The City of London Law Society

4 College Hill
London EC4R 2RB
Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 - Cheapside 2
mail@citysolicitors.org.uk
www.citysolicitors.org.uk

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

Summary

This paper has been prepared by the Financial Law Committee of the City of London Law Society (CLLS) in order to contribute to the on-going debate regarding the need for and suitability of a mandatory rule of private international law relating to the proprietary aspects of assignments which would require these to be settled according to the law of the habitual residence of the assignor. Further details about the CLLS and the Committee appear at the end of this paper.

In short, the Committee believe that the Regulation is misconceived. It has not been given the thought appropriate for the unusual decision to impose at Union level a mandatory rule excluding party autonomy and excluding, to a large extent, the most obvious law under which the problems it seeks to address are normally resolved, namely the law of the claim.

We consider that the proposed rule is unsuitable and that if there were to be any mandatory rule at Union level, the only suitable candidate would be the law of the claim.

Recommendation

On 12 March 2018, the European Commission published a proposal for a Regulation on the law applicable to the third-party effects of assignments of claims. We strongly urge the European Commission to amend substantially or abandon this proposal. As it currently stands, we strongly recommend that the UK exercises its right not to opt into this civil justice proposal. As we believe that the law is conceptually mistaken, we would urge the UK to argue for its abandonment or the adoption of a different rule consistent with the rights of the debtor.

While in the absence of a transitional period, the measure is unlikely to become law before the UK ceases to be bound by EU law, it is settled Government policy to maintain consistency with the rules of private international law embodied in the Rome I and Rome II Regulations, to which the proposed Regulation is an adjunct, to the extent required while the UK was a member of the EU.. Even if not adopted in the UK, this Regulation would be expected to lead to a greater multiplicity of jurisdictions within and without the EU hearing related litigation, whether or not the UK continues to have the benefit of the Brussels Regulation or the Lugano Convention.

The legal debate

Currently, the Rome I Regulation contains conflicts of law rules governing the relationship between the assignor and assignee and the relationship between the assignee and the debtor (as well as the

relationship between assignor and the debtor). It applies the law of the assigned claim to the relationship between the assignee and the debtor and the law chosen by the assignee and the assignor (or in the absence of choice the law applicable according the Rome 1 Regulation) to the relations between them.

There is a perceived lacuna relating to the relations between competing assignees – e.g. where the assignor has assigned the same claims twice, either lawfully, (e.g. first and second charge) or unlawfully (i.e. a subsequent assignment has, either inadvertently or deliberately, resulted in the assignor selling the same asset a second or multiple times to different buyers).

The proposed Regulation would, with the intention of filling this perceived lacuna, apply the law of the assignor's habitual residence to the third party effects of assignments, except for certain types of claim (cash in bank accounts and claims arising from financial instruments), where the law of the assigned claim will apply, and for assignments pursuant to a securitisation, where the parties will have a choice of which rule to apply. It is apparently intended to be consistent with the Rome I Regulation (see Recital 9) and to supplement it without amending it, but has a number of inconsistencies.

Debate about the effect in practice

The proposal require reference to the law of the habitual residence of the assignor is said to assist the business of factors and invoice discounters, by giving them a single law and point of time which they must consider when taking an assignment. Whether this rule would actually achieve this effect is debatable, but in any event it would have much wider effects on a wide range of financial transactions for which it is as unsuitable, just as it is acknowledged to be unsuitable in the context of securitisation. We are concerned that the proposed Regulation would cause substantial difficulties in the operation of the European capital markets if it were to be adopted.

