract itself could be considered to exist, if a written form is not mandatory, but this is subject to interpretation on a case-by-case basis. Moreover, such a contract might not be practically enforceable in the absence of written evidence.

1.2 Consumer Protections. Do Romania’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?

Generally, Romanian law does not impose limits on interest rates for consumer loans or non-consumer loans. However, if the contractual terms regulating interest rates or other fees are deemed abusive, the consumer’s obligations may be reduced. If consumer debtors or their spouses are in difficult situations (i.e. unemployment, reduction of income by at least 15%, death of spouse), the penalty interest cannot exceed the usual applicable interest rate plus 2%, for as long as the event lasts, but no longer than 12 months. The law provides that creditors have a statutory right to interest on late payments; its value, in the absence of contractual provisions, is set at the level of

the reference interest rate of the National Bank of Romania plus 4%. Consumers have a right of withdrawal from loan agreements which can be exercised within 14 days of the conclusion of the consumer loan agreement, but this right may be waived through an explicit clause to this end. In the case of loan agreements concluded at a distance, this right of withdrawal may not be waived. Judicial proceedings against consumers may only be filed at the materially competent court where the consumer has his/her residence.

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?

In the case of contracts concluded between “professionals” (persons undertaking an economic activity) and contracting authorities, the statutory penalty interest is set at the level of the reference interest rate of the National Bank of Romania plus 8%. There are restrictions on the sources of funding which may be used to pay receivables against public authorities and public institutions. In case there is not sufficient funding available to a public authority or institution to cover the receivables in question, creditors may only proceed to judicial enforcement after a six-month term since the cessation of payments.

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 Romania that will determine the governing law of the contract?

In the case of agreements concluded between non-consumers and assuming these agreements pertain to provisions of services, the law of the country where the service provider is domiciled shall apply. In the case of agreements concluded with consumers, the law where the consumer has his/her habitual residence shall apply, if the seller is offering its services in that country. If the seller does not offer its services in the country in question, assuming the contract pertains to a provision of services, the law of the country where the seller is domiciled shall apply.

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

We see no reason for a Romanian court to not give effect to the parties' choice of law.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Romania but the obligor is not, or if the obligor is resident in Romania 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 Romania 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 choice of law is not restricted to the extent the selected foreign law does not derogate from mandatory principles of law or allow the parties to waive rights of which they cannot dispose otherwise under Romanian law. For the case of consumer agreements, the choice of law may not have the effect of depriving a consumer from the protection afforded by the law which would have been applicable in the absence of the law that is selected.

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

Yes, Romania ratified this convention in 1991.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does Romania'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., Romania's laws or foreign laws)?

Romanian law does not provide for such a requirement that the sale of receivables be governed by the same law as the receivables contract and the choice of law for the sale of receivables should have no effect on the receivables contract itself.

3.2 Example 1: If (a) the seller and the obligor are located in Romania, (b) the receivable is governed by the law of Romania, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of Romania to govern the receivables purchase agreement, and (e) the sale complies with the requirements of Romania, will a court in Romania 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 will recognise the sale of receivables as validly concluded

and enforceable between the seller and purchaser, but the sale would only be enforceable against the obligor and other third parties once they are made aware of it.

In order for the sale of receivables to be enforceable against the obligor, it must be duly notified. In order for the sale of receivables to be enforceable against third parties, it should be registered with the Electronic Archive of Secured Transactions, as well as the Land Book, if the receivable is secured with guarantees over real estate located in Romania.

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 Romania, will a court in Romania 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?

The choice of law should be upheld by a Romanian court and the answer would be substantially the same as for question 3.2. Such a choice should not breach mandatory provisions of Romanian law, such as the requirement that the purchaser of receivables arising from mortgage loans should be authorised to grant mortgage loans.

It is recommended to obtain a legal opinion confirming the capacity of the purchaser to acquire the receivable and the possibility to enforce the assignment of the receivable against the obligor, according to the respective laws in their countries of residence.

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

A Romanian court could recognise this sale as valid, however, the parties to the sale agreement should be able to demonstrate the content of the law applicable to the sale agreement (that of the obligor's country) and how the sale fulfils the material and formal conditions for validity under that law.

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

A Romanian court could recognise this sale as valid, however, the parties to the sale agreement should be able to demonstrate the contents of the law applicable to the sale agreement (that of the seller's country) and how the sale fulfils the material and formal conditions for validity under that law.

