

The International Comparative Legal Guide to:

# Securitisation 2006

A practical insight to cross-border Securitisation Law



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# Estonia



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### 1 Choice of Law

**1.1** If the seller and the debtors are resident in your country, and the transactions giving rise to the receivables and the payment of the receivables take place in your country, can the seller and the debtor choose a different country's law to govern the receivable contract and the receivables?

Under the Estonian Private International Law Act, the parties to the contract are generally free to choose the applicable law. The court will uphold the choice of a foreign law insofar as it does not contradict the main principles of the Estonian legal system. Although there is no relevant case law, some authorities believe that under the EPILA, the choice of foreign law is only enforceable if the transaction has some connection to a foreign jurisdiction.

**1.2** If your country's law governs the receivables, and the seller sells the receivables to a purchaser in another country, can the seller and the purchaser choose the law of the purchaser's country or a third country to govern their sale agreement? Conversely, if another country's law governs the receivables, and the seller is resident in your country, are there circumstances where it would be beneficial to choose the law of your country to govern the sale agreement?

Parties to the contract are entitled to choose the law of any country to govern the sale agreement insofar as it does not contradict the main principles of the Estonian legal system and the mandatory rules established by the EPILA. There is no specific reason to choose the Estonian law to govern the contract. It may, however, be beneficial for strategic tax or liability purposes (lower court awards, almost no discovery procedures, minimal consumer protection laws, etc.).

**1.3** In either of the cases described in question 1.2 above, will your country's laws apply to determine (i) whether the sale of receivables is effective as between the seller and the purchaser; (ii) whether the sale is perfected; (iii) whether the sale is a true sale; and/or (iv) whether the sale is effective and enforceable against the debtors?

Estonian law will govern the relationship between purchaser and debtor, but not the effectiveness of the transactions

between the seller and the purchaser. Estonian law may also apply as to whether the sale is perfected, where perfection is performed by means of transfer to the purchaser of collaterals securing the receivables. In such a case, the validity of the agreement governing the transfer will be regulated by Estonian legal Acts. Since Estonian law will only govern the relationship between debtor and purchaser, the issue of whether the sale is a true sale will be resolved pursuant to the law applicable to the sale agreement.

### 2 Receivable Contracts

**2.1** In order to create an enforceable debt obligation of the debtor to the seller, (a) is it necessary that the sales of goods or services are evidenced by a formal receivable contract; (b) are invoices alone sufficient; and (c) can a receivable "contract" be deemed to exist as a result of historic relationships?

- (a) There are no formal contract requirements as to the sale of movable goods (unless the sale involves securities) or services. The exceptions to this rule concern the relationship between a credit institution and its clients and any assumption of debt;
- (b) an invoice may be considered evidence for the conclusion of an oral contract, but the resolution of this issue is at the discretion of the judge. Based on the general practice, it may be suggested that an invoice might be deemed sufficient if signed by both parties; and
- (c) where oral contracts are acceptable, the historic relationship of the parties may be deemed acceptable as a basis for the contract, for example if the parties have been involved in long-term commercial relations and one of them submits an offer for the conclusion of the contract, and the other party fails to timely object.

**2.2** Can the seller sell a receivable (a) without the debtor's consent if the receivable contract does not prohibit assignment and does not expressly permit assignment; (b) without the debtor's consent even if the receivable contract expressly prohibits assignment; or (c) without being liable to the debtor for breach of contract even if the receivable contract expressly prohibits assignment?

- (a) Yes, the assignment is allowed, provided the agreement

does not expressly state otherwise; (b) the assignment will be valid irrespective of the prohibition, but the assignor may be held liable to the debtor for the breach of the agreement; and (c) although the assignment is valid, it will be considered a breach of contract.

### 2.3 Do your country's laws (a) limit rates of interest on consumer credit, loans or other kinds of receivables; or (b) provide a statutory right to interest on late payments?

(a) There are no limits or restrictions on interest rates, except for the right of the consumer to refrain from payment of the full interest amount in the case of premature repayment of the loan; and (b) the statutory interest on late payment is the European Central Bank interest rate, to which 7% is added.