Concerns about the Proposal

We have concerns:

- that the law will complicate some situations by introducing a third jurisdiction law into a situation where otherwise the law of only a single jurisdiction would apply to all aspects of an assignment. To this extent it may make the taking of an assignment from a non-domestic assignor, less rather than more, attractive, even in the context of factoring, much of which is not cross-border in nature;

- that it will still be necessary for the assignee to due diligence the law of the original claim if it wants to be sure that the original debtor will be liable to pay it directly (particularly if the assignor were to become insolvent before the debt is paid) – e.g. that law may require notice to be given by the assignee to the original debtor and that law will not be displaced: it would be an interference with the rights of the debtor, inconsistent with EU law, to read the proposed regulation as removing those rights, which are protected by the current rules in the Rome Regulation;

- the rule may be over-ridden by the law of any relevant insolvency of the assignor which will apply its own rules in relation to claims by competing assignees claiming in that insolvency. There is no certainty this will be the law applicable as a result of the rule and it may therefore be of limited practical value;

- whether the proposed Regulation is within the vires of the EU;

- that the proposed Regulation may run counter to general principle of EU private international law respecting party autonomy – the right to choose the applicable law.

While not all these concerns are of equal weight we believe each of them deserves discussion. We are firmly of the view that the practical effects on financial transactions to which the proposed rule is

unsuited would be serious and costly to affected businesses, while making some financial markets more difficult and uncertain for participants.

List of Issues

1. The rules in the proposed Regulation, with two different types of exception organised according to different guiding principles, are overly complex.

A contractual claim is a single legal concept to which a single legal conflicts of law rule would normally be expected to apply. The proposed Regulation contains three different rules for this single category. One rule will apply only where the contractual claim arises from a particular type of contract (Article 4(2)). Another rule will apply only where the contractual claim is assigned pursuant to a particular type of transaction (Article 4(3) securitisation). The third rule applies to everything else (Article 4(1)).This approach is entirely different from any other part of the conflicts of law and will create uncertainty.

In addition the rights and obligations of the original debtor remain governed by the law of the original debt under Article 14 of the Rome 1 Regulation.

In some jurisdictions the rights and obligations of the debtor would be regarded as the mirror image of the rights and obligations of the proprietor of the debt (the original creditor or subsequent assignee(s), at least where the rights of an assignee had been perfected according to the law of the debt. This would produce a single solution. Where not perfected, some systems would determine the rights of a claimant assignee against the recipient of payment of the debt separately – usually applying the law of any relevant contract of assignment (even if different from the law of the underlying debt) and proprietary rules (including in common law jurisdictions equitable rules on beneficial ownership) to decide who was ultimately entitled. Where a system has an effective solution (mirror image or moving the dispute to the proceeds of the debt) there is no lacuna at all.

If under some Member State's legal systems there is a lacuna to be addressed, then the solution which respects party autonomy, respects the rights and choices of the original debtor and does not raise any conflict or tension with the Rome I Regulation Article 14, would be that in Article 4(2), which make the law of the original claim applicable to third party effects. There is nothing to indicate that it would not provide a universal solution workable in all cases and rendering both the proposed general solution (law of habitual residence of the assignor) and the securitisation solution (as for 4(2) but only if chosen by the assignor and the assignee) unnecessary.

The objection that this will require the assignee to due-diligence the law applicable to each contract, seems to us without point. If the assignee wishes to be sure that it can obtain payment direct from the original debtor if it so requires (e.g. after the insolvency of the assignor) it will need to do that due diligence anyway: and it is the same issue for each contract governed by a particular law, once the law of the contract is established). With the proposed law it would be also necessary to ascertain where the assignor is habitually resident and then due diligence that law as well as the law applicable when dealing with the debtor.

There is also the conundrum of the position where an assignee (B) takes an assignment over debts owed to the assignor (A) and created under the law of one jurisdiction and also a charge/assignment of rights in respect of the bank account to which the assignor has arranged that the assigned debts will be paid (most usually an account of the assignor (A) in the same jurisdiction) with the same governing law. Assume that assignor (A) is habitually resident in a different jurisdiction from all or most of the underlying debtors and the bank and its law is not the law of the assignment or charge; then assume that there is a subsequent assignment and charge (whether by assignor A or assignee (B)), which brings in assignee (C) who is habitually resident in a third jurisdiction. If the assignment and the charge are viewed as two separate assignments, then the rules to determine priority in Article 4 will not apply at all. The cash in the bank account will be dealt with according to Article 4(2) under the law of the debt regardless of the number of assignees who might assert a claim.