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

A Romanian court could recognise this sale as valid, however, the parties to the sale agreement should be able to demonstrate the contents of the law applicable to the sale agreement (that of the purchaser's country) and how the sale fulfils the material and formal conditions for validity under that law.

4 Asset Sales

4.1 Sale Methods Generally. In Romania 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?

The method utilised to transfer a receivable from its seller to the purchaser is a sale, known as an "assignment of receivables" (in Romanian, *cesiune de creanță*).

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?

In order to perfect the assignment of receivables, the following publicity requirements have to be observed:

- notification of the assignment to the obligors; and
- registration of the assignment with the Electronic Archive of Secured Transactions.

As an exception, to the extent Romanian Securitization Law applies, the perfection of the assignment of receivables shall occur after the following publicity requirements, provided under the Securitization Law of Secured Transactions, are observed:

- registration of the assignment within the Electronic Archive with at least 15 days prior to the issuance of the asset backed securities prospectus;
- notification performed by the seller to the obligors; and
- notification of the creditors of the seller.

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?

The perfection of promissory notes occurs when the issuer fills in all relevant details provided by law: the unconditional payment commitment; the committed amount; the due date; the place of payment; issuance date and place, etc. For promissory notes issued

in blank, some of the details may be left unspecified; however, these details should be filled-in within the three-year period after the issuance of the promissory notes in blank.

The assignment of the promissory note is performed by its mere registration on the promissory note together with the actual delivery of the promissory note to the assignee.

As regards the securitisation legislation issues, the Romania Mortgage Loans Law provides that assignment can be done only toward other entities authorised through special laws. Although it could be argued that assignment for the purpose of an offshore securitisation could be allowed and even if National Bank of Romania could support such decision, this does not reduce the potential risks of claims for annulment of the assignment for lack of capacity which could be brought forth by the obligors. Therefore, while the transfer of mortgage loans within an onshore securitisation process is possible, there are arguments that an offshore securitisation could not be made with respect to mortgage loans.

As regards the sale of marketable debt securities, the transaction should be in line with the applicable securities regulations where the securities are traded.

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? 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?

The sale of receivables should be notified to the obligors in order for the sale to be enforceable against the latter; the consent of the obligor is not necessary for the validity of the assignment. Either the seller or purchaser may perform this notification; however, if the purchaser makes the notification, the obligor may request proof of the assignment and suspend payments until such proof is provided.

For enforceability against other third parties, such as the seller's creditors, the sale of receivables should be registered with the Electronic Archive of Secured Transactions and the Land Book, if the receivables are secured with mortgages over real estate.

As an exception, to the extent Romanian Securitization Law applies, for enforceability purposes the following publicity requirements, provided under the Securitization Law, need to be observed:

- registration of the assignment within the Electronic Archive of Secured Transactions with at least 15 days prior to the issuance of the asset backed securities prospectus;
- notification performed by the seller to the obligors; and
- notification of the creditors of the seller.

The court action for the annulment of the assignment of receivables that has damaged the interests of the creditors of the seller is subject to a statute of limitation period of 45 days, elapsing from the moment the cumulative requirements regarding the registration of the assignment within the Electronic Archive of Secured Transactions and the notification of the creditors are fulfilled. Thus any creditor of the seller cannot contest the validity of the assignment of receivables and seek annulment upon elapse of the 45-day term.

Moreover, even in case of the insolvency of the seller, the validity of such transaction can only be contested if the 45-day period has not elapsed.

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?

Generally, the notice of assignment should be delivered to the obligor either in hardcopy or in electronic format and should include the identity of the purchaser, an individualisation of the assigned receivable (including reasonably identified future receivables) and a request to direct payments to the purchaser. If the notice is sent by the purchaser, it should also have enclosed written proof of the assignment.

In case of assignments for the purposes of securitisation, the obligors should be notified of the assignment by registered letter.

In the case of assignments of receivables arising from consumer loans, the notice must be delivered to the consumer within 10 calendar days as of the conclusion of the assignment agreement, regardless of when it becomes effective, by registered letter with confirmation of receipt.

In the case of assignments of receivables arising from mortgage loans, in the absence of other contractual provisions, the obligor should be notified by registered letter, within 10 days of the signing of the receivables sale contract, regardless of when it becomes effective.

