

Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims (COM (2018) 96 final)

ELRA Statement

1.- Since the internal market demands a clear and predictable rule in the field of cross border's assignment of claims, the [Regulation \(CE\) 593/2008](#) have established a set of uniform conflict of law rules in article 14. But Rome I Regulation only deals with the personal effects between the parties involved in the assignment, excluding from its scope the *erga omnes* effect, such as been recently confirmed by the ECJ¹.

2.- To fulfil the legislative lacuna, the Commission presented a proposal for a Regulation on the law applicable to the third-party effects of assignments of claims, [COM\(2018\) 96 final](#). According to it, the proprietary effects of the assignment of claims shall be governed by the law of the habitual residence of the assignor, with only two exceptions envisaged in paragraph 2 of article 4. That law shall decide the effective acquisition of the assignee's right and the preference between competing and contradictory rights.

3.- After analyzing the impact of the proposed solution in the national land registration systems, the European land registry organizations had expressed their concern with the scheme proposed by the regulation, since serious disruptions in the legal certainty delivered by States's systems could arise after its application. This is due to the lack of a specific solution for the claims backed with a registered collateral, in particular a security on an immovable property, typically but not exclusively, a mortgage.

4.- The incorporeal nature of this security right makes the registration of the mortgage a constitutive requirement in all MS, meaning that for its valid existence the mortgage must be registered in the land book. There's no mortgage without registration.

5.- Registration furnishes the mortgage with the all legal effects derived from its publicity, including the legal presumption that the right belongs to the registered mortgagee, for the benefit of any third party in good faith. Moreover, in most land registration systems the priority principle applies, meaning that for the shake of legal certainty, preference

¹ JUDGMENT OF THE COURT (First Chamber) 9 October 2019, In [Case C-548/18](#)

between competing and contradictory rights shall be decided by the date of registration (*prior tempore, potior iure*).

6.- Because the transmission of the claim transfers also the collateral (art. 14.3 Rome I Regulation), the *erga omnes* effect of the transmission of the mortgage shall be subject to the law of the habitual residence of the assignor according to articles 4 and 5 of the proposed regulation.

7.- However, the application of the law of the habitual residence of the assignor does not ensure that the requirements for the valid transmission of a mortgage registered in another state and set by its own law are fulfilled. On the contrary, due to the diversity of legal regimes in the assignment of claims, especially in the light of the universal scope of the applicable law, the transmission of the registered security right could fall under a law which do not demand its registration, even in those cases where the *lex registrationis* imposes the registration of the new mortgagee.

8.- That situation shall create a serious breach of legal certainty derived from the confrontation of the applicable law of this regulation with the application of Land registration law, which is out of the scope of any EU instrument. In those systems where transmission of the mortgage is needed of registration, the lack of that requirement shall prevent the new assignee of a valid title on the mortgage, which derives in a breach between the claim and its collateral.

9.- If a first creditor assigns the mortgage claim to a new creditor who does not need to register the transmission (according to the applicable law), the first creditor will remain in the registry entitled to that mortgage and, according to the legitimate effect derived from land registry publicity, empowered to dispose or to burden it in favor of a third party in good faith who would find no obstacles to be registered as new mortgagee, gaining the law's protection.

10.- This protection could be absolute, so the third party (either a second assignee or a creditor of the assignor) who is granted with a right on the security by the Register will be protected in any case and the assignee will lose the right on the mortgage (*bona fides* effect), while in other cases the lack of registration would demand from the assignee

specific actions before the courts to make effective his/her better right to the claim against the third party who had registered the right (the legitimate effect).

11.- In all those cases the proprietary effects granted to the new assignee by the applicable law would be confronted with the effects derived from registration in favor of the registered third party. Hence the protection given by the *lex registrationis* to the second assignee or to the creditor of the assignor who register first their right to the mortgage, shall deprive or undermine the right to the collateral of the first assignee. The collision between competing rights would increase complexity since now two different laws apply with different solutions.

12.- Foreclosure. In some jurisdictions the lack of registration deprives the assignee of the right to make effective the collateral. Moreover, the continuity principle prevents the current assignee to register his title on the mortgage even when he/she try to do it, if the previous owner of the claim has not registered his title to the claim. In other states, although registration is not a prerequisite for the acquisition of the collateral, it will turn to be much more complex to the assignee to make effective the foreclosure of the collateral.

CONCLUSION

13.- In order to prevent dysfunctions in the internal market by damaging the national land registration systems, ELRA considers that a specific disposition should be envisaged in the future regulation for the assignment of claims backed with an immovable registered security. That disposition must ensure that the requirements set by the law of the register for the effective transmission of the security are met.

14.- ELRA considers that a new exception in favor of the law of the assigned claim must be introduced (in art. 4 paragraph 2) for those claims backed with a mortgage or other registered security, or at least a provision should be consider in these cases stating the need of complying with the requirements imposed by the law where the security is registered.

15.- The solution, not only would enhance the proprietary effects of the assignment of mortgage claims preventing the aforementioned disruptions, but it also is coherent with

the rest of the Union acquis in civil cooperation, and in particular it would be in line with articles 8, 11 and 14 of the [Insolvency Regulation \(EU\) 1215/848](#), which excludes from the *lex concursus* the registered rights in rem.

16.- Moreover, ensuring a connection between the assignment of the claim and its registered mortgage will increase transparency in the markets by allowing to trace back the security which backs the claim while it brings relevant information and more protection to the debtor and mortgagor, often a consumer who borrows money by a mortgage to buy the family home.

17.- Land registers are legal institutions developed by the States to provide confidence among citizens and the markets by delivering legal certainty on property rights on immovable assets, which is based in its publicity. A breach of confidence in its integrity and exactness will undermine seriously the legal certainty in the immovable and financial market in Europe.

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