The International Comparative Legal Guide to: Securitisation 2012

General Chapters:

1 Documenting Receivables Financing in Leveraged Finance and High-Yield Transactions – Dan Maze & Rupert Hall, Latham & Watkins LLP


3 New Structural Features for Collateralised Loan Obligations – Craig Stein & Paul N. Watterson, Jr., Schulte Roth & Zabel LLP

4 EU and US Securitisation Risk Retention and Disclosure Rules – A Comparison – Tom Parachini & Erik Klingenberg, SNR Denton

5 US Taxation of Non-US Investors in Securitisation Transactions – David Z. Nierenberg, Ashurst LLP

Country Question and Answer Chapters:

6 Argentina Estudio Beccar Varela: Danníñ F. Beccar Varela & Roberto A. Fortunatti

7 Australia Ashurst: Paul Jenkins & Jane Ng

8 Austria Faller Watzfeld & Partners: Markus Fellner

9 Brazil Levy & Salomão Advogados: Ana Cecília Giorgi Manente & Fernando de Azevedo Peraçoli

10 Canada Torys LLP: Michael Feldman & Jim Hong

11 China FenXun Partners: Fred Chang & Xusheng Yang

12 Czech Republic TGC Corporate Lawyers: Jana Jesenská & Andrea Majerčíková

13 Denmark Accura Advokatpartnerselskab: Kim Tøftgaard & Christian Sahlertz

14 England & Wales Weil, Gotshal & Manges: Jacky Kelly & Rupert Wall

15 Estonia Attorneys at law Borenjus: Indrek Minka & Air Toero

16 Finland Roschier, Attorneys Ltd.: Helena Vitta & Tatu Simula

17 France Freshfields Bruckhaus Deringer LLP: Hervé Touraine & Laureen Gauriot

18 Germany Cleary Gottlieb Steen & Hamilton LLP: Werner Meier & Michael Kern

19 Greece KGDI Law Firm: Christina Papanikolopoulou & Athina Diamanti

20 Hong Kong Bingham McCutchen LLP: Vincent Sum & Laurence Isaacson

21 Hungary Göröd Füredi: Mosonyi Tomori; István Göröd & Erika Tomori

22 India Dave & Girish & Co.: Mona Bhide

23 Italy CDP Studio Legale Associato: Giuseppe Schiavello & Stefano Agnoli

24 Japan Nishimura & Asahi: Hajime Ueno

25 Korea Kim & Chang: Yong-Ho Kim & Hoin Lee

26 Mexico Cervantes Sainz, S.C.: Diego Martinez & Alejandro Sainz

27 Netherlands Loyens & Loeff N.V.: Mariëtte van ’t Westeinde & Jan Bart Schober

28 New Zealand Chapman Tripp: Dermot Ross & John Sproat

29 Poland TGC Corporate Lawyers: Marcin Gruszko & Grzegorz Witczak

30 Portugal Vieira de Almeida & Associates: Paula Gomes Freire & Benedita Aires

31 Saudi Arabia King & Spalding LLP: Nabil A. Issa & Martin P. Forster-Jones

32 Scotland Brodies LLP: Bruce Stephen & Marion MacInnes

33 Singapore Drew & Napier LLC: Petrus Huang & Ron Cheng

34 South Africa Werksmans Attorneys: Richard Roothman & Tracy-Lee Janse van Rensburg

35 Spain Uria Menéndez Abogados, S.L.P.: Ramiro Rivera Romero & Pedro Ravina Martin

36 Switzerland Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Kloeti

37 Taiwan Lee and Li, Attorneys-at-Law: Abe Sang & Hsin-Lan Hsu

38 UAE King & Spalding LLP: Rizwan H. Kanji & Martin P. Forster-Jones

39 USA Latham & Watkins LLP: Lawrence Safran & Kevin T. Fingeret
Chapter 34

South Africa

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?

The National Credit Act, 2005 (“NCA”) stipulates a number of requirements which need to be met for the valid conclusion of a credit agreement under the NCA. These agreements must be evidenced by a formal receivables contract and the provision of invoices alone is not sufficient.

The NCA requires that all credit agreements be recorded on paper or electronically. A failure to comply with these formalities does not affect the validity of the agreement, but may render a credit provider liable to a fine of up to either ZAR 1 million or 10 per cent of its annual turnover during the preceding financial year, whichever is the greater. The credit provider also runs the risk that its registration with the National Credit Regulator might be cancelled.

Under the Consumer Protection Act, 2008 (“CPA”), a supplier of goods or services must provide a written record of each transaction to the consumer to whom the goods or services are delivered. Under the CPA, the minister may prescribe certain categories of agreements that must be in writing. Section 50 of the CPA expressly provides that if a consumer agreement between a supplier and a consumer is not in writing, the supplier must keep a record of the transaction entered into over the telephone or any other recordable form as prescribed. To the extent that the invoices comply with requirements of the CPA, in relation to content and language, an invoice would be sufficient.

1.2 Consumer Protections. Do South Africa’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?

The Republic of South Africa (“RSA”) legislation regulating the rate of interest on consumer credit is the NCA. The application of the NCA is, however, limited in that certain provisions of the NCA will not apply to consumers that are juristic persons or to consumers that fall within certain prescribed thresholds.

The current regulations to the NCA prescribe the following maximum interest rates, applicable to consumers:

<table>
<thead>
<tr>
<th>Sub-sector</th>
<th>Maximum Prescribed Interest Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mortgage agreements</td>
<td>[(RR \times 2.2) + 5%] per year</td>
</tr>
<tr>
<td>Credit facilities</td>
<td>[(RR \times 2.2) + 10%] per year</td>
</tr>
<tr>
<td>Unsecured credit transactions</td>
<td>[(RR \times 2.2) + 20%] per year</td>
</tr>
<tr>
<td>Developmental credit agreements</td>
<td></td>
</tr>
<tr>
<td>-- for the development of a small business</td>
<td>[(RR \times 2.2) + 20%] per year</td>
</tr>
<tr>
<td>-- for low income housing (unsecured)</td>
<td>[(RR \times 2.2) + 20%] per year</td>
</tr>
<tr>
<td>Short term credit transactions</td>
<td>5% per month</td>
</tr>
<tr>
<td>Other credit agreements</td>
<td>[(RR \times 2.2) + 10%] per year</td>
</tr>
<tr>
<td>Incidental credit agreements</td>
<td>2% per month</td>
</tr>
</tbody>
</table>

(Where “RR” indicates the reference rate, being the ruling SA Reserve Bank Repurchase Rate.)