There is no time limit in which this notice should be sent, however, the sale of the receivable is unenforceable against the obligors prior to them being notified. The obligors' payments to the seller made prior to being notified of the assignment would be considered valid payments that discharge their obligations, while the purchaser will have to recover such payments from the seller.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that “None of the [seller’s] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]” be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says “This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]” (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says “The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]” (i.e., the restriction does not refer to rights)?

The assignment of receivables pertaining to sums of money cannot be deemed invalid through the receivables contract and any contrary provisions will be null, irrespective of their wording (including those listed above). However, the receivables contract may stipulate other forms of contractual liability in the case of a sale of receivables, such as events of default, penalties, etc.

By law, the transfer of a party's obligations under an agreement or the assignment of the agreement itself can only be performed with the consent of the other party, which can be expressed in advance through a clause to this end included in the receivables contract or at a later time. Note that the assignment of an obligation or of an

agreement is a tripartite contract, and the agreement will not be considered concluded in the absence of all parties' consent.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or “seller’s rights” under the receivables contract, are such restrictions generally enforceable in Romania? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Romania recognises restrictions on sale or assignment of receivables 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 tort, or on any other basis?

In the case of an assignment only of receivables, if the receivables contract specifies damages or other forms of contractual liability, these will be enforceable in Romania, by the obligor against the seller. Also, there is a risk for exposing the purchaser to litigation risk, in tort. The receivable sale agreement, however, should remain valid. Any clauses prohibiting the transfer of receivables will be deemed null.

In the case of an assignment of obligations or of the receivables contract itself, in the absence of consent by all parties to the original agreement (obligor and seller), the assignment will be deemed null and produce no effects. Moreover, in this specific case, any party that justifies an interest may submit a claim for the annulment of the assignment, with no statute of limitation.

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

The sale document should reasonably identify the receivables transferred and the seller should remit to the purchaser either the original document attesting the receivable. Please note that an identification such as “all of the receivables other than receivables owing by one or more specifically identified obligors” does not qualify as a reasonable identification under Romanian law. In the case of a partial sale, the purchaser has the right to request a legalised copy of the original document attesting the receivable.

4.9 Respect for Intent of Parties; Economic Effects on Sale. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent 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?

If the provisions of an agreement raise doubts, they should generally

be interpreted according to the intent of the parties. Generally speaking the seller may retain credit risk, interest rate risk, control of collections and a repurchase right without jeopardising the perfection of the receivable sale agreement, however, a clear view can be formed on a case-by-case basis based on the actual content of the assignment agreement.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

Generally, the continuous assignment of receivables (as and when they arise) is allowed under Romanian law provided that conditions mentioned under question 4.2 above are fulfilled. The validity of such agreement after the opening of seller's insolvency depends on the moment when the assignment produces its effects. Two interpretations are possible, depending on the language of the agreement:

- In cases where the continuous sales would be viewed as assignment of future receivables, under Romanian legislation the receivables are assigned as of the date of execution of the assignment agreement. Therefore, the operation would not be viewed as a deed performed by an insolvent debtor.
- In cases where the continuous sales would be viewed as subsequent stand-alone assignments based on an on-going agreement performed by insolvent debtor after opening of its insolvency, its validity should be assessed under the specific provisions of insolvency legislation.

In any case, as on-going contracts, the opening of the insolvency procedure does not trigger their termination through the effect of the law. Moreover, a contractual provision through which the contracts would be terminated as a consequence of one party entering into insolvency procedure would be null and void. Nevertheless, irrespective of the qualification, the contract faces the risk of being terminated by the insolvency administrator designated by the court.

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

Romanian law specifically regulates, under the new Civil Code, the sale of future receivables. "Future flow" securitisation is possible provided that conditions mentioned under question 4.2 above are fulfilled.

There is no specific legal provision regarding the enforceability of future receivables sale, in cases where receivables arise after the commencement of insolvency proceedings with regard to the seller. Considering that under Romanian legislation the receivable is assigned as of the date of execution of the assignment agreement, there is no necessity of the operation being assessed as a deed performed by an insolvent debtor. However, if the assignment agreement itself is executed in a period of time of two years prior to the opening of the insolvency, or 45 days as the case may be depending on the law applicable to the purchaser (i.e. in case the Romanian Securitization Law applies) it may face the cancellation risk, regulated under Romanian legislation. For further information please see the answer to question 6.3 below.

