Cross-Border Assignment Questionnaire

I. INTRODUCTION AND GUIDANCE NOTES

1. Objective

This Questionnaire has been prepared by the **British Institute of International and Comparative Law (BIICL)** for circulation to **representatives of business and the legal profession** concerning their activities involving the assignment of debts and other rights with a cross-border element. In particular, this Questionnaire is addressed to (but not limited to) those involved in factoring or securitisation transactions or in transactions backed by security or collateral over debts and other contractual rights with a connection to two or more States, countries or legal systems.

BIICL has been appointed by the **European Commission to conduct a Study into the effects on third parties of assignments, with a focus on the law applicable to such assignments.** At present, the EU Member States have different approaches to these questions, and the Study will consider (among other questions) whether a harmonised rule is necessary and whether any such rule should distinguish between transactions of different kinds. In order to make recommendations to the Commission, **it is essential that account should be taken of the needs and views of operators of different kinds within different sectors.**

2. Definitions

For the purposes of this Questionnaire, the expressions **"assignment", "debts"** and **"cross-border element"** should be widely interpreted as follows:

- "Assignment" includes outright assignments or other transfers, assignments or transfers by way of security and pledges or other security rights, and "assignor" and "assignee" should be understood accordingly.

- "Debts" includes claims and any other right arising out of or in connection with a contract, but not interests in land or goods in physical form, and "debtor" should be understood accordingly".

- "Cross-border element" refers to any situation which is not a purely domestic transaction but it connected to two or more States, countries or legal systems (e.g. because the debtor, assignor and/or assignee are based in different States, or because the transaction documentation or the contracts giving rise to the debts and other contractual rights are expressed to be governed by a foreign law).

3. What we ask you to do

- You are encouraged to **answer as many questions as possible**, but this is not compulsory and part-completed Questionnaires will be accepted. Please provide as much information as you can in response, even if it is not possible fully to answer the question.
- Please also **forward this Questionnaire** to colleagues in other organisations whom they believe will be interested in this Study.
- All responses will be treated by BIICL as **confidential** and will not be separately published, but the information provided will be collated for the purposes of the Study reports.

Please either

- **email the questionnaire to e.lein@biicl.org or**
- **send it by fax to BIICL, 0044 20 78625152 or**
- **send it by mail to Dr. Eva Lein, British Institute of International and Comparative Law, Charles Clore House, 17, Russell Square, London WC1B5JP.**

II. QUESTIONNAIRE

Part 1: YOUR BUSINESS

1. Business Details

1.1. Individual Respondent's Name **(not compulsory)**:

1.2. Company/Group of Companies/Firm Name **(not compulsory)**:

City of London Law Society Financial Law Committee

1.3. Member State of incorporation (and principal place of business if different):

United Kingdom

1.4. Nature of Business involving assignments (please tick):

☒ Factoring
☒ Securitisation
☒ Other secured transactions (please specify)
☒ Legal profession (please specify nature of transactions handled)
☐ Other (please specify)

1.5. If responding on behalf of a Group of Companies, please state the number of Companies within the Group undertaking transactions involving assignments:

2. Financial Information

If responding on behalf of a Company or Group of Companies, please give the following information with respect to the business areas undertaking transactions involving assignments for 2010 or the financial year ending in 2010 (please specify):

- Turnover (value):
- Approximate number of transactions involving assignments:
- Approximate percentage of transactions involving a cross-border element:
- Approximate average value (or range of values) of debts and other contractual rights assigned per transaction:
- Highest value transaction with a cross-border element:
- Lowest value transaction with a cross-border element:
- Is the average value of transactions with a cross-border element [lower than] [higher than] [about the same as] the average value of transactions without a

cross-border element

It would not be appropriate for our members to exchange information on this subject and we have invited individual firms to support this submission and to provide the requested financial information direct to BIICL.

