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Securitisation 2007

A practical insight to cross-border Securitisation Law

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the debtor 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 historic relationships?

Generally speaking, receivable contracts may be entered into without any formal requirements. A written contract is, however, useful in order to prove the sale. An invoice may only be used as evidence that a sale contract was concluded.

A receivable contract cannot be deemed to exist as a result of historic relationships. Please note, however, that pursuant to the General Civil Code (*ABGB*), a contract may be concluded orally or even implicitly.

1.2 Consumer Protections. Do your country'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; or (c) provide other noteworthy rights to consumers with respect to receivables owing by them?

There is no specific provision of law regulating permissible rates of interest of consumer credits, loans or other kinds of receivables, providing that such interest rates are not contra *bona mores* (according to case law, interest rates of about 20% or more are regarded as being contra *bona mores*).

In case of late payments, the creditor is, under Austrian law, entitled to claim interest on late payments. If there has been no contractual agreement on the rate of interest for late payments, Austrian law provides a rate of 4% *p.a.*; for contracts between entrepreneurs where the contract constitutes a commercial transaction, the law provides for 8% above the base rate (which leads to an interest rate of 10.67% *p.a.* in the period of January to June 2007). Compound interest (4%) may be charged upon the filing of a claim.

Claims for payments against customers owing receivables may only be brought forward at the competent court for their residence and certain restrictions for general conditions of business apply with regard to customers.

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 of receivables?

Generally speaking, there is no such law. However, non-assignment clauses between government entities ("*juristische Personen des öffentlichen Rechts*"), including related entities, and enterprises seeking for government aid prohibit the assignment of receivables (sec. 1396a ABGB).

2 Choice of Law - Receivables Contracts

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

It is a general principle of conflict law that the parties to a receivable contract are permitted to choose the law governing the contract. However, if the governing law is not specified the law of the country to which there is the closest connection is applicable. In most of the cases this is the country of the debtor.

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

No, there is no reason.

2.3 Freedom to Choose Other Law. If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivables contract and the receivables?

It is a general principle of conflict law that the parties to a receivable contract are permitted to choose the law governing the contract. However, if the receivable contract is solely connected with one jurisdiction (considering in particular the identity of the parties and the place of performance), the mandatory provisions of Austrian law have to be applied to the contract, irrespective of the choice of law.

2.4 Seller Resident. If the seller is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Generally speaking the answer is yes. However, if the debtor is qualified as a consumer, the mandatory law of the country of the debtor may apply.

2.5 Debtor Resident. If the debtor is resident in your country, and the seller and the debtor choose the law of your country to govern their receivables contract, will a court in your country give effect to their choice of law?

Yes it will.

3 Choice of Law - Receivables Purchase Agreement

3.1 Freedom to Choose Other Law. If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, and the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement, will a court in your country give effect to their choice of law?

Yes. However, it should be noted that enforcement against the debtor is still subject to Austrian law (as agreed between the seller and debtor).

3.2 Other Advantages. Conversely, if another country's law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

The parties have freedom of manoeuvre insofar as the principles stated in questions 3.1 and 3.3 are concerned.

3.3 Effectiveness. In either of the cases described in questions 3.1 or 3.2, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; and/or (iii) whether the sale is effective and enforceable against the debtors?

Under Austrian law a distinction must be made between the contractual undertaking and the actual transfer *in rem*. Concerning the contractual choice of law relating to the sale, the abovementioned principles have to be considered (see question 3.1). In order to perfect the transfer of the right *in rem*, Austrian law has to be obeyed.

With regard to receivables, different rules apply to true sales and to creations of security interests:

(a) Due to the fact that a true sale of receivables is perfected by entering into a contract between the seller and purchaser and that the law does not require any specific perfection of the transfer (see question 4.1 below), the seller and purchaser may choose the governing law (see question 3.1 above). However, if the sale is perfected by transferring an instrument (e.g. a bill of exchange), this transfer is subject to Austrian law in respect of the right *in rem*.