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

In the absence of contrary contractual provisions, an assignment of receivables would also transfer any and all related securities. The transfer of the securities should be registered with the applicable public registries (i.e. the Electronic Archive of Secured Transactions and/or the Land Book), for enforceability against third parties.

In the case of securities over real estate, the receivable sale agreement should be authenticated by a notary public in order for these securities to be registered with the Land Book.

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

The set-off rights of the obligor terminate when it is notified of the sale of the receivable in question. The seller or purchaser should not be liable for termination of the obligor's set-off rights, as both the set-off and its termination operate by effect of law, unless the receivables contract specifically provides for such liability.

As an exception, to the extent Romanian Securitization Law applies, the purchaser is prohibited from setting-off the receivables against other rights the obligors may have against it.

5 Security Issues

5.1 Back-up Security. Is it customary in Romania to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected?

Such mechanisms are not necessarily customary in Romania but sometimes are used in practice.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of Romania, and for such security interest to be perfected?

Please see the answer to question 5.1 above.

In general, securities over movable assets, including receivables, are considered perfected if the following conditions are fulfilled:

- a written security agreement is concluded;
- the secured obligation comes into existence;
- the person setting up the security gains rights over the assets forming the object of the security; and
- the publicity formalities relating to the security are fulfilled.

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

Securities over movable assets can be validly concluded through a written agreement, with no other specific formalities, while agreements for securities over real estate should be authenticated by a notary public.

Securities over movable assets, including receivables, should be registered with the Electronic Archive of Secured Transactions. If the movable assets themselves are, in turn, secured with other real estate, they should also be registered with the Land Book. Securities over *fonds du commerce* should also be registered with the Trade Registry. In addition, securities over receivables should also be notified directly to the debtor of the receivable in question.

Finally, securities over real estate should be registered with the Land Book.

As an exception, to the extent Romanian Securitization Law applies, the purchaser may not grant securities over the securitised receivables in favour of third parties in relation to the issuance of asset-backed securities.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of Romania, 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 Romania or must additional steps be taken in Romania?

Romanian courts should recognise foreign law securities, provided that the secured creditor (or other interested party) provides evidence of the fulfilment of the validity conditions for such a security under Romanian law. It is therefore recommended that securities over receivables comply with the requirements for validity under Romanian law, if the debtor of such receivables is also located in Romania.

If the security pertains to mortgage-backed receivables, the security agreement should also be concluded in notarised form in order for it to be registered with the Land Book.

Finally, for enforceability against third parties, securities over receivables against obligors located in Romania should be registered with the Electronic Archive of Secured Transactions and/or Land Book, as applicable.

Please note that, if the law applicable to the security agreement does not provide for any publicity formalities, the security will be considered to have an inferior rank to similar securities over the same receivable, which are registered with the Romanian public registries (i.e. the Electronic Archive of Secured Transactions or Land Book).

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?

Generally, no additional formalities should apply. Please see the answer to question 5.3 for more details. Securities over receivables that are in turn secured should be registered with the Electronic Archive of Secured Transactions and/or the Land Book. Securities

over marketable debt securities are subject to the specific formalities of the market on which they are traded.

Considering that receivables arising from mortgage loans may only be assigned to entities authorised to grant mortgage loans, the enforcement of securities having as object such receivables may raise difficulties as regards the capacity of the creditor.

A security interest may be created in connection to a promissory note by way of endorsement, registered on the promissory note.

5.6 Trusts. Does Romania 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?

Romania recognises a similar institution to that of a trust (i.e., *fiducia*), according to which a settlor transfers ownership of certain assets to a trustee, in the interest of the trust's beneficiaries. We note, however, that the concept has been rather recently introduced in Romanian law and there are no relevant precedents yet. A trust agreement under a foreign law may be recognised by Romanian courts provided that it does not infringe mandatory provisions pertaining to Romanian law.

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

Escrow accounts are recognised in Romania, however, its opening is a commercial and operational aspect to be determined by each bank in particular. It is possible to set up a security over a bank account, as a mortgage over a movable asset.

Please also see the answer to question 5.4.

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

A security over a bank account should extend over all amounts which may flow into the respective account. However, in the case of individuals, there are limits to which such securities can be enforced: up to one third of net monthly salaries, pensions or other similar sources of income; or up to half of this income in the case of two or more enforcement procedures.