In terms of the NCA, the interest rate applicable to an amount in default or an overdue payment under a credit agreement may not exceed the highest interest rate applicable to any part of the principal debt under that agreement. Despite any provision of the common law or a credit agreement to the contrary, any interest amount or fee that accrues during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.

Under the NCA, a consumer may terminate a credit lease or an instalment agreement, entered into at any location other than the registered business premises of the credit provider, within five business days after the date on which the agreement was signed by the consumer, by delivering a notice in the prescribed manner to the credit provider and tendering the return of any money or goods, or paying in full for any services, received by the consumer in respect of the agreement.

A consumer may terminate a credit agreement at any time by paying the settlement amount to the credit provider. In addition, a consumer may terminate an instalment agreement, secured loan or lease of movable property, by surrendering to the credit provider the...
goods that are the subject of that agreement and by paying to the credit provider any remaining amount demanded.

Under the CPA, a consumer has a number of rights of relevance which includes, *inter alia*, the right to a cooling off period after direct marketing, the right to choose or examine goods, the various rights in relation to delivery of goods or supply of services and the right to return goods. The rights afforded under the CPA will, however, only be applicable insofar as the goods or services supplied are governed by the provisions of the CPA.

### 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?

Yes, any receivables contract entered into with government will have to comply with the provisions of the Public Finance Management Act 1 of 1999 and/or the Municipal Finance Management Act 56 of 2003.

### 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 South Africa that will determine the governing law of the contract?

In determining the governing law of a contract, the courts will have regard to:

- 2.1.1 the domicile of the parties;
- 2.1.2 where the agreement was concluded;
- 2.1.3 the location of the subject matter of the receivables contract; and
- 2.1.4 where the obligations under the receivables contract are to be performed.

### 2.2 Base Case

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

The choice of law provisions contained within the receivable contract will, subject to our comments in question 2.3, be recognised and upheld by the courts of the RSA as a valid choice of law. We know of no reason why the courts of the RSA would not give effect to the choice of South Africa as the governing law.

#### 2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor

If the seller is resident in South Africa but the obligor is not, or if the obligor is resident in South Africa 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 South Africa 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?

Under South African law, as a general rule, a party to an agreement may, (subject to certain limitations), elect the law that is to govern an agreement to which it is a party. Once the law that governs the agreement has been selected by the parties, such law would then be applied in resolving any dispute that may arise between the parties in respect thereof.

There are, however, at least three instances where the choice of a foreign law would not be upheld by a South African Court, namely:

- 2.3.1 where the foreign law is repugnant to the values of the South African legal system. In other words, where the application of the foreign law would be, or have a result or effect, fundamentally offensive to South African law or public policy;
- 2.3.2 where the parties agree to be bound by a foreign law for purposes of evading South African law; and
- 2.3.3 where the parties elect to be bound by a foreign law, where the foreign law is illegal under South African statutory or common law.

In light of the above, there is no reason why the seller and the obligor would be prevented (under RSA law) from electing to be bound by a different country’s law to govern the receivable contract and the receivables. More specifically, the receivables contract and the receivables themselves could only be governed by a foreign law if and to the extent that the provisions of such foreign law was not elected for purposes of evading South African consumer protection legislation.


No, it is not.

### 3 Choice of Law—Receivables Purchase Agreement

#### 3.1 Base Case

Does South Africa’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., South Africa’s laws or foreign laws)?

This is not a requirement under RSA law. Subject to our comments in question 2.3, as a general rule, the parties to the sale of receivables may elect the law that is to govern the sale agreement, whilst the receivables may be governed by the laws of RSA.

#### 3.2 Example 1

If (a) the seller and the obligor are located in South Africa, (b) the receivable is governed by the law of South Africa, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of South Africa to govern the receivables purchase agreement, and (e) the sale complies with the requirements of South Africa’s, will a court in South Africa 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)?

Yes, as the seller, obligor and receivables are within the jurisdiction of South Africa and as the parties elected RSA law to govern the receivables purchase agreement, the RSA courts will recognise the sale as being effective against the seller, the obligor and other third parties.
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 South Africa, will a court in South Africa 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 requirements of the obligor’s country or the purchaser’s country (or both) be taken into account?

As the receivables are located within the jurisdiction of the RSA courts and as the parties elected South African law to govern the receivables purchase agreement, the courts will recognise the sale as being effective against the seller and other third parties. It will not be necessary for the court to take the foreign law into account.

3.4 Example 3: If (a) the seller is located in South Africa 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 South Africa 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 South Africa’s own sale requirements?

Where the seller and the purchaser elected a foreign law to govern their relationship in respect of the sale of the receivables, RSA law would not be applicable in determining whether the sale was effective against the seller, save in instances where the election of the foreign law was unenforceable as described in question 2.3, but rather the foreign law. However, South African law would be applicable in determining whether the sale is perfected against the creditors of the seller and upon the insolvency of the seller.

3.5 Example 4: If (a) the obligor is located in South Africa 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 South Africa 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 South Africa’s own sale requirements?

Yes, an RSA court will recognise the sale as being effective against the obligor and other third parties. An RSA court will recognise the choices of a foreign law subject to the limitations specified in question 2.3.

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

Yes, an RSA court will recognise the sale as being effective against the seller and other third parties subject to the limitations specified in question 2.3.

4 Asset Sales

4.1 Sale Methods Generally. In South Africa 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?

In order for a seller to sell accounts receivable (which we have for purposes hereof assumed to be only incorporeal rights), such sale would be effected through a cession of all of the seller’s rights, title and interest in and to such accounts receivable.

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?

There are no legislative requirements to be met in order to give effect to cessions under RSA law. RSA law does not provide for any register of cessions, nor is there any requirement that a cession must be in writing.