### 2.4 Where the receivables contract has been entered into with the government or a government agency are there different requirements and laws that apply to the sale of receivables?

Different requirements will only apply where the government or government agency is the seller and not the debtor. In such cases, restrictions arising out of the State Assets Act will apply with respect to the sale of receivables.

## 3 Asset Sales

### 3.1 In your country what is necessary generally in order for a seller to sell accounts receivable to a purchaser?

A valid and binding agreement must be entered into in order to sell accounts receivable, and formalisation of the contract is usually not required. If some form requirements are imposed by law, or prescribed by the receivable contract, the purchase agreement is to be concluded in the same form as the underlying contract.

### 3.2 What is required for the sale of accounts receivable to be perfected against any later purchasers of the same accounts receivable from the seller?

The major risk arising out of the sale of accounts receivable is not related to later, but to earlier purchases. There is always a risk that the receivable in question has already been sold, in which case the former conveyance shall prevail over the latter.

### 3.3 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 note can be transferred to another person by means of an endorsement, unless the drawer has expressly precluded transferability. If the drawer has precluded the transferability, the note may be transferred as a registered security. A right arising from a registered security shall be transferred pursuant to the provisions concerning the transfer of the corresponding right in writing, concurrently with the transfer of the security. An endorsement of the

promissory note shall be unconditional. An endorsement for partial transfer of the rights and obligations expressed in a promissory note is void.

Loan agreements are technically form-free, unless concluded by a credit institution. However, since the establishment of a mortgage requires an agreement certified by the notary, loan and sales agreements are also sometimes notarised. Consumer loans are generally concluded in writing, particularly where the lender is a credit institution, and therefore the purchase contract is also to be executed in writing.

The transfer of marketable debt securities is regulated depending on whether the debt security is registered with the Estonian Central Registry of Securities. If registered, the securities are transferred electronically from one securities account to another by the registrar. The regulation of the sale of non-registered debt securities may vary depending on the type of security, and will usually require the transfer of possession of the security, which will perfect the sale.

There are no specific restrictions as to the perfection of the sale of consumer loans.

### 3.4 Must the seller or the purchaser notify debtors of the sale of receivables and/or obtain the consent of debtors to the sale in order for the sale to be effective against the debtors, that is (i) to allow the purchaser to enforce the debts directly against the debtors; (ii) to prevent the debtor and the seller from amending the receivable contract without the purchaser's consent; (iii) to prevent the debtor from setting off receivables against any obligations of the seller to the debtor; or (iv) to require the debtors to pay the purchaser rather than the seller?

The consent of the debtor for the sale of a receivable is only required to avoid the breach of the anti-assignability clauses in the receivable contract, but in no way does it influence the enforceability of the claim against the debtor.

Although the right of the seller to amend the receivable contract is not specifically regulated, it may be derived that the seller, being the party to the receivable contract, is indeed entitled to amend it, but only to the extent not related to the receivable purchased.

According to the Law of Obligations Act, the debtor is entitled to a set-off claim against the seller against the claim of the purchaser, unless the debtor has acquired the claim from a third party while the debtor knew or should have known about the sale of receivable; or unless the claim of the debtor falls due later than the receivable and after the debtor became or should have become aware of the sale.

The notification of the debtor is not obligatory according to the LOA but highly recommendable in the interests of the purchaser. The notification prevents the debtor from performance of his obligation to the seller. The failure to notify the debtor will not, however, influence the right of the purchaser to enforce the debt directly against the debtor. The debtor may withhold the performance of his obligation to the purchaser until presented with a valid assignment document.

- 3.5 Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., debtor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics?

The LOA does not provide any specific information required for the sale of the securities except for the requirement that the receivables be sufficiently identifiable. Therefore, the contract for the sale of receivables should contain all the information reasonably required to identify the receivable being transferred.

## 4 True Sale

- 4.1 In general, what is necessary for a sale of receivables to be a true sale? Among other things, to what extent may the seller retain credit risk, interest rate risk, or control of collections on receivables?