On the other hand the proprietors of the two assignments will have competing laws to decide their position, neither of which is the law of the underlying debt, nor (probably) the law under which the

contracted, but the law of the jurisdiction of their respective head office). Assuming that Article 4(4) applies[1], then either the law of the habitual residence of assignor (A) or (Assignee (B) would apply to determine rights as between assignees (B) and (C) as regards their respective interests in the claims of the original debtors (while whether any particular original debtor had discharged its debt would be decided by the law of their original debt. The room for conflict with the solution arrived at in relation to the bank account into which the debts have been paid seems obvious.

2. ***The differing meaning of "habitual residence" in the Rome I Regulation and the proposed Regulation will cause confusion and legal uncertainty***.

The place of habitual residence of a corporate or other non-natural person assignor and other party may be different under the Rome I Regulation and the proposed Regulation, if the party is contracting through a branch, agency or other establishment.

Under the Rome I Regulation, Article 19, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration, but ".Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence."

In the case of the proposed Regulation the rules for branches etc. are omitted, so that for example, in the case of a Japanese assignor, operating through a UK branch assigning claims governed by English law to an English assignee under assignments governed by English law, the law of Japan would highly likely determine which of two assignees were entitled to the claim or to share in the claim, while English law would decide whether the debtor had got a good discharge. This would be particularly complicated (as illustrated at one above, if there are successive assignments by successive assignee/assignors[2], as is common in "on the record" transfers of syndicated loan participations in the secondary market[3].).

In practice, while the answer would normally be the same, the introduction of a third country law runs the risk that there is a finding (especially if this question is decided in a different court in a different jurisdiction) in the jurisdiction of the law of the assigned claim expressed in terms that the debtor should have paid assignee (A) and having done so gets a good discharge, but in the other jurisdiction a finding that the owner of the debt is assignee (B). In the event an original debtor has assets in the jurisdiction where the finding is favour of assignee (B), if assignee A is insolvent, this must open up the risk that the original debtor may be in double jeopardy, the foreign court not necessarily being bound by the finding in favour of the debtor in his home.

This risk of inconsistent finding and their potential consequences (which could be outwith the jurisdiction of any EU Court) could not occur if the law of the claim also determined who was the owner of the claim as a result of subsequent assignment(s). .

3. The proposed rules on which is the relevant law in the case of successive assignments will cause confusion and legal uncertainty

If there are successive assignments and the assignor has moved its jurisdiction of central administration between assignments (e.g. Scotland to England or The Netherlands to Belgium) or there are successive assignments by successive assignees (as in the secondary market for syndicated loans) then different rules could apply to third party effects. To determine rights as between successive assignees, one of those laws has to be preferred.

---

[1] No part of Article 4 seems to determine the law where there are successive assignments of the same debts by different assignees with different habitual residences, but none of those transactions would bring in the law of the assigned claim, but the rule in Article 4(1) would not apply the law of the underlying debt to any of the assignments – this may be deliberate or because of infelicitous wording of Article 4(4), which could be adapted to cover this situation.

[2] We understand that the Regulation is also intended to cover novations – that is assignments of rights accompanied by an assumption of obligations with release by the original debtor of the assignor, but there is no clarity whether that would take the assignee to the law of the new debt (or would override this in favour of the place of habitual residence of the first assignee in time (all such assignments would be perfected).

[3] See further discussion of syndicated loans below.

The rules to determine which law is relevant in the case of successive assignments (Article 4(4) and Article 14(2)) are confusing and will not always be capable of being known at the date of the assignment, particularly a second assignment where the existence of the first is concealed. Article 4(4) essentially chooses the law applicable to the assignment which is first in time to be perfected according to its applicable law (which would not necessarily be the assignment first in time)[i], but Article 14(2) chooses the law arrived at under the Regulation over the solution that would have been reached under preceding law to decide precedence over assignments that precede the Regulation coming into force.