(b) Creating security interests in accounts receivable is subject to a special perfection provision. Thus, Austrian law *in rem* applies to this perfection (see question 5.3 below).

4 Asset Sales

4.1 Sale Methods Generally. In your country what is (are) the customary method(s) for a seller to sell accounts receivables to a purchaser?

The only requirement for an effective sale and assignment of a receivable is a corresponding agreement between the seller and the purchaser. Such an agreement is not subject to a specific form. Further, it is not necessary to notify the debtor for the sale and transfer to be effective. However, before being notified of the assignment the debtor is entitled to pay its debt to the creditor who is known to him, with such payment discharging the debtor.

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

The assignment of receivables based on a purchase agreement requires no act of publicity ("*Publizitätsakt*"), e.g. the debtor's notification or annotation in the accounting ledgers, in order to be effective. However, prior to notification of the assignment, the assignee debtor is discharged of his liability if he performs to the assignor and may use any defences he enjoyed with respect to the seller. Before being notified, the debtor may set off receivables against any obligations of the seller to the debtor, and/or, unanimously with the seller, may amend the receivables contract (the seller would be liable to damages in this case). Once notified of the assignment, the debtor must perform to the assignee in order to be discharged of his liability.

If the seller sells the receivable several times, the purchaser for whom the sale has first been perfected acquires first rights, as the seller has then lost his right to the accounts receivable and thus cannot validly sell/assign them anymore. Acquisition in good faith is not possible (exceptions are provided for fictitious transactions, bills of exchanges and cheques). However, the debtor is protected if he has been notified of the second sale only, as in this case, payment to the assumed purchaser is deemed to be a discharge. Thus, the "real" purchaser is entitled to make a claim for unjust enrichment and damages against the assumed purchaser.

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

In Austria, debt certificates ("*Schuldscheine*") are sometimes used as instruments that are similar to promissory notes in other jurisdictions. Debt certificates, which evidence obligations resulting from a loan, are not securities. No additional requirements apply to the assignment of debt certificates, although in practice the purchaser requires the seller to hand these over in connection with an assignment of the related receivables.

Mortgage loans are the most frequent collateral in Austria. A mortgage is registered in the land register in order to secure the rank for the settlement of claims. Basically, there are two different types of mortgages: (i) a mortgage in the actual amount of the debt,

showing the applicable interest rate; and (ii) the usual maximum amount mortgage ("*Höchstbetragshypothek*"). In the case of the latter, only the maximum amount of the mortgage (regularly including certain anticipated amounts for interest and costs) is registered in the land register. Both mortgages are accessory, i.e. they cannot be transferred without the receivable that they secure. The transfer of a loan that is secured by a mortgage in the meaning of (i) above may be executed informally. A sale of a loan secured by a maximum amount mortgage, (ii) above, must be effected by a written, notarised purchase contract, which has to be accepted by the debtor, in order to be registered in the land register (5 Ob 189/03k).

Sec. 33 of the Banking Act provides for certain special regulations with regard to consumer loans which are in line with EU Directive 87/102/EEA. In particular, consumer loans have to be entered into in writing (violation of this obligation does not affect the validity of the contract but is an administrative offence).

Additional requirements relating to the sale of debt securities under Austrian law depend upon the type of securities involved. The transfer of bearer securities requires an agreement between the seller and the purchaser to transfer ownership and the delivery of the securities to the purchaser. Registered securities are transferred by way of assignment of the rights that they evidence. Instruments made out to order are transferred by way of agreement between the seller and the purchaser to transfer ownership, endorsement and delivery of the instrument to the purchaser.

4.4 Debtor Notification. Must the seller or the purchaser notify debtors of the sale of receivables in order for the sale to be an effective sale against the debtors?

The assignment of receivables based on a purchase agreement does not require the debtor's notification in order to be effective. However, prior to notification of the assignment, the assignee debtor is discharged of his liability if he performs to the assignor; see also question 4.2 above.

4.5 Debtor Consent. Must the seller or the purchaser obtain the debtors' consent to the sale of receivables in order for the sale to be an effective sale against the debtors? 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?

