ICLG

The International Comparative Legal Guide to:

Securitisation 2019

12th Edition

A practical cross-border insight into securitisation work

Published by Global Legal Group, with contributions from:

A&L Goodbody
Allen & Overy LLP
Association for Financial Markets in Europe
Basila Abogados, S.C.
Brodies LLP
Cuatrecasas
Elias Neocleous & Co LLC
Freshfields Bruckhaus Deringer LLP
GSK Stockmann
Kieti Advocates LLP
King & Wood Mallesons
Latham & Watkins LLP
LECAP
Levy & Salomão Advogados
Macfarlanes LLP
Maples Group
McMillan LLP
Nishimura & Asahi
Oon & Bazul LLP
Orrick, Herrington & Sutcliffe (Europe) LLP
Roschier Advokatbyrå AB
Schulte Roth & Zabel LLP
Shearman & Sterling LLP
Sidley Austin LLP
Structured Finance Industry Group
Vieira de Almeida
Wadia Ghandy & Co.
Walder Wyss Ltd.
Waselius & Wist

afme/ Finance for Europe

SFIG Structured Finance Industry Group

glg global legal group

Contributing Editor

Sanjev Warna-kula-suriya, Latham & Watkins LLP

Publisher
Rory Smith

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Senior Editors
Caroline Collingwood
Rachel Williams

Sub Editor
Jenna Feasey

Group Consulting Editor
Alan Falach

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
June 2019

Copyright © 2019
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-74-4
ISSN 1745-7661

Strategic Partners

Editorial Chapters:

1	**SFIG LIBOR Green Paper** – Sairah Burki & Jennifer Wolfe, Structured Finance Industry Group	1
2	**A New Era for Securitisation?** – Anna Bak, Association for Financial Markets in Europe	8

General Chapters:

3	**Unlocking Value in Private Equity Transactions** – Sanjev Warna-kula-suriya & Christopher Sullivan, Latham & Watkins LLP	11
4	**CLOs in the Current Regulatory Environment** – Craig Stein & Phillip J. Azzollini, Schulte Roth & Zabel LLP	15
5	**Securitization as an Integral Part of a Corporate Capital Structure** – Bjorn Bjerke, Shearman & Sterling LLP	20
6	**Credit Fund Warehouse Origination Facilities** – Richard Fletcher & Ryan Moore, Macfarlanes LLP	25

Country Question and Answer Chapters:

7	**Australia**	King & Wood Mallesons: Anne-Marie Neagle & Ian Edmonds-Wilson	30
8	**Brazil**	Levy & Salomão Advogados: Ana Cecília Manente & Fernando de Azevedo Peraçoli	44
9	**Canada**	McMillan LLP: Don Waters & Michael Burns	57
10	**Cayman Islands**	Maples Group: Scott Macdonald & James Reeve	70
11	**China**	King & Wood Mallesons: Zhou Jie & Eddie Hu	80
12	**Cyprus**	Elias Neocleous & Co LLC: Achilleas Malliotis	94
13	**England & Wales**	Sidley Austin LLP: Rupert Wall & Jason Blick	104
14	**Finland**	Waselius & Wist: Tarja Wist & Ann-Marie Eklund	123
15	**France**	Orrick, Herrington & Sutcliffe (Europe) LLP: Hervé Touraine & Olivier Bernard	134
16	**Germany**	Allen & Overy LLP: Dr. Stefan Henkelmann & Martin Scharnke	149
17	**Hong Kong**	King & Wood Mallesons: Paul McBride & Brian Sung	166
18	**India**	Wadia Ghandy & Co.: Shabnum Kajiji & Nihas Basheer	181
19	**Ireland**	A&L Goodbody: Peter Walker & Sinéad O'Connor	193
20	**Japan**	Nishimura & Asahi: Hajime Ueno & Taichi Fukaya	208
21	**Kenya**	Kieti Advocates LLP: Sammy Ndolo	225
22	**Luxembourg**	GSK Stockmann: Andreas Heinzmann & Hawa Mahamoud	236
23	**Mexico**	Basila Abogados, S.C.: Mauricio Basila & Karime Jassen Avellaneda	252
24	**Netherlands**	Freshfields Bruckhaus Deringer LLP: Mandeep Lotay & Ivo van Dijk	261
25	**Portugal**	Vieira de Almeida: Paula Gomes Freire & Benedita Aires	278
26	**Russia**	LECAP: Michael Malinovskiy & Anna Gorelova	295
27	**Scotland**	Brodies LLP: Bruce Stephen & Marion MacInnes	307
28	**Singapore**	Oon & Bazul LLP: Ting Chi-Yen & Poon Chow Yue	319
29	**Spain**	Cuatrecasas: Héctor Bros & Elisenda Baldrís	334
30	**Sweden**	Roschier Advokatbyrå AB: Johan Häger & Dan Hanqvist	355
31	**Switzerland**	Walder Wyss Ltd.: Lukas Wyss & Maurus Winzap	367
32	**USA**	Latham & Watkins LLP: Lawrence Safran & Kevin T. Fingeret	380

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

PREFACE

On behalf of Latham & Watkins, I would like to thank Global Legal Group for their efforts in publishing the 12th edition of *The International Comparative Legal Guide to: Securitisation*.

