29 June 2017

EU Public consultation on the conflict of laws rules for third party effects of transactions in securities and claims

This submission is made on behalf of the City of London (CLLS) Financial Law Committee. The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Financial Law Committee comprises leading solicitors who are specialist advisers on debt transactions under English law in leading law firms based in the City of London, who act for UK and international financial institutions, businesses and regulatory and governmental bodies. Their practice includes advising on loans related to real estate and development financing and on security structures related to these loans.

Section I details about the submission

Information about you:

Are you replying as:*

a private individual

an organisation or a company - Yes

a public authority or an international organisation

****Name of your organisation*:**

City of London Law Society (prepared by a working group of the Financial Law Committee and the Company Law Committee)

Contact email address:

The information you provide here is for administrative purposes only and will not be published

dorothy.livingston@hsf.com

****Is your organisation included in the Transparency Register?***

Yes

****If so, please indicate your Register ID number:***

24418535037-82

***Type of organisation:**

Academic institution

Company, SME, micro-enterprise, sole trader

Consultancy, law firm

Consumer organisation

Industry association X

Media

Non-governmental organisation

Think tank

Trade union

Other

***Where are you based and/or where do you carry out your activity?**

United Kingdom

***To which member State(s) will your replies relate to?**

United Kingdom

Please specify which other country(ies):

EU 28

***Field of activity or sector (if applicable):**
at least 1 choice(s)

Accounting

Auditing

Legal consulting X

Banking

Credit rating

Insurance

Pension provision

Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)

CCP

CSD

Regulated market

Issuer

Investor

Academia

Other

Not applicable

Important notice on the publication of responses

****Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?***

(see specific privacy statement)

Yes, we agree to our response being published under the name we indicate (name of your organisation/company/public authority or your name if your reply as an individual).

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2. Your opinion

Section 2: what is the issue and how do markets deal with it?

Question 1: Do you observe in practice that legal opinions on cross-border transactions in securities and claims contain an analysis of which law is applicable (conflict of laws)?

Yes, always where relevant

In general yes, but not in all relevant situations

In rare cases yes, but often not X

No, in general legal opinions do not include an analysis of which law applies

I don't know / I am not familiar with legal opinions

Please elaborate on your reply to Question 1 if you have further information:

Legal opinions in relation to financial collateral arrangements are usually sought where there is a regulatory requirement, e.g. under the Capital Requirements Regulation EU 575/2013 Article 194(1). They are also required by operators of financial market infrastructures (CCPs, CSDs, securities settlement systems and payment systems) which must operate their systems in compliance with or otherwise with regard to Principle 1 (Legal basis) of the CPMI-IOSCO Principles for financial market infrastructures (April 2012) – see, in particular, paragraph 3.1.3. Otherwise formal legal opinions on financial collateral arrangements are not usual.

In relation to lending transactions it is only occasionally that an opinion is sought on the transfer of an interest in a claim against the borrower, but if one is sought it will be by reference to the law of the contract of the transfer transaction (assignment or novation) and the law governing the underlying debt. Practice favours these being the same system of national law where the parties have the ability to achieve this (e.g. the use of standard form documents prepared under the same governing law as the underlying loan agreement in relation to participations in Syndicated Loan Agreements), although that is not invariably the case.

Question 2: Do you think that default of a large participant in the financial market who holds assets in various Member States could possibly create difficult conflict of laws questions, putting in doubt who owns (or has entitlement to) which assets?

Yes X

No

Don't know / no opinion / not relevant

If you answered YES to question 2, please provide concrete examples or specify in which legal context this problem might arise, pointing also to relevant national provisions where possible:

In the Lehman Brothers insolvency, for example, there were a large number of contracts relating to assets in the form of securities and cash held in many countries (both within and outside the EU).

Although there could have been (and probably were) some difficult conflicts issues, in practice this aspect of the insolvency did not we understand give rise to material difficulty. We believe this was for two reasons:

1. The outcome in many jurisdictions was sufficiently similar for it not to be necessary to definitively decide the answer to the conflicts questions.

2. In practice there was a need to get on with dealing with the securities and other assets which supported reaching agreement with claimants and other contracting counterparties.

In the case of the Rolls Royce insolvency in the 1970s, there were a number of questions about the transfer of claims arising from the exercise of the rights of the holder of a charge over the assets of Rolls Royce which would be analysed in many jurisdictions as an assignment (the approach taken in the Rome I Regulation). The insolvency practitioner managing the insolvency process ("receivership") claimed against debtors of Rolls Royce by virtue of the exercise of those rights. These issues were resolved by reference to English law, which was the law governing the documents under which the charge was created. In some cases there were questions whether the assignment of the claim could be effective or the claim was in relation to a contract not capable of assignment (e.g. a contract that could only be performed by the original contracting party – for example, a contract for the supply of goods made to order). These issues were also determined according to English law which was the law of the contract under which the claim against the third party arose. [see if case reference can be found]. The "assignor" would have been the English company, Rolls Royce PLC, in the assignment analysis, but in some other insolvencies of a similar type, where the debts of the parent company were guaranteed by and secured against the assets of operating subsidiaries, while the governing law of all the relevant contractual arrangements would have been English law, the habitual residence of an operating subsidiary "assignor" might have been another jurisdiction – e.g. if the group had significant business in the USA or France.

If you answered YES to question 2, please give an estimate of the magnitude of the issue (e.g. number or value of transactions that might be concerned):

This is not our area of expertise. However, it is a matter of public record that in the administration of Lehman Brothers International (Europe), the administrators reached a settlement with Citigroup relating to over $US2.5bn worth of securities and cash assets held in custody in a number of countries.

If you answered YES to question 2, please explain how market participants deal with such legal uncertainty:

By taking a pragmatic approach: see answer in first box under question 2.

Section 3: book-entry securities (primarily relevant for the securities industry)

Question 3: Are you aware of actual or theoretical situations where it is not clear how to apply EU conflict of laws rules, or their application leads to outcomes that are inconsistent?

Yes

No X

Don't know / no opinion / not relevant

If you answered NO to question 3, please explain how you interpret and apply the Place of the Relevant Intermediary Approach (PRIMA) in which types of transactions and in which Member State(s)?

The English law approach to the analysis of securities custody and similar arrangements for the intermediated holding of securities is based on the application of the principles of the law of trusts. A court's conclusions on the existence and terms of such a trust will be derived from an examination of the circumstances and in particular on the terms of the agreement between the parties, which will also govern the related contractual obligations of the parties. Recent case law (in particular in the context of the collapse of Lehman Brothers) has confirmed this approach(see in particular the summary of the key principles by Briggs J in paragraph 225 of his judgment in in re *Lehman Brothers International (Europe) (in Administration)* [2010] EWHC 2914 (Ch).)

We are not aware of any case in which a court in the UK has had to consider the application of PRIMA as enunciated in the three directives. The focus would naturally be the words of the relevant directive. We should expect, however, that in line with the general approach of starting with an analysis of the contract governing the parties' relations so far as they relate to the relevant account, a UK court would first look to that contract and seek to identify the branch or office responsible for the maintenance of the relevant account.

There is clearly a possibility of conflict between this approach and one centred primarily at the operational details of the account provider. As we observe elsewhere in this response, we think that such an approach is already problematic, given the difficulty of identifying where particular IT and computerised activities are located, and is likely to become more difficult still. This point applies to all jurisdictions that would be affected by the adoption of such a rule.

The possibility for conflict between PRIMA (as described, for example, in the Settlement Finality Directive and the Financial Collateral Arrangements Directive) and the contractual approach under English law specifically is there, because of the increasing uncertainty as to the location of securities accounts if such determination is approached on an objective basis and without regard to the intentions of the parties as expressed in contract.

In other Member States there may be more difficulties arising from a non-contract based analysis, in which the interest in the securities is defined by reference to the location of the underlying issuer of the security (on a "look-through" basis) or the location of the intermediary (or its accounts or records) which has recorded the interest.