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?

Prior to enforcement, the owner should be able to use the account as usual, in the ordinary course of business, unless otherwise specified in the security agreement.

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 Romania's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that 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?

After the sale of receivables being perfected, the seller's insolvency would not affect the purchaser's right to collect, transfer or otherwise exercise its ownership rights over the purchased receivables. Depending on the moment when the assignment was performed, there is an insolvency claw-back risk (please see the answer to question 6.3 below). If the object of assignment consists of future receivables, please see our answer to question 4.11 above. Regarding the actual handing-taking of the seller's deeds on the assigned receivables and any other ancillary documents/information (e.g., customers' data bases), there is a practical risk that such operations would be delayed or refused by the insolvency official.

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)?

The insolvency official has no power to prohibit the purchaser's exercise of rights in case of a perfected sale. However, in case of monetary claims against the seller, any judicial or extrajudicial action (including the foreclosure proceedings) against the seller or against its assets and having as purpose the recovery of debts against the seller shall be automatically suspended as of the date when the insolvency procedure is opened.

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 Romania for (a) transactions between unrelated parties, and (b) transactions between related parties?

As a general rule under the Romanian Insolvency Law, claw-back is subject to the positive assessment of the syndic-judge within the insolvency procedure, on the request of the insolvency official, respectively of the creditors' committee, if the former fail to submit such a request.

Generally, claw-back operates for the cancellation of fraudulent transactions entered into by the seller (i.e., the debtor under the insolvency procedure) to the detriment of the creditors within two years prior to the opening of insolvency proceedings. This rule is applicable in cases where the seller is a Romanian-based entity and the purchaser is a foreign-based entity.

As an exception, to the extent Romanian Securitization Law applies, the assignment of receivables for issuance of asset-backed securities

is not subject to insolvency claw-back. The Securitization Law provides express exclusion of the possibility to challenge such assignments by judicial administrators, judicial liquidators or creditors of the transferor under an insolvency procedure. In this situation, as previously mentioned, the court action for the annulment of such assignments that has damaged the interests of the creditors of the seller is subject to a statute of limitation period of 45 days, elapsing from the moment the cumulative requirements regarding the registration of the assignment within the Electronic Archive of Secured Transactions and the notification of the creditors are fulfilled. Thus, any creditor of the seller cannot contest the validity of the assignment of receivables for issuance of asset-backed securities and seek annulment upon elapse of the 45-day term; even in case of the insolvency of the seller, the validity of such transaction can only be contested if the 45-day period has not elapsed.

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?

Considering that under Romanian legislation the future receivable is assigned as of the date of execution of the assignment agreement, there is no necessity of the operation being assessed as a deed performed by insolvent debtor. Thus, the insolvency official is not entitled to consolidate the assigned receivable with those of the seller.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in Romania, 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?

Please refer to the answer to question 4.10 above.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

Pursuant to Romanian Insolvency Law insolvency is the state of the debtor's patrimony characterised by the impossibility to pay from the available funds the existing due debts. In our opinion, the existence of a limited recourse clause has no relevance for assessing debtor's insolvency, therefore the debtor may be declared insolvent under Romanian Insolvency Law.

7 Special Rules

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

Yes, in Romania, the Securitisation Law no. 31/2006 on the securitisation of receivables establishes the legal framework for securitisation transactions.

The basic principles of this law are the general principles of securitisation, i.e.: (i) the transaction represents a true and effective sale; (ii) the protection of the purchaser against insolvency claw-back; and (iii) insolvency remoteness with respect to the seller.

Also, for the implementation of this Law, the Financial Supervisory Authority issued the Regulation no. 11/2006 regarding the securitization of receivables.

7.2 Securitisation Entities. Does Romania 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?

Yes, as per the Romanian Securitisation Law, in order to implement a securitisation structure, the establishment of special purpose entities for securitisation (the “Vehicle”) is necessary.

The procedure is as follows:

- the seller groups a pool of receivables which are assigned towards a Vehicle which in turn issues asset-backed securities;
- the Vehicle acquires the receivables comprising the pool solely for the purpose of issuing asset-backed securities; and
- for the pool of receivables assigned, the seller is entitled to receive a price, which could also be paid, as per the Securitization Law, by receiving asset-backed securities.

This operation will be initiated upon the set up and issuance of the functioning authorisation for the Fund Manager.

