

The Applicable Law for the Third-Party Effects of Assignment of Claim – the Approach of the United Kingdom

Michaela Garajová

Faculty of Law, Masaryk University, Czech Republic

Abstract

The European Commission proposed a new regulation related to the law applicable to third-party effects of the assignment of claims. By this regulation the European Commission is aiming at increasing cross-border transactions, investments and market integration. However, the proposal is facing negative positions of member states, especially the United Kingdom. Even though the United Kingdom will not be obliged to follow the rules from the proposal, because it will come into effect after the transition period ends, its approach on this matter will regulate the third party effects of the assignment of claims in case the of cross-border transactions between a person from a member state and from the United Kingdom. Taking into account the difference between the approaches of the European Union and the United Kingdom, persons involved may get into more legal uncertainty than before.

Keywords

Assignment of Claims; Cross-border Transactions; Third Party; United Kingdom.

1 Introduction

The area of assignment of claims contributes to global economic growth by strengthening cross-border transactions and investment and thus facilitating access to business finance. Claims are assets of economic value that are easy to transfer and good short-term source of finance for the assignor. Given the existence of an international element in these contractual relations, legal certainty and predictability between them are being undermined.

The uncertainty stems from unclear rules governing the effects of the assignment of a claim on a third party.

The EU has proposed a separate uniform rule on conflict of laws rules in the regulation on the law applicable to the effects of the assignment of claims to third parties on 12 March 2018¹. From that date on the EU as well as the National Legislative Councils discuss the contribution of the new proposal that should ensure predictability and legal certainty in determining the ownership of a receivable that has been transferred to a third foreign party.

The conflict of laws rules governing the proprietary aspects of the assignment of a claim are currently regulated at member state level and are therefore based on different connecting factors. However, each member state has developed its conflict of laws rules based on its own experience and practice.² Finding one united manner for the whole EU that would respect individual concerns and market practice of each member state seems impossible.

Does the proposal for the regulation respects the different approaches of member states in the area of the applicable law to third-party effects of the assignment of claims? And how does the adoption of the proposal for a regulation change the overall legal regulation of assignment?

The proposal deals solely with the conflict of laws on the effects of the assignment of a claim. On the other hand, the Rome I Regulation³ contains a conflict of laws rule for determining the law applicable to the relationship between the assignor and the assignee, which will remain in force even after the adoption of the draft regulation. The question, therefore, arises as to whether the legal certainty of the parties to the relationship arising from the assignment of a claim will be enhanced by introducing

¹ Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims COM (2018) 96 final prepared by the European Commission in March 2018.

² The inconsistency in the determination of the law applicable to the effects of the assignment of claims results from the explanatory memorandum of the European Commission on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to the effects of assignment to third parties on 12 March 2018. Poland is based on the law of the assigned claim, Belgium and France are based on the law of the assignor's habitual residence, and the conflict of laws rules of the Netherlands are based on the law of the assignment.

³ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

a uniform conflict of laws rules at EU level but thereby creating a duplicate legal regime for the assignment of a claim.

Even though the intention behind the proposal was to strengthen cooperation and cross-border transactions by finding one united way that would be respected by each member state, the legal development in the area of third-party effects of the assignment of claims and its results reflected in the proposal are going against the established market practice of member states. Just like the UK, each member state determines the proprietary aspects of the assignment based on its on conflict of law rules which works. Further interventions by the EU that do not respect practices of member states are superfluous and cause divisions between the member states and the Union.

Against this background, this article is divided into 5 chapters starting with the analyzation of the legal development in the area of third-party effects of the assignment of claims that has an impact on the member states and the EU. Then the revision of the current Art. 14 of the Rome I Regulation that plays a significant role in the determination of applicable law on the assignment as a whole will be made. Continuing with the analysis of the European Commission proposal for the regulation and the negative approach of the UK against the proposal.