In our opinion, objective location tests are generally artificial and not suited to a proper determination of applicable law (except for real property and those rare cases where bearer securities are physically held) in the modern world. They are particularly unsuited for incorporeal assets, such as dematerialised securities. These may be constituted or evidenced by records held on one or multiple computer servers in a multiplicity of jurisdictions, in many of which the

responsible intermediary may have an office, systems or other records. In our view these location based tests will become increasingly uncertain in application and a source of legal uncertainty – especially if distributed ledger technology becomes widely adopted and accepted in the securities industry.

We certainly doubt that their enforced adoption will provide any clarity in terms of choice of law rules. We also question whether a rule which might prevent the application of property law rights under the law under which the interest was created would be a matter within the competence of EU law.

Question 4 a): In your Member State, which financial instruments are considered to be covered by the EU conflict of laws rules? Please provide references to relevant statuary rules, case law and/or legal doctrine.

In the case of the application of the Article 9(2) of the Settlement Finality Directive as implemented in the UK (through regulation 23 of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999), securities are defined by reference to the list of financial instruments for the purposes of MiFID (which potentially include derivatives, even though not all derivatives or other contractually-based investments lend themselves to an entry in a register, account or centralized deposit system.

In the case of the application of Article 9(1) of the Financial Collateral Arrangements Directive as implemented in the UK (through regulation 19 of the Financial Collateral Arrangements (No 2) Regulations 2003, book entry securities collateral is defined by reference to interest in shares, warrants, bonds, money market instruments and other securities (which is believed to exclude derivatives and other contractually-based investments).

It would be helpful if the rules in these two directives could be aligned – we would suggest by reference to the MiFID II definition, but qualified to apply only to interests capable of being recorded in a register or account.

In cases where neither of the above sets of provisions apply, but the financial instrument (or the interest in the financial instrument) is constituted under contract, the rules of the Rome I Regulation may apply (and in the case of a claim in an insolvency, the rules in the Insolvency Regulation, or specialist insolvency or recovery and resolution directives (for banks, insurance companies and other relevant financial institutions).

The Rome I Regulation will not apply to rights and obligations created under company law as constituted or evidenced by the company register or other primary record of entitlement of shares or other securities as against the issuer.

Question 4 b): In particular, are registered shares considered to be covered by the EU conflict of laws rules in your Member State?

Yes

No X

Don't know / no opinion / not relevant

If you answered NO to question 4 a), what could be the appropriate conflict of laws solution for those assets in your opinion?

The correctness of our answer "NO" depends upon what is meant by registered shares and what aspects are at issue for the purposes of the conflicts rules.

If by registered securities the Consultation Document intends to refer only to shares and debentures registered in the primary registers held by or for a company, then any rights and obligations related to these created by company law would be outside the Rome I and FCAD rules but may be subject to the rules in the SFD - in so far as the securities are held in a system which in law provides direct rights against the issuer of the security.

The records held in the UK securities settlement system, CREST, are by statute constituted as the primary records of entitlement to UK shares and other UK securities as against the issuer – as such they are the records, located in the relevant part of the UK, which "legally record" the entitlement of a collateral holder of such securities for the purposes of Article 9(2) of the SFD.

In contrast, in relation to CREST securities constituted under Irish law, the local registers in Ireland continue to be the share register or other record of primary entitlement as against the issuer. As such, for the purposes of Article 9(2) of the SFD, the Irish registers and records "legally record" the entitlement of a collateral holder of such securities.

Here, the SFD rules are generally aligned with the English conflict of law rules relating to shares and other registered securities governed by English company law – namely, that proprietary issues affecting shares or such other securities will be governed by the place where the relevant register is located and/or the place of incorporation of the issuer.

However, where securities (such as international bonds) are not subject to company law statutory provisions as to the location of registers, it is generally considered that the relevant conflict of laws rules will be governed by the law under which the relevant securities are constituted (*lex creationis*) and, possibly, the law of the location of the register (if title to the securities, as a direct claim against the issuer, is to be constituted or evidenced by entry on a register for or on behalf of the issuer).

Interests in securities (which are not themselves constituted as depository interests recorded in CREST registers or other record of primary entitlement as against the issuer of the security) have no special status in English law. The interests created thereby are constructs of contract and/or an English law trust so as to give direct personal rights as against the relevant intermediary (which will be proprietary in relation to securities held by the intermediary as trustee for the benefit of the account-holder), but give no direct claim on holdings recorded in superior records, whether of another intermediary, in CREST or the underlying company issuer itself. See, for example, *Secure Capital SA v Credit Suisse AG [2015] EWHC 388* in which the English court applied English contract law as the issue was one of contract law as between the plaintiff, Secure Capital, and its intermediary, RBS, so that the rights afforded under Luxembourg law as between RBS, BNYM (the actual holder of the issued bearer notes), Clearstream and Credit Suisse were irrelevant.

As stated above we favour a rule derived from the governing law of the contractual arrangements to which the securities or interests in the securities owe their existence (*lex creationis*) and which governs the manner/method of their transfer/disposition, save where this issue falls to be determined by the company law of the place of the issuer's habitual residence.

As regards the answer on exchange traded derivatives below is concerned, the rules in the SFD and Rome I may apply as described above, but the rules in the FCAD would not appear to apply. This could usefully be changed by bringing the SFD and FCAD rules into line.

Question 4 c): In particular, are exchange-traded derivatives considered to be covered by the EU conflict of laws rules in your Member State?

Yes	X

No

Don’t know / no opinion / not relevant

Question 5): In your Member State, how do statutory rules, case law and/or legal doctrine answer the question which is the relevant ‘record’ for conflict of laws purposes? Please provide references.

See the case *Secure Capital SA v Credit Suisse AG [2015] EWHC 388* referred to under 4(a) above. Except where specifically required to take a different approach (e.g. SFD) English law would regard interests in securities recorded by intermediaries below the level of CREST (or the underlying issuer) as being primarily constructs of contract (and/or trust). *Eckerle v Wickeder* [2014] Ch 196 confirms that the holders of a company's shares are the persons registered as members and not the persons with the ultimate economic interest in those shares. As explained above, English case law and legal authorities normally analyse intermediated holding patterns in terms of trust law. They would therefore be likely to regard the relevant "record" as being the entry in the accounts of the trustee that records the existence and quantum of the beneficiary's interest. Normally this will be the securities account maintained by the intermediary of whom the account holder is the direct client, rather than any higher tier intermediary. The terms of the trust are likely to be recorded in the contractual terms agreed between the parties and therefore apply the governing law of the contract to determine the effect of the application of the entries in that record as between the parties. Where the contractual terms do not fully resolve the matter, rules of trust law (a form of property law) would be applied.

If the recorded holder of the interest holds as a chargee, relations between that holder and the chargor would be determined according to the agreement between them (which might be governed by a different law from that determining the rights of the holder as against the intermediary).

The chargee which is not recorded as the holder (or some other third parties, such as a purchaser to whom (or to whose order) no transfer has yet been made by the intermediary, or the beneficiary of a trust of which the holder is trustee) will have his rights against the holder determined in accordance with the contractual or other relationship between the third party and the holder. Those third parties are unlikely to have direct rights against the intermediary under English law, unless the contractual arrangements between the holder and the intermediary specify the circumstances in which the intermediary can take instructions/get a good discharge from the third party. The use of third party notices can, however, enable rights as between the holder and the third party and against the intermediary to be determined in a single court process, if not resolved by agreement.

On the other hand, official representatives of the holder (e.g. a trustee in bankruptcy, insolvency administrator or liquidator) would be recognised as standing in the shoes of the holder and able to deal directly with the intermediary on the terms agreed between the intermediary and the holder. If that insolvency officer were operating under an insolvency not governed by UK legislation, then UK conflict rules related to the rights of foreign insolvency officials would apply. Currently these include the rules in the EU Insolvency Regulation and specialist insolvency, rescue and reconstruction directives, but these may not apply after Brexit.

