



ICLG

The International Comparative Legal Guide to:

Securitisation 2018

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A practical cross-border insight into securitisation work

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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.

EDITORIAL

Welcome to the eleventh edition of *The International Comparative Legal Guide to: Securitisation*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of securitisation.

It is divided into two main sections:

Five general chapters. These chapters are designed to provide readers with an overview of key securitisation issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in securitisation laws and regulations in 27 jurisdictions.

All chapters are written by leading securitisation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Sanjev Warnakulasuriya of Latham & Watkins LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Receivables Contracts

- 1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a binding contract arise as a result of the behaviour of the parties?**

Under Luxembourg law (provided the parties have reached an agreement), it is not necessary that the parties enter into a written agreement to evidence the sales of goods or services. According to article 109 of the Luxembourg Commercial Code, any means of evidence (including invoices) are acceptable in respect of agreements between merchants (*commerçants*) and, depending on the specific circumstances, an agreement between parties may be evidenced by their behaviour. However, according to article 1341 of the Luxembourg Civil Code and the Grand-Ducal Regulation dated 22 December 1986 made pursuant to article 1341 of the Luxembourg Civil Code, a contract, unless entered into between merchants (*commerçants*), shall be evidenced in writing if the value of the contract exceeds the amount of EUR 2,500.

Further, article 1326 of the Luxembourg Civil Code provides that if the agreement creates an obligation to pay a sum of money or deliver a fungible asset to only one party, the agreement must bear the signature of the obligor (handwritten or electronic) and mention the relevant amount/quantity in full words.

- 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?**

Consumer credit. The interest rate may, in principle, be freely determined between the parties to a loan agreement and may exceed the legal interest rate. However, if the interest rate is manifestly usury, a Luxembourg court may reduce it to the applicable legal interest rate. If the borrower is a consumer, information must be provided regarding the effective annual global interest rate (*taux annuel effectif global*) and on the interest amount charged for each instalment.

Interest on late payment. In commercial transactions between professionals, article 5 of the Luxembourg Law dated 18 April 2004 relating to late payment and overdue amounts, as amended, sets a maximum limit calculated on the basis of the ECB's key interest rate (*taux directeur*) plus 8%, unless otherwise provided in the relevant agreement. In transactions between a professional and a consumer, the interest rate on late payments is determined by a grand-ducal regulation for each calendar year; for 2018 it is fixed at 2.25%.

Compounding of interest. Pursuant to article 1154 of the Luxembourg Civil Code, contractual compounding of interest is, in principle, only permitted with respect to interest due and payable for a period of at least one year and where parties have agreed in writing to such compounding.

Early repayment. Under article L. 224-17 of the Luxembourg Consumer Code (the **Consumer Code**), a consumer has the right to proceed to an early repayment of its debt, in full or in part, under a consumer loan agreement without penalties. The lender may not charge any additional amount for the remaining term of the loan (i.e., interests or costs). However, the lender is entitled to recover fair and objectively justified costs which are directly linked to the early repayment, provided that the early repayment has been made during a fixed-rate period.

Consumer's right of withdrawal. Under article L. 224-15 of the Luxembourg Consumer Code, a consumer has a right of withdrawal in connection with its entry into a consumer loan agreement with a professional without any justification and for a period of 14 calendar days calculated on the later of: (i) the day of entry into the loan agreement; or (ii) the receipt by the consumer of the terms and conditions and information (to be included in the loan agreement) of the loan agreement. Under article L. 221-3 of the Luxembourg Consumer Code, a similar right is granted to consumers in relation to a number of other agreements (i.e., distance financial services contracts).

Moratorium on consumers' debts. In relation to their personal debts, individuals may request assistance from *the Commission de Médiation en matière de surendettement* in Luxembourg, in accordance with the provisions of the law of 8 January 2013 concerning over-indebtedness, as amended. The admission of such request by the commission triggers an automatic stay of proceedings which may have been commenced against the applicant. The stay period can last up to six months and may result, among others, in a restructuring of the debts or a reduction of agreed interest rates.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

In general, there are no different requirements, which apply under Luxembourg law, if a receivables contract has been entered into with a public entity in Luxembourg provided that the public entity is carrying out a commercial transaction and is acting *jure gestionis*, i.e., the transaction is governed by private law as opposed to sovereign acts *jure imperii*, which are governed by public law.

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?

The provisions of Regulation (EC) No. 593/2008 of the European Parliament and Council dated 17 June 2008 on applicable law to contractual obligations (the **Rome I Regulation**), are directly applicable in Luxembourg. According to article 4 of the Rome I Regulation, where the seller and the obligor do not specify an express choice of law governing the receivables contract, the applicable law will be the law of the country which is (i) most closely connected to the situation, and (ii) typically the law of the country where the party to effect the characteristic performance of the contract has its residence, except when it results from the circumstances of the case that the contract is manifestly more closely connected with another country, in which case the law of that country shall apply.

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?

If (i) both the seller and the obligor have their seat in Luxembourg, (ii) the transfer of the receivables and their payment will occur in Luxembourg, and (iii) the seller and the obligor have chosen the law of Luxembourg to govern the receivables contract, the choice of the parties to have the receivables contract governed by Luxembourg law will be recognised and upheld by a Luxembourg court in accordance with the provisions of the Rome I Regulation.

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?

If either: (i) the seller has its seat in Luxembourg but not the obligor; or (ii) the obligor has its seat in Luxembourg but not the seller, and the parties choose the foreign law of the country in which either the obligor or the seller have their respective seat to govern the receivables contract, the choice of the parties to have the receivables contract governed by foreign law will be recognised and upheld by a Luxembourg court in accordance with the provisions of the Rome I Regulation, unless the application of the provisions of foreign law would be manifestly incompatible with Luxembourg public policy (*ordre public*) provisions as provided by article 3(3) of the Rome I Regulation.

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)?

In principle, Luxembourg law does not require the sale of receivables to be governed by the same law as the law governing the receivables given that, in accordance with the provisions of the Rome I Regulation, the parties are free to choose the governing law of the transfer agreement which will determine the relation between the assignor and the assignee. However, the law governing the receivables will, pursuant to article 14 of the Rome I Regulation, among others, determine: (i) the assignability of the receivables; (ii) the relationship between the assignee and the obligor; (iii) the conditions under which the assignment can be invoked against the obligor; and (iv) whether payment by the obligor shall have the effect of discharging the obligor's obligations.

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)?