In Estonia the nature of the transaction is decided based on the intent of the parties thereto. Therefore, if the parties to the transaction have characterised it as a true sale, its ownership shall be considered transferred irrespective of whether the transaction bears the attributes of secured loans or not. The parties are free to agree that the seller will retain certain risks or control over the collection of the receivable, but in such case, the transaction may be recharacterised as a secured loan.

- 4.2 Can there be a true sale of receivables that do not yet exist (as in a "future flow" securitisation), so that a single sale on a certain date results in the purchaser automatically being the owner of the "sold" receivables immediately when they come into existence?

The Law of Obligations Act enables the transfer of the conditional receivables or those emerging in the future. The basic requirement, as pointed out in question 3.5 above, is that such receivables must be sufficiently identifiable at the time of their creation.

## 5 Security Interests

- 5.1 What is necessary for the purchaser to grant a security interest in accounts receivable under the laws of your country and for the security interest to be perfected?

A security interest over accounts receivable may be granted by way of establishment of a written pledge over receivables, and giving notice to the debtor. The consequence of the notification is that before the secured claim has become due, the debtor is only entitled to perform its obligation to the purchaser and pledgee jointly, and after the secured claim has become due, solely to the pledgee. The Property Law Act also stipulates establishment of financial collateral by entering into written agreement.

- 5.2 What additional or different requirements apply to security interests in or connected to promissory notes, mortgage loans, consumer loans or marketable debt securities?

If an endorsement of a promissory note contains a written declaration implying a pledge (a pledge endorsement), the holder of the promissory note may exercise all rights arising from the note as the pledgee. An endorsement by the pledgee only has the legal consequences of an endorsement by procurator.

If the note is endorsed by procurator, the acquirer may exercise all rights arising from the note on behalf of the endorser, and the acquirer may only endorse the note by means of a new endorsement by procurator.

Pledge over registered securities is established by filing an entry in the Estonian Central Register of Securities on the order of the account administrator of the pledgor. An instruction for the registration of a pledge is issued by the pledgor. A pledge of securities is created upon entry of the pledge in the register. The registrar makes a notation concerning pledged securities in a securities account in the register.

In the case of financial collateral, the registrar transfers the securities pledged on the basis of a financial collateral arrangement to the special securities account of the pledgor on the order of the account administrator of the pledgor. The encumbrance of non-registered debt securities depends on the type of debt security and may require transfer of possession thereof.

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

Yes, unless it is in contradiction with Estonian public policy.

## 6 Insolvency Laws

- 6.1 If after the sale of receivables the seller becomes subject to an insolvency proceeding, will your country's insolvency laws prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the receivables ("automatic stay")? Does the answer to this question (or the questions below) depend on whether the sale is a true sale?

No, there is no automatic stay in Estonia.

- 6.2 If there is no automatic stay, could the insolvency official prohibit exercise of rights by the purchaser by means of injunction, stay order or other action?

Upon the initiation of the bankruptcy proceedings or prior to them, the court conducting the proceedings is entitled to apply certain measures restricting the exercise of the ownership rights over the property of the purchaser should the property in question be subject to recovery. Such measures may, at the discretion of the court, include entry of

the notation prohibiting the disposal into the relevant registry, prohibition of the fulfilment of the obligation to the purchaser, etc.

**6.3 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?**

There are no circumstances under which the assets and liabilities of the purchaser can be consolidated with those of the seller, except in the case of criminal activities of either the seller or the purchaser, whereby the purchaser may be considered as a “tool” for committing the crime by the seller, or vice versa.

**6.4 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?**

General grounds for recovery of transactions during the insolvency proceedings are the following: a) the transaction was entered into during the period from the commencement of the proceedings until declaration of bankruptcy; b) the transaction was entered into within one year before the bankruptcy commencement and the other party knew or should have known that the transaction is detrimental to the interests of the creditors; c) the transaction was concluded within the period from one to three years before the commencement of the bankruptcy, and the debtor intentionally damaged the interests of the creditors, and the other party to the transaction knew or should have known that the debtor damaged their interests; or d) within five years before the commencement of the bankruptcy, the debtor intentionally damaged the interests of the creditors by the transaction and the other party to the transaction was a person connected to the debtor and knew or should have known of the damage. There are also specific terms for reversal of specific transactions.