In practice this structure has effect so that the holder of the interest in a security can deal with the interest in most respects as if it were a directly held security (e.g. as to voting, receipt of dividends, interest or income). This is because the intermediary will be obliged (under its contract with the account-holder) to exercise relevant rights (against the issuer or a high-tier intermediary) in accordance with the instructions of the account-holder and to account for any benefits received.

If the intermediary becomes insolvent, the rights of the holder be determined by whether the intermediary has assumed purely contractual obligations or whether (as is usual in regulated intermediated relationships) it accepts responsibility as a trustee in relation to the underlying securities (or interests in securities) held by it for the account of the account-holders.

If purely contractual, the account-holder will have contractual claims only against the intermediary without, in most cases, any right to transfer of securities, merely a right to prove for the value of the securities in the insolvency of the intermediary and to benefit from any investor protection programme relevant to the intermediary vis-à-vis its clients. Third parties such as purchasers, chargees, heirs etc. deriving rights through the holder will only, as explained above, have rights against the intermediary in limited circumstances. Whether their claims against the holder entitle them to more than the holder can recover from the intermediary will depend on the terms of the agreement or other relationship between the holder and that third party: e.g. the beneficiary of a trust, an heir or an insolvency official is unlikely to have any right to more than can be realised from the rights of the holder against the intermediary, but a purchaser may have an independent right against the holder for delivery of the appropriate number or value of the securities he contracted to purchase, even though the holder cannot get delivery from the intermediary.

Where the intermediary holds the underlying securities (or interests in securities) on trust for its account-holders, then the underlying assets should not fall into the insolvency estate of the intermediary and the account-holders will be entitled to a proprietary claim to the underlying pool of assets held. The insolvency office-holder of the intermediary will be obliged to segregate the account-holders' assets from the claims of the general creditors and, in accordance with the *Berkeley Applegate* jurisdiction, may claim his/her costs and expenses in administering the trust assets from those assets.

Question 6 a): Please describe how exactly you define and apply in practice the Place of the Relevant Intermediary Approach (PRIMA) in your Member State? If appropriate, please provide references to relevant case law and/or legal doctrine that corroborate your interpretation.

Are you aware of any case law?

Yes

No X

Don't know / no opinion / not relevant

Please explain your reply to question 6 a):

PRIMA in the United Kingdom is generally related to the choice of the law of some part of the United Kingdom in the relevant account agreement with the intermediary and gives little difficulty in practice. We are not aware of any directly relevant case law on the subject.

This is because the existence and constitution of interests in securities under English law is derived from contract in most situations. Possible exceptions are discussed in answer to earlier questions. The case *Secure Capital SA v Credit Suisse AG* [2015} EWHC 388 illustrates why PRIMA is unlikely to be a relevant concept in many circumstances, although it would be relevant to the application of the SFD and the FCAD in their UK implementations.

In our opinion, objective location tests are generally not suited to determination of applicable law (except for real property and in those rare cases where bearer securities are physically held) in the modern world and are particularly unsuited for incorporeal assets such as dematerialised securities, which may be evidenced by records held on one or multiple computer servers in a multiplicity of jurisdictions, in many of which the responsible intermediary may have an office, systems or other records. In our view these location based tests will become increasingly uncertain in application and a source of legal uncertainty – especially if distributed ledger technology becomes widely accepted and used in the securities industry. We doubt that their enforced adoption will provide any clarity in terms of choice of law rules.

Question 6 b): In your experience, do different substantive laws in one cross-border holding chain interact smoothly or do they create problems in practice? Please provide examples.

On the whole, the English law approach interacts smoothly with the other elements of a cross-border holding chain. What it will not do is give any holder of an interest in a security held below the level of CREST (or other register or other primary record of entitlement held by or for the issuer of the underlying security) any direct "look-through" claim against the issuer. This means that a holder under a contract governed by English law with an intermediary will not have any "look-through" rights directly against the issuer of the underlying securities (whether a UK company or not) and will not benefit directly from rights that the intermediary may have against a higher-tier intermediary or CSD in the UK or elsewhere (e.g. CREST, Euroclear Bank or Clearstream or any associated "looks-through" rights against the issuer). Where an intermediary is solvent, this should not in most circumstances have any practical adverse effect on the ability of the holder to get delivery to his order of an interest of the value of the relevant security. If the intermediary becomes insolvent the rules described in answer to question 5 may apply.

Question 7: In your experience, what is the scale of difficulties encountered because of dispersal of conflict of laws rules in EU directives and national laws? Please provide examples.

We do not believe there are difficulties in the mainstream conflict of law rules.

Any difficulties of making full recovery on the insolvency of intermediaries below the level of CRET or the issuer of the underlying security is an issue of insolvency law and cannot be addressed through conflict of law rules. In practice, these issues are resolved through regulatory or other principles which require the segregation (e.g. by way of trust) of the underlying assets held by the intermediary from its own property. In any event, given that the EU Treaties do not currently extend to the harmonisation of systems of property ownership, it is unclear that the EU has the tools to address this issue.

Question 8: Do you see added value in Union action to address issues identified in Section 3.1. of this public consultation?

Yes X

No

Don't know / no opinion / not relevant

If no, what would be the appropriate action in your view? N/A

Question 9: Do you think that targeted amendments to the relevant EU legislation containing conflict of laws rules would solve the identified problems?

Yes X

No

Don’t know / no opinion / not relevant

If you answered YES to question 9, do you have specific proposals as to which issues should be addressed and how? What would be the order of priority for addressing these issues?

We do not believe any extension of the PRIMA rule would address the relatively few problems we have identified. In our opinion, objective location tests are generally not suited to determination of applicable law (except for real property and those limited cases where bearer securities are physically held) in the modern world. They are particularly unsuited for incorporeal assets such as dematerialised securities, which may be evidenced by records held on one or multiple computer servers in a multiplicity of jurisdictions, in many of which the responsible intermediary may have an office, systems or other records. In our view these location based tests will become increasingly uncertain in application and a source of legal uncertainty – especially if distributed ledger technology becomes widely accepted and used in the securities industry. In some cases servers on which records are held may be changed every few hours within a 24 hour cycle according to cost. We doubt that the enforced adoption of location based test s will provide any clarity in terms of choice of law rules.

Assuming PRIMA, rather than a purely contractual rule, continues to be applied to the SFD and the FCAD, then harmonisation of the definition of securities to which the rule applies would be very helpful and would remove uncertainty and produce efficiency savings. We would suggest that the definition in both Directives should be by reference to the MIFID II definition, but qualified to apply only to interests capable of being recorded in an account.

Question 10: If there was a targeted solution clarifying which record is relevant for determining the applicable law, do you expect problems if within one Member State the legal relevance of record(s) for conflict of laws purposes does not coincide with the legal relevance of record(s) under substantive law?

Yes X

No

Don’t know / no opinion / not relevant

If yes, please explain your opinion and indicate the relevant national provisions that could generate problems:

This arises primarily because in some Member States records may be evidence of a property right and in others evidence of a contractual right.

We believe that a location based test is liable to add to confusion because, for example, when the intermediary is insolvent, much may turn on the location of the record, but this may be extremely difficult to resolve without recourse to the parties' (intermediary and account-holder) intentions. As stated above we do not favour any rule that requires location of a record or account – inevitably held in one or more servers in one or more parts of the globe, with the intermediary having offices in many jurisdictions and potentially trading on-line. They may be regulated in more than one place - and if regulation moves to EU level, the location in the EU will not be easy to determine. The intention of the parties (intermediary and account-holder) as to the law to govern their relations, and the rights and interests created (including as to the process for transfer or other disposition of such rights/interests), is the best test in our view.