A court in Luxembourg will recognise the sale of receivables as being effective against the seller, the obligor and other third parties (such as the creditors of the seller) provided that the sale of receivables is compliant with Luxembourg law. As per the effectiveness of such sale against insolvency administrators appointed with respect to the seller, it has to be highlighted that, under Luxembourg law, an insolvency administrator is not considered a third party and may, under certain circumstances, challenge the effectiveness of the sale of the receivables.

In the event that the receivables are sold by or to a Luxembourg securitisation vehicle governed by the Securitisation Law dated 22 March 2004, as amended (the **Securitisation Law**), pursuant to article 55 of the Securitisation Law, such sale will become effective between the parties and against third parties as from the moment the assignment is agreed on.

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?

Assuming the provisions of the Rome I Regulation are applicable, the sale of receivables is effective against the seller, the purchaser and the obligor. However, it is not clear, under the Rome I Regulation, which legal provisions determine the effectiveness of a transfer of receivables against third parties other than the obligor. Luxembourg conflict-of-law rules would generally point to the law of the country where the obligor is located and hence the formalities provided by the relevant foreign law for effectiveness against third parties would need to be analysed on a case-by-case basis.

If the receivables were assigned to a Luxembourg securitisation vehicle governed by the Securitisation Law, article 58 of that law provides that “*the law governing the assigned claim determines the assignability of such claim, the relationship between the assignee and the debtor, the conditions under which the assignment is effective against the debtor*”.

As per the effectiveness of such sale against insolvency administrators appointed with respect to the seller, please refer to the answer to question 3.2 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?

A court in Luxembourg will recognise the receivables purchase agreement as being effective against the seller – without the need to comply with Luxembourg's own sale requirements – assuming that the chosen applicable law to the receivables purchase agreement is compliant with the relevant provisions of the Rome I Regulation, unless the application of the provisions of foreign law would be manifestly incompatible with Luxembourg public policy (*ordre public*) provisions as provided by article 3(3) of the Rome I Regulation.

As per the effectiveness of the receivables purchase agreement against third parties and/or insolvency administrators, please refer to the answers to questions 3.2 and 3.3 above.

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?

With respect to the effectiveness of the receivables purchase agreement against the obligor, a Luxembourg court will recognise the receivables purchase agreement as being effective against the obligor pursuant to article 14(2) of the Rome I Regulation which provides that the “*law governing the assigned or subrogated claim determines the conditions under which the assignment can be invoked against the obligor*”.

With respect to the effectiveness of the receivables purchase agreement against third parties, a Luxembourg court will tend to designate the law of the country where the obligor has its seat (by application of Luxembourg conflict-of-law rules, which would generally point to the law of the country where the obligor is located). Hence, if the seat of the obligor is located in Luxembourg, the receivables purchase agreement will be effective and binding against third parties, if the obligor has been notified of the transfer of receivables in accordance with article 1690 of the Luxembourg Civil Code.

As per the effectiveness of the receivables purchase agreement against insolvency administrators, please refer to the answer to question 3.2 above.

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)?

If the obligor has its seat in a foreign country, please refer to the answer to question 3.4. If the obligor has its seat in Luxembourg, please refer to the answer to question 3.5.

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?

Under Luxembourg law, a receivable can be transferred by way of assignment, subrogation or novation.

All rights and obligations on the receivables may be assigned by a seller to a purchaser pursuant to articles 1689 *et seq.* of the Luxembourg Civil Code. The purchaser will therefore become the legal owner of the receivables so transferred. Such transfer of the receivable should be then notified to the obligor in accordance with article 1690 of the Luxembourg Civil Code.

Pursuant to articles 1249 *et seq.* of the Luxembourg Civil Code, receivables may also be transferred by way of contractual subrogation, i.e., a third party will pay to the original creditor the amount owed by the obligor and will then be subrogated to all rights and actions the original creditor could have exercised against the obligor prior to the payment by the third party.

Also, pursuant to articles 1271 *et seq.* of the Luxembourg Civil Code, receivables may be transferred by way of novation, i.e., all parties must consent that a new creditor will substitute the original creditor and assume its obligations under a new agreement made between the new creditor and the obligor.

It has to be noted that pursuant to article 1278 of the Luxembourg Civil Code, any security interests (such as privileges or mortgages), attached to a former (extinct) claim lapse by virtue of the novation unless the creditor has explicitly reserved them to subsist.

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 perfection of the sale of receivables by way of assignment requires the notification of the obligor pursuant to article 1690 of the Luxembourg Civil Code. Prior to the notification, and provided the obligor is not aware of the assignment, the obligor will be

discharged while making payments to the seller and the sale will not be enforceable against any subsequent purchasers provided that they are acting in good faith.

The formalities to be observed for perfection of a transfer of receivables by way of subrogation may vary depending on the context and should be analysed on the basis of the relevant facts. A notification to the debtor is, however, strongly recommended.

If the sale of receivables by way of assignment occurs as a transfer of title by way of security (*transfert de propriété à titre de garantie*) governed by the Law of 5 August 2005 on financial collateral arrangements, as amended (the **Law on Financial Collateral**), the assignment is perfected when the seller and purchaser have executed the transfer agreement. Hence, for perfection purposes, a notification of the transfer to the obligor is not required. However, provided the obligor is not aware of the assignment, the obligor will be discharged while making payments to the seller.

In the event that the purchaser is a securitisation vehicle, governed by the Securitisation Law, and provided both the seller and the obligor have their seat in Luxembourg, article 55 of the Securitisation Law provides that the assignment of the receivables is perfected, becoming effective between the parties and against third parties when the seller and purchaser have executed the transfer agreement, unless otherwise provided for in the relevant transfer agreement. Hence, for perfection purposes, a notification of the transfer to the obligor is not required. However, provided the obligor is not aware of the assignment, the obligor will be discharged while making payments to the seller.

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

Promissory notes and bills of exchange. Promissory notes (*billets à ordre*) and bills of exchange (*lettre de change*) are commercial papers (*effets de commerce*), the transfers of which are regulated by the law of 8 January 1962 relating to promissory notes and bills of exchange, as amended. Pursuant to articles 11 *et seq.* of that law, promissory notes are transferred through endorsement (*endossement*) by means of physical delivery.

