Luxembourg

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1 Receivables Contracts

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

It is in principle not necessary to have a contractual arrangement documented in written form for validity purposes.

A written document will generally be necessary to prove the content of such contractual arrangement. Article 109 of the Luxembourg Commercial Code (the "Commercial Code") provides that any contract for sale and purchase of goods or services concluded between merchants can be evidenced by any means.

For contracts concluded between non-merchants for an amount exceeding EUR 2,500, 1341 of the Luxembourg Civil Code ("Civil Code") expressly requires written evidence.

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

1.2 Consumer Protections. Do Luxembourg'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?

(a) Interest rate

Parties to a loan agreement may freely agree on the interest rate, which may either be the legal interest or the rate agreed between parties. Contractual interest rates must be determined in writing and may exceed legal interest unless specifically prohibited by law.

Free determination of the interest rate by the parties is authorised, but requires the professional to inform the consumer, prior to entering into the agreement, of the applicable rate(s) and all costs or potential changes related to such rate(s).

There are no specific provisions concerning a maximum interest rate but under general principles of law usurious interest is prohibited.

(b) Interest on late payments

Article 5 of the Luxembourg law of 18 April 2004 on late payments and overdue amounts, as amended, provides that in contracts between professionals, the interest rate on late payments is calculated on the basis of the ECB's key interest rate plus 8%, unless otherwise provided in the contract.

In contracts between a professional and a consumer, the interest rate on late payments is fixed by a grand-ducal regulation at the beginning of each calendar year taking into account the rates applied by the banks in ordinary transactions. For 2015 such interest rate is fixed at 3%.

(c) Consumer's right to withdrawal

Article L 221-3 of the Consumer Code provides that the consumer has a right of withdrawal of any contract concluded with a professional during 14 days. Such right must be exercised in writing, without any need for justification.

Article L 224-15 thereof grants a withdrawal right for consumer credit agreements within a period of 14 days starting either the day of the conclusion of the contract, or on the day the consumer receives the terms and conditions of the contract if those are transmitted to the consumer after the entering into of the contract.

(d) Other noteworthy rights applicable to consumer credit

The Consumer Code provides for various specific rights which may be important in this respect, such as early repayment rights. In addition, the law of 8 January 2013 on over indebtedness (*surendettement*) applies.

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?

The Luxembourg supreme court (*Cour de Cassation*) has by a judgment of 28 April 1914 distinguished between the acts of a sovereign made *jure imperii* (i.e. appertaining to sovereign activity) and those made *jure gestionis* (i.e. appertaining to commercial activities). Provided receivables contracts are entered into *jure gestionis*, which should generally be the case, the same requirements and laws would apply to such contracts.

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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 Luxembourg that will determine the governing law of the contract?

Article 4 of the Regulation (EC) n°593/2008 of the European Parliament and Council dated 17 June 2008 on applicable law to contractual obligations ("Rome I") will determine the governing law of an agreement absent of any express choice of law by the parties.

A receivables agreement will be governed by the law of the country where the party having to effect the "characteristic performance" of the contract has its habitual residence, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, which then will govern the contract.

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

The general principle expressed in article 3 of Rome I is that "*a contract shall be governed by the law chosen by the parties*". Considering in addition that all elements of the transaction are linked to Luxembourg, there is no reason why such choice of law would not be upheld by a Luxembourg court.

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

The parties will be free to choose the governing law of such receivables contract in accordance with and subject to the provisions of Rome I and notably the general principle referred to in its article 3 (see question 2.2).

Article 3 (3) of Rome I, however, states that "*the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement*" (i.e the Luxembourg judge will therefore appreciate any potential manifest conflict with public policy provisions and mandatory principles in force in Luxembourg when applying the foreign law chosen by the parties).

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

Yes. Luxembourg ratified the United Nations Convention on the International sale of Goods (CISG) on 30 January 1997 (entered into force on 1 February 1998).

3 Choice of Law – Receivables Purchase Agreement

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

The sale of receivables need not be governed by the law governing the receivables themselves.