The introduction of third party rights governed by a different and over-riding law also appears to be trespassing into an aspect of property law, which is not within the competence of the EU treaties.

If no, please explain your opinion:

N/A

Question 11: Do you think that an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities is needed to provide for legal certainty?

Yes

No X

Don't know / no opinion / not relevant

Please explain your reply to question 11:

We believe, that, except for the changes that we suggest above for the SFD and the FCAD to harmonise their application, an attempt to create universal rules would open a Pandora's box.

Indeed,we believe that it would be as well to abandon the location test and have regard primarily to the party's (intermediary/account-holder) intentions as to the law to govern their relations. As we have indicated, a location test will become increasingly difficult to apply; a modern intermediary may trade in many jurisdictions, hold records simultaneously in several and have business habits that make it a difficult legal question where is its centre of main interests, while it may have an extremely tenuous connection with the place of its registered office and not establish branches in the traditional sense. This is a particular concern for intermediaries that adopt distributed ledger technology. There is a real risk that a location based rule brings an additional law into a transaction where otherwise all parties have chosen a single law to govern their contractual and wider business relationship (e.g. the intermediary/account-holder contract, and the holder/third party contract) or a second or third law where the third party has non-contractual rights (e.g. through inheritance or the establishment of a trust) While, for example, it is possible that the intermediary/account-holder contract might be governed by one law and the rights of the executors or heirs of the holder by another law - a requirement which could require consideration of e.g. the law of the registered office of the intermediary in a third country as an over-riding law, would be an unnecessary complication - and also potentially cut across the EU conflict rules relating to inheritance where applicable, if the jurisdiction of the registered office is in a jurisdiction outside the EU, but that law is not otherwise engaged in either the contractual arrangements or the relevant jurisdiction for inheritance law purposes. Of course, if that intermediary becomes insolvent, the law of the insolvency may become relevant under conflict rules applicable to insolvency (not always the same as that of the registered office) but in most cases the rights of those claiming through a deceased holder can be expected to be clear without any difficulty based on the application of inheritance law to the rights of the deceased holder under its contract with the intermediary.

We do not favour a rule which may entrench over-riding rules of property law against the wishes of the parties and in circumstances where those underlying rules cannot be harmonised as the Treaties currently stand.

We would, therefore, strongly oppose use of the law of where the underlying security is constituted (generally, but not invariably associated with the issuer's place of registration or comi) as the applicable law to govern rights and interests in relation to that security created under a separate contract between the intermediary and account-holder (or other third parties). This would import into other systems of law, property rules the parties were unaware of and did not intend to apply

without any opt-out. It would also hugely complicate litigation involving all levels in the chain of ownership in the claims of the ultimate holder and commit holders frequently to litigation outside their home jurisdiction, possibly in a different language. We therefore reject "super-PRIMA" absolutely.

We note that this is not the solution chosen in the Hague Securities Convention or favoured by the conflict of law rules of more than a very few jurisdictions worldwide. We would strongly oppose the EU adopting an approach so far out of line with the solutions currently commonly used in international practice.

We would therefore consider the application of the Rome I rules and other conflict rules such as inheritance and insolvency rules, if relevant, as the least damaging. This does not require significant changes.

Question 12: If you prefer an overarching reform, what would be the appropriate connecting factor in your view?

(You can select more than one option in response to Question 12)

Option 1: the law of the Place of the Relevant Intermediary Approach (PRIMA)

Option 2: the law governing the contract

Option 3: the law under which the security is constituted

Option 4: other option(s)

We do not favour an overarching reform, so are not responding to any part of Question 12. In particular, we consider that it is not necessary to have a PRIMA override or a qualifying office override in relation to the law of the contract. That is to seek to distort conflict of law rules by reference to regulatory or other policy considerations inimical to legal certainty. Regulation should be treated as a separate matter.

[Text of unanswered questions deleted]

Question 13: For each of the options 1 to 4 in Question 12 above, as you defined these in your answers, please indicate the scale of advantages – disadvantages

In the light of our answer to question 11, we have not responded to any part of Question 13

[Text of unanswered questions deleted]

Question 14: In your view, on which of the following issues would options (1)-(4) in Question 12 above have any positive or negative impact:

In view of our answer to Question 11, we have not answered Question 14 in detail, but refer the Commission to the Financial Markets Law Committee Issue 58 paper on *Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary (November 2005).*

[Text of unanswered questions deleted]

Question 15: Which issues should be covered by the scope of the applicable law determined by such conflict of laws rules on third party effects of transactions in book-entry

securities (e.g. the steps necessary to render rights in book-entry securities effective against third parties, priority issues, etc.)?

the steps necessary to render rights in certificated securities effective against third parties

priority issues

other X

Please specify what other issues should be covered by the scope of the applicable law determined by such harmonised conflict of laws rules (in relation to question 15):

We believe that the current conflict rules are adequate, subject to aligning the definition of securities for the purpose of the FCAD and the SFD.

Question 16: Do you have other suggestions for conflict of laws rules for third party effects of transactions in book-entry securities or opinions on this topic that you have not expressed yet above?

We believe that it is extremely important not to change existing applicable rules under the Rome I Regulation. We warn against the risk of making changes which make matters worse, rather than better, add significantly to the costs of due diligence and resolving disputes and offering no greater, or less legal certainty.

Question 17 a): Do transactions in certificated securities still play an important role in your Member State?

Yes, very important X

Yes, important

Neutral

No

Don't know / no opinion / not relevant

Please explain your reply to question 17 a) and estimate the number or value of transactions concerned per year:

We have replied on the basis that the term "Certificated securities" refers to securities that are recorded in the register of a UK company (or other primary record of entitlement as against the issuer, which include dematerialised securities held in direct-holding systems such as CREST), as well as bearer securities. Trades in UK quoted securities that are recorded in CREST are the primary means of identifying holders of such securities at the highest level of ownership and are extremely important.

Securities registered directly in the registers of companies remain extremely important for private unquoted companies, which are the majority of all UK companies, though many are very small and not the subject of frequent trades in shares.

In the event the term is intended to refer only to bearer instruments, we should have answered "No" as bearer instruments are not used in UK practice (and, indeed, UK companies are now prohibited from issuing bearer shares under UK company law, although they can issue bearer bonds).

Question 17 b): How often are certificated securities being used as collateral in practice?

Very frequently X

Frequently

Sometimes

Rarely

Never

Don't know / no opinion / not relevant

Please explain your reply to question 17 b) and estimate the number or value of transactions concerned per year

Transactions in which securities are used as collateral take two main forms:-

Outright transfer of the collateral-giver's interest in the securities in return for a promise by the collateral-taker to return equivalent securities of the same quantity and description on a particular date or on the occurrence of a particular event (e.g. repayment of a loan or fulfilment of some other obligation). This type of transaction includes sale and repurchase (repo) transactions, stock or securities lending and financial collateral arrangements subject to the ISDA English law Credit Support Annex; and

The creation of a charge over the securities by the collateral-taker. As a result of UK judicial decisions on the UK implementation of FCAD, the most common form of charge used in the UK for this purpose does not benefit from FCAD and such charges are registered at Companies House in the event that the Chargor is a UK company. The case of *Private Equity Insurance Group v Swedbank* Case C-156/15, Judgment 10 November 2016 follows a similar analysis to the UK decisions on the question of control by the collateral taker and therefore reinforces the correctness of these decisions. The form of charge used takes effect as a "floating" charge leaving the collateral-giver free to deal with the charged securities and to substitute collateral so long as the other terms of the collateral arrangement are adhered to, although in other cases the consent of the collateral-taker may be required for these actions. On release of the charge the collateral-giver will be absolutely free to deal with the securities subject to the charge and may direct their transfer from an agreed account in CREST or with an intermediary as it wishes.