2 The Legal Development

Because the assignment of claims is not restricted by a particular territory, the cross-border assignments are a common practice in the area of financial operations. There are no physical but legal obstacles that must be resolved. Companies and credit institutions involved in such process require legal certainty to finance its business activities by using claims and provide for such services. Nonetheless, the concept of the assignment of claims differs between jurisdictions of members states.⁴

⁴ See the Country reports of the British Institute of International and Comparative Law. Study on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person – final report. *edz.bib.uni* [online]. 2018 [cit. 10. 10. 2020]. Available at: http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/12/report_assignment_en.pdf

Definitely, the different national rules regulating the third-party effects of such assignments bring the legal uncertainty about who is the owner of the claim among the parties of the assignment transaction itself as well as the market participants who are not the party to such transactions but somehow interact with the parties and therefore need to have the certainty who has the right to the claim in question.⁵ Yet, the unification of the substantive law among all members states cannot be achieved because of the unique approach of each state.

The topic of the determination of the applicable law on third-party effects of assignment of claims has been discussed on different national forums. The United Nations Conventions on Assignment of Receivables in International Trade (“UN Convention”), adopted in 2001, sets an objective to “*establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices.*”⁶ However, it has not entered into force so far. One of the most important parts of the UN Convention deals with the impact of assignment on third parties. The UN Convention addresses the issue in Art. 22–24 through the conflict of laws rules: “*the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.*”⁷ The rule specifies that the assignor’s location shall determine the applicable law since the “location” means the place of central administration and therefore it will always refer to one easily determinable jurisdiction.

The same conflict of laws rule specified in the UN Convention was proposed by the European Commission in 2005 as a part of the Proposal for Rome I⁸ in Art. 13 para. 3.⁹ Unfortunately, the views of the co-legislators

⁵ See the Commission Directorate General for Justice and Consumers and Directorate General for Financial Stability, Financial Services and Capital Markets Union. Inception Impact Assessment. *European Commission* [online]. 28. 2. 2017 [cit. 10. 10. 2020]. Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1073039_en

⁶ Preamble UN Convention.

⁷ Art. 22 UN Convention.

⁸ Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).

⁹ *Ibid.*, Art. 13 para. 3.

of the Rome I Regulation was different. They requested further studies to determine the applicable law and therefore the question of third-party effects of claims itself was not addressed in the Rome I Regulation. Despite that the Art. 27 para. 2 of the Rome I Regulation expressly required the European Commission to submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person by 2010.¹⁰

3 What are the Third-Party Effects of the Assignment?

The third-party effects are understood as aspects of the assignment that are excluded from the application of Art. 14 of the Rome I Regulation. Generally, and in the meaning of the subject of this article, the third-party effects of the assignment of claims are (i) the effectiveness of an assignment of claims against third parties and (ii) the determination of priority of claims in case of competing assignments.¹¹ Both categories are connected to the aspects regarding the passing of the right or the title to the claim on another third person. Therefore, the related question that must be answered is who the third party concerning the assignment of claims is. As *Labonté* analyzed in his article, the third party are (i) creditors of the assignor, (ii) competing assignees, if there are any, and (iii) creditors of the assignee.¹²

3.1 The Rome I Regulation and its Article 14

The Art. 14 para. 1 of the Rome I Regulation currently determines the applicable law to the contractual obligation between the parties of the assignment – assignor and assignee.¹³ The law between the assignor and

¹⁰ Ibid., Art. 27 para. 2.

¹¹ Art. 27 para. 2 Rome I Regulation that requires the European Commission to submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person.

¹² See LABONTÉ, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 proposal. *Journal of Private International Law*, 2018, Vol. 14, no. 2, p. 328.

¹³ Art. 14 Rome I Regulation.

the assignee that is of a contractual claim is determined either according to the Art. 3 para. 1 of the Rome I Regulation by the parties' choice of law or according to Art. 4–8 by objective connecting factors, or if the claim is non-contractual it is determined by Rome II Regulation¹⁴.