Maintaining an accurate and up-to-date guide regarding relevant practices and legislation in a variety of jurisdictions is critical, and the 2019 edition of this *Guide* accomplishes that objective by providing global businesses, in-house counsel, and international legal practitioners with ready access to important information regarding the legislative frameworks for securitisation in 26 individual jurisdictions.

The invitation to participate in this publication was well received by the world's leading law firms, thereby validating the continued growth and interest in securitisation around the world. We thank the authors for so generously sharing their knowledge and expertise, and for making this publication so valuable a contribution to our profession. The *Guide*'s first 11 editions established it as one of the most comprehensive guides in the practice of securitisation. On behalf of Latham & Watkins, I am delighted to serve as the *Guide*'s contributing editor and hope that you find this edition both useful and enlightening.

Sanjev Warna-kula-suriya
Latham & Watkins LLP

Kenya

Kieti Advocates LLP

Sammy Ndolo

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 binding contract arise as a result of the behaviour of the parties?

A contract can be written, oral or partly written and partly oral. A contract can also be implied between the parties based on their conduct. Contracts relating to land, hire purchase agreements and others (such as future performance agreements, direct agreements and time share agreements) specified in the Consumer Protection Act, 2012, must be in writing.

Others, such as contracts of guarantee or contracts for the sale of goods where the purchase price exceeds KES 200, require to be evidenced in writing. Such evidence can be an invoice that clearly identifies the parties and the subject matter of the agreement.

1.2 Consumer Protections. Do your jurisdiction'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 Banking Act, Chapter 488 (as amended) caps the interest chargeable on lending by licensed banks or financial institutions in Kenya at no more than 4% of the base rate set and published by the Central Bank of Kenya. Further, the Act limits the amount of interest recoverable by a licensed bank or financial institution from a debtor with respect to non-performing loans to not more than the principal owing when the loan becomes non-performing.

The Consumer Protection Act, 2012 allows consumers to cancel certain types of agreements (such as future performance agreements, direct agreements, time share agreements or consumer agreements) within prescribed periods of time or if certain requirements are not satisfied. The regulations in which many of these requirements will be set out have yet to be published. The interpretation of the relevant statutory provisions (including other consumer rights) therefore remains unclear.

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?

Not specifically, but one would need to consider various matters including the law pursuant to which the government or government agency entered into the contract and under which the government agency has been established.

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 your jurisdiction that will determine the governing law of the contract?

In the case of such a contract, Kenyan courts will assume jurisdiction, *inter alia*, if the contract is made in Kenya or if the proper law of the contract is Kenyan law or if a breach is committed within Kenya. If the parties have not expressed in their contract the law applicable to it, the court considers the system of law in reference to which the contract was made, or that to which the transaction has its closest and most real connection.

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

There is no reason why a court in Kenya would not give effect to their choice of law in such circumstances.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction 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 your jurisdiction 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?

As a general rule, parties may freely fix the proper law for the settlement of their disputes and Kenyan courts will carry out the intention of the parties and enforce the agreement. The court could depart from the choice of foreign law if there are exceptional circumstances such as matters relating to public policy.

3 Choice of Law – Receivables Purchase Agreement

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

Kenyan law does not require the sales of receivables to be governed by the same law as the governing law of the receivables themselves. Parties are free to agree on the governing law and Kenyan courts will generally respect such a choice of law subject to the exceptions noted in question 2.3 above.

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

Such a sale would be held as being effective against the seller except where the purchaser seeks to make an offer to the public or to restricted investors. Such a purchaser must be located in Kenya. See question 7.3 below.

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 your jurisdiction, will a court in your jurisdiction 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?

See questions 3.1 and 3.2 above, where we have noted that the purchaser is required to be located in Kenya. Kenyan courts would respect the parties' choice of law to govern the receivables purchase agreement subject to the exceptions noted in question 2.3 above.

3.4 Example 3: If (a) the seller is located in your jurisdiction 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 your jurisdiction 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 your jurisdiction's own sale requirements?

The same answer as in question 3.3 above applies.

