The law applicable to third-party effects of transactions in claims and securities in EU law

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Background - claims

- 2003 Commission Green Paper on the conversion of the 1980 Rome Convention on the law applicable to contractual obligations into a Union instrument: regarding third-party effects of the assignment of claims, several possible applicable laws indicated

- 2005 Commission proposal for Rome I Regulation: law of assignor's habitual residence, in accordance with majority of respondents to the Green Paper and the 2001 UNCITRAL Convention on the Assignment of Receivables in International Trade

- Complex legislative negotiations in Council, in particular on securitisation
In 2005, Commission suggested the adoption of conflict rules based on 2001 UN Convention on the Assignment of Receivables in International Trade, but co-legislators required further studies. => no conflict rules for claims not traded on financial markets

2008 Rome I Regulation covers receivables and claims traded on financial markets.

Rome I Regulation Article 14 on the voluntary assignment of claims contains conflict rules governing:

- relationship between assignor and assignee: law applicable to the assignment contract
- relationship between assignee and debtor: law applicable to the assigned claim
Background - claims

- Rome I Regulation does not contain a conflict rule governing the effects of the assignment of claims on third parties (e.g. other assignees, creditors of the assignor)
- However, review clause in Article 27(2): Commission to adopt report on effectiveness of claim assignment against third parties and priority of an assigned claim over right of another person
- 2011: Study by the British Institute of International and Comparative Law (BIICL)
- 2016: Commission report stressed link between claims and securities. Three main possible laws:
  - law of the assignment contract
  - law of the assigned claim
  - law of the assignor's habitual residence
Background - securities

- Sector-specific conflict rules for book-entry securities and certain claims traded on financial markets:
  - reorganisation and winding-up of credit institutions (2001 Winding-up Directive)
  - financial collateral arrangements (2002 Financial Collateral Directive)

- Outside the scope of this specific legislation, legal uncertainty as to the law applicable to third-party effects of transactions with securities
Background - securities

- In 2003, Commission proposed that Member States sign the 2002 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, but Member State views were divided
  => no general conflict rules on intermediated securities
- Parallel Commission work to harmonise Member States' substantive law on the ownership of securities did not materialise
State of play

• Capital Markets Union (CMU) Action Plan (2015) and CMU Communication (2016): legislative proposal by the end of 2017 on the law applicable to security ownership and third-party effects of the assignment of claims

• Joint initiative of DG Justice and Consumers (JUST) and DG Financial Stability, Financial Services and Capital Markets Union (FISMA)

• Inception Impact Assessment published on 28 February 2017: four weeks to receive comments

• Detailed public consultation to be published end of March 2017: 3 months to receive comments
State of play

- Expert Group:
  - some 15 experts (academics and practitioners) on conflict rules and financial markets
  - meetings in April, May, June and July 2017
- Questionnaires to Member States for updated information on national legislation on conflict rules
- Questionnaires to targeted stakeholders to obtain updated key statistical data
- Stakeholders' meeting to discuss results of public consultation: early September 2017
- Impact Assessment of envisaged proposal: mid-September 2017
- Commission adoption of proposal: December 2017
State of play

• Issues to decide:
  - scope of proposal:
    - claims not traded on financial markets (single claims, factoring)
    - financial instruments:
      - claims traded on financial markets (claims traded directly, claims used as financial collateral, securitisation),
      - securities
    - EU autonomous definition of basic concepts: certain financial instruments ('claim traded on financial market' and 'book-entry security') are characterised as claim or security in different Member State laws
  => joint JUST and FISMA initiative to avoid overlaps, gaps and conflicting solutions
State of play

- Options for claims: harmonised conflict rules on the basis of the following possible laws:
  - law of the assignment contract
  - law of the assigned claim
  - law of assignor's habitual residence

=> One single conflict rule for all claims, or a general rule with an exceptional rule for specific financial instruments?
State of play

- Options for securities:
  (i) the EU ratifying 2002 Hague Convention on intermediated securities (law agreed in the account agreement); or
  (ii) EU harmonised conflict rules on the basis of the following possible laws:
    - law of the Place of the Relevant Intermediary Approach (PRIMA), either for each level of the holding chain or for the whole holding chain
      =>$\text{must also be agreed what the "place" is}$
    - law of the issuer of the security
Thank you!

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