Para. 2 of the Art. 14 determines the applicable law regarding “*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.*”¹⁵, that is the debtor protection rules. The law of the assigned claim governs (i) the conditions of the notification of the debtor about the assignment, (ii) obligations of the debtor after receipt of notification of the assignment, (iii) the conditions of set-off or pay-off of the claim, or (iv) the regime of other defenses of the debtor.¹⁶ According to the wording, the law of the underlying assigned claim applies on above-mentioned issues that cannot be subject to the disposition of the parties because it could compromise the protection and legal certainty of the debtor.

The Rome I Regulation, therefore, covers the area of assignment of claims between the parties interested in such a relationship and should not apply to any aspects outside the circle. The member states aimed to exclude the third-party effects of assignment from the scope of the Art. 14 which was caused by a disagreement among the member states. The disagreement resulted from different approaches that were taken by the member states in this matter. Consequently, the Rome I Regulation was adopted without determination of applicable on the matter in question since its exclusion was the only way how to save the whole legal instrument.¹⁷

As a result, each member states determined the applicable law on the third-party effects of the assignment according to its own conflict of law

¹⁴ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

¹⁵ Art. 14 para. 2 Rome I Regulation.

¹⁶ GARCIMARTÍN ALFÉREZ, F.J. Assignment of claims in the Rome I Regulation: Article 14. In: FERRARI, F. and S. LEIBLÉ (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, pp. 231–232.

¹⁷ MANKOWSKI, P. The race is on: Germ reference to the CJEU on the interpretation of Art. 14 Rome I Regulation concerning third-party effects of assignments. *Conflict of Laws* [online]. September 2018 [cit. 10.10.2020]. Available at: <http://conflictoflaws.net/2018/the-race-is-on-german-reference-to-the-cjeu-on-the-interpretation-of-art-14-rome-i-regulation-with-regard-to-third-party-effects-of-assignments/?print=pdf>

rules. The European Commission examined the laws of member states and brought to a light different conflict rules from each member state. E.g. in the UK the law of the contract between assignor and assignee governs all aspects of the assignment. On the other the hand, in Belgium the law of the assignor's habitual residence shall apply and in Sweden the *lex rei sitae*.¹⁸

It must be noted that confusion regarding the scope of application of the Art. 14 still exists because of wrong clarification of the issue that is further analyzed in recital 38 of the Rome I Regulation: "*In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment (...)*".¹⁹ Some scholars argue that such wording suggests that the Art. 14 covers even the passing of title that has third-party effects.²⁰ However, such a conclusion is not correct and as *Labonté* mentioned in his article, the main argument against such a meaning of the Art. 14 and recital 38 is, that this recital had been included in the Rome I Regulation already in Commission's proposal of the Rome I Regulation that counted with an explicit provision for the determination of the applicable law for the third-party effects of the assignment before it was rejected by the member states. This implies that Art. 14 of the Rome I Regulation applies solely to the relationships between the assignor and assignee and the debtor.

4 The Proposal of the European Commission

Removing barriers to cross-border transactions in claims and investment is the main objective set by the EU to be achieved by the new proposal. Nevertheless, there are still doubts whether the proposal actually eliminates the legal uncertainty or just adds more of it.²¹

As mentioned in chapter 2, the different set of national conflict rules that regulates the issue in question causes the legal uncertainty about who has the

¹⁸ See pp. 6–7 of the Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person COM (2016) 626 final, prepared by the European Commission in 2016.

¹⁹ Recital 38 Rome I Regulation.

²⁰ LABONTÉ, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 proposal. *Journal of Private International Law*, 2018, Vol. 14, no. 2, pp. 329–330.