In the case of outright transfer, the collateral-giver will direct transfer of the securities from its intermediary to the collateral-taker or its intermediary. Thereafter neither the collateral-giver nor its intermediary will have any further interest in the transferred securities (assuming the intermediary does not have another role – e.g. as the intermediary for the collateral taker or as the collateral taker itself). The interests of the collateral-giver against its intermediary in relation to the execution of the transfer will be purely contractual, as will the rights of the collateral-giver as against the collateral-taker and the collateral-giver will lose any "property" rights it may have had against the

transferred securities prior to the transfer. These contractual rights will be governed by the law chosen by the parties in most cases. The rules in the Rome I Regulation are adequate to address any conflicts issues likely to arise. On the termination of the transaction (e.g. the return date of the securities loan), the collateral-taker will direct its intermediary to transfer equivalent securities of the same quantity and description to the collateral-giver's account in CREST or to its intermediary according to the collateral-giver's direction. Once that is done the collateral-taker will cease to have any interest at all in those securities.

If a third party asserts rights against the collateral-giver in relation to securities given as collateral after the transfer has occurred, in most cases those rights would be against the collateral-giver and would be to claim damages or delivery of equivalent securities of the same kind. These would be decided as between the third party and the collateral-giver in relation to the contract between them and in most cases would not involve the intermediary, the collateral-taker or its intermediary. . There might be some rare cases where the third party would have an additional claim against the collateral-taker (e.g. if the third party held a registered charge in relation to those specific securities which the collateral-taker should have been or was aware of, but those cases are rare). The resolution of that claim would involve assertion of a property interest in the specific securities, but might be resolved by payment of damages or transfer of like securities. We do not believe that property law claims can be dealt with by EU legislation as the Treaties stand currently. There may also be circumstances where a third party is able to stand in the shoes of the collateral-giver (e.g. as the heir to an individual or the insolvency practitioner acting in relation to the insolvency of the collateral giver), but the rights of that third party could be no greater than those of the collateral-giver, which would be contractual,

In the case of collateral given under a charge, it would be common (but not invariable) for collateral consisting of quoted securities to be transferred into the name of the collateral-taker, or otherwise to be put under its control as "escrow agent", in CREST records (assuming that the collateral-giver holds its interest at that level or can direct its intermediary to receive a transfer which will create an interest at that level). In addition the respective rights of the parties would be regulated by a separate charge document, e.g. a floating charge. If the collateral is not so transferred, the charge might provide that the collateral-giver's intermediary should be directed to act only on the instructions of the collateral-taker or only accept the collateral-giver's instructions if accompanied by the written consent of the collateral-taker. These arrangements are likely to be contractual even where they create rights in favour of the collateral-taker. This is the only circumstance where the records of a single intermediary may be the best evidence of dealings in the collateral at a time when both the collateral-giver and the collateral-taker have property interests in the collateral (as chargor and chargee), but in determining competing rights, the contractual arrangements between the collateral-giver and the collateral-taker are likely to be determinative. The position of a prior chargee of the securities may be recognized as a form of property interest. The position of heirs and insolvency practitioners would be the same as in the case of absolute title transfer arrangements.

In the event that the charge is over unquoted shares, then again it would be common, but not invariable to transfer the holding into the name of the collateral-taker for the securities to be in the register held by the relevant company and for the charge to be registered with the Registrar of Companies as described above. In some cases a deposit of the certificates with the chargee will be regarded as evidencing the intention to create a charge (as an equitable mortgage or fixed charge), but this is less certain and likely to be used only when the collateral arrangement is too short in duration to justify registering the chargee as legal holder of the charged securities..

In the case of bearer securities (now likely to be securities issued by non-UK companies only) mere deposit of the certificates would be sufficient to create a collateral arrangement (as a pledge or mortgage under English law). For the nature of these securities, UK conflicts of law rules would look to the law under which the bearer securities were constituted, which in the case of bearer shares would almost always be the law of the registered office (sometimes the COMI) of the issuer, but in the case of bearer bonds may be another law. For the law which governs proprietary issues affecting such securities, English conflict of laws will also look to the place where the physical securities are actually held or transferred to determine whether there has been an effective transfer or disposition of the securities.

Substantial volumes of collateral transactions are effected in the UK every year with substantial values. The daily movement of securities under such transactions is likely to be in the trillions of pounds.

Question 18: Are conflict of laws rules on third party effects of transactions in certificated securities easily identified in your Member State?

Yes, there are statutory rules

Yes, there is case law X

Yes, there is legal doctrine

No

Please explain your reply to question 18 and provide reference and indicate the connecting factor:

We refer you to *MacMillan Inc v Bishopsgate Investment Trust (No 3)* 1996 WLR 387 (CA). This case involved the ownership of shares which had been fraudulently charged to a third party by the individual controlling the owner of the shares. This was treated as a claim for breach of trust and the English conflict of law rule required the court to look at the location (*situs*) of the shares in order to determine the law to apply to this issue. It held that the location of bearer shares was the place where the certificates were physically (in this case, England).

In the case of other shares, the majority of the court appeared to follow the leading textbook, *Dicey & Morris,* in favouring the place of the register and discussion of the alternative of the place of incorporation of the issuer was not conclusive, as both tests gave the answer, New York law.

Question 19: Do you see added value in Union action to address the identified issues with regard to certificated securities?

Yes

No X

Don't know / no opinion / not relevant

If no, what would be the appropriate action in your view?

In our view there is no appropriate Union action which does not risk adding to uncertainty. In particular, as rules adopted by the Union might change the rules on the transfer of property within a Member State, there would be doubts whether this would be within Union competence.

Question 20: Do you consider that conflict of laws rules on third party effects of transactions in certificated securities should be harmonised at EU level?

Yes

No X

Please explain your reply to question 20:

In so far as certificated securities refer to bearer securities, the certificates for these securities are a form of property similar to physical goods and the Union does not have competence to change the system of property ownership in any Member State.

In many Member States interests in shares and other securities may be also regarded as property interests and the conflict rules flow from this analysis. It would change the law in one or more Member States we believe to adopt any of the rules being considered.

In addition, aspects of claims involving competing rights to securities (as for other property) are in part determined by the application of the rules on the creation of security interests (i.e. charges or liens), which in several countries involve taking account of the date of registration of the security interest over the property in a register established under company or administrative law and searchable by reference to the identity of the chargor/collateral-giver. It would be a source of great confusion to have a different priority rule for securities than that used in a Member State for other property. Securities and other property may be charged under the same charge under the legal systems of several Member States. Under English law a charge creates a property interest in the charged property (including contractual rights), so a change in priority rules (or even the conflict rules applicable to priority) is likely to create confusion.

We believe use of a physical location rule, other than for certificates representing bearer shares, would be a retrograde step.

In addition this change would be likely to increase due diligence costs and make it harder to give clear legal opinions.

Question 21: If you consider that harmonising conflict of laws rules on third party effects of transactions in certificated securities is the appropriate option:

N/A [Text of unanswered questions omitted]

Question 22: For each of the options a) and b) in Question 21 above, as you defined these in your answers, please indicate the scale of advantages – disadvantages

N/A [Text of unanswered questions deleted]

Question 23: In the past 5 years, have you encountered problems in practice in securing the effectiveness of assignments against persons other than the assignee and the debtor (e.g. a second assignee, a creditor of the assignor or of the assignee) in transactions with a cross-border element?

Yes

No X

Don't know / no opinion / not relevant

a) If you answered YES to question 23, please specify how frequently do these difficulties arise in practice:

N/A [Text of unanswered questions deleted]

Question 24: In a typical transaction with a cross-border element involving an assignment of claims, do you undertake legal due diligence with respect to the underlying claim under the law governing the assigned claim?