The rules in Article 4(2) cause legal uncertainty and also appear to defeat the purpose of simplifying the due diligence task of an assignee. They would need to due diligence for example any prior habitual residence (if the assignor had changed its place of central administration from one jurisdiction to another, as may happen both within the UK and as between EU Member States) just in case their assignment was not the first in time, as the law of the earlier assignment would be the applicable law.

The transitional rule in Article 14(2) appears to unfairly remove the rights of earlier assignees to have their rights judged by the law in force at the time of their assignment, turning the rule in Article 4(2) on its head in this instance. It is doubtful that this complies with general principles of EU law.

4. Vires

The proposed rule is intended to apply to "third party effects". These are defined at Article 2(e) of the draft as "proprietary effects, that is, the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or a functionally equivalent claim, creditors of the assignor and other third parties."

Article 345 of the Treaty on the Functioning of the European Union (TFEU) provides:"The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".

By setting a mandatory proprietary rule, however, the Regulation (which derives its vires from the treaties) would change the existing system of property ownership in claims by requiring the courts of Member States in certain circumstances to apply the rules of another jurisdiction to over-ride their own, in particular in so far as it may create a conflict between the law of the assigned claim as to whether the debtor has been discharged and the finding as to which assignee was entitled to be paid using a different system of law. That would apply in legal systems when the ownership of a debt is determined by reference to the identity of the person the debtor is obliged to pay and would create an enforced distinction between these concepts in legal systems that do not recognise this difference, as well as preventing the use of national rules that deal effectively with an difference in quality of ownership that is recognised, e.g. common law on beneficial ownership in relation to unperfected assignments.

It is often said that Article 345 is not intended to deal with this sort of situation[4], but in many cases, the CJEU has considered this Article and its predecessors, it has concluded that the facts at issue involved merely the exercise of property ownership rights arising under national law, rather than their essence. This is different. As a debt is the creation of the system of law under which the debt arises, by over-riding national rules, this Regulation has the effect of actually abrogating existing rights by effectively preventing their application to all aspects of ownership of the debt.[5] For example where a system of law would use a combination of contractual rights under the contract creating the debt, the terms of one or more contracts of assignment (applying standard conflicts rules to any governed by a different law) together with rules on the ownership of property created by contract to determine the rights of assignees inter se and as against the original creditor, it would be forced to completely abandon its own law in all these respects in favour of the law of a third country, which had no connection with any of the transactions, except incidentally being the place of the head office of one of the competing assignors.

---

[4] Matters such as State ownership of the means of production, or conditions as to persons who are eligible to acquire land.
[5] Except where Article 4(2) or 4(3) apply, the law of the debt can only be used in relations with the original debtor and effectively ceases to exist for any other purpose.

5. Having different rules for the contractual third-party effects and proprietary third-party effects of assignment will lead to confusion

The border between the contractual and proprietary effects of assignment is not clear. The question of who the debtor has to pay – that is, who can give them a good discharge of the debt – appears to be entirely contractual. In some legal systems, this is seen as precisely the same issue as who actually owns the debt – that is, the person who owns the debt is the person who the debtor has to pay to discharge the debt. In other legal systems, these two questions are logically distinct or may (depending on whether an assignment has been perfected) be decided according to different property rules. Similar debates apply to the connection between rules of priority over competing assignments and rules governing the relationship between the assignee and the debtor.

This distinction is not just of academic interest – it has real practical importance. The border between contractual and proprietary issues could determine whether a debtor has discharged its debt or whether a debt forms part of the insolvency estate of an assignor. It also determines how far a contractual restriction on assignment may be effective.

It is clear that this distinction only matters if different rules apply to the contractual and proprietary aspects of the effect of assignment on third parties. By applying a different rule to the Rome I Regulation, the proposed Regulation will create significant uncertainty. While it appears that the draft Regulation does not intend to repeal Article 14 of the Rome 1 Regulation, but rather to supplement, it in fact sets up a tension between the rules in Article 14 and the rule in the proposed Regulation.