There are, however, certain requirements under South African common law which need to be met to give effect to a valid cession of receivables. These include:

4.2.1 the seller must have the intention to transfer all of its rights, title and interest in and to the receivables to the purchaser, who must similarly have the intention to acquire same;
4.2.2 there must be an underlying causa (interest) for the cession. Generally, the fact that the purchaser pays some sort of consideration to the seller would be sufficient for these purposes;
4.2.3 the rights constituting the seller’s right, title and interest in and to the receivables to be transferred should be clearly identified. The document creating the cession is to describe the rights which are being transferred with a sufficient degree of specificity. This has traditionally been a problem in relation to cessions of future rights under RSA law and should be closely considered in the circumstances; and
4.2.4 the requirements which must be generally present in order for any agreement to be legal, valid and binding (for example the parties must have the requisite capacity and authority to enter into the agreement).
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 additional or different requirements applicable to promissory notes, mortgage loans and marketable debt securities differ. As such, each type of instrument is dealt with separately.

Promissory notes

The Bills of Exchange Act, 1964 ("Bills of Exchange Act") defines promissory notes and regulates the manner in which they may be transferred. As described above generally, the rights in and to a document would be transferred by way of cession but the Bills of Exchange Act describes a particular method of statutory transfer known as “negotiation” which enables the transferee to acquire title in and to the promissory note and to sue in its own name. The concept of negotiability (meaning transfer free from equities) applies to promissory notes as defined in the Bills of Exchange Act (briefly, a promissory note is defined as being an unconditional promise in writing made by one person to another, signed by the maker and engaging him to pay on demand or at a fixed determined future time a sum certain in money to a specified person, his order or to bearer).

Reference should be had to the Bills of Exchange Act for full details as to the manner in which title to promissory notes may be transferred; however, briefly, if the promissory note is a bearer instrument, the instrument may be transferred by mere delivery. In order for the instrument to be negotiated, however, the party who takes it must take the instrument both in good faith and for value. If the promissory note is an order instrument, it may be transferred both by delivery and endorsement (i.e. the note will not be payable to the maker’s order unless and until it has been endorsed).

Mortgage loans

Mortgage loans are made up of personal rights and real rights. It is the mortgage itself that constitutes the real right of security and it is the principal debt that constitutes the personal right.

Although there are numerous ways to approach a sale (or cession) of mortgage loans, the RSA courts have stated that when a claim secured by a mortgage loan is to be transferred, the parties require that the right real (constituted by the mortgage bond) and the personal right (constituted by the loan) must be transferred.

Accordingly, there will be two elements to the transfer of any mortgage loan, namely the cession of the loan (being the principal debt) and the cession of the relevant mortgage bond. Whilst the cession of the personal right constituted by the loan will be governed by the same principles outlined in questions 4.1 and 4.2, in order for a cession of a mortgage bond to be valid, registration of such cession is required in the relevant Deeds Registry Office where such mortgage bond was registered. As such, no cession of mortgage bond shall be valid vis-a-vis third parties until registration of same in the relevant Deeds Registry Office has taken place.

Marketable debt securities

There are certain legislative requirements in respect of the transfer of marketable debt securities. These requirements are dependent on the nature of the marketable debt securities in question.

The phrase “marketable debt securities” has various meanings under RSA law depending on the particular legislation applicable. However, in relation to the transfer of marketable debt securities the distinction in relation to the legalities required to effect such transfer is largely dependent on whether the debt security is certificated or uncertificated and whether the marketable debt security is a debenture (or similar instrument) or a preference share.

The requirements for the registration of the transfer of certificated securities evidenced by a written document and uncertificated securities are set out in the Companies Act, 2008 ("the Companies Act"). The registration and transfer of certificated securities is dealt with in terms of section 51 of the Companies Act which provides for the issue, to a holder, of a certificate evidencing any certificated securities held in the company. In terms of section 51, a company must enter in its securities register every transfer of any certificated securities and may only make such an entry if the transfer is evidenced by a proper instrument of transfer that has been delivered to the company or if the transfer was effected by operation of law.

The registration and transfer of uncertificated listed securities, and certificated securities lodged with a central securities depository (or a central securities depository participant), is governed by the Companies Act and the Securities Services Act, 2004 ("Securities Services Act") which obligates an issuer of uncertificated securities to register and deposit such securities with a central securities depository (or a central securities depository participant). In terms of Section 42 of the Securities Services Act, the transfer of securities held by a central securities depository (or the relevant participant) must be effected by entry in the (central) securities account of the transferor and the transferee kept by the central securities depository (or the relevant participant) as prescribed by the rules of the central securities depository. Uncertificated securities must also comply with Sections 52 and 53 of the Companies Act, which further require that a company enter into a sub-register of members to that security the number of securities held in such uncertificated form. The transfer of such shall be effected upon the debiting and crediting, respectively, of both the account in the sub-register from which the transfer is effected and the account in the sub-register to which transfer is to be made.

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

Further to our comments in question 4.1, as a general rule, a cession of rights may take place without the co-operation, consultation or consent of an obligor. The question as to whether or not notice is required to be given by a seller and/or a purchaser to an obligor in order to allow the sale to be effective vis-a-vis third parties until registration of same in the relevant Deeds Registry Office has taken place.
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 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?

The form, method and time of delivery of a notice to an obligor will depend entirely on the terms and conditions of the receivables contract. Generally there are no time limits in which notice has to be given and it can be given after the sale and after insolvency proceedings have commenced against the obligor. Notice must be given in such a way that the obligor receives effective notice which can be achieved through registered mail, electronic mail or normal postal delivery. Notice applies to all receivables.

4.6 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in South Africa? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If South Africa 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?

RSA law recognises that rights and obligations may be rendered incapable of assignment in situations where the obligor has a particular interest in restricting the seller’s ability to assign its rights and obligations. Such prohibitions against assignment would, in such circumstances, be contained in the underlying agreement between the obligor and the seller. The reasoning behind the requirement that a prohibition on assignment may only occur in situations where an obligor has a particular interest in restricting the seller’s ability to assign its rights seems to be that an absolute restriction on the right to assign where no such interest was present would impede the free-flow of commerce.

