

To:
Mr. Dirk STAUDENMAYER
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Ref.: Amendments to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Dear Mr. Staudenmayer,

The EU Federation for Factoring and Commercial Finance (EUF) is composed of national and international industry associations that are active in the EU and represent 97.5% of the industry turnover. The EUF seeks to engage with Government and legislators to enhance the availability of finance to business and wishes to act as a platform between the factoring and commercial finance industry, and key legislative decision makers across Europe. Therefore, the EUF offers itself as a source of reference and expertise on the factoring and commercial finance industry in order to assist with the direction of existing and future finance legislation with a view to ensuring the continued provision of prudent, well structured and reasonably priced finance to businesses, SMEs in particular, across the EU.

1. A short description of factoring

Factoring is a means of finance which is widely used especially by SMEs as it is a method of providing working capital finance to a supplier of goods and services. This is achieved by the supplier assigning and selling its accounts receivables to a factoring company. The factor provides a range of services to its clients, such as e.g. providing cash flow finance in respect of debts, accepting the risk of bad debts and collecting debts. The selection of which services are provided by the factoring company depends on the terms of the contract between the supplier as assignor and the factor as assignee. In most cases, cash flow finance will be provided by means of an immediate part payment of the debt by the factor upon its assignment, in return for a discount against the purchase price. Hence, factoring ultimately enables the factoring client to invest further in his business and to concentrate on its growth and expansion.

2. Gap in the Rome I regulation affecting factoring

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As this short introduction into the financing form of factoring shows, the assignment of receivables lies at the heart of every factoring operation. Consequently, the “Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)” is very relevant for cross-border factoring. Unfortunately, the Rome I-regulation currently lacks provisions on the law applicable to the priority of several assignments of the same receivable and to the effectiveness of assignments against third parties as no consensus could be reached on these matters during the legislative process leading up to the existing Rome I-regulation. The European Commission had already started working on filling in this gap in the Rome I-regulation in 2011/2012, but unfortunately, it then postponed its review of the Rome I regulation until further notice.

We highly welcome that the European Commission has once more taken up the issue of the third-party effectiveness of assignments and the order or priorities in its recently published Green Paper “Building a Capital Markets Union” (COM(2015) 63) and the accompanying Commission Staff Working Document (SWD(2015) 13), without validating the proposals referred to in these documents. We strongly advocate that the Commission consider the amendment of the Rome I-regulation as such an amendment would lead to further harmonization of the rules on the conflicts of laws regarding assignments. Therefore, we would hereby like to draw your attention to and reiterate some arguments and positions of the factoring industry in Europe, most of which we already put forward in our letters dated 5th of February 2010 and 21st of January 2013.

3. Possible solutions

There is a variety of conceivable solutions to the aforementioned regulatory gap, e.g. using the contractual relationship between the assignor and the assignee in the form of the assignment or the assigned receivable or the habitual residence of either the assignor or the assignee as connecting factors. However, most of these alternatives entail more disadvantages than advantages for all parties involved in and affected by an assignment: In some cases, the applicable legal system cannot be identified beforehand and does not sufficiently consider the interests of the assignment parties, while in other cases, problems can arise with multiple assignments. Also, some solutions do not provide an answer to question of which legal system decides on the matter of the priority of one assignment over another, but rather maintain the current dilemma.

4. The best possible solution

In our view, only the law of the assignor, i.e. the law of the place where the assignor has its centre of main interest, offers a well-balanced solution to the issue of the law applicable to the priority of parallel assignments and to the effectiveness of assignments towards third parties. The law of the assignor is predictable not only for the assignment parties but also for third parties. It thereby considers the interests of these third parties while not leaving the interests of the assignor and the assignee aside.

In addition, the law of the assignor also provides a clear answer in cases where e.g. the law of the assignment would fail to do so. This can be illustrated through an example: If an assignor from country A (simultaneously or consecutively) assigns the same receivable to an assignee from country B and to an assignee from country C and in both cases contractually agrees that the law of assignment is the law of the assignee, two different legal systems (i.e. of countries B and C) would still have to be considered when trying to answer the question as to which assignment has priority – this would not be the case if the law of the assignor were applicable, as there is only one assignor, even in this example of multiple assignments to different assignees.

Moreover, the law of the assignor generally also decides on the consequences in case of the insolvency of a factoring client/assignor. Submitting the questions of priority and effectiveness of assignments against third parties to the law of the assignor would thus lead to synchronising effects also with regard to insolvency procedures.

Last but not least, applying the law of the assignor to fill in the aforementioned regulatory gap would also entail that the Rome I-regulation is in line with international conventions on the conflicts of law such as the 2001 UN Convention on the Assignment of Receivables in International Trade which in its Art. 22 also uses “the law of the State in which the assignor is located” as connecting factor. Such a synchronisation of rules on the conflicts of laws contained in different European and international legislative documents enhances legal clarity and makes practical implementation simpler.

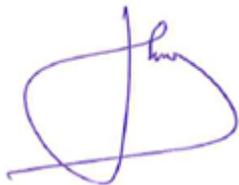
By defining the law of the assignor as the law of the place where the assignor has its habitual residence or centre of main interest (which for businesses generally is the place of their central administration), the rules contained in Art. 19 para. 1 of the Rome I-regulation would not only be synchronised with Art. 5 (h) of the aforementioned UN Convention, but also with Art. 3 para. 1 of the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. As the majority of questions with regard to the effectiveness of an assignment against third parties arise upon the insolvency of the assignor, such a synchronisation would be advantageous.

5. Conclusion

Therefore, we support the idea of resolving the question as to which law is applicable to the priority of multiple assignments of the same receivable and to the effectiveness of assignments towards third parties by submitting these matters to the law of the assignor’s habitual residence or centre of main interest, i.e. where the assignor’s business has its central administration. We kindly ask you to take these arguments and positions into consideration and also strongly advocate that the European Commission resume reviewing and amending the Rome I-regulation.

Please do not hesitate to contact us should you have any queries regarding the aforementioned viewpoints or require more information on the factoring industry in Europe.

With kind regards,



John Gielen
Chairman - EUF