Consumer loans. Pursuant to article L. 224-18 of the Consumer Code, the assignment of a consumer loan to a third party must be notified to the contracting consumer, except where the original lender, by agreement with the assignee, continues to service the credit *vis-à-vis* the consumer. Consequently, in the first scenario, if the assignment has not been notified to the consumer, all payments made by the consumer towards the original lender are valid, as the original lender remains the sole financial counterparty of the consumer and not the purchaser.

Mortgage loans. Mortgages over real estate and other assets must be (i) formalised in a notarial deed passed in the presence of two notaries or one notary and two witnesses following article 2127 of the Luxembourg Civil Code and (ii) registered with the appropriate mortgage register. There are no specific provisions under Luxembourg law dealing with the perfection requirements applying to the transfer of mortgage as accessory. However, following the general rule provided by article 1692 of the Luxembourg Civil Code which applies to accessory security in Luxembourg, the transfer of receivables includes the transfer of its accessory rights such as a mortgage. Therefore, by transferring the mortgage loan to the transferee, the mortgage will, by operation of law, automatically be transferred to the transferee and hence, no specific provisions under Luxembourg law require the assignment of the mortgage to

be registered in the mortgage register, to be enforceable against third parties. Registration of the mortgage may thus be done at any time before the mortgage lapses or is enforced. Pursuant to article 2154 of the Luxembourg Civil Code, the registration of the mortgage is valid and enforceable against third parties for 10 years and renewable for unlimited 10-year periods, provided that the underlying loan for which the mortgage was created is not extinguished and the 10-year term has not expired. In the absence of such renewal in due time, the security will no longer be enforceable and the secured creditor will lose its preferential rank over such immovable property.

Marketable debt securities. According to the provisions of the law of 10 August 1915 on commercial companies, as amended, the transfer of debt securities in bearer form is effected by the means of physical delivery from the transferor to the transferee without any further formalities, whereas the transfer of the debt securities in registered form must be recorded in the relevant register and be notified to the obligor in accordance with article 1690 of the Luxembourg Civil Code. The transfer of registered debt securities held on an account within the system of a securities depository will be carried out by matching instructions from the transferor and the transferee to the securities depository pursuant to which the securities depository will transfer the purchase price to the account of the transferor and the debt securities to the account of the transferee.

Debt securities may also be issued in dematerialised form and are transferred by book-entry transfer between the relevant securities accounts.

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?

As set out above, the sale of receivables must, in principle, be notified by the seller or the purchaser to the obligor in order to be perfected. In any case, if the obligor is not aware of the assignment, the obligor will be discharged while making payments to the seller. The obligor's consent to the assignment is not required provided that the agreement does not contain a clause preventing the seller from transferring the receivables. If the seller, despite such a clause in the agreement, assigns the receivables to the purchaser, the purchaser is, from a Luxembourg law perspective, likely not to be bound by this clause except if the purchaser has accepted the terms of the agreement.

If the purchaser of the receivables is a securitisation vehicle governed by the Securitisation Law and the agreement between the seller and the obligor prevents an assignment of the receivables, following article 57 of the Securitisation Law, the assignment will not be enforceable against the assigned obligor, unless (i) the obligor has agreed thereto, (ii) the assignee legitimately ignored such non-compliance, or (iii) the assignment relates to a monetary claim (*créance de somme d'argent*).

Provided that the conditions for a set-off under articles 1289 *et seq.* of the Luxembourg Civil Code are satisfied at the time of the perfection of the assignment, the obligor may set off its debt against obligations owed by the seller to the obligor even after a notification of the assignment.

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 are no particular rules applying to the form of notice and the manner in which the notice is delivered to the obligor. Pursuant to article 1129 of the Luxembourg Civil Code, only receivables that are determined or determinable at the time of the sale can be the subject of an assignment, hence the notice can extend to future receivables provided the future receivables are determined or determinable.

In principle, the notice can be delivered to the obligor after the sale of the receivables and after insolvency proceedings have been commenced against the seller. However, the notification of the sale to the obligor after insolvency proceedings have been commenced against the seller would not be binding against third parties, including the insolvency administrator appointed in respect of the seller.

If the purchaser of the receivables is a securitisation vehicle, then article 55 (2) of the Securitisation Law, which provides that “a future receivable can be assigned to a securitisation undertaking provided that it can be identified as being part of the assignment at the time it comes into existence or at any other time agreed between the parties”, will be applicable to such a case.

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 assessment of the above depends on the governing law, the specific content and the purpose of the agreement made between the seller and the obligor and must therefore be analysed on a case-by-case basis. Among others, it needs to be analysed whether the purchaser of the receivables will replace the seller in the contractual relationship with the obligor as a consequence of the assignment.

Depending on the type of contract and the main contractual obligations agreed between the parties, a restriction on assignment as regards the agreement as a whole could, from a purely Luxembourg law perspective, not necessarily be construed as requiring the consent of the obligor with respect to the transfer of receivables by the seller to the purchaser provided the receivables could qualify as specific rights and obligations, which are separate from the agreement as a whole.

Conversely, a restriction on assignment as regards the rights and obligations under the agreement would, from a purely Luxembourg law perspective, generally be construed as prohibiting a transfer

of receivables from the seller to the purchaser given that the rights and obligations deriving from the receivables qualify as rights and obligations under the agreement.

If a restriction on assignment refers to the sole obligations of a seller, it is not likely to request for the obligor's consent in the event of an assignment of rights.

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?

As regards the enforceability of clauses in an agreement restricting the assignment of receivables, please see the answer to question 4.4 above. Provided the obligor has suffered damages, the seller and the purchaser (if the purchaser is not acting in good faith) could, in principle, be held liable for breach of contract or tort.

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 transfer agreement does not need to specifically identify each of the receivables. However, the assigned receivables must be determined or determinable at the time of the sale.

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?

In principle, a Luxembourg court will consider the economic characteristics of an agreement, the common interest of the parties and not rely *per se* on the denomination of the transaction given by the parties.

Unless a Luxembourg court, based on the factual elements of a transaction, takes the view that it was the intention of the parties to

transfer the receivables for security purposes rather than to achieve a true sale and despite the seller retaining (i) the credit risk, (ii) the interest risk, (iii) the control of collections of receivables, or (iv) a repurchase/redemption right in relation to the receivables, it is unlikely that a Luxembourg court would, provided the sale of receivables has been duly perfected, recharacterise the transaction as a secured loan, even though this has not yet been tested in court.