²¹ *Ibid.*, p. 323.

legal title to the assigned claim, what happens if third parties claim legal title over the same claim, or which member state's authority is entitled to resolve dispute related to such transaction. Consequently, this lack of certainty creates a legal risk in cross-border assignments of claims resulting in loss of legal title, higher transaction costs or complete waive of the business opportunity.²²

4.1 The Structure of the Proposal

The proposal is parallel to the Rome I Regulation regarding the basic provision on the scope of the regulation that is taking into account all existing regulations of the EU including the Rome I Regulation. The proposal consists of the provision on universal application resulting in the possible application of a law of a third state, overriding mandatory provisions and public policy of the forum e.g. in case of mandatory obligation to register the assignment of claim in public register, the exclusion of *renvoi* and finally the relationship with other provisions of the EU law and existing international conventions. The proposal includes special new provisions regarding the applicable law and its scope.

4.2 The Applicable Law on Third-Party Effects of the Assignment of Claims

The proposal came with uniform conflict of laws rules in respect of the third-party effects of the assignment of claims defined in Art. 4. According to its recital 15, the conflict of laws rules shall govern proprietary effects of assignments of claims between all parties involved as well as in respect of third parties.²³ The scope of the Art. 4 of the proposal includes the proprietary rights not only of the third parties e.g. creditors. This provision shall apply also between the assignor and the assignee and the assignee and the debtor. However, some scholars²⁴ consider the wording of recital 15 in connection with Art. 4 of the proposal inconsistent with current legal rules

²² See pp. 4–5 proposal.

²³ Recital 15 proposal.

²⁴ See for example Kronke, H. Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's proposal. *Oslo Law Review*, 2019, Vol. 6, no. 1, p. 12.

provided by the Art. 14 of the Rome I Regulation. According to their opinion, Art. 14 of the Rome I Regulation implicitly covers even the proprietary rights between assignor and assignee as this conclusion results from the recital 38 of the Rome I Regulation. Reasons, why such an opinion must be rejected, are further analyzed in chapter 3.

The proposal laid down a general rule for the determination of the applicable law based on the assignor's habitual residence. In the meaning of the proposal, the "*habitual residence*" "*means, for companies and other bodies, corporate or unincorporated, the place of central administration; for a natural person acting in the course of his business activity, his principal place of business*"²⁵. The definition is partially transposed from the Rome I Regulation, specifically its Art. 19.²⁶ The European Commission decided to exclude from the scope of the definition of the "*habitual residence*" the branches, because of a possible uncertainty if the same claim would be assigned by the branch as well as by the central administration.²⁷

However, there is a problem linked to the habitual residence of assignor that the proposal envisaged – the potential change of assignor's central administration between individual assignments of a single claim. The rule on the conflict mobile establishes as the applicable law the law of the assignor's habitual residence that was applicable at the time when one of the assignments became effective against third parties.²⁸

For fulfilment of needs of the market participants, there are two exceptions from the general rule specified in the Art. 4 para. 2 that provides the applicability of the law of the assigned claims between the assignor, the original creditor, and the debtor.

Firstly, the law of the assigned claim is applicable in case of the assignment of cash by the creditor credited to an account in the credit institution such as a bank.²⁹ The first contract that assigns claim is concluded between the assignor and the debtor, the bank. Such regulation strengthens the legal certainty since in many cases, the applicable law of the assigned claim

²⁵ Art. 2 letter f) proposal.

²⁶ Art. 19 Rome I Regulation.

²⁷ See p. 18 proposal.

²⁸ Ibid., Art. 4.

²⁹ Ibid., Art. 4 para. 2 letter a).

will be the law of the state where the bank is located. If there are further assignments of the same claim, the applicable law on the third-party effects of such assignment will be determined according to the law of the contract between the assignor, and the first debtor, the bank.