3.5 Example 4: If (a) the obligor is located in your jurisdiction 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 your jurisdiction 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 your jurisdiction's own sale requirements?

The same answer as in question 3.1 above applies.

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

The same answer as in question 3.3 above applies.

4 Asset Sales

4.1 Sale Methods Generally. In your jurisdiction 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 customary methods and terminology applied by the Capital Markets Act and the CMA Policy Guidance Notes is sale, transfer and assignment. The sale of receivables by way of legal or equitable assignment is common. The Capital Markets Authority ("**CMA**")

© Published and reproduced with kind permission by Global Legal Group Ltd, London

has expressed in a strong preference for a legal assignment in the CMA Policy Guidance Notes, but the use of equitable assignment as a method of transfer has also been significantly strengthened under the Movable Property Security Rights Act, 2017 ("**MPSRA**") and this is discussed further in questions 4.2 and 4.4 below.

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?

The Capital Markets Act as read with the CMA Policy Guidance Notes requires the sale, transfer or assignment of receivables to be legal and not equitable, except in very limited circumstances. Such circumstances include where the transactions involve revolving short-term receivables (for example, under 365 days) and in which it is not practical to repeatedly go through the legal assignment process or where the assignment relates to future receivables.

The existing legal framework does not expressly provide for the formalities for a legal assignment. Previously, the Transfer of Property Act, 1882, of India (now repealed), provided that a legal assignment was effective if: (i) it was in writing (not necessarily a deed); and (ii) express notice was given to the obligor. In general, an assignment which did not comply with these requirements operated as an equitable assignment.

The CMA Policy Guidance Notes in giving some direction as to the formalities for effecting a legal assignment says that it will depend on the nature of the assets and the underlying contractual documentation, but may involve: (i) obtaining the consent of each obligor; (ii) giving notice to the obligor to make payment to the purchaser; and (iii) registration of the assignment. A legal assignment will therefore be expected to at least comply with the requirements as to writing and notice, failing which it would be an equitable assignment.

As a way of providing potential notice on the transfer of assets, the CMA Policy Guidance Notes require the purchaser to file with the CMA a summary of the transferred assets and this is made available for public inspection. Where it is demonstrated to the CMA that notification is not possible, the CMA will require that the servicer or originator has in place adequate systems and controls to "ring fence" and segregate cash flows relating to the securitisation assets and that the funds collected by the servicer or originator are remitted to the purchaser's account within three business days of collection from the obligor.

In the case of an assignment, the registration of the security interest in any movable asset with the Office of the Registrar established under MPSRA is recommended because it makes it effective against third parties. Furthermore, the right in any proceeds from the movable assets is also effective against third parties without any further action of the grantor and the secured creditor, if the security right in the original collateral was registered and the proceeds are in the form of money, receivables, negotiable instruments or rights to fund credited to a deposit account.

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 Bills of Exchange Act, 1882 provides that the transfer of a promissory note is by either delivery or by negotiation as well as delivery.

Mortgage loans and their related mortgages (the more common term being legal charge) over real property can be transferred by registration of the prescribed transfer form with the Lands Registry and at the Companies Registry (where applicable).

The transfer of a security interest in consumer loans for moveable assets or their receivables may be registered by filing an amendment notice with the Office of the Registrar created under MPSRA. The transfer of the security interest is, subject to certain exceptions relating to priority, effective whether or not the amendment notice is registered.

The transfer of marketable securities is usually achieved by registration of the purchaser in the members register. If the marketable securities are dematerialised and held in the central depository, the transfer can also be achieved by making appropriate debit and credit entries in the clearing system in relation to the purchaser and seller respectively (or their relevant intermediaries).

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?

Receivables can be assigned without consent from, or notice to, the obligor or creditors of the seller. We have noted in questions 4.1 and 4.2 above that the Capital Markets Authority has a strong preference for a legal rather than an equitable assignment, but this has been mitigated by the MPSRA.

Generally, if notice is not given: (i) the seller could engage in a second or further sale of the same receivables which results in the subsequent assignee of the receivables, without notice of the prior assignment, taking priority over the claims of the first purchaser; (ii) the obligors may continue to pay the seller (being the lender on record); (iii) the purchaser cannot take independent enforcement action against the obligor and must do so in the name of the seller; and (iv) the obligors may exercise set-off rights against the seller that arose before notice of the assignment was given.

In limiting the risk presented by an "equitable" assignment, the MPSRA provides that the security interest in any movable asset is effective against third parties if notice with respect to that security interest is registered under the MPSRA. Accordingly, the right in any proceeds from the movable assets is also effective against third parties without any further action of the grantor and the secured creditor, so long as the security right in the original collateral was registered and the proceeds are in the form of money, receivables, negotiable instruments or rights to fund credited to a deposit account.