**6.5 What is the effect of the initiation of insolvency proceedings on any future sales of receivables or on receivables that have been assigned but have not yet come into existence?**

Should the receivable be assigned but not have come into existence by the time of initiation of bankruptcy proceedings, the assignment becomes void upon declaration of bankruptcy with regard to claims which may arise after the declaration of bankruptcy.

Any future sales of receivables may be hindered because the court will usually impose the prohibition on further disposal of the debtor’s assets, and any transactions entered into by the debtor during the period from the initiation until declaration of bankruptcy are subject to recovery.

## 7 Special Purpose Entities

**7.1 Does your country have laws specifically providing for establishment of special purpose entities for securitisation? If so, then what does the law provide as to (a) requirements for establishment of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?**

There are no laws specifically providing for the establishment or regulation of special purpose entities (SPE) and their activities.

**7.2 If an agreement with a special purpose entity provides that the other parties will not take legal action against it or that they will not commence an insolvency proceeding against it, is that provision valid and enforceable?**

There are no laws specifically providing for establishment or regulation of SPEs and their activities.

Generally, the LOA prohibits agreements under which liability is precluded or restricted for intentional acts, and terms that are detrimental to the interests of a consumer are void. Finally, under Article 15 of the Constitution of the Republic of Estonia, any person whose rights and freedoms are violated has a right of recourse to the courts. Therefore, the validity of agreement restricting the right to file for bankruptcy or other lawsuits is questionable.

**7.3 To what extent will a limitation on the liabilities of the special purpose entity (limited, for example, to available funds) be valid and enforceable?**

There are no legal grounds for invalidity of such provision. However, under the LOA, agreements under which liability is precluded or restricted in cases of intentional non-performance or which allow the debtor to perform an obligation in a materially different manner, or which unreasonably exclude or restrict liability in some other manner, are void.

**7.4 If the organisational documents or agreements of a special purpose entity provide that the directors or managers will not commence an insolvency proceeding involving the entity unless required under applicable law, is that provision valid and enforceable?**

The practical implementation of this clause is non-existent because the Estonian Commercial Code obliges members of the management board of the entity to initiate bankruptcy proceedings within 20 days of the appearance of permanent insolvency of the entity. The breach of this duty will result in the personal liability of the member of the management board.

## 8 Regulatory Issues

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

There are a few restrictions on the use and dissemination of data about or provided by debtors. First, the Personal Data Protection Act prohibits the processing of personal data about, or provided by a natural person without their prior consent. Second, the Credit Institutions Act imposes upon a credit institution an obligation to maintain banking secrecy. Such data may only be transmitted to any third person with the prior written consent of the client. Similar restrictions may apply to other institutions, such as insurance companies.

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

Generally, consumer protection acts apply with respect to the relationship between seller and consumer. Since the purchaser only overtakes the claim against the consumer on the conditions stipulated in the receivable contract and is not therefore entitled to alter the legal position of the consumer, and any clauses detrimental to the scope and essence of the right of the consumer may be null and void.

- 8.3 Assuming that the purchaser does no other business in your country, will its purchase and ownership or its collection and enforcement of receivables result in it being required to qualify to do business or to obtain any licence or it being subject to regulation as a financial institution in your country?**

No, in Estonia the purchaser would not be required to qualify, obtain a licence or be subject to such regulation in this case.

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

No, Estonia has no such laws.

## 9 Taxation

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

Technically, the payments on receivables by the debtors to seller or the purchaser are not subject to withholding taxes in Estonia; however the tax will be withheld at the time of profit distribution. The system of corporate earnings taxation currently in force in Estonia is a unique system,

which shifts the moment of corporate taxation from the moment of earning the profits to the moment of their distribution, thus deferring taxation of profits for legal persons. Undistributed profits are not subject to income tax, regardless of whether they are invested or merely retained.

Income tax (currently 23%) is charged and withheld on interests received by a non-resident of the Estonian State, a local government or a resident, or from a non-resident through or on account of its permanent establishment registered in Estonia, if it significantly exceeds the amount of interest payable on a similar debt obligation under the market conditions during the period of occurrence of the debt obligation and payment of the interest. In that case income tax is charged on the difference between the interest received and the interest payable according to market conditions on similar debt obligations.