Article 14 of Rome I considers that two applicable laws may be determined. Article 14 provides that the law applicable to the receivable shall also "*determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged*".

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

Provided the agreement complies with Luxembourg law (and the formalities required thereunder), such agreement will be recognised as valid.

Article 55 of the law of 22 March 2004 on securitisation ("Securitization Law") provides that from a Luxembourg perspective "*the assignment of an existing claim to or by a securitization undertaking becomes effective between the parties and against third parties as from the moment the assignment is agreed on* (…)".

Regarding effectiveness *vis-à-vis* an insolvency administrator, it should be noted that the insolvency administrator will act on behalf of the insolvent company under the supervision of the court and, in this respect, he will not be considered as a third party. The insolvency administrator, depending on the circumstances, may however challenge the effectiveness of the sale of receivables (see the answers to questions 6.1 and 6.2 below).

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside Luxembourg, will a court in Luxembourg 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?

Vis-à-vis a Luxembourg seller, a receivables purchase agreement governed by Luxembourg law will be effective provided it complies with Luxembourg law (including *inter alia*, notification requirements).

Regarding effectiveness *vis-à-vis* third parties, it should be noted that Rome I only provides that the law of the assigned claim shall govern *inter alia* the conditions under which the assignment or subrogation can be invoked against the debtor.

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If the sale of receivables occurs within the framework of the Securitization Law, article 58 thereof specifically states 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 and whether the debtor's obligations have been validly discharged. The law of the State in which the assignor is located governs the conditions under which the assignment is effective against third parties*". This solution replicates that of the United Nations Convention on the Assignment of Receivables in International Trade.

When the sale of claims is outside the scope of the Securitization Law, there is some uncertainty concerning the applicable rules towards third parties, other than the debtor, where it will need to be considered on a case-by-case basis which rules may apply. Certain decisions tend to apply the law of the debtor (and in which case a notification in accordance with article 1690 of the Civil Code to the debtor will be necessary), while others apply the law applicable to the receivable. In any case it will be advisable to proceed to such notification as until such notification occurs the obligor can validly pay the seller.

Regarding the insolvency administrator, we refer to our response given under question 3.2.

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

Vis-à-vis the Luxembourg seller, the receivables purchase agreement of which the governing law has been chosen in accordance with Rome I, will be recognised subject to (i) the conditions set out in Rome I, (ii) the validity of the choice under such governing law, and (iii) not being contrary to public order in Luxembourg.

Regarding the effectiveness towards third parties or an insolvency administrator we refer to questions 3.3 and 3.2 above.

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

Pursuant to article 14(2) of Rome I, the conditions under which the assignment or subrogation can be invoked against the debtor depend on the law governing the assigned or subrogated claim.

Towards any other third parties (in which case Rome I is silent) please see question 3.3. Regarding the effectiveness against any insolvency administrator, please see question 3.2.

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

The law governing the receivables purchase agreement including its effectiveness against the parties is the law chosen by the parties. In the present case, the law of the purchaser's country would apply to the contract. Therefore, a Luxembourg court will apply the provisions of the foreign law and recognise the sale as being effective against the seller if it complies with the requirements of such foreign law.

If, in accordance with article 3 (3) of Rome I, a Luxembourg court considers that the relevant elements of the contract are located in Luxembourg, the court may still decide not to recognise the sale as effective against the seller, if such recognition would manifestly be contrary to the Luxembourg public order and mandatory provisions of law.

Regarding the effectiveness against the obligor and third parties, here a notification in accordance with article 1690 to the debtor should occur (see question 3.3).

4 Asset Sales

4.1 Sale Methods Generally. In Luxembourg 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 may be transferred by either an assignment, a novation or a subrogation.

An assignment of receivables constitutes a transfer of all rights and obligations on the receivables from the seller to the purchaser, the latter becoming the owner of the receivables (Article 1689 *et seq.* of the Civil Code).

A novation of receivables is the situation where, by the effect of a new undertaking, a new creditor is substituted for the old one, towards whom the debtor is discharged (Article 1271 *et seq.* of the Civil Code).

