A King without Land – the Assignee under the Commission's Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims

Professor Dr. Robert Freitag, Friedrich-Alexander-University Erlangen, has kindly provided us with his thoughts on the proposal for a Regulation on Third-Party Effects of Assigment:

Article 14 para. (1) of Regulation Rome I subjects the relationship between assignor and assignee under a voluntary assignment of a claim to the law that applies to the contract between the assignor and assignee. Pursuant to recital (38) of the regulation, the relevant law is to govern the "property aspects of an assignment, as between assignor and assignee". It is a much debated question whether article 14 para. (1) of Regulation Rome I also applies to the third-party effects of assignments, i.e. to "proprietary effects of assignments such as 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 functionally equivalent claim, creditors of the assignor and other third parties" (for this definition see article 2 lit. (2) of the Commission's 2018 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)096 final).

Only a short time ago, a German court has asked the CJEU for guidance on the matter (see here). The Commission clearly assumes that article 14 of Regulation Rome I leaves the matter to the autonomous conflict-rules of the Member States and has already expressed this view in its follow up-report under article 27 para. (2) of Regulation Rome I presented in 2016 (see COM(2016)626, p. 3). It has repeated this position in recital (11) of the aforementioned proposal for a regulation on the third-party effects of assignments dated 12 March 2018 and the Parliament has followed suite by demanding merely editorial changes to recital (11) of the proposed regulation (see Parliament resolution on the proposal

adopted in the first reading on 13 February 2019, document P8_TA(2019)0086, as well as the Explanatory Statement by the Committee on Legal Affairs dated 16 July 2018, document A8-0261/2018, p. 18). It is not astounding that the Council, whose reluctance to accept a different stance of Regulation Rome I on third-party effects of assignments has caused the aforementioned legal uncertainty, at least implicitly subscribes to this position by discussing "only" the conflict of laws-rules proposed by article 4 of the proposal (see namely the Presidency's suggestions in Council document 13936/18 dated 8 November 2018).

Ultimately, the answer to this question as well as the outcome of the proceedings before the CJEU are not decisive when dealing with the Commission's 2018 proposal. The European legislator may at any time either complement or ? explicitly or at least implicitly ? modify article 14 of Regulation Rome I. The Commission has therefore proposed to start a legislative procedure destined to lead to the adoption of a new regulation exclusively addressing the conflict of laws-issues pertaining to the third-party effects of assignments. Under the proposal, the relevant conflict-rules shall be placed completely outside the realm of Regulation Rome I which shall not be touched at all. This approach is due to the wish of the Commission to cover the assignment of and pledges relating to "financial collateral" within the meaning of article 1 para. (4) of Directive 2002/47/EC and including inter alia, the assignment or pledge of securities (especially of shares and bonds). An integration of the new conflict rules into Regulation Rome I would therefore collide with the latter's article 1 para. (2) lit. (d) and lit. (f) exempting matters relating to tradeable securities and to company law from the scope of its application.

As to the law which is to govern the third-party effects of assignments, article 4 para. (1) of the Commission's proposal designates the law of the habitual reference of the assignor (at least as a general rule). The Parliament has mainly endorsed this approach (see document P8_TA(2019)0086 cited above), whereas the debates in the council on this point were so controversial as to hinder that an agreement on a common position could be reached as yet (see Council document 14498/18 dated 23 November 2018). Without having to dwell on this discussion, it is worth stressing one issue of major importance which, until now, has been left out of the equation: The Commission's proposal as well as any other solution favoring the application of any law other than that designated by the existing article 14 para. (1) of Regulation Rome I will lead to a situation under which the

proprietary effects of an assignment will be subjected to a split legal regime: As regards the relationship between assignor and assignee, article 14 para. (1) Rome I will continue to apply and the assignee will become "owner" of the claim (if only in relation to the assignor) under the condition that the assignments complies with the law which governs the obligation which gave rise to the assignment. In contrast, with regard to competing assignments and any other third-party effects of the assignment, including the question whether in case of insolvency of the assignor the assigned claim will be part of the insolvent assignor's estate administered by an insolvency administrator, the assignee will only be considered owner of the claim if the assignment is validly executed under the law designated by the new regulation.

It is mandatory that this duplicity of legal regimes is to be avoided for dogmatic as well as for practical reasons. On the dogmatic level, it is not conceivable to speak of "proprietary effects" of an assignment under article 14 para. (1) of Regulation Rome I if these effects are exclusively limited to the relationship between the assignor and the assignee. It is the essence of any property right that the owner's title in the asset is effective *erga omnes*, i.e. that it prevails over any competing right or claim of any third party. There undoubtedly exist exceptions to this rule, namely it is conceivable to consider a transfer of property ineffective in relation to a limited number of persons (the transfer being "relatively ineffective" in this case). However, a "transfer" of title is no transfer in the legal sense if it only were to be valid exclusively in relation to the transferor (the transfer being only "relatively effective" in this case). An "owner" of property who can rely on his "title" neither in relation to competing assignees nor in relation to the creditors of the assignor but only *inter partes* has not received any proprietary position exceeding a position under a merely obligatory agreement between those parties. This finding has significant practical consequences: First of all, it is out of the question for the assignee to activate in his balance sheet a claim "validly assigned" to him solely under article 14 para. (1) of Regulation Rome I, but not under the conflict rules of the proposed new regulation. Second, if one considers that an assignment under article 14 para. (1) of Regulation Rome I will render the assignee "proprietor" of the claim at least *inter partes*, the assignor will have fulfilled his obligation to transfer the relevant claim to the assignee. It is most unfortunate for the assignee that, although performance has been duly rendered to him, he will not have received any valuable title in the claim. It is highly debatable whether the assignee may claim damages from the assignor in case his

legal position is successfully contested under the law applicable to the third-party effects despite the fact that performance has been duly rendered to him under the law relevant in his relation to the assignor. It is also unclear whether, unless the parties have explicitly agreed otherwise, the assignee may beforehand request that the assignor also complies with the law applicable under the new regulation at all.

This being premised, the European legislator, when deciding on a conflict of laws-rules on the third-party effects of assignments, must extend its scope of application also to the "proprietary" effects of the assignment as between the assignor and the assignee. One option would be to implement the rule to be agreed on for the new regulation also in article 14 para. (1) of Regulation Rome I. This approach would, however, lead to legal uncertainty as to the respective scope of application of the regulations dealing with assignments. The preferable approach therefore consists of creating a unique conflict of laws-regime for assignments outside Regulation Rome I. This regime would cover all assignments regardless of the legal cause of the transfer as well as all proprietary aspects of the transfer *inter partes* and *erga omnes* which would be subjected them to the same law. Consequently, article 14 of Regulation Rome I would have to be abolished and the contents of article 14 para. (2), (3) of Regulation Rome I would have to be implemented in the new regulation.