Yes X

No

Don't know / no opinion / not relevant

a) If you answered YES to question 24, please specify which elements you verify under the law governing the assigned claim: for example, assignability of the claim, effectiveness of the assignment against the debtor, other:

We verify against the original debtor, including such matters as registration and notice requirements and also any prohibitions on assignment in the contractual arrangements between the debtor and the original creditor and their legal effect. The law of the claim will apply to proprietary and (in most cases) priority aspects as against the original debtor and will include rules on the system of transfer of property which are a matter of national competence and, in many cases, rules of public policy (eg consumer protection, protection of a debtor against claims for double payment due to circumstances outside its control) which are required to be respected under the Rome I Regulation.

***b) If you answered YES to question 24, please specify how much of the legal costs of a transaction involving an assignment of claims would be allocated to legal due diligence regarding the assignability of the underlying claim, the perfection of the assignment, and the enforceability of the claim by the assignee against the debtor*:**

This is a matter for agreement between the parties to the assignment and there is no invariable rule as assignments of debts occur in a large number of different circumstances.

c) If you answered YES to question 24, please specify approximately what percentage of the total transaction costs (legal and other) would be allocated to the legal due diligence required in connection with the above situations:

between 0 and 100%

Highly variable depending on the nature of the transaction in which the assignment takes place.

Please explain your reply to question 24 c):

Many debt assignments are ancillary to other transactions, such as the sale of a business, and are not stand-alone transactions. In other cases a transaction may involve assignment of a portfolio of debts with similar characteristics, in which case costs may be controlled by relying on sample due diligence or, in some cases due diligence on the basic law and warranties about the characteristics of the debtors and an obligation to substitute those debtors who do not comply with basic requirements.

If the governing law of the contract creating the debt, the governing law of the contract creating the assignment and the habitual residence of the debtor are of single jurisdiction, due diligence costs will be less than if different jurisdictions are involved, but it will always be necessary to check the issues that relate to the obligation of the debtor to recognise the assignment under the law of the underlying contract and, if different, the law of the habitual residence of the debtor. This is because the debt is the asset in respect of which the assignee is gaining rights and the assignee needs to know what it must do to obtain the repayment of the debt when it is made by the debtor.

If the debtor is a consumer (as in many factoring and securitization transactions), then consumer protection laws may apply and cannot be over-ridden In most jurisdictions, in any event, there are rules to prevent a debtor being faced with multiple claims for payment of the same debt.

a) If you answered NO to question 24, i.e. if you do not undertake legal due diligence with respect to the underlying claims but accept the legal risks relating, for example, to the assignability of the claim and the legal enforceability of the claim against the debtor, please explain the reasons for this:

N/A [Text of unanswered questions omitted]

Question 25: Do you see added value in Union action to address the identified issues in the area of assignment of claims involving a cross-border element?

Yes

No X

Don't know / no opinion / not relevant

If no, what would be the appropriate action in your view?

We do not believe any action is necessary. We have not experienced difficulties with the present form of Article 14 of the Rome I Regulation.

Question 26: What conflict of laws rule on third party effects of assignment of claims would you favour?

Please indicate your order of preference among the below options ranging from 1 (best solution) to 4 (least preferred solution):

(BEST solution) 1 2 3 4

(LEAST preferred solution)

(1) the law applicable to the contract between assignor and assignee *3*

(2) the law of the assignor's habitual residence *4*

(3) the law governing the assigned claim *2*

(4) other *1*

Please specify what other conflict of laws rule on third party effects of assignment of claims would you favour:

As the question of third party rights obviously involves considerations of property law – e.g. because a claim under a prior security interest or a prior assignment is a property law claim, we do not believe there is competence under the EU Treaties to specify a universal conflict of laws rule, as this would undoubtedly change the rules on the transfer of property in some Member States, those rules not currently being aligned.

We doubt in any event that a single rule will be the most appropriate to determine third party rights in the wide variety of circumstances in which an assignment will arise. An assignment will either be effected by contract or by the deemed operation of a law intended to address some lacunae – this type of law may well be a public policy law. Where contract law is engaged, the third party may also be claiming by virtue of a contract and the over-riding of the law chosen for that contract will be difficult to justify.

Question 27: For each of the options 1, 2, 3 and 4 in Question 26 above, please indicate the scale of advantages – disadvantages

Option 1: the law applicable to the contract between assignor and assignee

Option 1: please indicate the scale of advantages / disadvantages in terms of:

-2 (significant DECREASE) -1 (some DECREASE) 0 (no change)
+1 (some INCREASE) +2 (significant INCREASE)

a) an estimated increase/decrease of the number or value of transactions which you are able to undertake in your business

0

b) an estimated increase/decrease of your legal due diligence costs

+1

c) an estimated increase/decrease of the profitability of your business

0

d) a change in your business model and the way in which you operate your business

0

e) any other advantages

-1

f) any other disadvantages

+1

Please explain your answer as the advantages or disadvantages of option 1 in terms of increase/decrease of the number or value of transactions which you are able to undertake in your business:

As lawyers we can adapt our business to the needs of our clients.

Please explain your answer as the advantages or disadvantages of option 1 in terms of

increase/decrease of your legal due diligence costs:

We anticipate that the over-riding requirement to use the law of the contract between the assignor and the assignee in relation to third party aspects would increase the number of cases where the outcome was potentially in conflict with:

- The public policy laws of the jurisdiction of the original debtor or of the law by which its contract with the assignor is governed (if different) and possibly relevant property laws of that jurisdiction; or

- The property laws of the jurisdiction of the law of the contract or other legal situation under which the third party acquired rights which it can assert in relation to the underlying debt, which could potentially be different from the law of the habitual residence of the debtor, the law of the contract or other legal situation which created the original debt owed to the assignor and the law of the contract between the assignor and the assignee.

This means both due diligence costs and litigation costs would be increased without any increase in legal certainty. It would be illusory to think that due diligence on the underlying debt or on any mandatory rules regarding competing claims in the jurisdiction of the law of the original debt (and the law of the habitual residence of the debtor, if different) could be excluded by this choice.

Please explain your answer as the advantages or disadvantages of option 1 in terms of increase/decrease of the profitability of your business:

N/A

Please explain your answer as the advantages or disadvantages of option 1 in terms of a change in your business model and the way in which you operate your business:

N/A

Please specify what other advantage(s) you can see to option 1, and provide relevant data if possible:

We do not see advantages, and there would be a risk of legal challenge to the new law. We cannot quantify that risk.

Please specify what other disadvantage(s) you can see to option 1, and provide relevant data if possible:

Taking action may result in challenges to the new law and add to due diligence and litigation costs for affected parties as a result of the additional prospects for clashes with other over-riding laws (e.g. mandatory rules of the jurisdiction of enforcement) as outlined above. We believe the risks of this outcome are significant, but not quantifiable.

Option 2: the law of the assignor's habitual residence

Option 2: please indicate the scale of advantages / disadvantages in terms of:

-2 (significant DECREASE) -1 (some DECREASE) 0 (no change)
+1 (some INCREASE) +2 (significant INCREASE)

a) an estimated increase/decrease of the number or value of transactions which you are able to undertake in your business

-1

b) an estimated increase/decrease of your legal due diligence costs

+2

c) an estimated increase/decrease of the profitability of your business

0

d) a change in your business model and the way in which you operate your business

0

e) any other advantages

-2

f) any other disadvantages

+2

Please explain your answer as the advantages or disadvantages of option 2 in terms of increase/decrease of the number or value of transactions which you are able to undertake in your business:

As lawyers we can adapt our business to the needs of our clients. However, the additional complexities introduced by this particular proposed rule seem to us sufficiently significant in some cases that they might possibly reduce the number of transactions, despite the popularity of the rule with some financing sectors.