Under Austrian law a receivable can be freely sold and assigned if the underlying agreement includes no prohibition. Based on the "*Zessionsrechts-Änderungsgesetz*" which became effective as of 1 June 2005, a company may validly assign its receivables to a third party even if the underlying agreement between the company and its debtor contains a clause of non-assignment. The assigning company and the debtor must qualify as entrepreneurs as defined in the Austrian Consumer Protection Act, and the non-assignment clause between the assignor and the company is required to be made in relation to the parties' businesses ("*unternehmerisches Geschäft*"). Notwithstanding the validity of such assignment, non-assignment clauses in relation to money receivables between a creditor and debtor are only valid provided that they are individually negotiated and that they do not put the creditor at a gross disadvantage. If receivables subject to a non-assignment clause are assigned, the assignor - without prejudice to the validity of such assignment - may incur liability for damages. However, such damages may not be offset against the assigned receivables. Furthermore, the assignee will not be liable for damages solely on the basis that the assignee knew about the non-assignment clause.

4.6 Liability to Debtor. If the seller sells receivables to the purchaser even though the receivables contract expressly prohibits assignment, will the seller be liable to the debtor for breach of contract?

Yes. There might be claims for damages as well as withdrawal from contract.

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., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

Under Austrian law, the object of the purchase has to be "definable". Thus, it is sufficient e.g. to sell/assign all receivables of a financial year or of one customer. It is also possible to assign all existing and future receivables (general assignment). If not all, but only a specific receivable is to be sold, it is advantageous if it is defined by e.g. the debtor's name, or invoice number.

4.8 Economic Effects on Sale. 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 (c) control of collections of receivables without jeopardising perfection?

Generally speaking, none of these characteristics prevent the sale from being effective.

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?

Yes, see question 4.7 above.

4.10 Future Receivables. Can the seller commit in an enforceable manner (both prior to and after its insolvency) to sell receivables to the purchaser that come into existence after the date of the sale contract (as in a "future flow" securitisation)?

Under Austrian law, the object of the purchase has to be "definable". Thus, it is also possible to assign all existing and future receivables (general assignment). If not all, but only a specific receivable is to be sold, it is advantageous if it is defined by e.g. the debtor's name, or invoice number.

4.11 Related Security. What additional formalities must be fulfilled for the concurrent transfer of related security to be enforceable? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Each and every related security has to be transferred to the purchaser, e.g. the entry of mortgages in the ground register has to be updated, movables have to be transferred to the purchaser, personal securities have to be transferred.

5 Security Interests

5.1 Back-up Security. Is it customary in your country 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?

This has to be determined on a case by case basis.

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

See question 5.1 above.

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

In terms of a contract, an assignment agreement needs to be concluded. To perfect secured interests it is necessary to comply with the rules of publicity. These require the assignment to be annotated in the accounting ledgers in order to be recognised. According to the current view of the courts, such annotation must appear (1) in the respective customer account ("*Kundenkonto*"); as well as (2) on the list of open invoices ("*Offene-Posten-Liste*"). For future receivables the remark may be of a general nature but must be individualised after the origination of the receivable. The annotation should be entered into the books of the assignor, even if the receivables are no longer reflected in the seller's book. Therefore, it is advisable to request such annotation in order to cover the risk of a re-characterisation of the transaction by the courts. It is advisable for the purchaser to retain information and inspection rights in order to be able to check whether the remarks have been entered correctly.

If the deletion of the receivables from the seller's accounts is envisaged, under Austrian GAAP the sale must be structured as a non-recourse factoring; however, under US GAAP the seller must surrender control of the receivables in accordance with the requirements of FASB Statement No. 140.

5.4 Recognition. If the purchaser grants a security interest in the receivables under the laws of the purchaser's country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in your country?

As both a formal pledge and a security assignment constitute a transaction in rem, Austrian law applies to the perfection of such a security (see question 3.3 above). The requirements of Austrian law cannot be avoided by perfecting a pledge under the laws of another country.