Pursuant to article 56 (1) of the Securitisation Law, a claim assigned to a securitisation vehicle becomes part of its property as from the date on which the assignment becomes effective, notwithstanding (i) any undertaking by the securitisation vehicle to reassign the claim at a later date, and (ii) that the assignment can be recharacterised on grounds relating to the existence of such undertaking. Furthermore, the securitisation vehicle may entrust the assignor or a third party with the collection of receivables or with any other task relating to their management pursuant to article 59 of the Securitisation Law.

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?

The seller may agree to a continuous sale of receivables provided the receivables are determined or determinable. It is, however, recommended to notify such sale to the obligors for enforceability purposes.

As per the effectiveness of the sale of receivables following the seller's insolvency, please refer to the answers to questions 6.1 and 6.3 below.

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?

In principle, a sale of future receivables is possible under Luxembourg law provided the future receivables are determined or determinable and that the sale has been notified to the obligor(s).

The Securitisation Law (under article 55 paragraphs (2) and (3)) expressly allows the assignment of future receivables and a securitisation vehicle can assert the assignment against third parties from the time of the agreement with the seller on the effective assignment of future receivables, which applies notwithstanding the opening of insolvency proceedings against the seller prior to the date on which the receivables come into existence.

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?

The assignment of the receivables triggers, from a Luxembourg law perspective, the transfer of all rights and obligations incidental to the assigned receivables in favour of the purchaser. Thus, all accessory security interests (provided they are governed by

Luxembourg law) securing the obligations under the assigned receivables are transferred, by operation of the law, to the purchaser and are enforceable by the purchaser against third parties.

The Securitisation Law (under article 56 paragraph (2)) explicitly provides that (i) the assignment of receivables entails the transfer of the guarantees and security interests securing such receivables, and (ii) no further formalities are requested under Luxembourg law in this respect.

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?

Legal set-off arises automatically and by operation of law where there are reciprocal claims between the parties, which are certain, due and payable. Provided the receivables contract does not contain a waiver as regards the set-off rights of the obligor against the seller, the notification of the transfer of receivables by the seller to the obligor does not trigger the termination of the obligor's set-off rights. As a result, provided the conditions for a legal set-off are satisfied at the time of the perfection of the assignment, the obligor may set off its debt against obligations owed by the seller to the obligor even after a notification of the assignment.

Provided that: (i) the conditions for a set-off were not satisfied at the time of the perfection of the assignment (i.e., the scenario set out in the previous paragraph does not occur and the notification of the transfer of receivables by the seller terminates the obligor's set-off rights); (ii) the receivables contract does not contain a waiver as regards the set-off rights of the obligor against the seller; and (iii) the obligor has suffered damages, the seller and the purchaser (if the purchaser is not acting in good faith) could, in principle, be held liable for breach of contract or tort.

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

In principle, Luxembourg law-governed securitisation vehicles do not generate profits due to their passive nature given that all income deriving from the underlying assets will be paid to the investors holding the securities or, as the case may be, to the shareholder(s) of the securitisation vehicle or the originator of the underlying assets.

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)?

Given that, in general, it can be ascertained that the sale of receivables has been perfected, it is not customary from a Luxembourg law perspective to take a back-up security over the seller's ownership interest in the receivables. However, the taking of additional security is, of course, possible.

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?

Please see the answers to questions 5.1 and 5.3.

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 Law on Financial Collateral typically governs agreements creating security interests over receivables.

In practice, security interests over receivables are either created by a pledge agreement or by a transfer of title by way of security agreement, each governed by the provisions of the Law on Financial Collateral.

To perfect a pledge over receivables the purchaser acting as pledgor must be dispossessed with respect of the pledged assets, which can typically and automatically be achieved by the conclusion of the pledge over receivables agreement between the purchaser acting as pledgor and the pledgee. When executed by the purchaser and the secured parties, the pledge over receivables has been perfected against the debtor and third parties. However, the obligor of the receivables will be discharged while making payments to the purchaser unless the obligor has been notified of the pledge over receivables to the secured parties.

With respect to a transfer of title by way of security, the purchaser transfers the ownership in relation to the receivables to the secured parties until the secured obligations have been discharged, triggering the obligation of the secured parties to retransfer the receivables to the purchaser. When executed by the purchaser and the secured parties, the transfer agreement has been perfected. However, the obligor of the receivables will be discharged while making payments to the purchaser unless the obligor has been notified of the transfer of the title of the receivables to the secured parties.

A securitisation vehicle may only create security interests over its assets for the purpose of securing the obligations it has assumed for their securitisation or in favour of its investors or the trustee or fiduciary-representative acting for the investors.

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?

The creation, perfection and enforcement of a security interest over receivables, which are, or are deemed to be, located in Luxembourg, are, pursuant to applicable Luxembourg conflict-of-law rules, governed by Luxembourg law.

Hence, even if the security interest over Luxembourg receivables were to be validly created and perfected pursuant to the applicable law of the country, where the purchaser has its seat, said security interest will, from a Luxembourg conflict-of-law perspective, only be validly created, perfected and enforceable, if the applicable Luxembourg rules are complied with.

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?

Security interests over claims arising under insurance policies, mortgage loans or consumer loans are granted either in the form of a pledge or a transfer of title by way of security and insofar, as regards their perfection, the answer to question 5.3 is applicable.

A security interest over a promissory note is perfected by way of endorsement indicating that the security has been transferred for security purposes.

A security interest over debt securities in bearer form is perfected by the physical delivery of the debt securities to the pledgee or, as the case may be, depositary acting for the pledgee. A security interest over debt securities in registered form is perfected by inscription of the pledge in the register held with the issuer of the debt securities. A security interest over debt securities held in an account within the system of a securities depositary is perfected by, among others: (i) the entry into the pledge agreement made between the pledgor, the pledgee and the securities depositary or between the pledgor and the pledgee with notification to the securities depositary provided the latter will follow the pledgee's instructions relating to the debt securities; (ii) the registration of the debt securities in an account opened in the name of the pledgee; or (iii) the indication in the books of the securities depositary that the debt securities are pledged provided the debt securities are held in an account opened in the name of the pledgor.

A transfer of title by way of security in relation to registered debt securities is perfected by (i) the transfer of the debt securities to an account opened in the name of the transferee, or (if the debt securities are held in an account opened in the name of the transferor (book-entry securities)) (ii) the indication in the books of the account bank that legal title to the debt securities has been transferred to the transferee.

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?

Pursuant to the law of 27 July 2003 on trusts and fiduciary agreements, as amended (the **Fiduciary Law**) foreign trusts are recognised in Luxembourg to the extent that they are authorised by the law of the jurisdiction in which they are created.