Furthermore, if the security interest over moveable assets has been registered, the security interest remains effective against third parties and retains the priority it had over rights of competing claimants before the transfer of the collateral (subject to the security interest) provided that the secured creditor registers an amendment notice including the transferee as the new grantor within ten days after the secured creditor acquires knowledge of the transfer and the identity of the transferee.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 have commenced against the obligor or the seller? 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?

There is no particular form of notice, but it should be in writing and given to the obligor by the purchaser or the seller. There is no specification on how it must be delivered. The CMA will prefer that the notice is given at the time of the sale rather than after the sale.

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 first two questions are likely to be interpreted by Kenyan courts as prohibiting a transfer or assignment of receivables by the seller to the purchaser without consent. The third question does not specifically prohibit the transfer of rights and it would therefore be possible to transfer those rights without consent.

The above notwithstanding, where the assignment is by way of security which is registered under the MPSRA, the security interest in the receivable will be effective between the purchaser, the seller and the debtor despite an agreement restricting the right to create the security entered into between the seller and the debtor. According to the MPSRA, the agreement giving rise to the receivable cannot be avoided on the sole ground of that breach or the debtor may not raise against the purchaser any claim he may have against the seller as a result of that breach. This statutory exception applies to certain categories of contracts that include contract for supply or lease of goods or services (other than financial services under specified statutes), construction contract, contract for sale or lease of immovable property, or contract for sale, lease or licence of immovable property.

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 your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction 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?

A restriction on the assignment or transfer of receivables will generally be enforceable and a debtor may have remedy in contract and tort arising from such a breach. A trust arrangement can be utilised where a restriction on assignment would otherwise prevent assignment. Where the MPSRA applies, the assignment may be valid even without the debtor's consent. See question 4.6 above regarding some of the exceptions under the MPSRA.

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 CMA Policy Guidance Notes require a summary of assets to be filed with the CMA, but do not prescribe how they should be described. Generally, the sale documents must describe the receivables with sufficient specificity so that they can be identified and distinguished from those that are not subject to the sale.

Where security is to be taken over the assets, it should describe the assets in a manner that reasonably allows their identification and this may be achieved in various ways including setting out: (a) specific listing; (b) category; or (c) quantity. For this purpose, it is sufficient to have a description that indicates that the assets (collateral) consist of all of the seller's assets or all of the seller's movable assets within a generic category.

It is not mandatory for the receivables sold to share objective characteristics, but it is common for them to share specified eligibility criteria.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

4.9 Recharacterisation Risk. 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 is there a risk that the transaction could be characterised by a court as a loan with (or without) security? If recharacterisation risk exists, what characteristics of the transaction might prevent the transfer from being treated as an outright sale? Among other things, to what extent may the seller retain any of the following without jeopardising treatment as an outright sale: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; (d) a right of repurchase/redemption; (e) a right to the residual profits within the purchaser; or (f) any other term?

We have noted in questions 4.1 and 4.2 above that the CMA has a strong preference for a legal rather than an equitable assignment. According to the CMA Policy Guidance Notes, equitable assignments will not generally be considered for approval. It will therefore not be sufficient to describe the transaction in the relevant documents as an outright sale when in fact it is not.

Arrangements including the following will generally not be considered to be inconsistent with a sale: (i) the seller retaining not more than 20% shareholding in the purchaser; (ii) the seller remaining as the servicer/collection agent of the receivables after the sale; (iii) credit enhancements provided by the seller; (iv) having buy-back or make good obligations owing to a breach of representation or warranty in relation to the assets; (v) the seller assuming a first loss position; and (vi) the right of the seller to extract residual profits.

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?

An agreement to sell receivables on an ongoing basis would take effect as an agreement to assign and the receivables would be assigned automatically at the time that they come into existence.

See the response to question 6.5 below on the effect of the seller's insolvency to such an agreement.

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 *versus* after the seller's insolvency?

A sale for valuable consideration of an identifiable receivable to come into existence and which shall in the future be clearly ascertainable is possible. The assignment will be an agreement to assign and the receivables will vest in the purchaser at the time that they come into existence.

See the response to question 6.5 below on the effect of the seller's insolvency to such an agreement.

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?

Additional formalities for the transfer of related security will depend on the type of security that has been registered. These have been discussed in response to questions 4.3 and 4.4 above.

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 obligors set-off rights (amounts owed to it from the seller against amounts it owes to the seller under the receivables contract) will not terminate upon its receipt of a notice of sale if those rights arose before the notice was received. However, the set-off rights may be unenforceable where the cross debt arises after the obligor received notice of the sale or where it is time barred. In such instances, the purchaser is unlikely to be liable for damages caused by such termination.