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

See question 4.3 above.

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 country's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables ("automatic stay")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected?

Generally speaking there is no automatic stay, but the receiver of the bankrupt's estate may contest certain transactions (see question 6.2). With respect to receivables already acquired by the purchaser, however, there is no possibility for the receiver of the bankrupt's estate to terminate the purchase if the receivables already have full intrinsic value ("*volle Werthaltigkeit*") and the purchaser has already acquired them, or paid the full purchase price for them.

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

Austrian insolvency law distinguishes basically two kinds of insolvency proceedings: bankruptcy proceedings ("*Konkurs-verfahren*"), which generally lead to the winding-up of the bankrupt's estate; and settlement proceedings ("*Ausgleichs-verfahren*") which primarily aim at eliminating the debtor's debt relief while preserving his business. The following exposition applies to both sorts of insolvency proceedings save as expressly stated otherwise.

For the protection of the creditors, certain transactions entered into by the debtor during specified periods of time ("dangerous period") preceding the bankruptcy proceedings of the debtor can be declared null and void by court upon contestation by the receiver ("*Anfechtung*").

This is the case with respect to disadvantageous transactions ("*nachteiliges Rechtsgeschäft*"; sec. 31 para. 1 no. 2 2nd case of the Bankruptcy Code - *Konkursordnung; "KO"*) entered into six months preceding the insolvency proceeding but after the establishment of insolvency (or the filing for bankruptcy proceedings), when transactions were entered into with the intention of depriving the creditors of assets to which they would otherwise have been entitled for the settlement of their claims ("*Benachteiligungsabsicht*"; sec. 28 nos. 1 - 3 KO; the "dangerous period" varies between 2 and 10 years preceding the opening of bankruptcy proceedings, depending on the creditor) or to grant an unfair advantage to certain creditors ("*Begünstigung*"; sec. 30 KO). Such act is voidable if the creditor could not have claimed for this specific act ("*inkongruente Deckung*") or if the creditor knew or should have known about the intention of the debtor to give preference to the creditor or other creditors. The relevant period of time preceding the bankruptcy proceedings in the case of sec. 30 KO is one year, but the contested act has to have been taken after the establishment of insolvency (or the filing for bankruptcy proceedings; or 60 days prior to these dates).

Another reason based on which a receiver can contest a contract or any legal act (transaction) set by the insolvent party six months preceding the insolvency proceedings but after the establishment of insolvency (or the filing for bankruptcy proceedings) is if the other contractual party (a creditor) knew or "should have known" about

the insolvency (sec. 31 para. 1 no. 2 1st case KO).

Finally, elements granting the receiver a right to void transactions are the squandering of assets (sec. 28 no. 4 KO; "*Verschleuderung*") if the other party did know about the intention to defeat other creditors; transactions without remuneration; and similar transactions (sec. 29 KO).

The right of the receiver to contest certain transactions (including payment) of the debtor does not apply (except for reasons of disadvantageousness) to concurrent transactions, in the sense that the debtor performs against performance (cash upon delivery; "*Zug-um-Zug-Geschäft*"); in such cases the other party never becomes a "creditor".

In the following, only practical cases of contestation with regard to securitisation transactions are described in more detail.

(a) Disadvantageousness (sec. 31 para. 1 no. 2 2nd case KO)

Pursuant to Austrian insolvency law, a receiver may allege a claim to set aside transactions ("*Rechtsgeschäfte*") with third parties entered into (1) during a period of a maximum six months prior to the formal decision of the insolvency court to open insolvency proceedings ("dangerous period"; however, such period starts at the earliest with the respective debtor being actually illiquid or over-indebted, so that such period may be shorter than six months if the period between actual illiquidity or over-indebtedness and the opening of insolvency proceedings is shorter than six months); (2) which are disadvantageous for the other creditors; and (3) provided such third party knew or should have known that the debtor was illiquid ("*zahlungsunfähig*") or over-indebted ("*überschuldet*") or had filed for the initiation of insolvency proceedings at the time when the respective agreement was entered into.