The RSA courts have extensively considered the requirements of an interest on the part of the obligor and in fact there has recently been some doubt expressed as to whether this additional requirement will still apply in circumstances where the restriction on the rights of assignment was contained in the agreement between the obligor and the seller at the time the right was created. However, since this point has not been finally decided, it seems prudent to assume that such interest should be present. The RSA courts have held that the need for an obligor to be aware of the seller’s identity will constitute sufficient interest for a prohibition on assignment to be justified. Should an assignment be concluded, notwithstanding a restriction in the underlying agreement thereto, the seller will remain bound by the terms of the agreement between itself and the obligor and the purchaser will not become a party to that agreement and the seller can be liable to the obligor for breach of contract.

Whether the obligor will be entitled to sue either the seller or the purchaser in circumstances where an assignment was purportedly concluded notwithstanding such prohibition, the obligor would be entitled, assuming prohibition on assignment was stipulated in its favour, to either set the assignment aside or, to the extent that it has suffered damages as a result thereof, sue the seller, being the party in breach of its obligations to the obligor, for damages.

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

The sale document should, as far as practicably possible, identify the receivables sold with sufficient particularity to enable such receivables to be easily identified. To this end, it is prudent to include as much information in relation to the receivables to allow for easy identification from amongst the ambit of receivables being sold. This could include information such as, inter alia, obligor’s name, description of receivables, account numbers, invoice numbers and any and all such other information to allow for the ease of identification thereof. It is not incumbent that the receivables being sold are to share objective characteristics. For so long as the seller and the purchaser have agreed on the scope of the receivables to be sold, which are easily identifiable and in relation to which particulars can be included or set out within the sale agreement and the parties are in agreement on the sale thereof, same would be in order.

To the extent that the seller sells “all” of its receivables to the purchaser, this would be sufficient identification of the receivables, subject thereto that the receivables are once again easily identifiable amongst the seller’s assets.
4.8 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and/or (c) control of collections of receivables without jeopardising perfection?

The RSA courts will always consider the substance of an agreement over its form and will give effect to the true intention of the contracting parties regardless of how the parties denominate their transaction.

The regulations to the Banks Act, 1990 ("Banks Act") which addresses securitisation transactions ("Securitisation Regulations") set out requirements relating to the disassociation by the seller of its risk into the receivables which are generally considered to be the requirements which should be fulfilled in order for a sale to occur. These requirements include:

4.8.1 the seller, being the originator, is required to be totally divested of all rights and obligations originating from the underlying transactions and risks in connection with the assets transferred; and

4.8.2 the purchaser may have no rights of recourse against the seller in respect of losses incurred in connection with an asset after its transfer, unless same was pursuant to a breach of warranty, provided that the warranties given by the seller may not relate to the future creditworthiness of the underlying obligor.

In addition to the foregoing, the Securitisation Regulations:

4.8.3 require that a risk relating to an asset may only be transferred if the transfer would not result in a breach of the underlying relevant transaction;

4.8.4 require that the transfer has to be of such a nature that should there be any amendment in the underlying terms of the underlying transaction, such amendment would be effective as between the purchaser and the relevant obligor and would not be effective vis-a-vis the transferring institution;

4.8.5 place limitations on the circumstances in which assets transferred to the seller could be repurchased or replaced with other assets; and

4.8.6 require that where the payments in respect of the assets are routed to the purchaser through a seller acting in a primary role (such as a collection agent), such institution is not to be under any obligation to remit the funds to the purchaser unless and until the payments are actually received from the underlying obligor.

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

A seller can agree, in an enforceable manner, to continuous sales of receivables. It is common practice in such agreements for the seller to sell to the purchaser all current and future receivables owned or acquired by the seller. However, in the event of the insolvency of the seller, the liquidator of its insolvent estate will have the choice to either abide by the contract or to repudiate the contract.

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

It is a well accepted principle of RSA law that future rights can be ceded and transferred in anticipation of a coming into existence. Whilst the agreement to cede the future or contingent rights take effect immediately (in that it creates rights and obligations between the parties to such cession), the transfer of such rights to the cessionary only occurs once the future or contingent rights come into existence. As such, should a cedent be liquidated prior to a right coming into existence, the liquidator of the cedent may elect not to transfer the future right to the cessionary upon such right actually coming into existence.

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

To concurrently transfer the related security with the sale of receivables, the related security similarly has to be ceded by way of a cession in securitatem debiti and no additional formalities are required.

5 Security Issues

5.1 Back-up Security. Is it customary in South Africa 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, the concept of taking “back-up” security over the seller’s ownership interest in the receivables and the related security is not customary.

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

See our response to question 5.1.

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

In order to grant a security interest in accounts receivables under RSA law, the accounts receivable (which we have for the purpose hereof assumed to only be incorporeal rights) must be ceded by way of a cession in securitatem debiti (i.e. a security cession). There is currently debate in South Africa as to whether a cession in securitatem debiti should be given the construction of an out and out cession or whether it should be given the construction of a
pledge. Recent decisions have, however, indicated that a cession in securitatem debiti is of a nature of an out and out cession as indicated by the fact that the cessionary must, after the extinction of the principal debt, re-cede the rights which are subject to the cession in securitatem debiti back to the cedent.

As such, we are of the view that the most likely construction the RSA courts would give to a cession in securitatem debiti is that of an out and out cession and the only formalities which would be required in order to perfect such security would be those referred to in question 4.2 relating to the formalities required for an out and out cession. It would not be necessary to meet any additional formalities in order to perfect the security.

What should be noted, however, is that a cession in securitatem debiti has generally been considered in RSA to be an ancillary obligation and as such there must be some causa (or interest) for the cedent to grant such security interest in favour of the seller.

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

The general rule is that the parties to an agreement may, subject to certain limitations, choose the law that is to govern such agreement and, accordingly, such general rule would be equally applicable to the granting of any security. However, where there are specific statutory requirements (for example, registration in the applicable Deeds Registry Office or the like), any security interest, in order to be enforceable in South Africa will, notwithstanding that it may be governed by the provisions of a foreign law, have to comply with any statutory requirements. So, should a purchaser wish to grant a cession in security over a mortgage bond registered as security for a principal debt, such cession, notwithstanding that it may be governed by a foreign law, would only be recognised in South Africa if the cession of such mortgage bond was registered in the applicable Deeds Registry Office.