A contractual subrogation of receivables is the situation whereby the seller subrogates the purchaser in his rights and other actions against the debtor up to the amount paid. Such subrogation must be express and made at the same time as the payment (Article 1249 *et seq.* of the Civil Code).

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

In case of an assignment of receivables, the debtor will need to be notified (article 1690 of the Civil Code). As long as such

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notification does not occur, the debtor will be considered lawfully discharged from any payment made to the assignor/seller (article 1691 of the Civil Code) and the sale will not be enforceable against any subsequent purchasers, if they act in good faith.

The formalities in case 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.

Article 55 of the Securitization Law provides that the assignment of an existing claim to a securitisation undertaking becomes effective between the parties and against third parties when parties agree on the assignment, unless the contrary is provided in such agreement. An assignment to a securitisation undertaking also entails its enforceability against third parties by operation of law, without any further formalities.

However, the obligor will be validly discharged from all payments made by him to the seller as long as it has not been informed of the assignment.

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?

a) Promissory notes

The transfer of promissory notes (*billet à ordre*) is organised by the Luxembourg law of 15 December 1962 on bills of exchange and promissory notes, as amended, which provides that any transfer of promissory notes will be perfected through endorsement and physical delivery of the promissory notes.

b) Mortgage loans

When a mortgage is constituted it must be recorded by a notarial deed and registered in the appropriate mortgage register.

The transfer of a mortgage loan implies the transfer of the mortgage itself as an ancillary right connected to the loan. Article 1692 of the Civil Code provides that the transfer of any receivables include the transfer of any rights ancillary thereto (e.g. mortgage).

However, no specific provisions in the Civil Code require the assignment of the mortgage to be registered in the mortgage register to be enforceable against third parties. Registration may thus be done at any time before the mortgage lapses or is enforced. Mortgage registrations are limited in time and must be renewed before the 10th year following registration.

Enforcement of the mortgage will, however, require to be inscribed as beneficiary of the mortgage in the relevant public registers and hence adequate steps in this sense should be accomplished.

(c) Consumer loans

Please see the answer to question 8.4.

(d) Marketable debt securities

A transfer of debt securities in registered form will be perfected by means of a declaration of transfer entered in the relevant register, dated and signed by the transferor and the transferee or by any duly authorised person, and notified to third parties in accordance with article 1690 of the Civil Code or by a transfer or the register into the name of the purchaser.

A transfer of debt securities in bearer form will be effective against third parties by means of physical delivery between parties, without any additional formalities. Indeed, the new Luxembourg law of 28 July 2014 regarding immobilisation of bearer shares and units and the keeping of the register of registered shares and the register of bearer shares only applies to equity and not to debt securities.

The Luxembourg law of 1 August 2001 on the circulation of securities and other fungible instruments governs the transfer of debt securities in registered form or in bearer form held on accounts within the system of a central securities depositary.

A transfer of debt securities in dematerialised form will be perfected by a 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?

In order for the sale of receivables to be effective against the obligors and/or creditors of the seller, the transfer has to be notified to the obligor.

This notification does not amount to an obligation to obtain the obligor's consent to the sale of receivables. However, an existing contract between the seller and the obligor may, as the case may be, contain a clause preventing the seller from selling the receivables without the consent of the obligor.

Concerning the obligor's right to set-off, please refer to question 4.13 below.

Concerning the assignment to a securitisation vehicle subject to the Securitization Law, please refer to question 4.2.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings against the obligor or the seller have commenced? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

Notification may be made by bailiff or a private deed. If the latter, registered mail with acknowledgment of receipt is recommended as evidence that the notification has been made.

Concerning the moment of delivery of such notice, Luxembourg laws do not provide for specific requirements. The notice will usually be delivered just after or at the same time as the occurrence of the sale itself, but it could be delivered later. Luxembourg laws do not provide any time limit for the delivery of the notice, but as long as no notice has been delivered to the obligor, the assignment will not be effective against him or any other third parties, including creditors in a bankruptcy of the seller.