According to the published cases decided by the Austrian Supreme Court ("*Oberster Gerichtshof*"), factoring agreements are deemed disadvantageous for the other creditors as a general rule. Due to the Master Receivables Purchase Agreement being comparable to a factoring agreement, it will most probably also be held to be disadvantageous. Based on the published cases decided by the Austrian Supreme Court, generally a claim to set aside may only be raised in respect of "*Verpflichtungsgeschäfte*" (agreements whereby parties assume certain obligations and undertake to perform them) but not in respect of "*Erfüllungsgeschäfte*" (acts whereby an already existing obligation is fulfilled; e.g. effecting payments or the assignment of receivables) (e.g.: OGH 20 May 1999, 2 Ob 114/99z). On this basis, it is only the Master Receivables Purchase Agreement which qualifies as "*Verpflichtungsgeschäft*" (and not the single assignments of receivables if under a global assignment agreement; note that assignment agreements under a framework agreement are each considered "*Verpflichtungsgeschäfte*") and may be subject to a claim to be set aside by a receiver if (1) any of the sellers is insolvent when the Master Receivables Purchase Agreement is entered into; (2) formal insolvency proceedings are opened within a six-month period following execution of the Master Receivables Purchase Agreement; and (3) the Master Purchaser knew or should have known that the respective seller was illiquid or over-indebted when entering into the Master Receivables Purchase Agreement.

However, in one single decision (OGH 9 July 1998, 2 Ob 2147/96s) the Austrian Supreme Court held that payments for receivables which have previously been sold under a global assignment agreement constitute "*Rechtsgeschäfte*", and are subject to a claim to be set aside. The view of the Austrian Supreme Court as set out above would have the practical effect that the assignment of purchased receivables in respect of which payment is effected (1) following the respective seller having actually become insolvent (illiquid or over-indebted); (2) when the purchaser knew or should have known about the insolvency at that time; and (3) within the "dangerous period" are - if the purchase agreement (and its performance) is considered a disadvantageous transaction - exposed to a claim to be set aside, leading to the obligation of the purchaser to pay (back) to the receiver all (contested) funds received.

(b) Knowledge / should have known about the insolvency (sec. 31 para. 1 no. 2 1st case KO)

To the extent that the purchaser of receivables becomes a creditor (i.e. cases other than concurrent transactions; the purchaser of receivables will only become a creditor of the seller if and to the extent that the purchase price is higher than the actual and real value of the purchased receivable, e.g. to the extent that the collected amount with respect to the respective receivable is lower than the respective deferred purchase price) of the seller, it will be an unsecured creditor in the bankruptcy of the seller. Any performance (including all sorts of legal acts - "*Rechtshandlungen*") or providing of security by the seller in respect of any respective claim of the purchaser may be subject to a claim by a receiver to set it aside, provided that such performance is made (1) following the seller having actually become insolvent; (2) within the "dangerous period" of up to six months (as described above); and (3) when the purchaser knew or should have known that the seller was illiquid or over-indebted at the time of performance.

Given the legal elements described above and to the extent that the purchaser becomes an unsecured creditor of the seller, a contestation by the receiver of any action (performance or granting security) by the seller (being the debtor) satisfying the purchaser would lead to the obligation of the purchaser to pay to the receiver all funds received and reimburse all (economic) advantages granted by the contested action (which aimed at either satisfying or granting security to the unsecured creditor, i.e. the purchaser).

As already mentioned, the right of the receiver to contest certain transactions (including payment) of the debtor does not apply to concurrent transactions in the sense that the debtor performs against performance ("*Zug-um-Zug-Geschäfte*"); in such cases the other party never becomes a "creditor". In its decision 6 Ob 17/02 x of 12 December 2002, however, the OGH held that a concurrent transaction requires a close timely context of performances. On this basis, it held that payments under a factoring arrangement are non-concurrent (whilst it confirmed the overall factoring arrangement as concurrent) and thus avoidable where, due to warranty claims, the purchaser has only received collections from assigned receivables but not made any advances to the seller over a period of several months.