3. Legal Costs per Transaction

3.1. What would you (or your clients) budget for legal costs for a typical transaction with a cross-border element?

3.2. How much of the legal costs budget would be allocated to “legal due diligence” issues (e.g. investigation of the underlying debts and the law(s) applicable to their assignability, to perfection of the assignment, effectiveness against third parties and enforceability of the debt against the debtor)?

3.3. Approximately what percentage of the total transaction costs (legal and other) would be allocated to “legal due diligence” issues?

It would not be appropriate for our members to exchange information on this subject and we have invited individual firms to support this submission and to provide the requested financial information direct to BIICL.

4. Other

Is there any other information regarding your business which you consider relevant for the purposes of this Questionnaire?

A wide range of financial and business transactions involve assignments and cost will vary greatly for this element of the transaction depending on what is involved. We would note that in view of the broad definition of "debts" as appearing in section 2 on page 1 of this questionnaire, our responses do not consider claims or rights constituted as: either "book-entry securities collateral" for the purposes of the Financial Collateral Arrangements (No.2) Regulations 2003, or as rights in securities held as collateral security for the purposes of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.

PART 2: LEGAL ISSUES

5. Legal Due Diligence

In a typical transaction with a cross-border element, what level of legal due diligence do you undertake with respect to the underlying debts? *[Please tick more than one box if applicable]*

5.1. Analysis of each underlying debt individually yes ☒ no ☐

If yes, please specify which elements you verify (e.g. assignability, legal enforceability against debtor, effectiveness of assignment against third parties under law applicable to debt)

The level of due diligence varies from deal to deal. For example, on a cash CLO (effectively a securitisation of loans) or a securitisation of a small pool of debts the analysis is typically of each underlying debt. Typical matters to diligence include location of the debtor, governing law of the debt agreement, transferability, perfection requirements, (for secured claims) transferability of any related security, tax, confidentiality and the debtor's rights of set-off.

5.2. Analysis of a selection of underlying debts yes ☒ no ☐

If yes, please specify the basis upon which you choose the debts to be analysed and specify which elements you verify (e.g. assignability, legal enforceability against debtor, effectiveness of assignment against third parties under law applicable to debt)

Where an analysis is performed of only a selection of the underlying debts (for example, on a securitisation of a large, granular pool of debts), the debts to be analysed would typically be selected randomly. Typical matters to diligence include location of the debtor, governing law of the debt agreement, transferability, perfection requirements, (for secured claims) transferability of any related security, tax, confidentiality and the debtor's rights of set-off. In some cases warranties might be taken as to the law or residence of debtors and the assignor obliged to substitute debts that do not conform to the required profile. This reduces risk and due diligence cost.

5.3. Analysis of enforceability of assignment against assignor yes ☒ no ☐

If yes, please specify which types of enquiries you undertake

We would ask counsel in the jurisdiction of the governing law of the assignment agreement to confirm that the assignment is enforceable against the assignor.

5.4. Analysis of enforceability of assignment against third parties yes ☐ no ☒

If yes, please specify which categories of third parties are of concern to you and which types of enquiries you undertake

We have answered "no" because we would ask counsel in the jurisdiction of the governing law of the assigned contract to confirm what steps need to be taken to perfect a full legal assignment of the debt.

5.5. If you do not undertake legal due diligence with respect to the underlying debts, but accept the legal risks relating (for example) to assignability and legal enforceability against the debtor, please explain the reasons for this (e.g. costs, impossibility of undertaking individual verification)

N/A

6. Effectiveness of Assignments against Third Parties

Have you, in the past 5 years, encountered problems in practice in securing the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element (e.g. a second assignee, a judgment creditor of the assignee)? yes ☐ no ☒

If "Yes":

-
- How frequently do difficulties of these kinds arise in practice?

N/A

- Which category or categories of third parties most commonly give rise to difficulties?

