

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

By Prof. Dr. Peter Mankowski, University of Hamburg

Sometimes the unexpected simply happens. Rome I aficionados will remember that the entire Rome I project was on the brink of failure since Member States could not agree on the only seemingly technical and arcane issue of the law applicable to the third-party effects of assignments of claims. An agreement to disagree saved the project in the last minute, back then. Of course, this did not make the issue vanish – and this issue concerns billion euro-markets in the financial industry. In the spring of this year the Commission finally ventured to table a Proposal COM (2018) 96 final for a separate Regulation. This was the result of extensive preparation – and does yet deviate in important respects from the majority results reached in a very prominently staffed expert commission. The Commission proposes a compromise and combined model. Regardless of the degree to which one agrees or disagrees with this proposal (for discussion see *Peter Mankowski*, *Recht der Internationalen Wirtschaft [RIW]* 2018, 488; *Andrew Dickinson*, *IPRax* 2018, 337; *Michael F. Müller*, *Zeitschrift für Europäisches Wirtschaftsrecht [EuZW]* 2018, 522; *Leplat*, *Petites Affiches* n° 155, 3 août 2018, 3), one thing should be clear: The proposed model does definitely not form part of the still *lex lata*.

And now enter the surprise guest. Astonishingly, for ten years after the implementation of Rome I not a single reference to the CJEU had been made on the relevance which Art. 14 Rome I might have in the said regard. But once the Proposal is out, the Oberlandesgericht Saarbrücken (decision of 8 August 2018, case 4 U 109/17) simply did it. The decision is excellently structured and well researched. The questions submitted to the CJEU are pin-point accurate. They follow a strict line. In the author's translation they read:

1. Is Art. 14 Rome I Regulation applicable to the third-party effects of multiple assignments of the same claim by the same assignor?
2. If the first question is to be answered in the affirmative: Which law is applicable to such third-party effects?
3. If the first question is to be answered in the negative: Is Art. 14 Rome I Regulation to be applied *per analogiam*?
4. If the third question is to be answered in the affirmative: Which law is applicable to such third-party effects?

Multiple assignments of the same claim by the same assignor are particularly a field where applying the law of the assignor's habitual residence scores and applying the *lex causae* of the claim assigned fares not too badly whereas applying the law governing the relation between assignor and assignee fails.

But the more interesting question of course is whether the recent reference will interfere with the progress which the Commission Proposal might make. Will Council and Parliament wait for the CJEU to point into any direction for the *lex lata*? And if the CJEU will utter an opinion as to substance, which influence will it exert on the substance of a possible *lex ferenda*?

If one dares to employ the crystal maze and to conduct some Kirchberg astrology the most likely outcome of the reference procedure might be that the CJEU will answer the first and third questions submitted in the negative thus rendering any answer to the second and fourth questions obsolete. In the light of the drafting history how Art. 14 Rome I Regulation was rescued in the last minute (see the dramatic account by the Dutch delegate, *Pauline van der Grinten*, in: *Westrik/van der Weide* (eds.), *Party Autonomy in International Property Law* [2011] p. 145, 154-161) this would be a sound way out for the CJEU leaving all liberty and leeway possible for Commission, Council and Parliament.