(c) Preference (sec. 30 KO)

To the extent that the purchaser of receivables becomes a creditor of the seller (see above), the granting of security or performance (by any kind of act whatsoever) by the seller may also be subject to a claim by a receiver to set it aside (1) if such obligation is performed or security is granted to the creditor by the seller within the "dangerous period" of one year prior to the opening of insolvency proceedings but after becoming insolvent (illiquid or over-indebted), or after the filing for the initiation of insolvency proceedings, or 60 days prior to these events; (2a) if the seller by this action (performance or granting of security) intended to treat the purchaser in a preferential manner; and (3a) the purchaser knew or should have known about such intention; or (2b) if the performance could be considered an "*inkongruente Deckung*".

Given the legal elements described above and to the extent that the purchaser becomes an unsecured creditor of the seller, a contestation by the receiver of any action (performance or granting security) by the seller (being the debtor) satisfying the purchaser would lead to the duty of the purchaser to pay to the receiver all

funds received and reimburse all (economic) advantages granted by the contested action (which aimed at either satisfying or granting security to the unsecured creditor, i.e. the purchaser).

(d) Contestation in Settlement Proceedings

In settlement proceedings, on the other hand, the receiver's right to contest legal transactions is very limited: they may only be contested on the basis of intentional discrimination of creditors ("*Benachteiligungsabsicht*") or squandering of assets ("*Vermögensverschleuderung*"), as well as in the case of certain transactions without consideration.

6.3 Suspect Period. 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?

See question 6.2 above.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?

See question 6.2 above.

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?

Since RPAs are contracts which are deemed to not be fully performed with respect to both parties' obligations after the opening of bankruptcy proceedings ("*Konkurseröffnung*"), the receiver of the bankrupt's estate has a right to terminate the contract or to demand full performance according to sec. 21 of the Bankruptcy Code. The receiver's right of termination also applies if the purchaser has already acquired the receivable but the receivable does not yet have full intrinsic value (which may be the case if the seller has not yet fully performed its obligations under the customer relationship, e.g. because of a case of warranty, if applicable).

7 Special Rules

7.1 Securitisation Law. Does your country have laws specifically providing for securitisation transactions? If so, what are the basics?

In Austria there is no such specific law. It should be noted, however, that recent legislation clarified that special securitisation companies ("*Verbriefungsspezialgesellschaften*") do not pursue banking activities (see question 8.1 below).

7.2 Securitisation Entities. Does your country 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 of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

No, but see question 7.1 above.

7.3 Non-Recourse Clause. Will a court in your country 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?

Yes, as long as no consumers are involved.

7.4 Non-Petition Clause. Will a court in your country 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?

The predominant view is that such a provision is valid and enforceable under Austrian law, except to the extent that the relevant underlying claim is based upon the SPE's wilful misconduct or gross negligence.

Further, it has to be noted that the SPE's management is obliged by law to file for insolvency proceedings in the case of over-indebtedness and/or illiquidity. Failure to fulfil this obligation may lead to damage claims from the SPE against its management (see question 7.4 below).

7.5 Independent Director. Will a court in your country 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?

Vis-à-vis third parties such provisions would be deemed null and void. Internally, however, the company may claim damages from its director acting without the consent of the independent director.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your country, 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 license or its being subject to regulation as a financial institution in your country? Does the answer to the preceding question change if the purchaser does business with other sellers in your country?

The purchase of receivables and the assumption of the risk of realising such receivables on a commercial basis (i.e. factoring) is a banking activity ("*Bankgeschäft*") pursuant to the Austrian Banking Act. As such, factoring is subject to the banking and passport requirements set forth in Austrian banking law. Recent legislation clarified that special securitisation companies ("*Verbriefungsspezialgesellschaften*") - which are companies with the exclusive purpose of, *inter alia*, issuing bonds, taking out loans, and entering into security agreements in order to purchase receivables from another company's business operations - do not pursue banking activities. Therefore, no qualification or licence has to be obtained.