Furthermore, according to the Fiduciary Law, a Luxembourg fiduciary may enter into a fiduciary agreement with a fiduciant, pursuant to which the fiduciary becomes the owner of a certain pool of assets forming the fiduciary estate, which are, even in an insolvency scenario, segregated from the assets of the fiduciary and held off-balance.

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?

Luxembourg law recognises the mechanism of escrow accounts, although this mechanism does not constitute a security *stricto sensu* and is not covered by the Law on Financial Collateral.

Security interests may be created over the balance standing to the credit of a specific bank account, which typically take the form of a pledge governed by the Law on Financial Collateral.

If, pursuant to Luxembourg conflict-of-law rules, an account is located, or would be deemed to be located, in Luxembourg, the relevant Luxembourg provisions will apply regarding the creation, perfection and enforceability of a security interest over such account. Hence, if the foreign law would not provide for the same rules, a Luxembourg court will not recognise the foreign law security interest over a Luxembourg account and would apply the relevant Luxembourg rules as regards the creation, perfection and enforceability of a security interest over an account located in Luxembourg.

Fiduciary mechanisms can also be used for the purpose of an escrow arrangement.

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?

If a pledge has been granted on a bank account, upon the occurrence of the agreed event of default, the secured party would enforce the account pledge. As a result, the account's bank would block the pledged account and the pledgor would have no further access to the account. Hence, the pledgee controls, upon the occurrence of an event of default, the pledged account (unless the parties have agreed on a different mechanism in the pledge agreement regarding access to the account after an event of default has occurred) until the secured obligations have been fully discharged. Following the discharge of the secured obligations, the pledgee has the obligation to unblock the account and to release the pledge.

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?

Pursuant to the provisions of the Law on Financial Collateral, the owner of the account (typically the pledger) may have access to the funds in the pledged account until enforcement of the pledge, without affecting the security.

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?

Provided the sale of the receivables cannot be challenged by the insolvency administrator appointed with respect to the seller, i.e., (i) the sale of receivables has been perfected in connection with applicable law, (ii) the sale has not been executed during the pre-bankruptcy suspect period, which is a period of six months and 10 days preceding the opening of insolvency proceedings against the seller, or (iii) the receivables were not transferred under value, there will be no stay of action preventing the purchaser from collecting, transferring or otherwise exercising ownership rights with respect to the receivables.

In addition, the transfer of receivables, provided that provisions of the Law on Financial Collateral are applicable to such transfer, may only be set aside in case of manifest fraud.

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 administrator could prohibit the purchaser's exercise of rights by way of summary proceedings while challenging the validity of the transfer or the perfection of the transfer of the receivables.

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?

As stated in the answer to question 6.1 above, the insolvency administrator could challenge the validity of the transfer of receivables, if the transfer was executed during the pre-bankruptcy

suspect period, which is a period of six months and 10 days preceding the opening of insolvency proceedings against the seller.

As regards the length of the pre-bankruptcy suspect period, there is no difference with respect to transactions carried out between related or unrelated parties. However, if the activities and assets of the seller and the purchaser are commingled and hence could be seen as one common estate, the insolvency administrator may, depending on the factual circumstances, extend to the purchaser insolvency proceedings which were initially commenced against the seller.

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?

In principle, and subject to what is stated in the answer to question 6.3 above, the insolvency administrator could not, in the context of an insolvency scenario, consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates.

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?

Provided the provisions of the Securitisation Law are applicable, a securitisation vehicle can assert the assignment of future receivables against third parties from the time of the agreement with the seller on the effective assignment of future receivables, which applies notwithstanding the opening of insolvency proceedings against the seller prior to the date on which the receivables come into existence.

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

There is only little published case law and legal literature as regards limited recourse provisions under Luxembourg law. As a consequence, Luxembourg law would tend to turn to Belgian legal doctrine and case law, which we understand admit, in principle, the validity and enforceability of limited recourse provisions provided the *pari passu* treatment of creditors is not violated and the limited recourse provisions are not designed to unfairly impair the rights of certain creditors to the detriment of one or more creditors.

Provided that the contractual limited recourse provisions in the documentation, to which the debtor and the creditor are a party, are effective and lawful under Luxembourg law (when the debtor is a securitisation undertaking under the Securitisation Law or a fiduciary within the meaning of the Fiduciary Law), the creditor should, from a Luxembourg law perspective, not have an interest to act (*intérêt à agir*) against the securitisation undertaking or the fiduciary beyond the available pool of assets to which its recourse is limited and, depending on the contractual mechanism embedded

in the documentation, its claim should be extinguished once the relevant assets have been realised. As a result, the creditor should not be in a position to file a valid petition for bankruptcy against the securitisation undertaking or the fiduciary with the competent Luxembourg court on the basis of the balance of the outstanding debt, where the assets of the securitisation undertaking or the fiduciary prove to be insufficient to fully satisfy the claim of the creditor.

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?

The Securitisation Law established a particular legal framework for securitisation transactions in Luxembourg.

In accordance with the Securitisation Law, a securitisation is a transaction by which a securitisation vehicle (i) acquires or assumes, directly or through another vehicle, risks relating to claims, other assets, or obligations assumed by third parties, and (ii) issues securities, whose value or yield depends on such risks.

Under the Securitisation Law, almost all classes of assets are capable of being securitised.

The securitisation may be completed either (i) on a true sale basis, whereas the securitisation vehicle will acquire full legal title in relation to the underlying assets, or (ii) by the synthetic transfer of the risk pertaining to the underlying assets through the use of derivative instruments. To finance the transfer of risk, the securitisation vehicle must issue negotiable securities, i.e., equity or debt instruments, which can be freely transferred by assignment or physical delivery and which are subscribed by the investors. With the issue proceeds derived from the securities' issue, the securitisation vehicle will acquire the risks pertaining to the underlying assets.

As per the regulatory authority responsible for regulating securitisation transactions in Luxembourg, please see the answer to question 7.2 below.

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 Securitisation Law allows for two types of securitisation entities, which may be set up in the form of a company or a fund.

A securitisation fund does not have legal personality, is managed by a management company and consists of one or more co-ownerships (*copropriétés*) or one or more fiduciary estates. The management regulations expressly specify whether the fund is subject to the provisions of the Luxembourg Civil Code on co-ownership or the rules on trusts and fiduciary contracts set out in the Fiduciary Law, which allow for the legal separation of the fiduciary assets from the trustee's assets.