The second exception is the assignment of claims arising from financial instruments.³⁰ The proposal uses the derivative contract, that is used mostly by investors as risk protection, as an example of the financial instruments in question. Again, the legal certainty is quite high in this case, because the law applicable to the assignment of claim is either chosen by the parties or determined in accordance with non-discretionary rules applicable to the relevant financial market.³¹

Moreover, the proposal allows an alternative for the parties given the applicable law on the third-party effects of the assignment of the claim in respect of the securitization. The parties, meaning the assignor and the assignee, may choose for the third-party effects the law applicable to the assigned claim or remain subject to the general rule, the law of the assignor's habitual residence.³² The proposal itself provides with an explanation of why the alternative in respect of securitization and no other financial transactions exist. The current practice of some credit institutions is the application of the law of the assigned claim because then all claims in question are regardless of their assignors' habitual residence subjected to the same law.³³

It is common that one single claim was assigned more than once and that the parties of each assignment chose a different applicable law to the third-party effects. In case of such conflict of different legal systems, the proposal determines the clear rule. Based on an objective factor that is the time aspect of the efficiency of the claim against a third-party.³⁴ This rule copies the rule used for the conflict mobile. And as well as in case of conflict mobile, the rule is responding to the purpose of the proposal that concerns the third-party effects.

³⁰ Ibid., Art. 4 para. 2 letter b).

³¹ Ibid., p. 19.

³² Ibid., Art. 4 para. 3.

³³ Ibid., p. 20.

³⁴ Ibid., Art. 4 para. 4.

4.3 What it Means in Practice

The regime for the applicable law to third-party effects of the assignment of claims chosen by the European Commission reflects the previous negotiations between the member states that were linked to the preparation of the Rome I Regulation. In that time there were two approaches supported by the member states: the application of (i) the law of the habitual residence of the assignor and (ii) the law of the assigned claim. Since both approaches had some drawbacks, a combination of both of them was examined as well. The member states came to the following: the general rule would be the law of the assignor's habitual residence and exceptions for certain types of claims would be introduced.³⁵ However, the main problem in that time was to draft the exceptions and that led to the rejection of including these rules into the Rome I Regulation.

The law of the habitual residence of the assignor as governing law of the third-party effects is considered by many well-known scholars³⁶ to be the best and logical option. It is said that this approach is a practical solution for many forms of assignment, especially in case of assignment of future or bulk claims, the most predictable and easily ascertained by any third party and also consistent with the Insolvency Regulation³⁷ and the UN Convention.³⁸

Taking into account that there are 2 main industries covered by the proposal – factoring and securitization, the European Commission had to even, in this case, introduce exceptions.

In case of factoring when a company assigns a bulk of claims, usually future receivables, to an assignee it is the most convenient to apply the general rule – the law of the assignor's habitual residence. The bulk of receivables

³⁵ GARCIMARTÍN ALFÉREZ, F.J. Assignment of claims in the Rome I Regulation: Article 14. In: FERRARI, F. and S. LEIBLÉ (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, p. 246.

³⁶ See WALSH, C. Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade. *Dickinson Law Review*, 2001, Vol. 106, p. 174; or GOODE, R. The Assignment of Pure Intangibles in the Conflict of Laws. In: GULLIFER, L. and S. VOGENAUER (eds.). *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale*. Oxford: Hart Publishing Ltd, 2014, p. 353, 375.

³⁷ Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

³⁸ KRONKE, H. Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's proposal. *Oslo Law Review*, 2019, Vol. 6, no. 1, p. 15.

consists of more than one future claim that may be governed by different laws. If we would apply the law of the assigned claim on the third-party effects that would mean that for each claim the assignee would have to consider different national rules.

On the other hand, the proposal offers the assignor and the assignee flexibility in relation to a securitization. When an assignor, such as a bank, does not want to be exposed to the risk that the loans it has provided will not be repaid, it assigns the claims to the assignee, that is called the “*special purpose vehicle*”, that then issues the securities and sells it to investors. In the case of large securitization transactions, the assignors are located in different states. This means that the assignee (the special purpose vehicle) will need to comply with the requirements laid down in the law that governs the assigned claims (that is, the contract between the assignor and the debtor) to ensure that it acquires legal title over the assigned claims. The law of the assigned claim corresponds to the current market practice involving large banks by applying the law of the assigned claim to the third-party effects where the assigned claims are all subject to the same law but the assignors are located in various states.