However, Austrian banking secrecy and data protection law have to be considered (see question 8.2).

8.2 Data Protection. Does your country have laws restricting the use or dissemination of data about or provided by debtors? If so, do these laws apply only to consumer debtors or also to enterprises?

Austria implemented the EU Data Protection Directive 95/36/EC with the Data Protection Act 2000 ("DPA"). The DPA governs the legitimacy of the use of personal data of data subjects, these being individuals, enterprises, government entities or other entities. The DPA only allows for the transfer of data *inter alia* if the affected individual has consented. Otherwise such a transfer is only admissible if the transferor's interests outweigh the data subject's non-disclosure interests. The latter is regularly the case with securitisation.

Further, although SPEs are not deemed to be banks, the provisions relating to Austrian banking secrecy apply to such SPEs to the same extent as in relation to credit institutions if it purchases bank loans. This implicitly means that Austrian banking secrecy provisions principally do not prohibit the assignment of receivables of credit institutions.

8.3 Consumer Protection. If the debtors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your country? Briefly, what is required?

Pursuant to the Austrian Consumer Protection Act, only the seller is responsible for compliance with consumer protection rules. Non-compliance may affect the validity of the receivable contract or the debtor may have a right to rescind from the contract. Thus, it is advisable for the purchaser to check whether the seller has been in compliance with these laws. In addition, it is customary for the seller to give the purchaser respective representations and warranties. Consumer protection laws become particularly relevant in respect of contracts that are based on the seller's general conditions of business.

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

Under Austrian law there are no such rules, save for (i) UN and/or EU restrictions of transactions with certain countries and/or persons; and (ii) notification requirements to the Austrian National Bank (*OeNB*) for statistical purposes. However, the Austrian National Bank is entitled to restrict the exchange of currencies and/or the making of payment in certain currencies in special situations with a decree or decisions (sec. 4 DevisenG).

9 Taxation

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

Payments on receivables (including interest payments) are generally not subject to withholding taxes in Austria. Depending on the nature of the receivables, there are certain exemptions to this general rule.

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

Austria has not adopted a specific accounting policy in the context of securitisation.

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

Austria imposes stamp duty tax on certain agreements executed in writing. Generally, the assignment of receivables is subject to 0.8% (1.5% in relation to up-front consideration clauses in favour of the assignor in factoring agreements) stamp duty calculated on the basis of the agreed consideration. However, Austrian legislators have recently amended applicable tax law provisions so as to exempt the assignment of receivables to securitisation companies ("*Verbriefungsspezialgesellschaften*"), as discussed in question 8.3. In the event that companies do not qualify as securitisation companies or that assignment transactions do not benefit from the above exemption for other reasons, parties may nevertheless avoid the imposition of stamp duty by properly drafting the assignment documents and/or - especially in case of international transactions - by keeping the documents outside of Austria.

9.4 Value Added Taxes. Does your country 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?

Austria generally imposes value added tax (VAT) at a rate of 20% on sales of goods and services. However, pursuant to sec. 6 para. 8 lit. c of the Value Added Tax Act (UStG), turnover with cash receivables and the placement of this turnover are exempt from VAT. It may also be that the assignment is exempt from VAT as it qualifies as a lending transaction under tax law. This exemption basically does not apply for the collection of receivables. However, when the seller continues to collect the receivables after the sale, as is typically the case in securitisation transactions, this may not be treated as a separate service to the purchaser, and thus no VAT is levied on these services.

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 against the purchaser or on the receivables or collections for the unpaid tax?

All parties to a transaction are liable for Austrian stamp duty, if applicable (see question 9.3 above). In contrast, only the seller (generally: the enterpriser who performs the service, delivers the goods, or who issued the invoice) may be liable for VAT, if applicable.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your country, 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 debtors, make it liable to tax in your country?

In general, the purchase of receivables would not make a purchaser that conducts no other business in Austria liable to tax in Austria (save stamp duty, if applicable).

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