

Legal considerations of assignment of receivables under Swiss international private law

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Introduction

When structuring securitisation transactions in an international context, putting a receivables transfer agreement in place reveals the existence of various legal concepts relating to the transfer of title to receivables in the relevant jurisdictions. Further, it becomes evident that the country-specific conflict of laws deviate considerably from each other with regard to the connecting factor which decides on the law governing the assignment. While some jurisdictions focus on the assignor's jurisdiction of incorporation, others focus on the law governing the respective receivables, as is the case for Switzerland. Prior to providing a quick overview of the legal position in Switzerland under a conflict of laws perspective, this article outlines some basic elements of substantive Swiss assignment law.

Transfer of title in receivables

Pursuant to Swiss substantive law, the assignment of receivables must be made in writing. In such respect, scanned copies of duly executed original copies of declarations of assignment do not qualify as instruments in writing. Thus, in principle, the assignment of a receivable is perfected only on the assignee's receipt of the original wet-ink copy of the duly executed declaration of assignment. With a view to electronic data transmission, under Swiss law the only equivalent to a handwritten signature is an authenticated electronic signature combined with an authenticated time stamp within the meaning of the Federal Act of 18 March 2016 on Electronic Signatures. However, in practice, electronic signatures have not yet become popular, as their application is rather sophisticated.

Further, all receivables to be subject of an assignment must be sufficiently specified. In order to ascertain compliance with this requirement, the declaration of assignment must comprise a list of the respective receivables, detailing at least the name and address of the respective debtor and the nominal amount, invoice date and due date for each receivable. In case of a repeat transfer of receivables, it must be ensured that the assignor is contractually obliged to periodically provide updated lists of the receivables, specifying each receivable individually.

Notification of assignment to debtors: no perfection requirement

There is no perfection requirement for the notification of debtors of receivables under mandatory Swiss law. However, prior to the notification of an assignment, debtors may validly discharge their payment obligation by effecting payment to the originator of the receivables or a third party asserting title over the receivables, subject to the relevant debtor acting in good faith. However, the right to notify debtors qualifies as a right connected to ownership in the receivables. As a result, a contractual waiver by assignees of such rights for a certain period bears the risk that the assignment will qualify as a conditional assignment only to the detriment of the assignee in particular in an insolvency scenario.

Law on assignment of receivables: Swiss conflict of laws rules

As a general rule under Swiss conflict of laws rules, the transfer and assignment of a receivable will be governed by the law governing such receivables. However, the Swiss Private International Law Act of 18 December 1987 (PILA) allows for a choice of law (ie, a law other than that governing the receivables to be transferred and assigned) to govern the assignment between assignors and

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assignees. In such respect, according to Article 145 of the PILA, a choice of law clause regarding the assignment of a receivable may not be asserted against the debtor of the assigned receivable, not having agreed to such choice of law. According to the PILA, except where a debtor consents, a Swiss law-governed assignment of a receivable that is governed by a law other than Swiss law will not replace, affect or alter the foreign law applicable with respect to the debtor's rights and obligations pursuant to the receivable which continues to be determined in accordance with the relevant foreign law provision. As a consequence, the assignment of a non-Swiss receivable under Swiss law is valid and enforceable only between the parties to the assignment agreement.

Formal requirements regarding the assignment are subject only to the law governing the assignment agreement.

Comment

From a Swiss legal perspective, in order to ascertain the enforceability of an assignment against a debtor of receivables, the assignment of a receivable must be subject to the law governing the respective receivable. Further, in order to safeguard the validity of a Swiss law-governed assignment of receivables under a formalities perspective, care must be taken that a wet-ink original of each declaration of assignment is made available to the assignee. When using electronic signatures, a careful check of the validity of such signatures is key, as in practice, such signatures often lack one of the required elements which becomes apparent only on running a careful search using the relevant tools.

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