N/A

- Please give short particulars of as many situations as possible in which these problems have arisen (including whether you were able to overcome the problems and, if so, how)

N/A

7. Issues Concerning which Country's Law Applies to Your Transactions

7.1. Is it important for your business to be able to determine which country's law will be applied by EU courts to determine any dispute regarding the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element? yes ☒ no ☐ *Please give short reasons for your answer*

On cross-border transactions, the involvement of multiple jurisdictions means multiple legal analyses and the potential for conflict. Therefore, legal certainty across jurisdictions is inherently a good thing (subject to the proviso that it produce a commercially sensible outcome).

7.2. Have you ever encountered problems in practice in identifying which country's law would be applied by an EU court to determine any dispute regarding the effectiveness of

assignments against persons other than the assignee and the debtor in transactions with a cross-border element? yes ☐ no ☒

If “Yes”:

- How frequently do difficulties of these kinds arise in practice?

N/A

- Which category or categories of third parties most commonly give rise to difficulties?

N/A

- Please give short particulars of as many situations as possible in which these problems have arisen (including whether you were able to overcome the problems and, if so, how)

We are concerned, even though problems are rare, that in an EU insolvency, a different result could arise from that in the instance where no party is insolvent. This is because the Insolvency Regulation (EC) No 1346/2000 contains in Article 5 particular rules over rights *in rem* (including rights arising under assignments by way of mortgage, charge or lien) that apply to claims which are situated in another Member State from that of the insolvency process. These could mandate different results from those arising under Article 14, (an example would be where an English assignor company had made an assignment by way of charge followed by an absolute assignment of the same debt, both governed by English law, and the debt was owed to the assignor under a contract governed by English law entered into by the English branch of a Swedish company and this was followed by the insolvency of the English assignor at a time when no notice of the absolute assignment had been given to the third party debtor, but the assignment by way of charge had been duly registered in England against the assignor and was valid in England against the assignor in liquidation and its creditors).

Under Article 14(2) the position as between the debtor and the respective assignees in this example is governed by the law of England in all respects. English law governs all the relevant contractual relations and the UK registration rules are probably overriding mandatory rules (not proprietary laws separate from contract law), but have been complied with. The same would apply if there were no choice of law in the original contract that created the debt as the habitual residence of the original debtor must be England (having regard to Article 19 of the Rome 1 Regulation which places the habitual residence of the Swedish party for the purpose of this contract in the jurisdiction of its contracting branch).

However, if the same issue arises under the Insolvency Regulation, it appears where a claim is situate in another Member State and Article 5 mandates the application of the law of that other Member State, then the contractually chosen law will apparently be displaced, particularly if there are different mandatory rules in that other Member State or it regards proprietorial matters relating to the relationship between the original debtor and the assignee as separate from the contractual aspects of the original contract under which the debt was created and the contractual proprietorial aspects of the assignment which are governed by the applicable law of the assignment (Article 14(1) as amplified by recital 38).

This is a real issue because, according to the rules in Article 2(g) and (3)(1) of the Insolvency Regulation the situs of the debt in our example would almost certainly be Sweden, not England. These Articles mandate the centre of main interests of the third party required to meet the claim (i.e. the original debtor, in our example a Swedish company) to be used to identify situs and raise a rebuttable presumption that this will be the place of the registered office of the corporate. The presumption is only rebutted if there is somewhere else which corresponds to the place where the debtor conducts the administration of his interests (Recital 13). There are no provisions regarding establishments or branches in another Member State in the Insolvency Regulation which apply to the identification of the situs of a claim owed by a third party (although there are provisions dealing with this issue for the insolvent company). A further complication is that Article 19(3) of the Rome 1 Regulation states that habitual residence should be determined at the date of entry into the contract, while the Insolvency Regulation looks to the date of the commencement of the insolvency process. This problem arises solely with third party debtor companies with an EU centre of main interests. In the case of third country companies, it seems that the Rome 1 rules will apply even in an insolvency, subject only to mandatory rules in the place of the insolvency.

