

One step forward, two steps back – proposed EU regulation impacting cross-border receivables financing

We recently submitted to the European Commission (the “Commission”) our response to its proposed EU regulation on the law applicable to the third-party effects of assignments of claims. Whilst welcoming this long-awaited attempt to plug a gap left by the Rome I regulation, we have identified some serious problems with the Commission’s proposal – so serious that, in our view, unless they are sorted out it would be better to leave things as they are, unplugged gap and all. You can find our response to the Commission [here](#).

One step forward

Starting with the good news, the proposed regulation seeks to fill the gap left by current EU legislation on conflict of laws rules for securitisations and other receivables financing transactions.

At the heart of most of these transactions is an assignment of the receivables to an SPV or the financier. In cross-border deals, it is crucial to know which laws will govern the various questions which arise in relation to these assignments. The 2008 EU regulation known as “Rome I” attempted to provide clarity in this area. It divided the relevant questions into three aspects and provided common conflict of law rules for two of them:

- Relationship between assignor and assignee – Article 14(1): determined by the law they choose to govern the assignment.
- Issues between assignee and debtor and assignability of the receivables – Article 14(2): determined by the law governing the receivable.
- Impact on third parties and questions of priorities of competing assignees – Article 27(2): no agreement reached, so left for further consideration.

After 10 years of stop-start consultation on this third set of questions, the Commission is at last proposing its solution to this third aspect:

- Generally, “third-party effects”, including priority questions, are to be governed by the law of the country of the assignor’s habitual residence (for a corporate, broadly similar to its “centre of main interests” for EU Insolvency Regulation purposes).
- However, the law governing the receivable will govern these questions regarding cash credited to bank accounts and claims arising from financial instruments such as derivative contracts.
- In addition, parties to securitisation transactions can decide to have these questions governed by the law governing the receivable instead (the “securitisation option”).

The proposed solution is far from perfect. For example, there are irritating drafting glitches (such as the inexplicable absence of a definition of “securitisation”); and it is not clear why the securitisation option is not extended to other types of transactions (such as buyer-centric supply chain financing) where this could serve to achieve the stated aim of increasing cross-border transactions involving the assignment of receivables. However, especially if these deficiencies can be corrected, we welcome as a step forward the provision of clarity as to the appropriate governing laws for this third aspect.

Two steps back

Unfortunately, that's where the good news ends. In its current form, the proposed regulation would create more uncertainty than it resolves and will make structuring transactions harder, rather than easier. In particular, in our view it would limit the circumstances in which a receivables sale/purchase agreement with a single governing law (a "**single law RPA**") can be used for transactions including multi-jurisdictional receivables and originators/sellers.

In order to work, a single law RPA structure needs to navigate two obstacles. The proposed regulation would make life more difficult in respect of both of them.

The first obstacle is the need to ensure that an assignment of multi-jurisdictional receivables under a single law RPA will be treated in each relevant jurisdiction as working properly between assignor and assignee. Can the assignee rely on it being a valid assignment? Is it a "true sale" (i.e. an outright disposal), rather than a disguised security interest? In other words, has the assignee got what it is paying for? Under Article 14(1) of Rome I, the assignor-assignee relationship is governed by the law that applies to the contract between them. So these assignor-assignee questions (both contractual and proprietary) are ones for that governing law. This is why we, along with lawyers in various EU jurisdictions, have concluded that single law RPAs can work under Rome I as it stands.

If the proposed regulation comes into effect as currently drafted, this growing consensus would be replaced by considerable confusion. The proposed regulation baldly asserts in a recital that Rome I deals only with the contractual, rather than the proprietary, aspects of assignments, making no mention of the clear intention to the contrary stated in the recitals of Rome I. Another recital in the proposed regulation indicates that the new conflict of law rules which it will establish are intended to govern all proprietary effects of assignments of claims, including as between assignor and assignee and as between assignee and debtor. However, there is nothing in the operative provisions to put this into effect or to amend the relevant provisions of Rome I to allow for this change.

We find it next to impossible to make sense of this muddled thinking and inconsistent drafting. This is why in our response to the proposed regulation, we asked the Commission to delete the offending recitals and make clear in the new regulation that the assignor-assignee and assignee-debtor position (both contractual and proprietary) under Rome I is not intended to be affected.

The second obstacle to be navigated by a single law RPA structure is the need to ensure that an assignment of receivables by originators/sellers from more than one jurisdiction under a single law RPA will be binding in an insolvency of each originator/seller.

In the period which has elapsed since Rome I, there has been significant debate about whether liquidators and other insolvency appointees should be treated as "third parties" in the context of Article 27(2). We have consistently argued that they should not and that the effect of an assignment of a receivable vis-à-vis a liquidator or other insolvency appointee of the assignor should fall within the scope of Article 14(1) of Rome I. This would avoid the bizarre situation where a sale is effective against the assignor one day but may not be effective against its liquidator or other insolvency appointee the following day. Although the position is not made clear in the operative provisions of the proposed regulation, unfortunately it appears from the explanatory memorandum and a recital in the proposed regulation that the Commission disagrees and has decided to treat them as third parties for this purpose. This policy decision is regrettable. The resulting additional due diligence will make single law RPA structures less attractive for transactions involving multi-jurisdictional originators/sellers unless the financier or SPV is being protected in other ways from the risk of originator/supplier insolvency.

It is hoped that the proposed regulation will be clarified in order to resolve the above issues, without which it may not achieve its objective of increasing cross-border receivables financing transactions.

Mayer Brown has market-leading expertise in relation to, and extensive experience of, cross-border receivables financing transactions and securitisations.

If you would like to discuss the issues in this Legal Update, please contact the lawyers below or your usual Mayer Brown contacts.

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