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?

As indicated in question 5.3, in order to grant a security interest in respect of incorporeal rights, the parties would conclude a cession in securitatem debiti agreement whereby all of the cedent's rights, title and interest in and to the applicable incorporeal rights would be ceded as security for an underlying interest or debt.

As also indicated in question 5.3, the requirements for a cession in securitatem debiti to be validly effected are the same as those for out and out cessions described in question 4.1. As such, in order to grant security over the rights comprised in the applicable promissory notes, mortgage loans or marketable debt securities, a cession in securitatem debiti would be the applicable construction. However, in addition to the aforesaid, certain additional statutory requirements will be required to be fulfilled in regard to granting security in relation to:

5.5.1 a promissory note, due to the nature of a promissory note, delivery of the promissory note, is of great evidential value;

5.5.2 a mortgage bond, in respect of which the relevant cession in securitatem debiti would be required to be registered in the applicable Deeds Registry Office where the original mortgage bond was registered. Until such time as such cession in securitatem debiti is registered in the applicable Deeds Registry Office, the security granted by such cession will not be effective as against third parties; and

5.5.3 a cession or pledge of dematerialised securities, in terms of the Security Services Act (specifically section 43), must be effected by entering same into the relevant central securities account or securities account of the applicable pledgor or cedent (as the case may be) in favour of the cessionary specifying the name of the cessionary, the interest in the relevant securities ceded and the date.

In respect of insurance policies, the insurer should be given notice and should endorse the necessary cession or pledge against the insurance policy.

5.6 Trusts. Does South Africa 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?

RSA law does recognise trusts and the concept that one person can hold assets in trust and on behalf of and for the benefit of another person. Collections are usually received by the seller in its general collections account. To prevent co-mingling risk, sweeping mechanisms are usually applied in respect of which collections in relation to receivables sold are transferred on a periodic basis (i.e. daily, weekly or monthly) to the purchaser. A separate collections account can also be created.

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

The RSA does recognise escrow accounts, whilst the concept is not commonly used within the RSA. Security can be taken over bank accounts located in the RSA. Once again, it is common for a cession in securitatem debiti agreement, on the basis as discussed in question 5.3, to be provided, pursuant to which all of the cedent’s rights, title and interest in and to the bank account set out within the cession document is ceded by the cedent to and in favour of a cessionary.

RSA courts will recognise a foreign-law grant of security taken over a bank account located in the RSA, however, enforcement against that bank account will have to comply with RSA laws.

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

If there has been a valid sale, the receivables will form part of the purchaser’s estate and as such there will be no prohibition on the purchaser collecting, transferring or otherwise exercising its
ownership rights over the receivables provided that the sale and transfer of the assets could not be set aside by either a liquidator or creditor of the seller upon the insolvency of the seller.

If, however, the purchaser is deemed to only be a secured party rather than the owner of the receivables, the receivables would form part of the seller’s estate and the liquidator would be responsible for the collection of all proceeds under the receivables. The purchaser would be required to lodge a claim with the liquidator and would be entitled, once the seller’s estate is wound up, to be paid out of the estate before any preferent or concurrent creditors.

It must be noted that the business rescue process has recently been incorporated into RSA law. Business rescue proceedings allow for the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company, and of the management of its affairs, business and property as well as for a temporary moratorium on the rights of claimants against the company or in respect of property in its possession.

During business rescue proceedings and despite any provision of an agreement to the contrary, the business rescue practitioner may:

6.1.1 entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that:
6.1.1.1 arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
6.1.1.2 would otherwise become due during those proceedings; or
6.1.2 apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company is party.

If a business rescue practitioner suspends a provision of an agreement relating to security granted by the company, that provision will nevertheless continue to apply, with respect to any proposed disposal of property by the company.

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)?

As discussed in question 6.1, the concept of “automatic stay” relates to the seller’s estate upon the insolvency of the seller and not the estate of the purchaser. As such, the question of whether or not there is an automatic stay is not linked to whether the insolvency official of the seller could prohibit the exercise of the rights of the purchaser (by means of injunction or otherwise) but rather as to whether the actual transfer of the receivables by the seller to the purchaser could be attacked on any of the basis set out in question 6.3.

Again, as stated in question 6.1, to the extent that there has been a valid sale, there would be no basis upon which an insolvency official could prohibit the exercise by the purchaser of any rights under the receivables by means of injunction, stay order or otherwise.

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 South Africa for (a) transactions between unrelated parties and (b) transactions between related parties?

6.3.1 Transactions which may be reversed or rescinded during a “suspect” or “preference” period prior to the commencement of the insolvency of the seller are those transactions which constitute impeachable transactions under RSA insolvency law. Impeachable transactions are voidable at the instance of the relevant insolvency official but will stand until such time as they are actually set aside by an RSA court or by an agreement between the relevant insolvency official and the other contracting parties. The Insolvency Act, 1936 (“Insolvency Act”) makes provision for the setting aside of impeachable transactions in the following circumstances:

6.3.1.1 where an insolvency official proves that at any time before the liquidation of the insolvent estate, the insolvent made a disposition of its property and that immediately after such disposition the insolvent’s liabilities exceeded its assets; the disposition may be set aside by the court if the insolvent official is able to prove that the disposition was not made for value. Alternatively, where an insolvency official proves that at any time within two years of the liquidation of the insolvent, the insolvent made a disposition of its property (again not for value) such disposition may be set aside unless the person who benefited as a result of the alleged disposition proved that immediately after the alleged disposition was made the insolvent’s assets exceeded its liabilities;

6.3.1.2 a disposition made by an insolvent prior to its liquidation could be attacked in circumstances where the disposition was effected not more than six months preceding the date of such liquidation and had the effect of preferring one creditor of the insolvent over another and, in addition, immediately succeeding such disposition the liabilities of the insolvent exceeded its assets. Again, in such circumstances, such disposition may be set aside by an RSA court unless the entity in whose favour the disposition was made proves that the disposition was made in the ordinary course of business of the insolvent and that the disposition was not intended to prefer one creditor over another; and

6.3.1.3 a transfer of receivables could be attacked on the basis where, prior to the insolvency of the seller, the transfer was effected in collusion (that is with fraudulent intent) with another person and in such a manner that it had the effect of prejudicing the creditors of the insolvent or alternatively preferring one creditor over another.