The Vehicle can be established either as a fund (civil partnership agreement with no legal personality) or as a joint stock company. The establishment and functioning of the Vehicle is also subject to Financial Supervision Authority (“FSA”)’s authorisation.

Under the Romanian Securitization Law, the Vehicle has no personnel; all of its operations pertaining to the management (including the representation of the Vehicle in front of third parties) are performed through its Fund Manager. The servicing of the pool of receivables is done by a servicer which could also be the seller. In addition, the rights of asset-backed securities holders are represented in relation with the Fund Manager by the Agent (i.e. the authorised entity representing the investors’ interests in relation to the Vehicle).

The management of securitisation vehicles is performed by an entity established as a joint stock company having the following features:

- share capital: minimum the equivalent in RON of EUR 125,000;
- scope of activity: management of investment vehicles (exclusive);
- shareholders: at least two significant shareholders that are financial/credit institutions; and
- board of directors: at least three persons having good reputation and expertise in financial field (express conditions are established by FSA).

7.3 Limited-Recourse Clause. Will a court in Romania give effect to a contractual provision in an agreement (even if that agreement’s governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

There are no specific provisions under Romanian legislation in respect of validity of limited-recourse clauses. However, a limited recourse provision should be viewed as valid and enforceable against a specific debtor but the treatment of such provision by the syndic-judge or judicial administrator/liquidator in insolvency proceedings has been open to interpretation and is thus uncertain.

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

This type of contractual provision is not regulated under Romanian law and, in absence of specific court precedents/relevant doctrine, there is the risk of a court of law interpreting this contractual provision as depriving the receivable of its due character throughout the validity of the agreement which could have significant negative consequences. Cautious drafting is recommended.

7.5 Priority of Payments “Waterfall”. Will a court in Romania give effect to a contractual provision in an agreement (even if that agreement’s governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Yes, if the provisions do not contravene with the Romanian imperative provisions under the Romanian Civil Code. Therefore, while in theory such a contractual provision is possible, in fact, its applicability should be analysed on a case-by-case basis, especially in case of insolvency when Romanian Insolvency Law contains non-derogatory provisions regarding distributions of funds.

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

Yes, such a provision in an agreement would produce effects and would be recognised by a court of law in Romania as producing effects between the parties to that agreement, if this provision does not lead to the breach of certain legal obligations of the directors.

However, such a provision could not be enforced against third parties in a court of law, except if proving that these third parties had knowledge of this provision and, acting in bad-faith, chose to ignore it.

8 Regulatory Issues

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

If the receivables arise from non-performing loans or other similar situations, the purchaser does not require a specific authorisation or licence to acquire such receivables.

If the receivables arise from performing loan agreements, the purchaser should be authorised to also carry out crediting activities of the same type, e.g. as a credit institution or non-banking financial institution.

Finally, if the receivables arise from mortgage loans, regardless of whether they are performing or non-performing, they may only be assigned to institutions specifically authorised for mortgage lending.

Securitization SPV purchasers domiciled in Romania must receive prior authorisation to perform their specific activities from the Financial Supervisory Authority, regardless of the nature of the receivables. Such activities include the purchase, ownership, collection and enforcement of receivables.

While the legislation is not very clear, there are arguments supporting that a foreign securitisation SPV will not need a licence in Romania.

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?

Generally, the seller does not require any licence, etc., in order to continue to enforce and collect receivables following their sale to the purchaser.

In case a third party replaces the servicer, the necessity of that third party being licensed should be analysed considering the type of receivables which are transferred, i.e.:

- in case of non-performing receivables, the servicer does not require any licence;
- in case of receivables qualifying as mortgaged loans under the Romanian legislation, the servicer shall have to be authorised by the National Bank of Romania;
- in case of receivables pertaining to the banking system, it should be analysed on a case-by-case basis if the servicer needs to be licensed. Please note that the servicing of receivables could be qualified, in this hypothesis, as an outsourcing of the crediting activity, which can be performed only with the fulfilment of certain conditions; and
- if the receivables do not fall under any of the special categories mentioned above, as a general rule, no licence is required for the servicer, unless the latter qualifies as a payment institution, as per the EU Directive no. 2007/64/EC, in which case special conditions shall have to be observed.