It should be noted that, in practice, securitisation funds are not often used and, in most cases, the securitisation vehicle is incorporated in accordance with the general provisions of the Luxembourg law dated 10 August 1915 on commercial companies, as amended, whereas the articles of incorporation of the securitisation vehicle are expressly made subject to the provisions of the Securitisation Law.

A securitisation company can be set up as a public limited liability company (*société anonyme*), a corporate partnership limited by shares (*société en commandite par actions*), a private limited liability company (*société à responsabilité limitée*) or a co-operative company organised as a public limited company (*société coopérative organisée comme une société anonyme*).

Luxembourg securitisation vehicles are, in principle, unregulated entities not subject to any authorisation or prudential supervision by the Luxembourg financial sector regulator (the CSSF) unless they issue securities to the public on a continuous basis. In such a case their activity must be authorised by the CSSF prior to the first issue of securities. However, the securitisation vehicle may be exempt from the requirement to be licensed by the CSSF provided it does not issue more than three series of securities per year to the public or the denomination of the securities is at least EUR 125,000.

If a securitisation vehicle is a regulated entity, the CSSF must (i) approve the directors of the vehicle and hence the directors will need to evidence a certain track record and experience within the field of securitisation and (ii) examine whether its direct or indirect shareholders are in a position to exercise a significant influence over the conduct of the business of such securitisation vehicle, are of sufficiently good repute and have the experience or means required for the performance of their duties.

As of 18 April 2018, 33 securitisation vehicles are registered on the official list of authorised securitisation vehicles held and published by the CSSF and hence subject to the supervision of the CSSF.

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?

Establishment of special purpose vehicles in Luxembourg and advantages to locating the special purpose entity in Luxembourg: Luxembourg is a well-known jurisdiction for the establishment of securitisation vehicles which can benefit from the provisions of the Securitisation Law and the favourable tax regime applicable to securitisation vehicles in Luxembourg. However, the special purpose vehicle's shares are usually held by an offshore company for tax and insolvency remoteness reasons.

Typical forms of the special purpose entities: Luxembourg securitisation vehicles are often set-up as a public limited liability company (*société anonyme*) or a private limited liability company (*société à responsabilité limitée*).

Ownership of the special purpose entities: Luxembourg special purpose vehicles are usually owned by orphan entities for tax and insolvency remoteness purposes, such as a Dutch *Stichting* (being a special type of Dutch trust foundation controlled by a board of directors). Such orphan entities are mainly used in order to isolate the obligations of the special purpose vehicle from those of the originator.

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?

Under the Securitisation Law, contractual limited recourse clauses are recognised (even if the relevant agreement or the terms and conditions of the notes are not governed by Luxembourg law) and will be upheld by Luxembourg courts. In addition, the Securitisation Law provides for a statutory ring-fencing mechanism, which can be established by the creation of compartments within the securitisation vehicle. The securitisation vehicle may allocate assets and liabilities to a specific compartment and the creditors and investors of that specific compartment have no recourse to assets, which are allocated to other compartments of the securitisation vehicle, i.e., each compartment forms a separate estate and the assets of which are segregated from those allocated to other compartments of the securitisation vehicle. The constitutional documents of the securitisation vehicle and the transaction documents entered into in relation to a specific securitisation transaction should always contain the appropriate limited recourse wording.

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?

Under the Securitisation Law non-petition clauses are recognised (even if the relevant agreement or the terms and conditions of the notes are not governed by Luxembourg law) and will be upheld by Luxembourg courts. Hence, investors or creditors of the securitisation vehicle may waive their right to submit a petition for the commencement of insolvency proceedings against the securitisation vehicle.

The constitutional documents of the securitisation vehicle and the transaction documents entered into in relation to a specific securitisation transaction should always contain the appropriate non-petition wording.

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?

Under the Securitisation Law, subordination clauses are recognised (even if the relevant agreement or the terms and conditions of the notes are not governed by Luxembourg law) and will be upheld by Luxembourg courts. The constitutional documents of the securitisation vehicle and the transaction documents entered into in relation to a specific securitisation transaction should always contain the appropriate subordination wording.

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?

The enforceability of contractual provisions prohibiting the directors from taking specified actions (including commencing insolvency proceedings) without the affirmative vote of an independent director could be problematic from a Luxembourg perspective given that, in certain circumstances, the directors may have the legal obligation to make a filing for insolvency. However, the relevant articles of incorporation could provide that certain actions can only be validly taken with the affirmative vote of the independent director. The relevance of such a clause may be less important in the Luxembourg context, since a Luxembourg securitisation vehicle should be insolvency-remote.

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?

Luxembourg is a well-known jurisdiction for the establishment of securitisation vehicles which can benefit from the provisions of the Securitisation Law. As per the advantages to locating the securitisation vehicle in Luxembourg, please refer to the answer to question 7.3 above.

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 purchaser will not be required to obtain a business licence in Luxembourg or an authorisation from the CSSF approving its activity in connection with the provisions of the Luxembourg law dated 5 April 1993 on the financial sector, as amended (the **Financial Sector Law**), only because the purchaser will purchase or collect receivables from one or more sellers having their seat in Luxembourg or enforce, as the case may be, the receivables in Luxembourg acquired from them.

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?

Assuming that provisions of Luxembourg law apply to the seller, a debt collection activity carried out in Luxembourg requires, in

principle, the prior authorisation of the CSSF pursuant to article 28-3 of the Financial Sector Law. However, a securitisation vehicle may entrust the seller or a third party with the collection of receivables pursuant to article 60 of the Securitisation Law. In such a scenario, the seller or the third party, acting as a servicer, does not need to apply for a CSSF licence under the Financial Sector Law.

In a true sale transaction, the purchaser or, as the case may be, its representative will appear in court with respect to any litigation in connection with the receivables given that the purchaser is the legal owner of the receivables.

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?

The Law of 2 August 2002 on the protection of persons with regard to the processing of personal data, as amended, (the **Data Protection Law**), implementing the Directive 95/46/EC on the protection of individuals (the **Data Protection Directive**), establishes standards for the collection and processing of personal data, which restrict, among others, the use and dissemination of data about, or provided by, obligors to third parties and to entities having their seat in non-EU Member States. The person, whose data will be processed, has a right of information, a right to access the data, and a right to oppose any processing or communication of that data. The Data Protection Law only covers the collection and processing of personal data in relation to individual consumers.