6.3.2 Under the common law, a disposition may also be set aside where the creditors of the insolvent can prove that:
6.3.2.1 the disposition reduced the assets of the insolvent;
6.3.2.2 the insolvent and the purchaser or entity in favour of whom the disposition was made had a common intention to defraud or prejudice the creditors of the insolvent; and
6.3.2.3 the prejudice to the insolvent’s creditors was caused by the fraud referred to in question 6.3, paragraph 6.3.2.2.

6.3.3 The sale of receivables by a seller could, in addition, be attacked under section 34 of the Insolvency Act if the relevant notices required by the aforesaid section are not given. Briefly, section 34 of the Insolvency Act provides that if a trader transfers any business belonging to him or the goodwill of such business or any goods or property forming part thereof (save in the ordinary course of that business or for the purpose of securing the payment of a debt) and such trader has not published a notice of the intended transfer in the Government Gazette within a period of not less than thirty and not more than sixty days prior to the date of such transfer, the transfer shall be void as against the creditors of the seller for a period of six months after such transfer and in addition shall be void against the insolvency official if the
6.3.4 Lastly, the sale of receivables by the seller could be attacked on the basis that the sale does not constitute a “true sale” but rather constitutes a simulated transaction, that is a pre-ordained transaction having no real commercial purpose other than the removal of assets from the estate of the seller (and that the creditors of the seller) upon or preceding the insolvency of the seller.

Please take cognisance thereof that the Insolvency Act does not distinguish between the lengths of the “suspect” or “preference” period in relation to transactions between unrelated parties and/or transactions between related parties.

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?

An insolvency official could attend to consolidate the assets and liabilities of the purchaser with those of the seller where such official attacks the sale of the assets on the basis that such sale does not constitute a “true sale” but rather constitutes a simulated transaction. In this context, a simulated transaction would mean a pre-ordained transaction having no real commercial purpose other than the removal of the assets of the creditors of the seller upon or preceding an insolvency of the seller.

The only circumstances where the assets and liabilities of the purchaser would be consolidated with those of the seller or its affiliates would be in circumstances where the corporate veil (i.e. the separate legal identity) of the purchaser and the seller would be pierced and, as such, the purchaser and seller would really be considered to be a single legal entity. Whilst the concept of separate legal personality of a company is recognised and empowered in RSA law (save in exceptional circumstances) and the RSA courts have no discretion to disregard the existence of a separate corporate identity where it is simply convenient to do so, the RSA courts would generally, however, pierce the corporate veil, between holding and wholly owned subsidiary companies where there is an element of fraud or other improper conduct in the establishment or use of such subsidiary company or the conduct of its affairs. In this regard the words “device”, “strategy”, “cloak” and “sham” have been used to describe the nature of transactions where the corporate veil will be lifted. As such, assuming the transfer and sale of the receivables is on commercial terms, without fraud or intention to defraud and assuming that the purchaser is operating as a self standing separate, and independent legal entity to the seller, there would seem to be no basis upon which the corporate veil should be pierced and accordingly upon which the assets and liability of the purchaser and the seller will be consolidated upon the insolvency of the seller.

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?

Liquidation of a company does not terminate an executory contract lying outside the categories specifically covered by the Insolvency Act, but the liquidator cannot be forced to render specific performance in terms of the contract.

To the extent that any agreement to sell any future receivables obtained by the seller constitutes an executory contract (i.e. a contract which is executory or not completed as at the date on which the concursus creditorum is instituted), the liquidator of the seller will have an election to either abide by the agreement or to repudiate its obligations under same.

Should the liquidator elect to abide by the agreement, the agreement and all the obligations thereunder will be enforceable. Should the liquidator elect to terminate the agreement, the purchaser will be entitled to lodge a claim for damages against the seller’s estate and will rank as a concurrent creditor, entitling the purchaser to share in the free residue.

7 Special Rules

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

Within the RSA, securitisation transactions are regulated pursuant to the Securitisation Regulations, published under Government Notice 2 in Government Gazette 30628 of 1 January 2008.

These regulations were promulgated as an exception to certain provisions of the Banks Act 94 of 1990, which requires for certain conduct to be regarded as the “business of a bank” and which would require registration as a bank.

The Securitisation Regulations regulate the corporate status, ownership and control of an issuer of commercial paper under a securitisation transaction.

Please see our further comments below.

7.2 Securitisation Entities. Does South Africa 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?

In terms of the Securitisation Regulations, an issuer of commercial paper is required to be a vehicle (either a trust or a company) which is insolvency remote. For purposes of the Securitisation Regulations, “insolvency remote” means that the assets of the relevant issuer must not be subject to any claim from the institution transferring such assets (i.e. the seller) whether as a result of the seller’s insolvency or otherwise.

In addition, an issuer is required to have an independent board of directors (or in the case of a trust, trustees). However, the Securitisation Regulations do permit an institution acting in a primary role (i.e. a sponsor, originator or the like) to appoint one director to the board of directors of such issuer (or in the case of a trust, a single trustee) provided that in such circumstances the board of directors or trustee (as applicable) comprises at least three persons.

Further, in addition to the foregoing, the Securitisation Regulations stipulate that:

7.2.1 the name of an issuer of commercial paper may not be associated or linked to the name of the bank which is acting as sponsor or arranger in respect of the relevant securitisation scheme;

7.2.2 institutions acting in a primary role (i.e. as sponsor, originator or the like), to hold (directly or indirectly) no more than 20% of the equity share capital, (in the case of a company), or 20% of the interest, beneficial or otherwise (in the case of a trust); and
7.2.3 no institution acting in a primary role (as described above) may have the right to determine the outcome of voting at any meeting of the issuer.

7.3 Non-Recourse Clause. Will a court in South Africa 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?

As a general rule the courts will not interfere in an individual’s right to vary or discharge their contract as they deem fit and, accordingly, the parties to an agreement may limit the recourse of parties to available funds. However, the courts have a discretion, albeit one which is exercised sparingly, to set aside a contractual provision which it deems to be unfair, unreasonable or unjust (i.e. against public policy).