We recommend that the Insolvency Regulation, Article 2(g) be amended to align it with the rules in the Rome I Regulation, so that the situs of a claim against a third party debtor created by contract is that of the applicable law of the contract under which the claim arises, or if there is no contract (e.g. a statutory claim), the place of habitual residence of the third party that must meet the claim determined in accordance with Article 19 Rome 1 Regulation. This would enable consistent conflicts rules as between assignees and the original debtor, whether prior to or in insolvency.

7.3. Are you aware of the rules contained in Article 14 of Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), or of the rules contained in its predecessor Article 12 of the 1980 Rome Convention, specifying the law applicable to assignments? yes ☒ no ☐

If "Yes":

- Do you (or your legal advisers) apply those rules to your transactions with a cross-border element? yes ☒ no ☐
- Do you (or your legal advisers) find those rules are useful in practice?
- yes ☒ no ☐ *Please give short reasons for your answer*

They provide sufficient legal certainty for the market and produce a commercially sensible result. We note in particular that Recital 38 provides for the proprietorial aspects of an assignment as between assignor and assignee to also be decided according to the applicable law of the assignment.

- In particular, do you (or your legal advisers) apply those rules in determining questions regarding the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element? yes ☒ no ☐ *Please explain what effect you consider Art. 14 (or Art. 12) to have to these situations*

To the extent that we are asked to address the question of the effectiveness of assignments against such parties, we would apply the existing rules. However, this question seldom, if ever, arises, if it does arise at all

7.4. Do you have any other comments regarding legal issues affecting your business insofar as it involves assignments with a cross-border element?

The key issues are legal certainty and commercial viability. Any change which complicates matters or introduces an element (however small) of legal uncertainty would be most unwelcome, because it risks introducing additional time, cost and complexity into cross-border transactions.

In the context of cash CLOs, the underlying loans are typically secured. Depending on the type, nature and location of the borrower's assets, and the subject of the security, the security is (necessarily and rightly) often created under different laws. When transferring a loan from an existing lender to a new lender, it is important that the benefit of the security also be transferred to the new lender. However, the cost of verifying/ensuring that this takes place is often prohibitively expensive such that market participants are only narrowly focussing on the enforceability of the transfer of the loan itself (but not including as part of the due diligence whether or not the benefit of the security has actually been effectively transferred to the new lender). This is outside of the scope of this study.

PART 3: POLICY OPTIONS

8. A single common rule or specific rules per sector?

8.1. Should the EU legislate for a **single common rule** for all Member States to determine the law applicable to all (or some) questions regarding the effectiveness of assignments against persons other than the assignee and the debtor for all transactions?

yes ☐ no ☒ *Please give short reasons for your answer*

We do not believe that any such rule is required because the status quo is acceptable. However, if a common rule is to be introduced, we would favour a rule which applied the law applicable to the underlying debt assigned, as that is the clearest and most practicable of the options for parties to determine objectively and with certainty. It would also make the law applicable to successive assignments consistent, which would reduce due diligence costs and the risk that a subsequent assignee cannot determine the governing law of an earlier assignment. Finally, it would also be consistent with the provisions of Article 14(2). We recommend that the Insolvency Regulation, Article 2(g) be amended to align it with the rules in the Rome I Regulation, so that the situs of a claim against a third party debtor created by contract is that of the applicable law of the contract under which the claim arises, or if there is no contract (eg a statutory claim), the place of habitual residence of the third party that must meet the claim determined in accordance with Article 19 Rome 1 Regulation. This would enable consistent conflicts rules as between assignees and the original debtor, whether prior to or in insolvency. This would be consistent with Recital 40 first para and Recital 39, to enable parties to know where they stand and avoid an unnecessary shift in applicable law.