6. Law firms will have to add additional qualifications to their legal opinions, as residency is a mixed question of law and fact.

Parties to an assignment often require formal legal opinions as to its efficacy. Legal opinions can only opine as to matters of law – they must assume any necessary factual conditions. Whether an assignor is resident in a jurisdiction on a particular date is, at least in part, a question of fact. Therefore, legal opinions relating to assignment will need to contain additional factual assumptions.

Where there is a series of assignments of the same debt, the proposed Regulation may apply different laws to each of those assignments. This could lead to uncertainty and contradictory results.

7. *The exception for 'securitisation' is not defined properly*.

'Securitisation' can refer to a broad category of financial transactions. Many structures have some but not all features commonly associated with securitisations, such as warehousing arrangements or covered bonds. Securitisation is not defined in the proposed Regulation, so it will be unclear in many situations whether the securitisation exception applies.

8. The exception for 'financial instruments' is not sufficiently wide.

The definition of financial instrument is not sufficiently wide to include all transactions involving the standard ISDA documentation.

9. The new rule is inconsistent with the current operation of the market for trading in syndicated loans.

Syndicated loan trading currently takes place on the basis that all "on record" assignments/novations of loans in respect of a particular facility must comply with a single set of rules – those applicable under the law governing the facility agreement (i.e. the law of the assigned debt). The proposed

Regulation would apply different rules to assignments under a single facility depending on the residence of the assignors.[6]

In addition the Regulation is obscure as to how it will address novations (which most "on record" assignments of loan participations are structured to be). A novation sets up a new debt between the original debtor and the assignee and releases the assignor from the contract. Logically these should be dealt with according to the law of the underlying contract and the novation (which in this market will always be the same). Article 5(e), however, suggests that the law of an assignee's habitual residence would be applied to determine priority as against the beneficiary of a novation (presumably the "beneficiary" is intended to be the new creditor under the novation, rather than the original debtor or the assignor, although all these parties actually could be described as "beneficiaries" of a novation as they all acquire rights). This would seem to displace the law of the debt, although the new creditor will have achieved a direct relationship with the original debtor, while the assignee (and the law of its head office) may not be known to the original debtor or the new creditor at all.

As loan participations and sub-participations are traded internationally between financial institutions with head offices in a wide range of jurisdictions world-wide and with branches in many more countries which actually deal with the trades, the general rules in the proposed legislation are wholly unsuitable for this market and would give rise to uncertainty, as well as potentially affecting the ability of some institutions to participate in this market, with consequent effects on market liquidity. (see 11 below as regards future receivables).

In the event this Regulations proceeds, assignments and novations in the course of syndicated loan trading should be subject to the rule in Article 4(2).

10. ***The new rule would lead to inconsistent results for assignment when compared with other forms of transfer***

Contractual rights may be transferred otherwise than by assignment, for instance, by sub-participation, novation or declaration of trust (we use 'transfer' here as an umbrella term – some of these methods strictly involve extinction and replacement of a right rather than it moving). The proposed Regulation would potentially lead to inconsistencies between the conflicts rules applicable to assignments and those applicable to other forms of transfer.

11. The new rule would limit freedom of contract in assignment of future receivables

Some legal systems do not permit the assignment of future receivables. The proposed rule means that an assignor habitually resident in such a jurisdiction would not be able to assign future receivables at all, even though they may be incurred by original debtors contracting under a law where such assignments are lawful and assigned under the same law. This would limit the assignor's ability to operate fully in those markets. Where the assignor is from a WTO country and is lawfully operating in the financial markets of another WTO country, it is as a general rule (sometimes subject to specific reservations) entitled to "national treatment". The proposed general rule would appear to deny the assignor "national treatment" which would be accorded to an assignor in the same line of business with a head office in the jurisdiction of the law of the underlying debt.

In any event, the mandatory rule would introduce undesirable effects on the ability of branch banks to trade in the EU (or if EU institutions, elsewhere in the EU) if the law of the jurisdiction of their head office did not permit the assignment of future receivables.