The CPA provides that a supplier must not offer to supply or enter into an agreement to supply, any goods or services on terms that are unfair, unreasonable or unjust or require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

In terms of the CPA, a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied or the terms of the transaction or agreement are so adverse to the consumer as to be inequitable.

7.4 Non-Petition Clause. Will a court in South Africa 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?

7.4.1 Such a clause is often utilised by the parties to a securitisation transaction, however, there is some concern that such a clause may be found to be contrary to public policy in that it deprives a creditor of its right to enforce his claim against the relevant debtor in a court of law. Whilst the court has a discretion to refuse to allow a contract to be enforced where the court considers that such enforcement would be contrary to public policy, it has been held that no court should shrink from the duty of declaring a contract contrary to public policy when the occasion so demands.

7.5 Independent Director. Will a court in South Africa 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?

As discussed in questions 7.3 and 7.4, the parties to an agreement may vary or discharge their contract as they deem fit, provided that such agreement does not offend public policy. Accordingly, the parties to an agreement may prohibit directors from taking specified actions. In determining whether a provision, which provides that the directors or managers will not commence an insolvency proceeding unless required under applicable law, or which prohibits a director from taking any other specified action without the affirmative vote of an independent director, is given effect, consideration should be had to the provision of section 20 of the Companies Act, which provides that if a company’s memorandum of incorporation limits, restricts or qualifies the purposes, powers or activities of that company, no action of the company is void by reason only that the action was prohibited by that limitation, restriction or qualification or as a consequence of that limitation, restriction or qualification, the directors had no authority to authorise the action by the company. Furthermore, section 20 provides that in any legal proceeding, other than proceedings between the company and its shareholders, directors or prescribed officers, or the shareholders and directors or prescribed officers of the company, no person may rely on such limitation, restriction or qualification to assert that an action is void. However, whilst a company cannot escape liability on the grounds of lack of capacity or power, the company may be able to assert that the act in question was beyond the authority of the directors of the company. Where the memorandum of incorporation not only limits the power and capacity of the company, but also limits the power and capacity of the organs of the company (including the board of directors of the company), as the memorandum of incorporation of a company is a public document, a person who dealt with the company’s directors would be prevented from asserting the lack of authority of such directors.

In light of the foregoing, the provisions in the memorandum of incorporation of the SPV, which purport to ring fence the objects of the company, must, in addition, limit the power and capacity of directors to commence an insolvency proceeding against the company in order for such clause to be valid and enforceable.

8 Regulatory Issues

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

The question of whether the purchase, ownership or collection and enforcement of receivables would result in a purchaser being required to qualify to do business or obtain any licence in South Africa or being subject to regulation as a financial institution in RSA will depend entirely on the nature of the business in question and the particular facts and circumstances. We therefore cannot express a general view in relation to this issue.

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, however, depending on the nature of its business, the seller may require a general licence (i.e. be registered as a bank under the Banks Act or be registered in terms of the Financial Advisory and Intermediary Services Act 37 of 2002). Furthermore, the seller would be required to register as a debt collector and to comply with the provisions contained in the Debt Collectors Act 114 of 1998.
8.3 Data Protection. Does South Africa 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?

There is currently no formal legislation in South Africa regulating data privacy, however the Protection of Personal Information Bill ("POPI"), which is expected to come into force during the course of this year, aims to safeguard personal information by regulating the manner in which it may be processed, retained and destroyed.

POPI introduces information protection principles so as to establish minimum requirements for the processing of personal information and to regulate the flow of personal information across the borders of the RSA. Once POPI is legislated, any purchaser or seller would be required to comply with the provisions of the act. A failure to comply with the Act could result in imprisonment or an administrative fine of up to ZAR 1,000,000.

In the interim, the Constitution of the Republic of South Africa Act, 1996 ("Constitution") and the common law places certain restrictions on the processing and disclosure of personal information. An obligor’s “personal information” would comprise all information about the obligor as an identifiable individual, including his or her identity/passport number, addresses, e-mail addresses, telephone numbers, and salary and other financial details.

The common law right to privacy encompasses the competence of individuals to determine the destiny of personal information. The individual concerned is entitled to dictate the ambit and method of disclosure. Similarly, a person is entitled to decide when and under what conditions personal information may be made public.

Although RSA courts recognise that juristic entities and enterprises have a right to privacy (especially in relation to the enterprise’s reputation), the extension of the right to enterprises is approached cautiously and the law in this regard remains undefined.

The Electronic Communications and Transactions Act, 2002 ("ECTA") contains principles that apply to personal information that is collected electronically (through websites, e-mail, facsimile and the like). Adherence to the principles set out in ECTA is voluntary (there is no penalty for non-compliance). Nonetheless, these principles are based on international fair and lawful data processing standards and provide an indication of what may ultimately be required in the anticipated privacy and data protection legislation.

From a regulatory perspective, it is advisable to adhere to the principles outlined in ECTA and to bear in mind the legal risk of affecting exchange controls in the RSA is founded upon and is to be discerned from:

- the Currency and Exchanges Act, 1933;
- the RSA Exchange Control Regulations ("Excon Regulations") issued in terms of section 6 of the Currency and Exchanges Act;
- the orders and rules issued under the Excon Regulations;
- the delegation to the exchange control department of the South African Reserve Bank ("Excon") of most of the powers, functions and duties assigned to and imposed upon the Treasury by the Excon Regulations;
- the system of appointment of authorised dealers ("Authorised Dealers") (certain banks who co-administer certain of the Exchange Controls in terms of the exchange control rulings) in foreign exchange; and
- the issue by Excon of the exchange control rulings ("Excon Rulings") which are from time-to-time amended by circulars.