Please explain your answer as the advantages or disadvantages of option 2 in terms of increase/decrease of your legal due diligence costs:

We anticipate that the over-riding requirement to use the law of the place of the assignor's habitual residence to resolve third party aspects would increase the number of cases where the outcome was potentially in conflict with:

- The public policy laws of the jurisdiction of the original debtor or of the law by which its contract with the assignor is governed (if different) and possibly relevant property laws of that jurisdiction; or
- The property law of the jurisdiction of the contract between the assignor and the assignee; or
- The property laws of the jurisdiction of the law of the contract or other legal situation under which the third party acquired rights which it can assert in relation to the underlying debt, which could potentially be different from the law of the habitual residence of the debtor, the law of the contract or other legal situation which created the original debt owed to the assignor, the law of the contract between the assignor and the assignee and the law of the habitual residence of the assignor.

We are particularly concerned that this over-riding choice may introduce a requirement to look at an additional law, when, without this provision the issues would all fall to be determined by a single system of law: e.g. if the original debt was created under French law, the third party claims arise from a transaction between the assignor and the third party under French law, the assignment the third party seeks to impugn was made under French law and the debtor is habitually resident in France, the law of the habitual residence of the assignor may still apply (this could be anywhere from Japan to Australia).

This is an increasing risk as financial transactions take place electronically and the assignor may not have or have ever had an habitual residence (e.g. a business branch) in France – it may not be a French company and its EU authorised branch might be habitually resident in say, Ireland, while its corporate form could be Japanese or Australian, with a head office habitually resident there; or if an individual, the assignor may have been involved in a set of family transactions for French relatives while being habitually resident in another country. As stated above, we strongly oppose the use of location based tests in modern conflict of law rules.

There is also a temporal issue – is the habitual residence to be determined at the date of the assignment to which that assignor is a party or at the date of the dispute. Further, which law is to apply when there is more than one successive assignment of the same debt, so that the first assignee is also an assignor and thus there are two different assignors to consider, but the third party has an independently based claim under another law, which it wishes to assert against the debtor claiming through the original assignor in competition with the assignee of the second assignment.

In any event this seems to add an additional potential law for consideration in for due diligence purposes in any case where there is a risk that the habitual residence of the assignor is not that of either the law of the assignment or the law of the underlying debt or that of the habitual residence of the original debtor and is therefore likely to add to due diligence costs related to assignments, rather than reduce these costs. We believe it is illusory to think that this rule would reduce the need to perform due diligence on the law of the underlying debt and habitual residence of the debtor, including whether there are mandatory rules in relation to competing claims.

Please explain your answer as the advantages or disadvantages of option 2 in terms of increase/decrease of the profitability of your business:

N/A

Please explain your answer as the advantages or disadvantages of option 2 in terms of a change in your business model and the way in which you operate your business:

N/A

Please specify what other advantage(s) you can see to option 2, and provide relevant data if possible:

We see no advantages. We believe the alleged advantages are nugatory, as explained above. In addition the risk of a challenge based on interference with property rights under national law remains.

Please specify what other disadvantage(s) you can see to option 2, and provide relevant data if possible:

Please see above. We consider this the most complicating option.

Option 3: the law governing the assigned claim

Option 3: please indicate the scale of advantages / disadvantages in terms of:

-2 (significant DECREASE) -1 (some DECREASE) 0 (no change)
+1 (some INCREASE) +2 (significant INCREASE)

a) an estimated increase/decrease of the number or value of transactions which you are able to undertake in your business

0

b) an estimated increase/decrease of your legal due diligence costs

0

c) an estimated increase/decrease of the profitability of your business

0

d) a change in your business model and the way in which you operate your business

0

e) any other advantages

0

f) any other disadvantages

+1

Please explain your answer as the advantages or disadvantages of option 3 in terms of increase/decrease of the number or value of transactions which you are able to undertake in your business:

As lawyers we can adapt our business to the needs of our clients

Please explain your answer as the advantages or disadvantages of option 3 in terms of increase/decrease of your legal due diligence costs:

We debated earnestly whether this option should be our preferred option and some of us favoured it. On balance, we felt that the disadvantage outlined in our final answer in relation to this option, made it doubtful whether the adoption of a mandatory rule was justified. However, we are clear that this option is a realistic one and because of its closeness to the current position in most cases where there are competing claims against the debtor could be introduced with relatively little cost, if there were strong support for this change.

As we already due diligence the law of the underlying debt (i.e. the assigned claim), there would be little or no additional legal due diligence costs. In addition as Article 14 of the Rome I Regulation already specifies that the law of the assigned claim governs the relationship between the debtor and the assignee, this will naturally take into account any competing claims (including the most common which is a competing assignment), without EU law needing to specify that outcome and thus possibly impinge on national systems of property law – a debt or other contractual obligation being a form of property under English law and many other systems.

It is questionable, however, whether an attempt to impose a uniform solution throughout the EU specifically related to third party issues over and above the current language of Article 14 is justified. The risks of the rule substantially changing the applicable law may be appreciably lower than for options 1 and 2 and thus the risk of legal challenge based on interference with property law reduced, but it is not clear that it would improve clarity in a cost effective way.

Please explain your answer as the advantages or disadvantages of option 3 in terms of increase/decrease of the profitability of your business:

N/A

Please explain your answer as the advantages or disadvantages of option 3 in terms of a change in your business model and the way in which you operate your business:

N/A

Please specify what other advantage(s) you can see to option 3, and provide relevant data if possible:

See previous answers. The risks of adverse consequences will be much reduced compared with options 1 and 2.

Please specify what other disadvantage(s) you can see to option 3, and provide relevant data if possible:

We also observe that some jurisdictions have regard to the law of the habitual residence of the debtor when enforcing claims and this is potentially different from the law of the assigned claim; and may be different at the time of enforcement from at the time of creation of the original claim. Conflicts between the mandatory laws of that jurisdiction and the law applied under this rule will not be eliminated, but may be no more severe than currently.

Option 4: other solution(s)

Option 4: please indicate the scale of advantages / disadvantages in terms of:

-2 (significant DECREASE) -1 (some DECREASE) 0 (no change)
+1 (some INCREASE) +2 (significant INCREASE)

a) an estimated increase/decrease of the number or value of transactions which you are able to undertake in your business

0

b) an estimated increase/decrease of your legal due diligence costs

0

c) an estimated increase/decrease of the profitability of your business

0

d) a change in your business model and the way in which you operate your business

0

e) any other advantages

+1

f) any other disadvantages

-1

Please explain your answer as the advantages or disadvantages of option 4 in terms of increase/decrease of the number or value of transactions which you are able to undertake in your business:

We are lawyers and can adapt to the needs of our clients.

Please explain your answer as the advantages or disadvantages of option 4 in terms of increase/decrease of your legal due diligence costs:

If the law remains unchanged, so will due diligence requirements.

Please explain your answer as the advantages or disadvantages of option 4 in terms of increase/decrease of the profitability of your business:

N/A

Please explain your answer as the advantages or disadvantages of option 4 in terms of a change in your business model and the way in which you operate your business:

N/A

Please specify what other advantage(s) you can see to option 4, and provide relevant data if possible:

Taking no action will avoid legal challenges to the new law

Please specify what other disadvantage(s) you can see to option 4, and provide relevant data if possible:

Taking action may result in challenges to the new law and add to litigation costs for affected parties.

Question 28: Which issues should be covered by the scope of the applicable law determined by the conflict of laws rule?

the steps necessary to render rights in certificated securities effective against third parties

priority issues

other X

Please specify what other issues should be covered by the scope of the applicable law determined by the conflict of laws rule (in relation to question 28):

We do not think the scope of the applicable law covered by the conflict of law rules should be changed from its present ambit. The specific options mentioned include aspects of property law which is not an EU competence.

Question 29: In your experience, how frequently are claims constituting financial instruments other than book-entry securities and/or other claims traded on financial markets assigned, i.e. transferred?