A notice will cover all the receivables subject to the relevant assignment. Pursuant to article 1129 of the Civil Code, only receivables that are determined or determinable at the time of the sale can be the subject of an assignment. Therefore, the notice will not apply to future receivables not yet determined or determinable at the time of the assignment.

Pursuant to article 55 (2) of the Securitization Law, 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.

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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)?

If Luxembourg law applies to the receivables contract, the above needs to be determined on a case-by-case basis in light of the agreement. As a matter of principle a restriction would be binding, but the precise scope may be subject to discussions and different interpretations. In order to assess the assignability of the agreement or parts thereof and the required consent from the obligor, one will need to determine the common intent of the parties.

If a restriction or transferability only refers to obligations of a seller, it is difficult to argue that an assignment of rights requires the obligor's consent.

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

See the answer to question 4.6 regarding enforceability of the restrictions mentioned under such point.

Regarding the enforceability of a strict restriction to assign the receivables or "seller's rights" under the receivables contract, it will be recognised and enforced against those parties that agreed to it.

Pursuant to article 57 of the Securitization Law, contractual restrictions on transferability of a receivable will not prevent assignment to a securitisation vehicle if (i) the debtor has agreed thereto, (ii) the securitisation undertaking was not aware of the restrictions or is not supposed to have known them, or (iii) the receivable is a cash receivable.

If, despite a valid restriction in the receivables contract, the seller sells receivables to the purchaser, the seller may incur liability for damages for breach of contract or in tort. The purchaser will only be liable to the obligor if at the time of the transfer he knew about the restriction and intentionally made the seller breach the contract.

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?

It is not required to specifically identify each of the receivables in the sale document by a specific reference. However in order to be validly sold, the receivables must be either determined or determinable at the time of the sale.

4.9 Respect for Intent of Parties; Economic Effects on Sale. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; or (d) a right of repurchase/redemption without jeopardising perfection?

Article 1156 of the Civil Code requires that when analysing an agreement the common intent of the parties is prevailing over the literal meaning of the terms used by the parties.

A court may requalify, if circumstances so warrant, the relevant agreement. However, a transfer would, in our view, also either be a "normal" transfer or a transfer for security purposes.

An assignment is normally valid even if the assignor has guaranteed the payment by the debtor or assumed other risks.

If the transaction is governed by the Securitization Law, receivables validly assigned to a securitisation undertaking become part of its assets, "*notwithstanding any undertaking by the securitisation undertaking to reassign the claim at a later date. The assignment cannot be recharacterised on grounds relating to the existence of such an undertaking*" (article 56 (1)).

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?

A continuous sale of receivables is possible subject to compliance with certain conditions. The receivables should be determined or determinable and it is advisable to comply with the debtor notification requirement.

Regarding the case of seller's insolvency, please refer to questions 6.1 and 6.3.

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

A sale of future receivables is as such possible if the transaction is known and such future receivables are determined or determinable. Within the framework of the Securitization Law this is specifically provided for in article 55 paragraphs (2) and (3).

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 transfer of any receivables includes the transfer of all ancillary rights (i.e. mortgage, guarantee, and lien).

Article 56(2) of the Securitization Law confirms that the transfer to a securitisation undertaking of assets includes, the transfer of relevant guarantees and collateral.

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 as when the conditions, i.e. reciprocal debts between the same parties which have matured, are met.

In case of a transfer of receivables article 1295 of the Civil Code provides that the obligor may exercise its right to set-off if (i) the obligor had a receivable towards the seller that existed prior to such transfer, and (ii) the respective receivable of the obligor against the seller matures before, or at the same time, as the seller's receivable. .

A notification to the obligor regarding the sale of receivables will not terminate his right to set-off under such conditions.

5 Security Issues

5.1 Back-up Security. Is it customary in Luxembourg 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?

It is not customary in Luxembourg to take a "back-up" security interest in such a context, but it is of course possible.

It should, however, be noted that a transfer will either be an ordinary transfer or a transfer for security purposes. Therefore the back-up should not be necessary. Please see question 5.3.