12. ***It is unclear how the new rule would affect 'mutuality' of claims in an insolvency context*****.**

Automatic set-off of debts on insolvency depends, in many legal systems, on 'mutuality' of the debts owed between the two parties. It is unclear how a rule that maintains the relationship between the

---

[6] On the other hand sub-participations, in which the owner of the debt (the original creditor in some cases and in others an "on record" assignee/novatee agrees to pay all or part of what it receives from the original debtor to a third party are not perfected (and may not always legally be assignments at all), leaving the rights of the holders of sub-participations inter se and vis-à-vis the original creditor to the rules of equity and beneficial ownership not affecting the rights and obligations of the original debtor vis-à-vis the original creditor.

parties contractually but distinguishes it for proprietary purposes (or vice versa) will apply to mutuality. For instance, if the debtor must still discharge the debt by paying only the assignor but the assignor is deemed no longer to be the owner of the debt, it may be unclear whether there is still mutuality with regard to that debt between assignor and debtor.

For reasons stated below, we think the effect of imposing this rule would not be to remove the need to look to the law of the original claim in cases where the competing assignees were competing for a debt not yet paid by the original debtor and therefore would not relieve factors and other assignees of the need to due-diligence the law of the claim.

Even though the law of an insolvency of an assignor is quite likely to be that of its habitual residence at the time of any relevant assignment(s) this is not invariable, as illustrated by the rules to cover the possibility of changes in habitual residence. Additionally in some cases the place of incorporation may not be that of habitual residence and an insolvency may occur in that jurisdiction, while in others, the jurisdiction where a branch is situate may take insolvency proceedings in relation to the affairs of the branch. In that case the law of any habitual residence determined under the Proposed Regulation would not necessarily be determinative in an insolvency.

In the case of the insolvency of the debtor the law of its registration or habitual residence is most likely. In the case of debts that are factored, this is most likely to be the same as the law of the claim against it, although this will not be invariable for the reasons stated above and/or because the debtor may have contracted under the law of another jurisdiction.

13. The proposed Regulation has been prepared without consideration of whether it creates an increased likelihood of the parties' contractual choice of court not covering the sort of dispute likely to arise as between competing assignees or any particular problems (e.g. in relation to real property arrangements)

It does not seem that a choice of court under Article 25 of the Brussels Regulation is likely to be capable of covering a dispute between competing assignees, since the problems are likely to arise in circumstances where the second assignee was unaware of the first assignment. Even if they are first and second charge holders, it would require a change of practice for them each to agree on a court to deal with disputes between them.

While the rules in the Brussels Regulation on choice of court in the absence of agreement may in most cases give one or more EU Member State courts jurisdiction over most inter-assignee disputes relating to debts, the governing law of which is the law of an EU jurisdiction, those rules would not be likely to limit parties to proceedings in a court associated with the law of the underlying debt, the law of any assignment (if different) or even the law of the habitual residence applicable in consequence of the proposed Regulation.[7]

The risk of a party that is looking for a procedural or other advantage seeking to invoke a court which is not a natural forum seems likely to increase in cases where the law(s) governing the original debt and the assignments (often all the same) have been mandatorily excluded in favour of the law of a third state. The courts of jurisdictions outside the EU might also be invoked on similar grounds. This would add to costs for the parties and increase the risk of multiple proceedings in different languages and the risk of inconsistent findings.

There may also be issues regarding assignment of debts owed to the holder of an interest in real property, particularly if linked to creation of a mortgage or charge over that property. Article 24 of the Brussels Regulation gives the courts of the jurisdiction where the real property is situated mandatory jurisdiction. That jurisdiction's law will also be the law of most contracts relating to real property: it is the fall-back rule in the Rome I Regulation Articles 4(c) and (d) (except for certain short-term tenancies). Although parties are free to choose another law, in practice this is not often done.