If "Yes", what rule would you favour:

- Apply the law applicable to the underlying debt assigned ☒
- Apply the law of the debtor's habitual residence ☐

The law of the debtor's or assignor's habitual residence is not as easy to establish objectively and with certainty as a chosen law, although it will remain relevant where there is no choice of law. There is an inevitable uncertainty in applying the concept of "habitual residence" (in particular for businesses), given that people and businesses move. Even allowing for the fact that the test for "habitual residence" is under Article 19(3) applied at the date of the relevant contract, it would be difficult for subsequent assignees to ascertain that fact from a future point in time. Therefore, it is important that there is a right to rely on a chosen law so that successive assignments can be governed by the same law, so as to reduce due diligence costs and the risk that a subsequent assignee cannot determine the governing law of an earlier assignment.

- Apply the law of the assignor's habitual residence ☐
- Apply the law of the closest connection to the debt ☐
- Apply the law chosen by assignor and assignee ☐
- Other. *Please specify*

Please give short reasons for your answer

8.2. If "No", should the EU legislate for **a specific rule (or rules)** to be applied by all Member States to determine the law applicable to all (or some) questions regarding the effectiveness of assignments against persons other than the assignee and the debtor **for those types of transactions with which your business is concerned**?

A far worse outcome would be the introduction of a rule which only applied to certain types of transaction or business, because this would often make it difficult to determine whether or not a given transaction fell within the new rule. Such a rule would therefore introduce a degree of legal uncertainty, where at present there is relatively little, and that would result in additional time, cost and complexity for cross-border transactions. However, we believe, excluding the right to choose the applicable law, which several of the suggested options would involve, would also create very considerable additional expense and add to confusion in the identification of applicable laws, including risking the application of numerous laws to a single situation. This would be, similarly, much worse than the current situation and should be rejected as an unnecessary limitation on party autonomy.

Yes ☐ no ☒ *Please give short reasons for your answer*

If "Yes", what rule would you favour for your sector:

- Apply the law applicable to the underlying debt assigned ☐
- Apply the law of the debtor's habitual residence ☐
- Apply the law of the assignor's habitual residence ☐
- Apply the law of the closest connection to the debt ☐
- Apply the law chosen by assignor and assignee ☐
- Other. Please specify

N/A

8.3. If you consider that the rule that you favour should apply to some questions and not others, please explain to which questions it should apply and give your reasons

N/A

8.4. Please give reasons for your favoured policy option, where possible giving evidence to support its suitability for your business and reasons for opposing other possible solutions

N/A

9. Impact of policy options on your individual business

N/A

9.1. If the EU were to adopt the rule that you favour, would this be likely to lead to an increase the number or value of transactions which you are able to undertake in your business? Yes ☒ no ☐ *Please give reasons*

We are of the view that maintaining the current rules in Article 14(1) and aligning apparently contradictory rules in the Insolvency Regulation would provide the most certainty for parties and respect the principle of party autonomy that is central to the ethos of the Rome 1 Regulation.

We consider that this approach is least likely to result in loss of business to jurisdictions which appear to have rules more favourable to party autonomy, particularly New York and Far Eastern jurisdictions with common law systems and to make the laws of EU jurisdictions attractive to commercial parties. This would be good for the business of EU lawyers, including members of the CLLS, several of which practice law in numerous EU jurisdictions.

9.2. If the EU were to adopt the rule that you favour, would this be likely to lead to a reduction in your legal due diligence costs and/or an increase the profitability of your business? yes ☒ no ☐ *Please give reasons*

The effect would be broadly neutral, with some saving from removal of anomalies in the Insolvency Regulation. All other proposals would add to due diligence costs.

9.3. If the EU were to adopt the rule that you favour, would this lead you to change your business model? yes ☐ no ☒ *Please give reasons*

Our role is to advise on the applicable law, and this role would not be affected, although we would hope the change we propose would improve the attractiveness of the laws of jurisdiction within the EU.

9.4..Do you have any other comments regarding policy issues in this area?

We do not see that any case has been put forward to displace party autonomy as currently enshrined in Article 14.