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 Luxembourg, and for such security interest to be perfected?

See the answers to question 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 Luxembourg to grant and perfect a security interest in purchased receivables governed by the laws of Luxembourg and the related security?

There is a possibility to record a general pledge on business assets, which will comprise receivables, but which offers fewer rights than a pledge under the law of 5 August 2005 on financial collateral arrangements, as amended, (the "Collateral Law"). The pledge on business assets needs to be registered with the mortgage registry. For the purpose of this contribution, it is for the reasons set out above of minor interest.

Normally the Collateral Law governs the security over receivables. The security agreement (which can be a pledge or a transfer for security purposes) must be in writing and allow the identification of the collateral to which such agreement applies.

In the context of a pledge over receivables, the dispossession will be perfected against the obligor and any third parties by the sole conclusion of the pledge. However, as long as the obligor has no knowledge of the pledge, the obligor may validly be discharged from any obligations by making any payments to the pledger. Hence, it is customary to notify the obligor of the pledge.

Similarly, a transfer of receivables for security purposes takes effect between the parties and becomes enforceable against third parties at the time of the agreement. However, the obligor of an assigned receivable may validly be discharged from any obligations performed to the benefit of the transferor as long as the obligor has no knowledge of the transfer.

Certain restrictions apply to securitisation vehicles when granting security. Indeed pursuant to article 61 (3) of the Securitization Law, the securitisation undertaking may only create security interests (i) in order to secure the obligations contracted to realise the securitisation, (ii) in favour of its investors, (iii) in favour of the fiduciary-representative (if any), or (iv) in favour of the issuing vehicle participating in the securitisation. Any others security interests and guarantees granted in breach of the above mentioned will be void by operation of law.

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

If Luxembourg law governs the receivables, it also governs, among others, the validity of any assignment of such receivables including the creation of a security interest.

If the purchaser grants a security interest over receivables governed by Luxembourg law, even if that security interest is perfected under the laws of the purchaser's country, the security interest granted over the receivables will have to comply with Luxembourg law in order to be perfected in Luxembourg (see question 5.3).

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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 are insurance policies, mortgage loans or consumer loans, receivables will be granted as set out under question 5.3 above.

A security interest on debt securities will be a pledge or a transfer of title. Any perfection formalities depend on the form of such securities.

A pledge over bearer securities is perfected by delivery of bearer certificates to the pledgee or a third party depositary appointed by the parties. Registered securities will be earmarked in the register or transferred to the pledgee or a third party depositary on the register. For book entry securities, a notification to the depository or a transfer on an account in the name of the pledgee or of a third party depositary is required.

Transfer of title for security purposes of book entry receivables will be perfected by the recording of the securities on account in the name of the transferee or a third party depositary appointed by the parties.

For other receivables, the assignment of ownership for security purpose is perfected by the mere execution of the agreement between the parties provided that the obligor of an assigned receivable will validly discharge his obligation when paying the transferor as long as he has no knowledge of the transfer.

A security interest on promissory notes requires, in order to be perfected, an endorsement for purposes of the pledge or the transfer for security purposes (as applicable).

5.6 Trusts. Does Luxembourg recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets until turned over to the purchaser?

The Luxembourg law of 27 July 2003 on trust and fiduciary agreements (the "Fiduciary Law") provides for recognition of a trust duly constituted under a foreign law.

A similar mechanism exists under Luxembourg law, which is the fiduciary contract pursuant to which a person agrees with another person (the fiduciary) that subject to the obligations determined by the parties the latter will become the owner of determined assets, which shall form, fiduciary assets.

The fiduciary assets should be completely separated from the fiduciary's own assets or from any other fiduciary assets managed by the fiduciary, and are excluded from the assets subject to insolvency or similar proceedings.

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

Escrow arrangements exist, however do not constitute security *per se*. They may constitute security, if the arrangement is structured as a fiduciary contract.

