

P.R.I.M.E. Finance
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EMERGING THEMES IN FINANCIAL LAW

EU PROPOSALS FOR A REGULATION ON THE LAW APPLICABLE TO THE ASSIGNMENT OF CLAIMS

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Within the context of the 2015 EU Action Plan on Capital Markets Union the EU commission has tabled a proposal in March 2018 for a Regulation on the Law applicable to the third party effects of assignments of claims (Proposed Regulation).

The Proposed Regulation is intended :

- to address conflict of laws rules on the third-party effects of the assignment of claims such as financial claims, receivables, cash credited to a credit institution.**
- as follow-up on the Rome 1 Regulation (Regulation EC No 593/2008) which includes rules to determine the law applicable to contractual obligation (Rome 1 Regulation).**

The Rome 1 Regulation includes inter alia conflict of law rules applicable to the contractual aspects of assignment of claims – receivables.



The Rome 1 Regulation :

- contains uniform conflict of law rules regarding the relationship between :
 - the parties to the assignment contract (assignor and assignee)
 - the assignee and the debtor
- provides that (except for specified contracts) in the absence of an express choice of law to govern the contract that contract shall be governed :
 - by the law from the country where **the party** required to effect the characteristic performance of the contract **has his habitual residence** (this is now a principle and not a presumption);
 - where it is clear from all circumstances that the country is more closely connected with another country in which case the law of that country shall apply;
 - Where the law applicable cannot be determined on the basis of the above, the law of the country with which it is more closely connected shall apply.

That Rule contemplates exceptions in case of mandatory provisions of the forum or of the place of performance as well as in case of public policy of the forum.



Voluntary assignment and contractual subrogation under the Rome 1 Regulation (Voluntary Assignment) :

- The relationship between **assignor and assignee** in case of Voluntary Assignment of a claim against another person (the debtor) shall be governed by the **law that applies to the contract** between the assignor and assignee.
- The law governing the **assigned or subrogated claim** shall 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.
- The concept of assignment includes outright transfer of claims, transfer of claims by way of security and pledges or other security rights over claims.



The Rome 1 Regulation :

- **does not address conflict of law rules regarding the proprietary effects of assignments of claims.**
- Although the EU Commission , at the preparation stage of the Rome 1 Regulation, has suggested to retain the **law of the assignor's habitual residence** to fill that gap that proposal was not retained.
- In view of the acknowledgement of the importance of that issue an Article 27.2 was introduced in the Rome 1 Regulation providing that :
 - the matter was to be revisited by June 17 , 2010 at which date a report was to be delivered by the EU commission on that matter;
 - that report was to be accompanied , if appropriate, by a proposal to amend the Rome I Regulation together with an impact assessment of that proposal.



Different connecting factors prevail in EU Member States in respect of **perfection against third parties** of assignments of claims (EC Commission Staff Working Document -12.3.18) :

- law governing the contract between assignor and assignee : The Netherlands - statute,
- law of assignor's habitual residence : Belgium,
- law of debtor's habitual residence : France,
- law governing the assigned claim : Spain (statute), Poland, UK and Luxembourg (except in respect of the latter for securitizations) (case law and doctrine),
- *lex rei sitae* (country where obligation as intangible thing is located) : Czech Republic, Sweden,
- law of the assignor's residence : adopted by UNCITRAL.

Such divergent approaches are a source of risk and uncertainty for market participants who are seeking predictability. Extra due diligence costs are resulting therefrom.



The Proposed Regulation :

Following an extended consultation process the EU Commission has proposed the following rules to govern third party effects of assignments of claims :

- as a general rule :the law of the country where the **assignor has its habitual residence**
- as **exceptions** :
 - the **law of the assigned claim** with respect to certain assignments (claims arising from financial instruments – cash deposits with a credit institution) ;
 - For securitizations a **choice of law option between law of assignor habitual residence or the law applicable to the assigned claim (the choice to be made expressly in the assignment contract or by separate agreement).**



The General Rule (the assignor's habitual residence) offers :

- assignees having to comply with only **one national law** -has a cost reduction effect, is easily predictable and identified by parties involved in the assignment ;
- It is the only law which makes possible the determination of the law applicable to future claims which are assigned (a common practice in factoring, securitization, collateralization) ;
- is in line with the original proposal made during preparation of the Rome 1 Regulation which will continue to govern the transfer or novation of contracts such as derivatives ;
- Is generally consistent with the EU acquis on insolvency – (Insolvency Regulation (Regulation EU 2015/848)) which retains the concept of Centre of Main Interest (COMI) (facilitates resolution of the assignor's insolvency) ;
- is consistent with the UNCITRAL Convention on the Assignment of Receivables in International Trade.



Exceptions :

Permit to address as to the third party effect of an assignment :

- specificities of an assignment of **cash credited to an account** maintained with a credit institution ;
- the assignment of claims arising from financial instruments to be governed by the law of the assigned claim (relevant in respect of derivatives).
- a mixed option offers the choice for assignor and assignee in the assignment of claims in the context of a **securitization** (law of (i) the habitual residence of the assignor ; or (ii) the law of the assigned claim -the latter being of particular relevance in respect of smaller operators).



Universal application :

A law designated by the Proposed Regulation shall be applied whether or not it is the law of a EU Member State.



Conflicts :

Conflict 1

Where the assignor has changed its habitual residence between two assignments of the same claim to different assignees :

- the priority of the right of an assignee over the rights of another assignee ;
- to be governed by the law of the habitual residence of the assignor at the time of the assignment which first became effective against third parties under the law designated as the law applicable.



Conflict 2 :

A priority conflict between assignees of the **same** claim where the third party effects of :

- one of the assignments are governed by the law of the country in which the assignor has its habitual residence ; and
- other assignments are governed by the law of the assigned claim ;

shall be governed by the law applicable to the third party effects of the assignment of the claim **which first became effective** against third parties under its applicable law.



Scope of applicable law :

The applicable law to the third party effects of claims shall govern in particular :

- the requirement to ensure effectiveness of the assignment against third parties, such as registration or publication formalities ;
- the priority of the rights of the assignee over the rights of other assignees of the same claim ;
- the priority of the rights of the assignee over the rights of the assignor's creditors ;
- the priority of the rights of the assignee over the rights of the beneficiary of a transfer of contract in respect of the same claim;
- The priority of the rights of the assignee over the rights of the beneficiary of a novation of contract against the debtor in respect of the equivalent claim.



Overriding mandatory Provisions :

Nothing in the Proposed Regulation shall restrict the application of the overriding mandatory provisions of the **Forum**.

Public Policy :

The application of a provision of the law of any country specified by the Proposed Regulation may only be refused only if such application is manifestly incompatible with the public policy of the Forum.

Renvoi :

Renvoi is excluded.



Shortcomings ?

What about transfers of :

- Participations in a syndicated Loan ;
- Derivatives (reliance is made on Financial Instrument definition : what happens with transfer of Master Agreement, set-off and collateral) ;
- Loans secured by a mortgage ;
- Bank Deposits (why not refer to IBAN number).



Thank you



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