4.14 Profit Extraction. What methods are typically used in your jurisdiction to extract residual profits from the purchaser?

The methods for extraction of residual profits from the purchaser include paying the seller fees (such as for administration of the receivables contracts and collecting the receivables), paying the seller deferred consideration on the receivables purchased, the seller holding shares (the CMA Policy Guidance Notes set this at not more than 20% shareholding) or a residual interest in the purchaser or the seller acquiring equity securities in the purchaser. The method adopted will depend on a number of factors including regulatory requirements, the types of credit enhancement used, the nature of the purchaser, accounting and tax treatment, and the natures of assets to be securitised.

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction 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 (see question 4.9 above)?

The CMA Policy Guidance Notes provide that security must be taken over the receivables and the bank account into which they are paid, if the purchaser is structured as a company or if it is structured as a trust, but will issue debt securities. Where an outright sale is intended and the receivables already have security attached to them and this security is transferred with the receivables, it will be unusual to take "back-up" security.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 your jurisdiction, and for such security interest to be perfected?

See the response to questions 5.1 above and 5.3 below.

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

The security over a receivable will usually be created by way of an assignment by way of security or by way of a charge. The formalities that the purchase must comply with to perfect the security interest will depend on the property that is secured. The formalities for the granting and perfecting an assignment have been discussed in questions 4.2 and 4.4 above and an assignment by way of security will be perfected in the same way.

Registration of the charge over receivables may be required within thirty days (in certain instances within 21 days) after its creation under the Companies Act, 2015. Further registration of the charge may also be required under MPSRA. Prior to registration, the assignment agreement or charge will need to be stamped with stamp duty or otherwise marked as exempt from stamp duty. Failure to register the charge where required will render the charge void or ineffective against third parties.

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

Where the purchaser is Kenyan or a foreign company registered in Kenya, the security should comply with the Kenyan law validity and perfected requirements. Where the purchaser is not Kenyan or registered in Kenya, the court may apply conflict of law principles and these are complex.

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?

There are generally no additional or different requirements in or connected to insurance policies, promissory notes, or consumer loans except as noted in section 4 and question 5.3 above.

5.6 Trusts. Does your jurisdiction 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 (so that they are not part of the seller's insolvency estate) until turned over to the purchaser?

Trusts over collections received by the seller in respect of sold receivables are recognised under Kenyan law.

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

Kenyan law recognises escrow accounts. The security is taken over the cash and interest on the amounts standing to the credit of the bank account by way of a charge or an assignment by way of security. Where the security is created in favour of the account bank, it can only take a charge (and not an assignment) over the deposit and this is usually supplemented by additional security such as flawed asset provisions and a contractual right to set off the deposit against the amount secured or liabilities owed to the account bank. The security interest may be perfected by registration pursuant to the MPSRA.

Kenyan courts would recognise a foreign law-governed security over a bank account in Kenya so long as it is valid under its own governing law and the laws of Kenya.

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?

The possibility of a secured party controlling all cash flowing into the bank from enforcement until repayment in full will depend on various things including whether the security over the bank account is a fixed or floating charge, whether there are competing security interest or trust arrangements over the bank account, the extent of commingling of cash in the account, and whether the account holder is the subject of insolvency proceedings.

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?

It is possible for the owner of the account to have access to the funds and in such cases it will be appropriate to have a floating charge rather than a fixed charge.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 your jurisdiction'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?

If the sale of receivables has been perfected (that is, the purchaser has both legal and equitable ownership), a seller's insolvency should not interfere with the purchaser's ability to collect, transfer or otherwise deal with the purchased receivables. A purchaser who is deemed to only a secured party rather than owner should also not be affected by the seller's insolvency if the security interest is registered under the MPSRA.

If there is doubt as to whether the assignment has been perfected or in the circumstances discussed in question 6.3 below, the seller's administrator or liquidator could obtain an interim injunction from a court prohibiting the purchaser from collecting or otherwise exercising his rights over the purchased receivables. The duration of the interim injunction is determined by the court granting it, but if granted it may continue in place pending determination as to whether the assignment has been perfected.

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 its ownership rights over the receivables (by means of injunction, stay order or other action)?

The insolvency official would generally not be able to prohibit the purchaser's exercise of its ownership rights over the receivables other than in the circumstances discussed in questions 6.1 above and 6.3 below.

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 seller's insolvency proceedings? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties? If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period? If a parent company of the seller guarantee's the performance by the seller of its obligations under contracts with the purchaser, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period?