The Data Protection Law and the Data Protection Directive will be replaced by the Regulation (EU) No. 2016/679 on the protection of natural persons with regard to the processing of personal data (the **GDPR**) and by a new Luxembourg law yet to be passed, as from 25 May 2018. On 12 September 2017, a draft bill of the law complementing the GDPR was submitted to the Luxembourg Chamber of Deputies.

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 Luxembourg Consumer Code provides rules that are binding on the purchaser of receivables arising under a consumer credit contract. In general, notification with respect to the transfer of the receivables to the obligor should be made by the seller (article L. 224-18 (2) of the Luxembourg Consumer Code). However, a notification is not required if the seller continues to service the credit *vis-à-vis* the consumer. Further, pursuant to article L. 224-18 (1) of the Luxembourg Consumer Code, the consumer retains the right to raise all defences and exceptions against the purchaser, which it could have raised against the seller prior to the perfection of the transfer of the receivables.

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?

Luxembourg does not have currency or exchange controls or central bank approval requirements restricting payments to entities located outside Luxembourg.

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 Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms (the **CRR Regulation**), which has been directly applicable since 1 January 2014 and the Law of 15 July 2015 transposing, among others, the Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (the **CRD Law**), apply to Luxembourg securitisation transactions (within the meaning of "securitisation" therein). The CRR Regulation and the CRD Law provide that credit institutions when acting in a particular capacity, such as originator, sponsor or lender, and also when investing in securitisation transactions, shall be exposed to the credit risk of the securitisation position in their trading book or non-trading book and must explicitly disclose that they will retain, on an ongoing basis, a material net economic interest measured at the origination which, in any event, shall not be less than 5 % of the nominal value of the securitisation position.

In addition, the Regulation (EU) 2017/2402 on simple, transparent and standardised securitisation (the **STS Regulation**), which will apply from 1 January 2019, will also require that the originator, sponsor or original lender of a "securitisation" (as defined therein) shall retain, on an ongoing basis, a material net economic interest in the securitisation transaction of no less than 5%. However, there shall be no multiple applications of the retention requirements for any given securitisation.

The risk retention requirements of the CRD Law/CRR Regulation and the STS Regulation are typically satisfied by having the originator, sponsor or original lender hold at least 5% of the outstanding principal balance of each class of securities (vertical slice) or 5% of the fair value of all the issued securities (horizontal slice).

Further, the European Banking Authority guidelines EB/GL/2015/20 (the **EBA Guidelines**), to be read in conjunction with the CSSF Circular No. 16/647, on limits on exposure to shadow banking entities that carry out bank-like activities outside a regulated framework (and developed in accordance with article 395(2) of the CRR Regulation), apply to all institutions subject to part four (Large Exposures) of the CRR Regulation which shall comply with the aggregate exposure limits or tighter individual limits set on exposures to shadow banking entities carrying out banking activities outside a regulated framework (including special-purpose vehicles engaged in securitisation transactions).

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?

PRIIPs Regulation

Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products (the **PRIIPs Regulation**) entered into force on 29 December 2014 and took effect on 1 January 2018. The PRIIPs Regulation requires that all packaged retail and insurance-based investment products (the **PRIIPs**) manufacturers provide a key information document (the **KID**) to retail investors in order to enable retail investors to understand and compare the key features and risks of the PRIIPs. Structured securities, e.g., mortgage backed securities (**MBS**) or

asset backed securities (ABS), including financial instruments issued by special purpose vehicles, fall under the scope of the definition of PRIIPs. Hence as from 1 January 2018, any securitisation vehicle which issues debt securities falling under the scope of the PRIIPs Regulation must provide its potential retail investors with a KID according to the standard laid down in the PRIIPs Regulation.

The Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing the PRIIPs Regulation lays down regulatory technical standards with regard to the presentation, content, review and revision of KIDs and the conditions for fulfilling the requirement to provide such documents, and applies as of 1 January 2018.

On 25 October 2017, a draft bill implementing the PRIIPs Regulation and modifying the amended Luxembourg Law of 17 December 2010 on undertaking for collective investment and the amended Luxembourg Law of 7 December 2015 on the insurance sector, was deposited with the Luxembourg Chamber of Deputies. The draft bill designates the CSSF and the *Commissariat aux Assurances (CAA)* as the competent supervisory authorities regarding supervision and compliance with the requirements of the PRIIPs Regulation.

The application of the PRIIPs Regulation to Luxembourg securitisation vehicles should be analysed on a case-by-case basis considering that most Luxembourg securitisation vehicles are unregulated entities, not subject to any authorisation or prudential supervision by the CSSF, and issue debt securities to institutional and professional investors rather than to retail investors.

STS Regulation

On 28 December 2017, the STS Regulation was published in the Official Journal of the European Union. The STS Regulation lays down a general framework for securitisation, defines securitisation and establishes due diligence, risk-retention and transparency requirements for parties involved in securitisations, criteria for credit granting, requirements for selling securitisations to retail clients, a ban on re-securitisation, requirements for securitisation vehicles as well as conditions and procedures for securitisation repositories. It also creates a specific framework for simple, transparent and standardised (STS) securitisation.

The STS Regulation came into force on 17 January 2018 and will apply, subject to transitional provisions, from 1 January 2019.

The Securitisation Law which outlines the legal framework for securitisation in the broad sense is bound to be amended in the near future in order to comply with the requirements of the STS Regulation as Member States retain discretion as to whether and how to apply certain provisions contained in the STS Regulation. No draft bill has been submitted to the Chamber of Deputies in this respect yet.

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?

As a matter of principle, there is no withholding tax in Luxembourg on payments of all items of income from capital other than dividends. In particular, Luxembourg does not apply any withholding tax on interest paid by one of its residents to a Luxembourg non-resident (unless such interest is not at arm's length or paid under a profit participating bond/security). The withholding tax exemption also covers dividend payments made by securitisation companies or funds on shares.

By way of exception, an individual beneficial owner of interest or similar income made or ascribed by a paying agent (in the sense of the law of 23 December 2005, as amended, the **Relibi Law**) established in Luxembourg to an individual beneficial owner who is a resident of Luxembourg, will be subject to a withholding tax of currently 20%. Such a withholding tax will be in full discharge of income tax if the beneficial owner is an individual acting in the course of the management of his/her private wealth (the **20% Withholding Tax**). Responsibility for the withholding of such tax will be assumed by the Luxembourg paying agent.