Otherwise, security can be taken over an escrow account by a pledge. If located in Luxembourg, Luxembourg law will determine the relevant conditions regarding creation, existence and perfection of such pledge. Hence if a foreign security agreement does not meet the conditions of Luxembourg law, it will not be recognised.

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?

Upon an enforcement event, the pledgee will notify the relevant account bank and take control of the account (unless something different would have been agreed in the pledge agreement) until the secured obligations are discharged.

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?

Pledge agreements generally provide that the pledgor can operate the pledged accounts until the occurrence of an enforcement event. The parties will have flexibility to structure such arrangement according to their needs.

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 Luxembourg'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?

Assuming that the sale has been (i) be duly perfected, (ii) not been entered into during the "suspect period" (i.e. more than six months and 10 days before the opening of the insolvency proceeding against the seller), and (iii) the sale was not made under value, then there will be no stay of action. Regarding conditions under (ii) and (iii) the general principle is that existing agreements continue to be performed except where the law or an agreement provides otherwise. A sale entered into even during the "suspect period" if made on arm's-length terms should be upheld, but the arm's-length character may obviously be questioned by the insolvency receiver.

The transfer of the receivables under an arrangement subject to the Collateral Law can be challenged only in case of 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 rights (by means of injunction, stay order or other action)?

An insolvency administrator could, depending on the circumstances,

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seek to prevent the purchaser to exercise its rights by challenging the validity of the transfer in summary proceedings. This is, however, difficult if the Collateral Law applies to the transaction.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in Luxembourg for (a) transactions between unrelated parties, and (b) transactions between related parties?

The length of the suspect period will be determined by the court and can be set up to six months and 10 days before the opening of the insolvency proceeding against the seller regardless of whether the transaction is between unrelated or related parties.

Any transfer of property for no consideration, or for a price that is obviously below value, any payment made for non-matured debt as well as any payment made otherwise than in cash or promissory notes or bills of exchange for any matured debt and any security (other than financial collateral) created over the insolvent's assets in order to secure a debt previously taken, can be voided if entered into within the suspect period.

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?

Substantive consolidation could occur in situations where the purchaser and the seller are affiliates and have been managed in a way that they are considered to be a single enterprise. There could also be circumstances, where the assets acquired by the purchaser would be deemed still to be part of the assets of the seller, namely the situation where the sale of the assets has not been perfected by notification to the obligor.

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

The judgment declaring the insolvency will deprive the insolvent party from the management of its assets and this will be carried out by the insolvency administrator. The insolvency administrator cannot ignore existing agreements, although he may chose not to perform and to default (Article 444 of the Commerce Code). Please see question 6.1 above.

The Securitization Law provides that the assignment of a future claim is conditional upon its coming into existence, but once the receivable comes into existence, the assignment becomes effective between parties and against third parties as from the moment the assignment is agreed, notwithstanding the opening of bankruptcy proceeding or any other collective proceedings against the seller.

In other cases, where the Securitization Law does not apply, if the assignment is not perfected by notification to the obligor, a bankruptcy of the seller may affect the rights of the purchaser, since the receiver will in that respect be considered as representative of the other creditors and as such a third party to the assignment arrangement.

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 no case law in Luxembourg regarding the validity of contractual limited recourse provisions and thus there may be some uncertainty. However, such a clause should be construed as an undertaking for the benefit of the debtor and other creditors and there is no reason why this should not be valid.

There are only limited circumstances, as is the case in the Securitization Law, where the law explicitly refers to limited recourse.

When limited recourse provisions do exist, one may conclude that the creditor has no further claim when having received all available assets from the debtor and that such a creditor has no legal interest to act in court to require insolvency proceedings since his claim is extinguished of the limited recourse and the distribution of the assets.

7 Special Rules

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

The Securitization Law defines securitisation as the acquisition or assumption, directly or through another undertaking, of risks related to receivables, other assets or obligations assumed by third parties or inherent to all or part of the activities of third parties, combined with the issue of securities, whose value or return depend on those risks.

It may involve a single securitisation undertaking, but can also be performed by a two-tier structure involving an acquisition vehicle and a separate issuing vehicle.