5 The diversity among member states

The divergence in the conflict rules is more than obvious and it causes an obvious problem, **the legal uncertainty that results from complexity**. Firstly, the relationship between assignor, assignee and the debtor and different understanding of the concept of the assignment among jurisdictions is already a complex and only on the substantive national law level. Such complexity transferred on the conflict of laws level results in even more confusion and adds to the growth of uncertainty. Moreover, the legal uncertainty is supported by overlapping rules of regulations adopted in the EU that may be applied at the same time. Such conflict may, for example, occur in case of an insolvency of an assignor. Firstly, Art. 14 of the Rome I Regulation clarifies the applicable law between the assignor and the assignee, however, in the event of insolvency of the assignor, the Insolvency

Regulation Recast³⁹ may cause a bigger uncertainty. In such a case, the law of the state where the insolvency proceedings are commenced against the assignor determines even aspects related to the assignment of claims to third-party.⁴⁰

The absence of the general rule on the EU level leads many member states to develop a solution based on an interpretation of the Art. 14 of the Rome I Regulation. In *Brandsma qq vs. Hansa Chemie AG* the Supreme Court of Netherlands decided whether a validity of the assignment of claim, that is a question of a property rights, in that case was governed by the Rome Convention⁴¹ (in force at that time) and whether to apply Art. 12 para. 1 of the Rome Convention (currently the equivalent to the Art. 14 of the Rome I Regulation). The Court decided that the abovementioned article covers the contractual aspects of the assignment as well as the proprietary between the assignor and the assignee.⁴²

5.1 The approach of the United Kingdom

Taking into account on one hand current negotiations between the EU and UK regarding the Brexit deal and that the transition period ends on the 31 December 2020, and on the other the current impossibility and absence of negotiations on the proposal on the EU level, the UK will leave the EU before the proposal will be adopted. However, during the development of the proposal, the UK was a valid member of the EU as any other country. Therefore, its approach and opinion on the proposal for the regulation should be properly analyzed, since it can reveal the manner how the proprietary aspects of the assignment of claims in relation to the UK will be regulated.

³⁹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

⁴⁰ See p. 8 of the Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person COM (2016) 626 final, prepared by the European Commission in 2016.

⁴¹ Convention of 19 June 1980 on the law applicable to contractual obligations.

⁴² HARTLEY, T. C. Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation. *International and Comparative Law Quarterly*, 2011, Vol. 60, no. 1, p. 43.

The UK expressed strong disagreement with the proposal for the regulation.⁴³ The imposition of a mandatory rule on the EU level that excludes the party autonomy and does not respect the current market practice reflected in the law that currently address the issue of the proprietary aspects of the assignment, was not accepted by this common law country.

As many other member states, the UK also considers the Art. 14 para. 1 of the Rome I Regulation as the main conflict of laws rule determining the law applicable to the assignment of claims in general. It regulates

- the relationship between the assignor and the assignee,
- the relationship between the assignee and the debtor, and
- the relationship between the assignor and the debtor.

The general rule is that the contractual claim is determined either according to the Art. 3 para. 1 of the Rome I Regulation by the parties' choice of law, according to Art. 4–8 by objective connecting factors, or if the claim is non-contractual it is determined by Rome II Regulation. Each aspect of the assignment is therefore determined by the same applicable law.

However, the proposal for regulation introduces a new jurisdiction law that should apply besides the general rule as stated above, the law of the assignor's habitual residence. By this approach further issues arises, that consequently lead to bigger complexity and confusion.