An individual beneficial owner of interest or similar income, who is a resident of Luxembourg and acts in the course of the management of his/her private wealth, may opt for a final 20% Withholding Tax when he/she receives or is deemed to receive such interest or similar income from a paying agent established in an EU Member State (other than Luxembourg) or in a state of the European Economic Area (which is not an EU Member State).

Unless the terms of a sale of trade receivables could be considered abusive, there is no reason to recharacterise a discount or a deferred purchase price as interest. However, it should be noted that a repayment above the discounted price would be fully taxable unless such sale at a discount would be structured in a tax-efficient way.

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?

Luxembourg has no specific accounting policy for tax purposes in the context of securitisation insofar as the Luxembourg tax law usually follows the accounting rules applicable in Luxembourg as per the law of 10 August 1915 on commercial companies, as

amended and the law of 19 December 2002 on the Luxembourg trade and companies register as well as accountancy and companies annual accounts, as amended (the **2002 Law**).

The Luxembourg accounting rules will vary according to the legal form adopted by the seller or purchaser.

With regard to securitisation vehicles, the form may either be that of a securitisation company or that of a securitisation fund. In both cases, the accounts of a securitisation company must be audited by an independent auditor. If the securitisation vehicle issues securities to the public on a continuous basis, both the securitisation vehicle and the independent auditor must be authorised by the CSSF.

A securitisation company is subject to the accounting rules under the 2002 Law, whereas a securitisation fund is subject to accounting and tax regulations applicable to investment funds provided for by the law of 17 December 2010 relating to undertakings for collective investments, as amended. Thus, the securitisation company may choose between Luxembourg generally accepted accounting principles (the **GAAP**) under the historical cost convention, Luxembourg GAAP under the fair value convention, or international financial reporting standards (the **IFRS**), while the securitisation fund may choose IFRS or Luxembourg GAAP under mark-to-market convention unless otherwise stated in the management regulations.

Crucially, the CSSF has confirmed that securitisation companies with multiple compartments should present their financial statements in such a form that the financial data for each compartment is clearly stated.

In addition, waterfall structures and valuation methods used to identify impairments or losses related thereto should be presented in the notes to be appended to the relevant financial statements.

Finally, a securitisation vehicle may book additional liability (at least tax-wise) to compensate “technical profit”, i.e., profit linked to cash flows received by the securitisation vehicle which will be distributed to the shareholders of the securitisation company or the unit holders of the securitisation fund in later financial years, in order to provide a true and fair view of the financial situation and to avoid unwarranted taxation.

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

According to article 52 § 1 of the Securitisation Law, all agreements entered into in the context of a securitisation transaction, as well as all other deeds relating to such transaction, are exempt from registration formalities if they do not have the effect of transferring rights pertaining to Luxembourg real estate, aircraft or ships. However, they may be presented for registration, in which case they will be subject to a fixed charge of EUR 12.

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?

A securitisation vehicle should be considered as a taxable person according to Circular No. 723 issued by the Luxembourg Value Added Tax Administration (*Administration de l'enregistrement et des domaines*). Should the purchaser be considered as a taxable person in Luxembourg, the sale of goods or services would generally be subject to a value added tax (VAT) at rates typically lower than those of Luxembourg's neighbours (14% and 17%). However,

transactions (except those related to collection of receivables) and negotiations related to receivables as well as management of securitisation vehicles located in Luxembourg are exempt from VAT.

The concept of “management” of securitisation vehicles is quite vague. In addition to the management of the portfolio (by the securitisation company itself, a management company or fiduciary representative), most administrative services should benefit from the VAT exemption.

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 purchaser is jointly and severally liable for the payment of VAT on goods and services sold to it (including relevant fines) toward the country where the VAT is due except if the purchaser proves that it has, in good faith, paid the VAT to the supplier.

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?

With regard to the tax to be withheld by the purchaser, the rules detailed above in answer to question 9.1 are applicable. As the investors are treated like bondholders with no direct profit participation, no withholding tax should be applicable unless the payments of the purchaser fall under the scope of the Relibi Law.

Regarding net wealth tax, since 1 January 2016, securitisation vehicles have been subject to a minimum net wealth tax in Luxembourg (contingent to their balance sheet of either a fixed amount of EUR 4,815 or to a progressive rate between EUR 535 and EUR 32,100).

Regarding corporate income tax and municipal business tax, the tax treatment depends on the corporate form of the purchaser.

A. Securitisation vehicle organised as a corporate entity

A securitisation vehicle organised as a corporate entity with either its statutory seat or central administration in Luxembourg, is fully liable to corporate income and municipal business taxes at an aggregate tax rate of 26.01% (irrespective of the vehicle's activity and possible appointment of a servicer or collection agent). However, in this case, commitments made by the purchaser to remunerate its investors qualify as interest on debt (even if paid as return on equity) and are fully tax deductible. Hence, the purchaser's taxable basis should, as a rule, be very limited if not nil.

The purchaser should, nevertheless, be subject to a minimum net wealth tax. Should the purchaser be identified as a *Soparfi* (i.e., a corporation that has aggregate financial assets, securities and bank deposits exceeding 90% of its balance sheet total and an amount of EUR 350,000) it should be subject to a EUR 4,815 minimum net wealth tax (including solidarity surcharge).

Moreover, no capital duty applies on incorporation of the corporate form (except for a fixed registration duty of EUR 75).

Ultimately, securitisation companies may obtain tax residency certificates from the Luxembourg tax authorities to fully benefit from the European directives and Luxembourg's important tax treaty network.

B. Securitisation funds

Securitisation funds should arguably be considered tax-wise as investment funds transparent for Luxembourg tax purposes. Hence, they are not liable to corporate income tax and municipal business tax.

Finally, both the fiduciary representative and the management company of a securitisation fund with their statutory seat or central administration (or even permanent establishment) in Luxembourg should be subject to corporate income tax, municipal business tax and net wealth tax in Luxembourg. They may also be subject to VAT (please refer to the answer

of question 9.4 above). The fiduciary representative must, in addition, pay a registration tax of EUR 1,000 and an annual registration tax of EUR 1,000 to the CSSF.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.3 above), is that debt relief liable to tax in your jurisdiction?

In general, a debt relief should be a taxable item in Luxembourg.

However, in case the purchaser is a securitisation company, taxable profits should be very limited or neutralised completely at the level of a securitisation company given the fact that commitments assumed *vis-à-vis* the investors and any other creditor by a securitisation company, are considered fully tax-deductible business expenses.



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