It will only apply to securitisation undertakings located in Luxembourg, i.e. securitisation companies having their registered office in Luxembourg or securitisation funds whose management company has its registered office in Luxembourg.

The Securitization Law contains an "opt-in" clause whereby only those undertakings which elect to be governed by the Securitization Law will fall under its scope.

Securitisation transactions can be of various types, i.e. either a true purchase of underlying assets by securitisation undertaking or synthetic securitisation where only the risks related to the underlying asset are transferred to the undertaking (credit default swaps or guarantees), whole business securitisations or partial business securitisations when the risk assumed related to the profitability of an activity performed by a third party.

Beyond traditional securitisations involving claims, the Securitization Law does not limit the type of risks to be securitised whether by origin or types of assets. The risks must originate from a third party and be transferred to the securitisation vehicle in order to be linked to securities issued by such vehicle.

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Unless otherwise specified in the articles of association, securitisation undertakings with multiple compartments may be established. Each compartment corresponds to a separate pool of assets and liabilities, which are segregated from the other compartments as regards investors' and creditors' rights. This ring-fencing also applies in case of liquidation as a compartment can be liquidated without affecting the other compartments.

The rights and obligations of investors and creditors are limited in recourse to the assets of the securitisation undertaking or as the case may be, to the particular compartment to which they relate. Their assets are reserved to satisfy such rights.

Bankruptcy remoteness is addressed by a specific recognition of the validity of clauses by which investors or creditors commit not to attach the assets of the securitisation undertaking, nor to initiate bankruptcy proceedings against any securitisation undertaking (non-petition and non-attachment clauses).

7.2 Securitisation Entities. Does Luxembourg 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?

Securitisation undertakings can be established either in the form of a company or in the form of an unincorporated fund.

Corporate undertakings must opt for one of the alternatives provided in the Securitization Law. Corporate undertakings will be governed by the rules generally applicable to the relevant form of company, except for aspects specifically determined by the Securitization Law.

Securitisation funds are not legal entities, but pools of assets managed by a management company. They can be structured in two different ways: either in the form of a co-ownership of assets, in which case investors will have a right *in rem* to an undivided portion of the relevant securitised assets; or a fiduciary contract in which case the management company will hold the securitised assets as fiduciary property (which will be segregated from its other assets).

A management company must limit its activity to the administration of financial flows linked to the securitisation transaction itself and to the prudent management of the securitised risks. It cannot pursue an activity likely to qualify the securitisation undertaking as an entrepreneur.

There are no specific requirements for shareholders. There are only specific requirements regarding directors in case the vehicle will qualify as a regulated securitisation vehicle (which will be the case if it issues securities to the public on a continuous basis).

7.3 Limited-Recourse Clause. Will a court in Luxembourg 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?

If the relevant debtor is a securitisation undertaking and/or the limited recourse is based on the Securitization Law, please see question 7.1. If there is a contractual provision, please see question 6.6.

7.4 Non-Petition Clause. Will a court in Luxembourg 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?

If the purchaser is a securitisation vehicle where the law provides such a possibility, please see question 7.1.

Absent of such a specific legal basis it is doubtful that such a provision would be recognised, unless there is another reason to justify it, such as the argument that if there are no further assets available, the claim is extinguished.

7.5 Priority of Payments "Waterfall". Will a court in Luxembourg 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?

Subordination clauses are explicitly recognised by the Securitization Law and courts have recognised the validity thereof outside the scope of securitisations.

7.6 Independent Director. Will a court in Luxembourg 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?

A company may provide in its articles of association that certain specific decisions can only be validly taken with the affirmative vote of an independent director. This will need to be reviewed on a case-by-case basis. To subject a decision to file for bankruptcy, the affirmative vote of an independent director is not possible. Article 440 of the Commercial Code requires directors and managers of a Luxembourg company to petition for the initiation of an insolvency proceeding when the conditions therefore are met.