Firstly, the place of the "*habitual residence*" may have a different meaning under the Rome I Regulation and the proposal for the regulation. The Art. 19 of the Rome I Regulation determines the habitual residence of companies as the place of its central administration with one exemption that cannot be omitted. In case of contracts concluded by a branch, agency or other establishment, the place where the branch, agency or any other establishment is located shall be considered as the place of the habitual residence.⁴⁴ The proposal, on the other hand, does not specify such rule for determination of the habitual residence. German creditor, operating through a branch

⁴³ Proposed EU Regulation on law applicable to the third party effects of assignment of claims – Why the UK should opt-out and work to get this proposal changed or scrapped. *The City of London Law Society* [online]. 24. 5. 2018 [cit. 18. 10. 2020]. Available at: <http://www.citysolicitors.org.uk/storage/2018/05/Proposed-EU-Regulation-on-law-applicable-to-the-third-party-effects-of-assignment-of-claims-24-05-18.pdf>

⁴⁴ Art. 19 Rome I Regulation.

in the UK, assigns a claim governed by the English law to two assignees. Assignee A is from the UK and assignee B is from the Czech Republic. The assignment itself is regulated by the law of the claim, that is the English law. However, the determination who of the two assignees is entitled to the claim that was assigned to them will be, by applying the rules from the proposal, determined by the law of the assignor's habitual residence. The habitual residence of the assignor regardless of whether it was assigned by its branch with place of business in another jurisdiction, will be determined by the place of its central administration, which is in Germany. Therefore, we have a single contractual claim that is assigned between assignor and assignee A. The assignment itself is regulated by the law of the assigned claim, however the proprietary effects of such assignment are determined by the law of the assignor's habitual residence (if not taking into account the other two rules stated by the proposal).

Furthermore, these (at least) two legal jurisdictions may have a different impact on assignment of a future claim. The assignor must due diligence not only the possibility of the assignment under the law applicable to the claim itself, but even the law of its habitual residence.

Another issues that arises regarding the proposed rules by the European Commission is the current market practice regarding the assignment of claims. For example, in the area of syndicated loans, the assignments must always comply with a single legal jurisdiction, usually the law of the assigned claim. However, by applying new rules, different set of rules may apply on a single facility based on the residence of each assignor.

The UK itself proposes that the general conflict of law rule should be the law applicable to the assigned claim.

5.1.1 The law applicable to the assigned claim

As mentioned in the precious chapters, the law of the assigned claim is already applicable according to the Art. 14 para. 1 of the Rome I Regulation and respected by some member states such as the UK. What if the law of the assigned claim would apply even on the third-party effects? The assignor and the assignee must consider the law of the assigned claim if they choose to transfer such claim for example in question of assignability of the claim.

The claim may become non-assignable because of the protection rules of the debtor that come into the game.⁴⁵ There are more prerequisites for transfer of claim that are regulated by the law of the assigned claim and should, therefore, regulate also third-party effects of the assignment.⁴⁶ Another issue that supports this approach is the debtor position in case of a set-off. The original creditor, the assignor, rightfully assigned the claim to an assignee who chose as the applicable law to the assignment German law. However, the debtor wants to determine whether it can still exercise the set-off against the assignor. In such case, he will have to refer to the law other than the one under which his obligation arose to determine whether it is still possible to set off its debt with the original creditor, the assignor.⁴⁷ To avoid the complexity of applicable laws that apply to the whole process of the assignment, the law of the assigned claim should apply even to third-party effects.

6 Conclusion

The very existence of general rules governing the law applicable to the effects of the assignment of claims to third parties entails a certain shift in certainty in the context of financial operations in the EU. Definitely, one united manner to determine the applicable law to the third-party effects of the assignment is more than welcomed by the EU and its member states. However, it seems almost impossible to agree on it. The reason is obvious. Each member state regulates the aspects of assignment under its own conflict of law rules setting different connecting factors for the determination of the applicable law. Some of the member states found a solution on this matter by applying the same law as determined by the Art. 14 of the Rome I Regulation. The reason is to avoid the unnecessary double legal regime for the contractual aspects and the proprietary aspects of the assignment.