An insolvency official may apply to the court for an order avoiding a transaction at an undervalue entered into two years ending at the commencement of the administration or liquidation of the company if the company was at that time, or as a result of the transaction became, unable to pay its debts (either as they fall due or a balance sheet basis). A company's inability to pay its debts will be presumed to exist where the transaction at undervalue is with or the preference is given to a connected person. The court will not make such an order if it is satisfied that both the company entered into the transaction in good faith and there was, at that time, reasonable grounds for believing that the transaction would benefit the company.

A transaction that has the effect of placing a creditor or guarantor in a better position than it would otherwise have been in in an insolvency liquidation can be set aside by the court as a preference if it is made: (i) to a person connected with the company two years ending at the onset of the insolvency; or (ii) to any other person six months ending at the onset of the insolvency. The court will presume the intention to give a preference where the transaction is with a person connected with the company. As in the case of a transaction at an undervalue, the preference must have been given at a time that the company was, or as a result of the transaction became, unable to pay its debts (either as they fall due or a balance-sheet basis).

A person is connected with the company if he is an officer or an associate of the company. An officer includes the chief executive officer and the directors of the company whereas an associate in relation to a company includes: (i) its holding company or its subsidiary; (ii) a subsidiary of holding company; (iii) a holding company of its subsidiary; (iv) a person who controls the company (alone or with others); or (v) any other company in which a director of the company is also a director.

Accordingly, a sale transaction in which the seller's parent company guarantees the performance by the seller of its obligations under contracts with the purchaser will not constitute a related party transaction if the seller (and its parent) and the purchaser are not connected persons.

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? If the purchaser is owned by the seller or by an affiliate of the seller, does that affect the consolidation analysis?

There is no established Kenyan authority or statutory right for the substantial consolidation of the assets and liabilities of the purchaser with those of the seller or its affiliates in insolvency proceedings. Under Kenyan law, a company is deemed to have a distinct legal personality separate from its shareholders. This distinction would only be ignored in limited circumstances involving fraud or other illegality or aimed at dishonestly placing assets beyond the reach of creditors.

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

If the contract does not require the seller to do anything further for the receivables to be transferred to the purchaser, the contract will

© Published and reproduced with kind permission by Global Legal Group Ltd, London

generally remain effective after the commencement of the insolvency proceedings, but subject to the right of either party to terminate it. If there is further action required from the seller under the contract, the insolvency official may decide not to take or procure the taking of that action and in that case the purchaser's recourse may be limited to an unsecured claim in the insolvency proceedings.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.4 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

To our knowledge, the Kenyan courts have not determined the effect of a limited recourse clause on a company's insolvency. We expect that such a clause if properly drafted would be enforced on its terms. As a matter of policy, the CMA Policy Guidance Notes prescribes that the transaction documentation must contain limited recourse provisions with the aim of preventing creditors from seeking to wind up the debtor or dissolving the trust except in very limited circumstances (for example, unpaid director or trustee fees). Where the debtor is a trust, the Capital Markets Act provides that the assets of the securitisation trust shall not be available to creditors except as specifically provided for in the trust deed.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics? Is there a regulatory authority responsible for regulating securitisation transactions in your jurisdiction? Does your jurisdiction define what type of transaction constitutes a securitisation?

An offer for asset-backed securities to the public or to restricted investors requires approval by or notification to the Capital Markets Authority. The Capital Markets Authority established under that Act is mandated to regulate such transactions. The Capital Markets Act (Chapter 485A), the Capital Markets (Asset Backed Securities) Regulations, 2007 as read with the CMA Policy Guidance Notes, establishes the legal framework for securitisation transactions in Kenya. There are inconsistencies between the Act and its regulations resulting from amendments introduced to the Act and which have not been reflected in the regulations. The CMA Policy Guidance Notes are not legally binding and their intention is to provide a mechanism for the approval of securitisation transactions until such time as the Act and its regulations are amended.

The Capital Markets Act defines asset-backed securities to mean: (a) any securities including promissory notes (but excluding shares or entitlements under a collective investment scheme); (b) any rights or interest, debentures, or certificates evidencing the legal, equitable or beneficial interest or entitlement of its holder to a share of the assets of a special purpose vehicle or to entitlement to payment from such assets where payments or distributions of capital, income, principal or interest to investors accrue principally from assets of the special purpose vehicle as a consequence for the establishment or operation of a securitisation transaction; and (c) any other right, interest, instrument of security or class of securities prescribed to be asset-backed securities.