Very frequently

Frequently

Sometimes X

Rarely

Never

Don't know / no opinion / not relevant

Please explain your reply to question 29 and estimate the number or value of transactions concerned per year:

With the growth of dematerialization the volume of claims related to primary holdings in financial instruments has decreased both absolutely and as a share of all claims. In addition the use of bills of exchange (which may be financial instruments in some measures as money market instruments) has fallen greatly. We speak from experience, but cannot provide statistics.

Question 30: Are conflict of laws rules on third party effects of assignment of claims constituting financial instruments other than book-entry securities and other claims traded on financial markets easily identified in your Member State?

Yes, there are statutory rules X

Yes, there is case law X

Yes, there is legal doctrine

No

Don't know / no opinion / not relevant

Please explain your reply to question 30 and provide reference and indicate the connecting factor:

A claim under a bond may be a contractual claim, in which case Article 14 of the Rome I Regulation will apply to an assignment of claims created by the instrument. See earlier answers.

In addition the Settlement Finality Directive and the Financial Collateral Arrangements Directive may provide the rules in some circumstances and displace the normal rules.

See cases referred to in earlier answers, which also explain the connecting factors.

Question 31: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of claims constituting financial instruments other than book-entry securities and/or other claims traded on financial markets which is different from your preferred solution for claims in general?

Yes

No X

Don't know / no opinion / not relevant

In the light of our answer above we have not responded to any other part of this question.

[Text of unanswered questions omitted]

Question 32: In your experience, does cash collateral play an important role?

Yes, very important X

Yes, important

Neutral

No

Don't know / no opinion / not relevant

Please explain your reply to question 32 and estimate the number or value of transactions concerned per year:

We have no exact figures but believe the numbers will run into trillions. .

Question 33: Are conflict of laws rules on third party effects of assignment of cash held in accounts easily identified in your Member State?

Yes, there are statutory rules X

Yes, there is case law X

Yes, there is legal doctrine

No

Don't know / no opinion / not relevant

Please explain your reply to question 33 and provide reference and indicate the connecting factor:

The law in Article 14 of the Rome I Regulation will be relevant and case law relating thereto.

Question 34: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of cash held in accounts which is different from your preferred solution for claims in general?

Yes

No X

Don't know / no opinion / not relevant

[Text of unanswered questions deleted]

Question 35 a) : Do you consider that a specific rule, different from the above, is needed for cash collateral being provided for the purpose of securing rights and obligations potentially arising in connection with a system designated under the Settlement Finality Directive?

Yes

No X

[Text of unanswered questions deleted]

Question 35 b) : Do you consider that a specific rule, different from the above, is needed for cash collateral being provided to central banks of Member States or to the European Central Bank?

Yes

No X

[Text of unanswered questions deleted]

Question 36: In your experience, are credit claims used as financial collateral outside the Eurosystem credit operations?

Very frequently

Frequently

Sometimes X

Rarely

Never

Don't know / no opinion / not relevant

Please explain your reply to question 36 and estimate the number or value of transactions concerned per year:

Credit claims are also used as collateral in a number of commercial transactions but we are unable to estimate volumes.

Question 37: Are conflict of laws rules on third party effects of assignment of credit claims easily identified in your Member State?

Yes, there are statutory rules X

Yes, there is case law X

Yes, there is legal doctrine

No

Don't know / no opinion / not relevant

Please explain your reply to question 37 and provide reference and indicate the connecting factor:

The use of credit claims as collateral will involve an assignment of rights against the borrower to which the rules of conflicts of law under Article 14 of the Rome I Regulation apply. There are no cases specifically related to credit claims, but general case law applies.

Question 38: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of credit claims which is different from your preferred solution for claims in general?

Yes

No X

[Text of unanswered questions omitted]

Question 39: In your experience, how frequently are claims used as underlying assets in securitisations?

Very frequently X

Frequently

Sometimes

Rarely

Never

Don't know / no opinion / not relevant

Please explain your reply to question 39 and estimate the number or value of transactions concerned per year:

The essence of a securitisation is the assignment of monetary claims, although some may be structured so that an amount equivalent to the claims given as security is paid as a direct debt to the financing parties and "synthetic" securitisations are effected through the use of credit derivatives. It follows that very many securitisations are likely to involve assignments of claims, even if other assets are also charged or assigned.

Question 40: Are conflict of laws rules on third party effects of assignment of claims used as underlying assets in securitisations easily identified in your Member State?

Yes, there are statutory rules X

Yes, there is case law X

Yes, there is legal doctrine

No

Don't know / no opinion / not relevant

Please explain your reply to question 40 and provide reference and indicate the connecting factor:

The normal rules of conflict of laws under Article 14 of the Rome I Regulation apply.

Question 41: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of claims used as underlying assets in securitisations which is different from your preferred solution for claims in general?

Yes

No X

[Text of unanswered questions deleted]

Question 42: Do you have any other comments on the topic of this public consultation?

Our answers to questions 29 to 41 are made on the basis that our chosen option is not to seek to impose an over-riding rule at EU level in relation to third party rights in the context of assignments. We are content with the present form of Article 14 of the Rome I Regulation. If, contrary to our view an over-riding rule were chosen, we believe the only one which would not require different rules for different situations would be the one which tied the conflict rules for third party rights, which as discussed, might include issues of priority, to the law of the assigned claim. That will in our view always be a relevant law and often the determinative law in the case of competing claims under current rules in many jurisdictions.

Adoption of over-riding rules relating to laws which are not the law of the claim (such as law of the assignment, law of the habitual residence of the assignor) are likely to result in conflict between that over-riding law and the mandatory laws of the jurisdiction of the law of the claim and, if different, those of the habitual residence of the original debtor as well as potentially the property laws of those jurisdictions. If the original debtor is insolvent, there may also potentially be conflict with the conflicts of law rules relating to insolvency (e.g. in the Insolvency Regulation).

This will not reduce due diligence costs and is likely to complicate and make more expensive litigation in relation to those claims, as well as adding to legal uncertainty.

In our view, if any group is particularly persuasive in arguing that a law such as the place of habitual residence of the assignor should be adopted for third party claims or more generally, that

adoption should not be universal but confined to the particular form of transaction they wish to carry out. Even then, this should not be done unless the EU authorities are satisfied that:

- The rule will not change the rules of property law in any Member State.
- The rule will not be in fundamental conflict with consumer protection rules, bearing in mind that some mass assignments (e.g. some invoice discounting) may be of claims against consumers for payment in respect of purchases of goods and services (including on-line purchases). They are entitled to be assured that their liabilities will be dealt with in a way they might reasonably expect at the time they enter into the transaction and without the introduction of the complications of a foreign law.
- The rule will not operate to damage the interests of the original non-consumer debtor. It would In any event be repugnant in relation to any claim that was assigned, if an over-riding conflicts of law rule were to operate in such a way as to increase the liability of the debtor by excluding the protections to which it was entitled under the law by which the debt were created. An assignment should not be capable of increasing the rights of the assignee over those of the assignor, whether as a result of a rule of the conflicts of law or otherwise.
- The rule will not increase uncertainty because of potential uncertainty as to the location of the habitual residence of the assignor: we strongly believe that locational rules are unsuitable for modern conflicts rules and should be eliminated, wherever possible.

As regards contractual and trust interests in securities, the *lex creationis* provides adequate rules for the English law approach. For holdings in CREST or in the records of the issuer rules of company law become involved. We strongly oppose the introduction of a new locational rule and would favour moving away from any such rules already in use, as they are increasingly unsuitable for the modern world, especially for addressing questions related to incorporeal rights evidenced by entries in computer systems (including on distributed ledgers which have no single locational nexus).

We appreciate that common and civil law systems may have different concepts of "property" in relation to securities, particularly dematerialised securities, which in civil law systems lead to the desire for a locational test, but we submit that these rights are essentially the product of contracts in all systems and best dealt with as such.