⁴⁵ Such a case can occur for example when a debtor assigned his salary to pay off his debt but then he becomes penniless. Some of the national laws forbid the assignment of salary as a protection for the employee.

⁴⁶ LABOTNÉ, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 proposal. *Journal of Private International Law*, 2018, Vol. 14, no. 2, p. 335.

⁴⁷ *Ibid.*, p. 336.

The same applies for the UK. Even though it is no longer a member state and therefore, it will not be obliged to apply the rules from the proposal, its arguments for rejection of such proposal are understandable.

If the proposal will be adopted on the European level, it may bring more legal uncertainty than before. It seems that the UK is about to leave the EU without any deal which means that there will be no solution for uniform rules determining applicable law for any transactions, including the assignment of claims and its proprietary aspects, between them. The approach of the UK is quite clear. Even though, the UK will not be obliged to apply the new regulation after it will be adopted by the EU, some of current rules related to the assignment of claims adopted on the EU level will apply even after leaving the EU.

As a result of the European Union (Withdrawal) Act 2018 the Rome I Regulation shall continue to apply in the UK after Brexit. Therefore, the general rule for the assignment of claims shall be the one in Art. 14 of the Rome I Regulation. Regarding the third-party effects of the assignment the law governing the claim shall apply.

However, the question still is whether and within what time limit the EU will adopt the proposal. Until then the same regime between the states applies.

Literature

Country reports of the British Institute of International and Comparative Law. Study on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person – final report. *edz.bib.uni* [online]. 2018 [cit. 10. 10. 2020]. Available at: http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/12/report_assignment_en.pdf

GARCIMARTÍN ALFÉREZ, F.J. Assignment of claims in the Rome I Regulation: Article 14. In: FERRARI, F. and S. LEIBLÉ (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, pp. 217–249.

GOODE, R. The Assignment of Pure Intangibles in the Conflict of Laws. In: GULLIFER, L. and S. VOGENAUER (eds.). *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale*. Oxford: Hart Publishing Ltd, 2014, pp. 353–378.

HARTLEY, T. C. Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation. *International and Comparative Law Quarterly*, 2011, Vol. 60, no. 1, pp. 29–56.

Inception Impact Assessment. *European Commission* [online]. 28.2.2017 [cit. 10.10.2020]. Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1073039_en

KRONKE, H. Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's proposal. *Oslo Law Review*, 2019, Vol. 6, no. 1, pp. 8–18.

LABONTÉ, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 proposal. *Journal of Private International Law*, 2018, Vol. 14, no. 2, pp. 319–342.

MANKOWSKI, P. The race is on: Germ reference to the CJEU on the interpretation of Art. 14 Rome I Regulation with regard to third-party effects of assignments. *Conflict of Laws* [online]. September 2018 [cit. 10.10.2020]. Available at: <http://conflictoflaws.net/2018/the-race-is-on-german-reference-to-the-cjeu-on-the-interpretation-of-art-14-rome-i-regulation-with-regard-to-third-party-effects-of-assignments/>

Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims COM (2018) 96 final prepared by the European Commission in March 2018.

Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).

Proposed EU Regulation on law applicable to the third party effects of assignment of claims – Why the UK should opt-out and work to get this proposal changed or scrapped. *The City of London Law Society* [online]. 24.5.2018 [cit. 18.10.2020]. Available at: <http://www.citysolicitors.org.uk/storage/2018/05/Proposed-EU-Regulation-on-law-applicable-to-the-third-party-effects-of-assignment-of-claims-24-05-18.pdf>

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).

Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person COM (2016) 626 final, prepared by the European Commission in 2016.

United Nations Convention on the Assignment of Receivables in International Trade as adopted on 12 December 2001.

Walsh, C. Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade. *Dickinson Law Review*, 2001, Vol. 106, pp. 159–204.

Contact – e-mail

Michaela.Garajova@mail.muni.cz

ORCID

0000-0001-5908-7700