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

There is no special regulation or any specific accounting policy for tax purposes by the seller or purchaser in the context of a securitisation.

- 9.3 Does your country impose stamp duty or other documentary taxes on sales of receivables?**

There are no stamp duties or other documentary taxes on sales of receivables in Estonia.

- 9.4 Does your country impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?**

The government of Estonia imposes value added tax ("VAT") on sales of goods and services of the person whose taxable supply exceeds 16,000 EUR in a calendar year. If receivables are sold through economic activity, VAT is imposed. According to the Value Added Tax Act ("VATA"), a transfer of any right is also considered to be a service and there is no exemption to exclude the transfer of a claim (assignment of claim) as a service from the scope of VAT.

According to the VATA, the taxable value of a factoring service shall be the contract fee and the fee for handling the accounts. The VATA stipulates that the claim amount itself is not subject to taxation, but that only the contract fee and the fee for handling the accounts shall be taxable to the Estonian VAT of 18%. Accordingly, the amount of the receivable transferred is not taxable with VAT, but the commission or other fees charged in connection with the assignment of receivables are subject to VAT in Estonia.

- 9.5 If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims against the purchaser or on the receivables or collections for the unpaid tax?**

According to the VATA, the person liable for VAT is the

person who creates the taxable supply as a result of the business. Thus, if the seller does not pay the tax, the claims for unpaid tax can only be made against the seller and not the purchaser or on the receivables or collections. It is the purchaser's duty to ascertain that the seller has been registered as a VAT-liable person if the purchaser deducts the sum from VAT calculated on its taxable supply.

**9.6 Assuming that the purchaser conducts no other business in your country, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the debtors, make it liable to tax in your country?**

If the purchaser appoints the seller as its servicer and



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Priit Pahapill participated in the share sales transaction of the largest timber company in the Baltics AS Sylvester (today known as AS Stora Enso Timber) to the Stora Enso Group, and advised international investment funds in the sales of the shares of a leading information technology company in the Baltic States with the total value of ca EUR 30 million. He has participated in the privatisation and share transfer of AS Tallinna Vesi with a transaction value of over EEK 1.3 billion and advised the sale of the majority shareholding in a major Estonian credit institution to a Scandinavian finance group.

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collection agent, the seller can be considered to be a representative of a non-resident. If a representative of a non-resident operates in Estonia and is authorised to carry out and repeatedly carries out transactions in the name of the non-resident, such non-resident is deemed to have a permanent establishment in Estonia with respect to those transactions, and is required to register itself in the regional tax centre of the Tax and Customs Board prior to the commencement of activities. The profits of a permanent establishment are taxed in the same way as the income of resident legal persons - the Estonian Income Tax Act exempts non-residents that have a registered a permanent establishment in Estonia from payment of income tax on earned income unless it is distributed. Obligations are reduced for subjects of countries with which Estonia has a double taxation treaty.

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**LUIGA MODY HÄÄL BORENIUS**

In August 2005 the attorneys of Luiga, Mugu & Borenius and Mody & Hääl Glimstedt merged to form Luiga Mody Hääl Borenius, having operated separately since 1998. The firm has been constantly growing ever since the merger and is now working with more than 27 attorneys, thus being one of the largest law offices in Estonia. Luiga Mody Hääl Borenius offers advice on all basic matters of business and corporate law. The majority of our clients comprise investment banks, credit institutions, private equity funds, real estate funds, domestic and international retail, industrial, construction and transport (aviation, maritime, railways etc.) companies. The firm is highly valued in the field of M&A, banking/finance and taxation matters due to the long-experienced and excellent professionals practicing in this area. English is the main working language of the office in addition to Estonian, but service is also provided in Russian, Finnish, French and German.

Luiga Mody Hääl Borenius continues to work in alliance with one of the oldest and biggest law firms in Finland, Borenius & Kempainen. The alliance also includes Liepa, Skopina/Borenius in Latvia and Attorneys at Law Foigt & Partners/Regija Borenius in Lithuania.