7.2 Securitisation Entities. Does your jurisdiction 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?

The Capital Markets Act provides for the establishment of a common law unincorporated trust as the special purpose vehicle for a securitisation transaction. In addition, the use of a company limited by shares or guarantee incorporated in Kenya is now also permitted according to the CMA Policy Guidance Notes. The special purpose vehicles company must not be a subsidiary of the originator and not more than 20% of its shares or membership may be owned or controlled by the originator. The majority of its board must consist of independent directors approved by the Capital Markets Authority. In the case of a common law incorporated trust, the trustee must be approved by the Capital Markets Authority and its function is limited to those required for the securitisation and ancillary matters.

7.3 Location and form of Securitisation Entities. Is it typical to establish the special purpose entity in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the special purpose entity in your jurisdiction? If offshore, where are special purpose entities typically located for securitisations in your jurisdiction? What are the forms that the special purpose entity would normally take in your jurisdiction and how would such entity usually be owned?

The special purpose vehicle is required to be established in Kenya if it seeks to make an offer to the public or to restricted investors. See question 7.2 above in relation to the forms of the entity, namely that it may either be a common law unincorporated trust, or a company limited by shares or guarantee.

Some of the incentives for locating the special purpose vehicle in Kenya are discussed in section 9 below.

7.4 Limited-Recourse Clause. Will a court in your jurisdiction 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?

It is likely that Kenyan courts will give effect to contractual provisions limiting the recourse of the parties to the available assets of the relevant debtor and that to the extent of any shortfall the debt of that debtor is extinguished. Where the agreement is governed by the law of another country, Kenyan courts would apply the relevant foreign governing law to determine whether the limited recourse provision was effective.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

7.5 Non-Petition Clause. Will a court in your jurisdiction 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?

Kenyan courts should generally give effect to a clause prohibiting a party from taking legal action or commencing insolvency proceedings against the purchaser or another person. Such a clause can be enforced by obtaining injunctive relief. Where the agreement is governed by the law of another country, Kenyan courts would apply the relevant foreign governing law to determine whether the non-petition provision was effective.

7.6 Priority of Payments "Waterfall". Will a court in your jurisdiction 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?

Generally, Kenyan courts should give effect to contractual provisions in respect of priorities of payments agreed to by the parties, except where to do so is contrary to applicable law or public policy. The CMA Policy Guidance Notes indicate that it in a securitisation transaction it is to be expected that there will be different priority ranking and subordination arrangements unlike in the case of a standard trading company. The relevant foreign governing law will be applied as discussed in questions 7.4 and 7.5 above.

7.7 Independent Director. Will a court in your jurisdiction 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?

In principle, the articles of association of a company or a contract entered into by a company may restrict the authority of its directors and a Kenyan court may give effect to such a provision, but a restriction on the ability of directors to bring insolvency proceedings may be invalid as it is inconsistent with certain statutory duties of directors.

7.8 Location of Purchaser. Is it typical to establish the purchaser in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the purchaser in your jurisdiction? If offshore, where are purchasers typically located for securitisations in your jurisdiction?

The CMA Policy Guidance Notes provide that the purchaser intending to make an offer to the public or to restricted investors must be established in Kenya. We have set out in section 9 some of the incentives that are available in Kenya.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, 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 your jurisdiction? Does the answer to the preceding question change if the purchaser does business with more than one seller in your jurisdiction?

The CMA Policy Guidance Notes provide that the purchaser must be a trust established with a trust deed subject to the laws of Kenya or a company incorporated in Kenya if it seeks to make an offer to the public or to restricted investors. However, there is no requirement for the purchaser to obtain any licence or be subject to regulation as a financial institution in Kenya. The answer does not change if the purchaser does business with more than one seller in Kenya.

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?

A servicer (whether the original or his replacement) does not require any licence or authorisation in order to enforce or collect the receivables following their sale or to appear in court.

8.3 Data Protection. Does your jurisdiction 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?

Kenya does not have a law specifically dealing with data protection, but its Constitution does grant every person a right to privacy and this includes the right not have information relating to their private affairs unnecessarily required or revealed or the privacy of their communications infringed. There are presently legislative proposals in the Kenyan Parliament for the enactment of a data protection law.

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 your jurisdiction? Briefly, what is required?

The Consumer Protection Act, 2012 contains key provisions relating to consumer agreements and loan agreements, but no regulations have been made under this Act and many of these provisions require to be implemented as prescribed in these regulations. There are restrictions on imposing default charges and on imposing fees for prepayments.

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

There are no exchange controls applicable in Kenya and foreign currency is freely transferable to persons outside Kenya.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

8.6 Risk Retention. Does your jurisdiction have laws or regulations relating to "risk retention"? How are securitisation transactions in your jurisdiction usually structured to satisfy those risk retention requirements?