8 Regulatory Issues

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

A purchaser of receivables whose only activity would be that of acquiring and managing a portfolio of receivables does neither need a business licence nor an authorisation from the *Commission de surveillance du secteur financier* ("CSSF"). If the purchaser trades continuously in receivables, a licence is required.

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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 Luxembourg law applies to the seller or the relevant third party, under article 13 and article 28-3 of the financial sector law of 5 April 1993 (the "Financial Sector Law"), debt recovery is considered as an activity of professional of the financial sector (PFS) and must receive the authorisation of the CSSF in order to validly exercise such activities.

If the seller or the third party do not exercise the debt recovery activity as their professional activity, but only because the debt recovery is one of their duties under the purchase agreement concluded with the purchaser, it seems unlikely that such situation will fall into the scope of the Financial Sector Law. In this latter case, only the legal owner of the relevant receivables (or his representative) will have standing to pursue this in court.

Article 60 of the Securitization Law provides that the securitisation undertaking may entrust the seller or a third party with the collection of receivables it holds "*without such persons having to apply for an authorisation under the legislation on the financial sector*".

8.3 Data Protection. Does Luxembourg 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 Luxembourg data protection law of 2 August 2002 (the "Data Protection Law") provides the framework for the processing and dissemination of personal data. It sets out conditions under which such processing and use is permitted. The law also provides several rights to the data subjects such as a right to be informed concerning the process of the data, a right to access the data and a right to contest the use of certain data.

The Data Protection Law only concerns the processing and dissemination of personal data regarding individual obligors.

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 Luxembourg? Briefly, what is required?

If the obligors are consumers, the purchaser (including a bank acting as purchaser) will be required to comply with the provisions of the Consumer Code.

The consumer has to be informed of any transfer of its consumer loan to a third party, unless the parties to the transfer agree that the original lender will continue to manage the consumer loan *vis-à-vis* the consumer (Article L 224-18 (1)).

The consumer holds against the purchaser of the receivables (including a bank acting as purchaser) all the exceptions and defences it had against the seller, including the right to set-off, legally authorised (Article L 224-18 (2)).

For other consumer right under Commercial Code see answer to question 1.2.

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

Luxembourg does not have laws restricting the exchange of Luxembourg's currency (the Euro) for other currencies or the making of payments in Luxembourg's currency to persons outside the country.

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 Luxembourg? 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?

There is no withholding tax in Luxembourg on interest (including discounts), except if payments are made to individuals. Since securitisation implies interest payment to corporate entities, no withholding tax will be applicable. The income received from interest or discount will be considered for domestic tax purposes as normal commercial income, irrespective its characteristics as interest.

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

For securitisation transactions that fall into the scope of the Securitization Law, the securitisation undertaking must register the assets acquired at fair value. The booking of commitments towards the holders of the securities issued will be tax deductible, even though the commitment does not appear in the commercial accounts.

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

The sale of receivables is not subject to stamp duty or other documentary taxes. A 0.24% registration duty may, however, apply in the event that documents embodying an acknowledgment of debt is registered or presented in court. This does, however, not apply to documents of securitisation operations that fall into the Securitization Law.

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9.4 Value Added Taxes. Does Luxembourg 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?

Sale or other transfers of receivables against consideration are in principle VAT exempt operations in Luxembourg. Fees for collection agent services are subject to VAT in Luxembourg, if the services provided are debt collection or debt recovery services. If the underlying assets of a securitisation transaction are assets other than financial assets the VAT treatment of such sale of goods of services should be scrutinised.

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?

As indicated under questions 9.3 and 9.4, in principle no VAT, stamp duty or other taxes apply in Luxembourg upon the sale of receivables. No such joint and several liability exist for unpaid taxes owed by the seller before the receivables had been transferred to the purchaser.

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

The purchaser's purchase of the receivables or its enforcement of the receivables against the obligors does not create a taxable presence of the seller in Luxembourg. Also, assuming that adequate contractual arrangements, providing for "at arm's-length" remuneration for services provided, are entered into, appointment of the seller as servicer and collection agent do not create a taxable presence of the seller in Luxembourg.

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