8.5.2 An overview of the legal framework in question 8.5, paragraph 8.5.1 makes it apparent that:

8.5.2.1 the Excon Regulations contain either an absolute prohibition or an absolute direction or decree, in each case tempered by a provision creating the possibility of exemptions and/or permissions to be granted by Treasury (and thus Excon by virtue of the delegation referred to in question 8.5, paragraph 8.5.1.4), in respect of the export of capital and/or revenue from the RSA and/or the dealing in foreign exchange;

8.5.2.2 the Excon Rulings contain the conditions, permissions and limits applicable to transactions in foreign exchange which may be undertaken by Authorised Dealers, on behalf of their clients, as well as details of related and administrative responsibilities. Residents of the RSA are restricted in their ability to export capital and/or deal in foreign currency and may only do so, pursuant to the Excon Rulings, to the extent that it can be demonstrated or is accepted that it is to the benefit of the RSA; and

8.5.2.3 aspects of Exchange Control which fall outside the ambit of the Excon Rulings must be referred by Authorised Dealers to Excon which has the power, in specific cases referred to it by Authorised Dealers for consideration, to grant permissions and/or exemptions subject to such conditions which Excon itself imposes in regard to any such matter.

8.5.3 The Excon Regulations, Orders and Rules and the Excon Rulings set out the only permissible manner in which a resident is entitled to export capital from the RSA and/or deal in or acquire foreign currency.

8.5.4 Exchange Controls only apply to residents of the RSA and non-residents have been granted general approval (subject to certain administrative requirements), pursuant to the Excon Rulings, to deal in RSA assets and to freely invest in and disinvest from the RSA. This general approval, in respect of non-residents, would include the entitlement by non-residents to exchange the currency of the RSA for foreign currency when disinvesting from the RSA. Notwithstanding this general approval, residents of the RSA who wish to allow investments by non-residents in RSA debt securities, are required, when doing so, to comply with the requirements of the Excon Rulings and in particular the securities control provisions thereof. These requirements include, inter alia, residents obtaining the prior approval of Excon before issuing or listing any form of debt security which may be invested in and/or acquired by a non-resident.

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 South Africa? Briefly, what is required?

A purchaser of consumer receivables (whether a bank or otherwise) will be required to comply with the provisions of the consumer protection legislation in the RSA, such as the NCA and the CPA. See question 1.2 above.

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

8.5.1 The precise nature and content of the legal framework affecting exchange controls in the RSA is founded upon and is to be discerned from:
### 9 Taxation

**9.1 Withholding Taxes.** Will any part of payments on receivables by the obligor to the seller or the purchaser be subject to withholding taxes in South Africa? 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?

Currently there is no withholding tax on interest under RSA law, whether domestic or international. However from 1 January 2013, there will be withholding tax on foreign interest payments, subject to double taxation agreements, at a rate of 15%. There will be no local withholding tax on interest payments.

**9.2 Seller Tax Accounting.** Does South Africa 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 South Africa impose stamp duty or other documentary taxes on sales of receivables?

No, stamp duty was previously payable on the cession of insurance policies but has been abolished. Transfers of shares will attract securities transfer tax.

**9.4 Value Added Taxes.** Does South Africa 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?

There is value added tax (“VAT”) on sales of goods or services and on fees. Generally speaking, a sale of a receivable is an exempt financial service. Where the receivable arose out of a sale of goods or services which included VAT, and the receivable is sold without recourse, and the receivable becomes irrecoverable thereafter, the seller of the receivable may not reclaim the VAT contained therein, but the purchaser would, if it is registered for VAT, have that right. Where the receivable is sold with recourse and becomes irrecoverable, and is ceded back to the seller of the receivable, the seller can at that stage reclaim the VAT.

**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?

Not in terms of the legislation which regulates VAT in South Africa. The entity liable for VAT will be the seller.

**9.6 Doing Business.** Assuming that the purchaser conducts no other business in South Africa, 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 obligor, make it liable to tax in South Africa?

Yes, but only if the purchaser is earning income, for example, it acquires interest bearing receivables or other receivables at a discount. If the purchaser is a non-resident, such purchaser will pay tax on income regarded from an RSA source, such as interest. Further activities may result in such a purchaser creating a permanent establishment.

Acknowledgment

We would like to gratefully acknowledge the assistance of Leon Rood, Ina Meiring and Megan Lawrence in the preparation of this chapter.
Areas of Practice

Qualifications
BCom LLB (Pretoria, RSA), LLM (Cornwell, USA), LLM (Tax) (Witwatersrand, RSA).

History
Richard was admitted as an attorney in 1997 and as a member of the New York Bar in 1996. From 1997 to 2000 he worked in the Amsterdam office of a major English law firm specialising in securitisations and debt capital market transactions. Richard joined Werksmans as a director in the commercial department in 2007. Richard is presently part of the firm’s banking and finance team and heads up the firm’s banking and finance practice. He is involved in the negotiation and drafting of finance, banking and commercial transactions with a particular focus on securitisations, debt capital market transactions, project finance, structured finance and leveraged finance transactions. Richard has acted for some of the major financial institutions in South Africa and abroad and has advised arrangers and issuers in respect of residential mortgage backed, store card receivables and auto loan securitisation transactions.

Areas of Practice

Qualifications
BCom LLB (University of Johannesburg, RSA). Various diploma courses.

History
Tracy was admitted as an attorney in 1998 and joined Werksmans in 2008. Tracy became a director in the commercial department of Werksmans in March 2010. She is presently part of the firm’s banking and finance team. Tracy has acted for some of the major financial institutions in South Africa and is mainly involved in the negotiation and drafting of finance, banking and commercial transactions with a particular focus on securitisations and the debt capital market transactions.

About Werksmans Attorneys
Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm serving multinationals, listed companies, financial institutions, entrepreneurs and government.

Werksmans operates in Gauteng and the Western Cape and is connected to an extensive African network through Lex Africa*.

With a formidable track record in mergers and acquisitions, banking and finance, and commercial litigation and dispute resolution, the firm is distinguished by the people, clients and work that it attracts and retains.

Werksmans’ more than 190 lawyers are a powerful team of independent-minded individuals who share a common service ethos. The firm’s success is built on a solid foundation of insightful and innovative deal structuring and legal advice; a keen ability to understand business and economic imperatives; and a strong focus on achieving the best legal outcome for clients.

Go to www.werksmans.com for more information.

*In 1993, Werksmans co-founded the Lex Africa legal network, which now has member firms in 27 African countries.
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
- Insurance & Reinsurance
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Telecommunication Laws and Regulations
- Trade Marks