The CMA Policy Guidance Notes do not impose a minimum risk retention requirement, but each securitisation transaction is required to disclose the level of risk retention and its implication to investors. In the circumstances, parties should have flexibility in how they structure a transaction.

8.7 Regulatory Developments. Have there been any regulatory developments in your jurisdiction which are likely to have a material impact on securitisation transactions in your jurisdiction?

The Capital Markets Authority has recommended proposals for the amendment of the Capital Markets Act and its regulations to better align them to the provisions of the CMA Policy Guidance Notes. Many provisions of the Consumer Protection Act, 2012 depend on matters yet to be prescribed in regulations and these may be issued in the near future.

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 your jurisdiction? 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? If withholding taxes might apply, what are the typical methods for eliminating or reducing withholding taxes?

The payment of withholding taxes in Kenya will depend on the nature of the receivables. Generally, trade receivables are not subject to withholding tax in Kenya unless they provide for payment of interest. The rate of withholding tax will depend on whether the recipient of the interest is resident or non-resident. The rate may be reduced where Kenya has a double tax treaty with the recipient's country. The sale of trade receivables at a discount will fall under the definition of interest under the Income Tax Act, Chapter 470 in Kenya and be subject to withholding tax. A deferred purchase price is not expected to be recharacterised as interest.

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

Kenyan tax law does not require a specific accounting policy to be adopted by the seller or purchaser in the context of a securitisation.

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

Stamp duty is imposed in Kenya on certain kinds of documents or transactions. The rate chargeable varies depending on the nature of the document or transaction, but there are also exemptions that apply. A transfer by way of assignment may attract nominal stamp duty whereas an assignment by way of security that is registered pursuant to the MPSRA is exempt from stamp duty. A previous general exemption from stamp duty on any instrument that is certified to be in connection with a securitisation approved by the Capital Markets Authority was repealed by the Finance Act, 2007.

9.4 Value Added Taxes. Does your jurisdiction 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?

Value Added Tax ("**VAT**") is chargeable on the supply of taxable good or services made or provided in Kenya. The general rate is currently 16%. The supply of certain services is exempt under the Value Added Tax Act, 2015 and these include an assignment of debt for consideration, and any asset transfer and other related transactions related to the transfer of assets into asset backed securities. In this context, the fees for collection agent services would be exempt and not subject to 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?

The Kenya Revenue Authority is empowered by the Tax Procedures Act, 2015 to collect unpaid tax from a third party who owes (or may later owe) or holds money on account of the defaulting tax payer.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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

The purchaser's tax liability will depend on where it is resident for tax purposes. Where it is resident in Kenya, the whole of the gains or profits from business carried on or exercised partly within and partly outside Kenya is deemed to have been accrued in or derived from Kenya and therefore liable to tax in Kenya, subject to relief by any applicable double tax treaties.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.4 above), is that debt relief liable to tax in your jurisdiction?

A bad debt is allowable for tax purposes if it satisfies the requirements of the Income Tax Guidelines on the Allowability of Debt, 2011. Conversely, and where the requirements in the Guidelines are satisfied, the debt relief received by a purchaser as a result of a limited recourse clause may be liable to tax in Kenya.

Sammy Ndolo

Kieti Advocates LLP
CVS Plaza, Lenana Road
P.O. Box 22602-00505
Nairobi
Kenya

Tel: +254 20 440 9918 / +254 73 108 6649
Email: sndolo@kieti.co.ke
URL: www.kieti.co.ke

Sammy is the managing partner of Kieti Advocates. He is an expert in structured finance, corporate law, capital markets, real estate finance and general finance matters.

He is recommended as a top lawyer in Kenya by international legal directories such as *The Legal 500* and *Chambers Global* and is ranked in the corporate/commercial and banking and finance categories. He has been recognised for leading Kenya's first successful solar securitisation deal and has been described as "very helpful in coming up with solutions to new types of transaction" and that he "gets everything, including the complexities" (*Chambers Global Guide*, 2017).

Sammy was previously a partner at Hamilton Harrison & Mathews and has also worked on secondment at Allen & Overy and Shell in London. He holds an LL.M. in International Corporate Governance and Financial Regulation from the University of Warwick, and an LL.B. from the University of Nairobi.

Kieti Advocates LLP is a leading boutique law firm in Nairobi, Kenya serving financial institutions, multinationals, international aid organisations, entrepreneurs and the government.

The firm has an established track record in advisory, transactional and disputes work centred on traditional and alternative finance, corporate law, capital markets, energy and natural resources, environment and climate change, projects and real estate. Kieti's banking and finance practice is among the firm's core practice areas.

Visit www.kieti.co.ke for more information.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com