As an exception, to the extent the Securitization Law applies, the servicer can only be a financial institution, a credit institution or the seller. A financial institution should obtain prior approval from the Financial Supervisory Authority, while a credit institution should obtain approval from the National Bank of Romania for the performance of such activities.

Note that the National Bank of Romania has not issued specific regulations on such an authorisation procedure and it is not clear how such an authorisation could be obtained for credit institutions.

8.3 Data Protection. Does Romania 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?

Data protection and the circulation of personal data are regulated by Law no. 677/2011 which transposes Directive 95/46/EC. This law applies to the personal data provided by natural persons.

However, depending on the entity that originated the receivable, the transmission of such information may also be subject to banking secrecy, in the case of credit institutions or professional secrecy, in the case of non-banking financial institutions.

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 Romania? Briefly, what is required?

If the obligors are consumers, the purchaser should comply with the requirements under consumer protection legislation, especially Emergency Government Ordinance no. 50/2010 implementing Directive 2008/48/EC.

Moreover, even if the purchaser is not a Romanian entity, acquiring receivables arising from performing loans could be considered by the National Bank of Romania to constitute a direct provision of services, which should also comply with the Romanian norms regulating the “general good” – these also include consumer protection legislation.

The applicable requirements after the loan agreement is concluded include observing the consumers’ rights to:

- receive information regarding the amounts still due;
- not be obliged to pay any additional costs, other than those stipulated in the loan agreement;
- make early repayments at a certain maximum additional cost; and
- receive a document stating that all the consumers’ obligations have been discharged when the loan is fully repaid.

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

Romanian Lei (“RON”) may be freely exchanged for other currencies and payments from Romanian residents to persons who do not qualify as Romanian residents, such as companies incorporated outside Romania, may be made freely in any currency, according to the terms of the contract from which the payment obligation arises.

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 Romania? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest?

The withholding tax applies in relation to certain type of payments made to non-residents. In the situation of securitisation, the withholding tax treatment depends on the nature of the receivables. Generally, withholding tax applies in relation to interest payments and, for example, it should not apply in relation to receivables representing/coming from sale of goods.

Generally, there should not be any reclassification into interest for the discount granted for a regular sale of trade receivables or when the portion of the purchase price is payable only upon collection of receivables. However, as interest could apply in case of sales with payments postponed or payments made in instalments an analysis should be done on a case-by-case basis, depending on the contractual provisions.

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

There are no requirements for a specific accounting policy to be adopted for tax purposes on this matter.

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

The sale of receivables should be made enforceable against third parties by registration with the relevant public registries: Electronic Archive of Secured Transactions; as well as the Land Book, if the receivables are secured with real estate guarantees.

The base tax for registration with the Electronic Archive of Secured Transactions is of RON 10 (approx. EUR 2), while each Electronic Archive of Secured Transactions operator also charges an individually determined additional fee.

Registration with the Land Book involves a notation for each immovable asset provided as a security for the receivables in question, which entails a tax of RON 60.

9.4 Value Added Taxes. Does Romania 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 sale of goods and the provision of services, including those of a collecting agent (“servicing”) taxable in Romania are, in general, subject to Romanian value-added tax (VAT) at the current standard rate of 24%. Each transaction should be analysed on a case-by-case basis in order to assess the correct VAT treatment for each transaction (e.g. place of taxation, person liable to account for VAT, etc.).

The sale of receivables is not subject to VAT. In certain situations, if the assignee buys the receivables and charges a collection fee to the assignor, this fee will be considered taxable.

The sale of goods/services/receivables is subject to corporate income tax at the level of the Romanian seller. The fees for collection services should be taxable at the level of the Romanian service provider and generally deductible at the level of the Romanian beneficiary.

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?

In general, the tax authorities will not be able to make such claims regarding VAT. However, the VAT legislation does provide for “joint liability” provisions and under certain conditions, the purchaser is held liable together with the seller. However, if the beneficiary can prove that it paid the VAT to the seller he will not be held accountable for the non-payment of the VAT to the state budget. Note that in certain situations, joint liability may be assessed in case of transactions between related parties, especially in case the taxpayer who is liable to pay the tax becomes insolvent.

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

Generally, for non-resident purchasers, a permanent establishment could arise in Romania from certain operations made by servicers on its behalf: collection, re-schedules for receivables payments and enforcement of receivables, which assumes signing of agreements, etc. An analysis is required on a case-by-case basis.

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- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

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