

Rome I

BACKGROUND

When financing receivables a financier will typically be relying on an assignment (whether by way of security or an outright transfer) of or charge over the receivables. For the remainder of this note, reference to an assignment shall, where applicable, include a charge.

The requirements for a valid assignment which is effective against the assignor, the debtor and third parties and takes priority over competing interests vary depending on which jurisdiction's laws govern those aspects of the assignment (the **applicable law**).

The applicable law can in turn vary, depending on the conflict of laws rules applied by different jurisdictions.

Regulation (EC) No 593/2008 on the law applicable to contractual obligations (**Rome I**) seeks to provide some certainty by setting out rules for determining the applicable law of the various aspects of an assignment, which must be applied by the courts of all EU member states (other than Denmark) and the UK (**Rome I jurisdictions**).

Rome I is of universal application, meaning that the courts of Rome I jurisdictions must apply the applicable law as determined by Rome I even if it is not the law of a Rome I jurisdiction.

WHAT IS THE APPLICABLE LAW FOR DETERMINING THE ASSIGNABILITY OF A RECEIVABLE?

Article 14(2) of Rome I provides that questions as to whether a receivable can be assigned or the effect of a prohibition on assignment are governed by the law of the receivable (i.e. the law of relevant contract from which the receivable arises).

WHAT IS THE APPLICABLE LAW FOR DETERMINING THE EFFECT OF AN ASSIGNMENT AS BETWEEN THE ASSIGNOR AND FINANCIER?

Article 14(1) of Rome I provides that the relationship between the assignor and financier is governed by the law of the relevant receivables purchase agreement / security agreement.

Further, Recital 38 of Rome I provides that Article 14(1) also applies to the property (or ownership) aspects of an assignment.

Accordingly, most English legal practitioners consider that the validity of an assignment in respect of the assignor and its insolvency estate and whether it is characterised as an outright transfer or a security interest is governed by the law of relevant receivables purchase agreement / security agreement.

This does not override any mandatory requirements in the assignor's jurisdiction (e.g. security registration requirements).

WHAT IS THE APPLICABLE LAW FOR DETERMINING THE EFFECT OF AN ASSIGNMENT AS BETWEEN THE FINANCIER AND DEBTOR?

Article 14(2) provides that the relationship between the financier and debtor, the conditions under which the assignment can be enforced against the debtor and when the debtor's obligations have been discharged are governed by the law of the receivable (i.e. the law of relevant contract from which the receivable arises).

■ GAPS IN ROME I AND CONFLICTING INTERPRETATIONS

Rome I is silent as to which laws should govern the relationship between a financier and third parties (i.e. persons other than the assignor and the debtor), leaving a gap with respect to who takes priority if there are competing assignments. These questions are currently left to be determined under local law; but which local law?

Further (and unfortunately), the interpretation of Rome I differs among and within Rome I jurisdictions. For example, English legal practitioners generally consider that Article 14(1) of Rome I extends to the insolvency estate of the assignor, whereas certain European jurisdictions consider insolvency practitioners of the assignor to be “third parties”, which Rome I does not address.

■ PLUGGING THE GAP

In March 2018, the European Commission issued a proposed EU regulation on the law applicable to the third party effects of assignments of claims (the **Proposed Regulation**). As drafted, it proposes that, subject to certain exceptions, the third party effects of assignments of receivables (including priority questions) shall be governed by the law of the country in which the assignor has its habitual residence (for a company, its place of central administration).

Unfortunately, we and other market participants had some misgivings with the effect of the Proposed Regulation and provided feedback to the European Commission. For further information, please see our note [here](#).

For the time being, the Proposed Regulation is not in effect and, on the basis that it would lead to confusion and uncertainty and, citing Mayer Brown’s note to the European Commission, the UK government expressed its intention to opt out of the Proposed Regulation in July 2018.

■ WHAT HAPPENS POST BREXIT?

The UK ceased to be an EU member state as of 31 January 2020 and entered into a transition period (scheduled to end on 31 December 2020) during which the UK will continue to be bound by Rome I. Rome I is intended to be written into domestic law, so the English courts will continue to apply equivalent rules beyond the transition period.

To the extent the Proposed Regulation is clarified to resolve its issues in order that it may achieve its objective of increasing cross-border receivables transactions, it remains to be seen whether the UK will choose to write it into domestic law or continue to apply domestic conflict-of-law rules in relation to third party effects of assignments.

■ BEYOND ROME I JURISDICTIONS

Courts outside Rome I jurisdictions will apply their own conflict of laws rules (and the resulting “applicable law” may be different to that which Rome I would prescribe).

For reference, the US has recently ratified the UN Convention on the Assignment of Receivables in International Trade which, amongst other things, sets out certain conflict of laws rules in relation to the assignment of receivables. For further information, please see our note [here](#).