[7] Indeed, the Brussels Regulation applies the term "domicile" to corporate entities and only one of the 3 tests of domicile is the same as that for habitual residence in the proposed Regulation. This means that a court may have jurisdiction as the courts of the domicile of a company even though that jurisdiction is not the habitual residence of the company (so a Luxembourgois court could take jurisdiction based on the registered office of a company with its central administration in France and all relevant contracts governed by the law of Spain!).

However, in the case of an assignment of debts arising from real property (e.g. rent), coupled with the creation of a charge or property interest in the real property, the law of habitual residence of the assignor will intrude into the situation and could require a court to apply a third country law to determine who was entitled to the debts, while it had different rules to determine the ranking of interests in the real property, unless it was satisfied that its own rules could be regarded as mandatorily excluding the third country law. This could result on a finding that a chargee had a charge to secure an amount including sums that the debtor had already paid to another claimant whose priority in relation to debts was determined to rank first under the law of that claimant's habitual residence. This would leave the court scraping round for a basis to protect the original debtor against double payment.

14. The law of the Forum, particularly in the case of an insolvent party, may contain mandatory rules that override the effect of the proposed rules (or rules that are unaffected by the Regulation)

Article 5 sets out the areas where the proposed rule is to apply. These include registration or publication formalities, priority rules as between assignees, priority rules as against the rights of the assignor's creditors, priority rules as against the beneficiary of a transfer of contract in respect of the same claim (this language is unclear, but may apply to a transfer by the original debtor of its contract with the assignor, where the transfer of obligations is possible without novation) and priority rules against the beneficiary of a novation (again obscurely worded as noted above in discussing syndicated loans).

Under Article 6 the mandatory rules of the forum will override the applicable law. Where, for example the forum is that of the law of the claim and that is not the law of the habitual residence of the assignor, aspects of its rules within the scope of Article 5 may be mandatory. For example, if they require that a charge is registered in a register in that country before it will be effective (as UK law used to do as regards charges created by overseas companies with a place of business in the UK) then this may be considered a mandatory law and affect the effectiveness of an assignment, even though the registration requirement of the law of the place of the assignor's place of habitual residence are met.

On the other hand, conflict of law rules of the forum which, absent this Regulation, would require regard to be had to registration in the place of registration of the assignor as a company would not be mandatory and would be disapplied if that place was not also the place of habitual residence.

Where insolvency law contains specific conflict rules these will also take priority where they are European Union law (Article 10). Thus the rules in the Insolvency Regulation would appear to take priority over the rules in the proposed Regulation. These rules do not currently contain any requirement to look to the law of the habitual residence of the assignor.

"Union law" is not defined, so it is not entirely clear whether it extends to Member State implementation of EU Directives, there could therefore be the anomalous position that the Insolvency Regulation conflict rules took precedence, but the same rules in Member State laws as implementation of the Directive on the Winding Up of Credit Institutions (CIWUD) would be over-ridden. With its present scope the Regulation is as likely to apply to assignments by credit institutions subject to CIWUD as to assignments by companies subject to the Insolvency Regulation.

Finally there are various assignments excluded from the Regulation (see Article 1): they are adapted from the relevant part of the Rome I Regulation, but the changes in language, mean that, for example questions under company law related to the assignment of rights against companies appear to be over-ridden by this Regulation, but not by the Rome I Regulation.

15. General Conclusion

We believe that the Regulation is misconceived. It has not been given the thought appropriate for the unusual decision to impose at Union level a mandatory rule excluding party autonomy and excluding, to a large extent, the most obvious law under which the problems it seeks to address are normally resolved, namely the law of the claim.

We consider that the proposed rule is unsuitable and that if there were to be any mandatory rule at Union level, the only suitable candidate would be the law of the claim.

Dorothy Livingston
Chair
CLLS Financial Law Committee

24th May 2018

About the CLLS

The City of London Law Society (CLLS) represents approximately 17,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a wide range of consultations and comments on issues of importance to its members through its 18 specialist Committees. The CLLS is registered in the EU Transparency Register under the number 24418535037-82. Details of the membership of the CLLS Financial Law Committee are found herewith:-

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=130&Itemid=469