

Uniform European Union Conflict of Law Rule to Foster Cross-Border Transfer of Claims

IN SHORT

The Situation: Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008, on the law applicable to contractual obligations (Rome I Regulation) does not cover the question of third-party effects of assignment of claims.

The Result: As part of the Capital Market Union Action Plan, the European Commission published on March 12, 2018, a proposal for a Regulation that proposes a uniform conflict of laws rule for third-party effect of an assignment of claim at the Union level.

Looking Ahead: The objective is to foster cross-border transfer of claims, including by way of security, by reducing legal uncertainty. The proposed Regulation will now follow the European legislative process.

In April 2017, the European Commission launched a public consultation on conflict of laws rules for third-party effects of assignment of claims and established a group to advise on conflict of laws issues regarding securities and claims. The group assisted the Commission by providing advice on private international law and financial markets, and Jones Day served as a member of the group.

After a year of continuous work, the European Commission published, on March 12, 2018, a proposal for an EU Regulation on the law applicable to the third-party effects of assignments of claims ("Proposed Regulation").

Why a Uniform Conflict of Laws Rule?

Assignment of claims is commonly used as a funding tool. Factoring, securitization, and generally any type of financing using claims as collateral are usually based on assignments of claims. It is essential, especially when the assignment of claims is used as a financing tool, that the assignee is sure that its right over the claim can be invoked against any potential competing rights from third parties (creditors of the assignor or subsequent assignees of the same claim).

When the transfer of claim is made on a cross-border basis, presenting factors connecting to different jurisdictions, the effects of the assignment of claims may be governed by different laws: there is a "conflict of laws." It is therefore important for the parties to be able to foresee which law will govern the effects of their assignment of claims.

Member States of the European Union apply the same set of conflict of laws rules provided by the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").

The Rome I Regulation expressly provides uniform conflict of laws rules for the effects of an assignment with respect to the parties to the assignment contract (the assignor and the assignee) and for the relationship between the assignee and the debtor, but not for the effects of the assignment of the claim on third parties. Article 27(2) of the Rome I Regulation clearly shows that this aspect was left outside the scope of the Rome I Regulation.

As a result, determining the rule of conflict of laws has been left to each Member State, which resulted in different rules being adopted. For example, Spain has chosen the law of the assigned claim (statute), Belgium has chosen the law of the assignor's location (statute), and France seems to have opted for the law of the assigned debtor (case law). In other Member States, the applicable conflict of laws rule is even nonexistent or unclear.

The variety of the conflict of laws rules throughout Europe brings complexity and legal uncertainty. The Proposed Regulation aims to fill the gap left by the Rome I Regulation in order to foster business opportunities and market integration within the European Union.

A 10-Year Process



The proposal offers a mixed approach, combining the law of the assignor's habitual residence, as a general rule, and the law of the assigned claim, as an exception, for certain assignments.



Article 27(2) of the Rome I Regulation tasked the European Commission with submitting to the European Parliament, the Council, and the European Economic and Social Committee a report on the question of effectiveness of an assignment of a claim against third parties and, if appropriate, a proposal of rule of conflict of laws. That was in 2008.

Four conflict of laws rules have been suggested to designate the law applicable to third-party effects of an assignment of claims: (i) application of the law governing the contract between the assignor and the assignee; (ii) application of the law of the country where the assignor has his habitual residence; (iii) application of the law governing the assigned claim; and (iv) application of the law of the country where the assigned debtor has his habitual residence. Each option has its advantages and disadvantages.

After several green papers, reports, and external studies, the European Commission eventually achieved a result that should meet consensus.

The proposal offers a mixed approach, combining the law of the assignor's habitual residence, as a general rule, and the law of the assigned claim, as an exception, for certain assignments: (i) assignment of cash credit balance of a bank account; and (ii) assignment of claims arising from "financial instrument" (such as net termination amounts calculated pursuant to a derivatives master agreement).

As a further exception, the parties may choose between the law of the assignor's habitual residence and the law of the assigned claim to govern third-party effects of the assignment of claims in view of a securitization.

The proposal also provides for a rule for the so-called *conflict mobile* (when the assignor changes his habitual residence between two subsequent assignments of the same claim), which was one of the main arguments raised by legal scholars against the law of the assignor's habitual residence as a conflict of laws rule.

Like in Rome I Regulation, the term "assignment" covers voluntary outright transfers of claims, contractual subrogation, and any transfer by way of security, pledge, or other security rights over claims, which includes French *Daily Law* assignment or financial collateral arrangements.

Finally, the proposal codifies the general understanding of what a claim is under the Rome I Regulation: a broad concept that includes noncontractual claims.

THREE KEY TAKEAWAYS

1. The proposal for Regulation intends to fill the gap left by the Rome I Regulation on third-party effects of assignment of claims.
2. The proposal elects for a mixed approach, combining the law of the assignor's habitual residence, as a general rule, and the law of the assigned claim, as an exception, for certain assignments.
3. Parties to a securitization transaction may choose between the law of the assignor's habitual residence and the law of the assigned claim to govern third-party effects of the assignment of claims.

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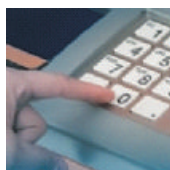
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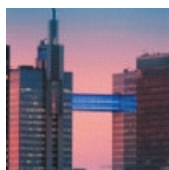
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