STUDY ON THE QUESTION OF EFFECTIVENESS OF AN ASSIGNMENT OR SUBROGATION OF A CLAIM AGAINST THIRD PARTIES AND THE PRIORITY OF THE ASSIGNED OR SUBROGATED CLAIM OVER A RIGHT OF ANOTHER PERSON

FINAL REPORT
Project Coordinators
- Dr. Eva Lein, BIICL,
- Prof. Andrew Dickinson, Professor, University of Sydney; Solicitor; Consultant Clifford Chance LLP, London; Visiting Fellow BIICL.

Project Research Fellow
- Hayk Kupelyants, BIICL

Project National Rapporteurs:
- Belgium, Hélène Volkova/ Lounia Czupper, Clifford Chance LLP, Brussels,
- Czech Republic, Robert Pavlu, Allen & Overy, Prague,
- Finland, Jari Tukiainen, Hannes Snellmann, Helsinki,
- France, Alban Caillemer du Ferrage/Clément Saudo, Gide Loyrette Nouel, Paris,
- Germany, Ilka Breuer/ Peter Scherer, Clifford Chance LLP, Frankfurt,
- Italy, Dr. Anna Gardella, Università Cattolica, Milan,
- Luxembourg, Marc Mehlen/Stefanie Ferring, Clifford Chance LLP Luxembourg,
- The Netherlands, Prof. Hendrick Verhagen/Sanne van Dongen, Radboud University Nijmegen,
- Poland, Tomek Jedwabny/ Andrzej Stosio, Clifford Chance LLP, Warsaw,
- Spain, Prof. Francisco Garcimartin Alferez, Universidad Autonoma, Madrid,
- Sweden, Anne-Marie Pouteaux, Wistrand Advokatbyrå, Gothenburg,
- United Kingdom, Pamela Kiesselbach/ Dorothy Livingston/ Adam Johnson, Herbert Smith LLP, London.

Participating Trade Bodies and Financial Institutions
- Asset Based Finance Association (ABFA),
- Association for Financial Markets in Europe (AFME), Securitisation Division,
- International Swaps and Derivatives Association (ISDA),
- Financial Markets Law Committee (FMLC).

Expert Group
- Prof. Trevor Hartley, Emeritus, LSE, London, United Kingdom,
- Prof. Hendrick Verhagen, Radboud University Nijmegen, The Netherlands,
- Prof. Francisco Garcimartin Alferez, Universidad Rey Juan Carlos, Madrid, Spain,
- Prof. Axel Flessner, Emeritus, Humboldt University Berlin, Germany,
- Prof. Michael Hellner, University of Uppsala, Sweden,
- Prof. Horatia Muir Watt, Sciences Po, Paris, France,
- Dorothy Livingston, Herbert Smith LLP; City of London Law Society, United Kingdom,
- Joanna Perkins, Barrister, South Square; Director Financial Markets Law Comittee, London, United Kingdom,
- Peter Werner, Senior Director, ISDA, London, United Kingdom,
- Richard Hopkin, Consultant, AFME, London, United Kingdom,
- Kate Sharp, Edward Wilde, AFBA, London, United Kingdom.
TABLE OF CONTENTS

EXECUTIVE SUMMARY ................................................................................................................. 10

1. BACKGROUND OF THE STUDY ................................................................................................. 10

2. STRUCTURE OF THE STUDY ...................................................................................................... 10

3. CURRENT DIVERGENCE OF SOLUTIONS IN THE MEMBER STATES ...................................... 12

4. PROBLEMS IDENTIFIED ............................................................................................................ 14

5. SOLUTIONS PROPOSED ............................................................................................................. 17

PART 1: SYNTHESIS REPORT ........................................................................................................... 23

1. INTRODUCTION ............................................................................................................................. 23

2. SUMMARY OF THE STATISTICAL, EMPIRICAL AND LEGAL ANALYSIS ...................................... 24
   2.1. STATISTICAL ANALYSIS ............................................................................................................ 24
   2.1.1. Evaluation of Stakeholder Responses .......................................................................................... 24
   2.1.2. Transaction Volumes of Market Sectors ..................................................................................... 25
   2.1.3. Case Law .................................................................................................................................. 26
   2.1.4. National Conflict of Laws Solutions for the Third-Party Effects of Assignment ....................... 26
   2.2. EMPIRICAL ANALYSIS ............................................................................................................. 26
   2.2.1. Distribution of the Questionnaire .............................................................................................. 26
   2.2.2. Participation of Stakeholders .................................................................................................... 27
   2.2.3. Presentation of Results .............................................................................................................. 29
   2.3. LEGAL ANALYSIS - NATIONAL REPORTS ................................................................................. 30
   2.3.1. Conflict of Laws Issues ............................................................................................................. 30
   2.3.2. Related Substantive Law Issues ............................................................................................... 36
   2.4. LEGAL ANALYSIS - DEVELOPING THE RULES ON ASSIGNMENT IN THE ROME I REGULATION ......................................................................................................................... 40

3. SUMMARY OF RECOMMENDATIONS .......................................................................................... 46

PART 2: STATISTICAL ANALYSIS ..................................................................................................... 48

1. INTRODUCTION ............................................................................................................................. 48

2. TABLES (SECTOR-SPECIFIC) ........................................................................................................ 49
   2.1. SUMMARIES OF RESPONSES FROM STAKEHOLDERS ............................................................... 49
   2.1.1. Business Sectors ....................................................................................................................... 49
   2.1.2. Business Types .......................................................................................................................... 49
   2.1.3. Problems Encountered in Securing the Effectiveness of an Assignment Against Third Parties .... 50
   2.1.4. Average Legal Costs for Cross-Border Transactions per Business Sector .................................. 57
   2.1.5. The Need for New Legislation .................................................................................................... 58
   2.1.6. Suggested Solutions to the Law Applicable to the Third-Party Effects of Assignment .................. 62
   2.1.7. Impact of a Uniform EU Solution on Businesses ....................................................................... 71
   2.2. TRANSACTION VOLUMES PER SECTOR .................................................................................... 74
PART 3: EMPIRICAL ANALYSIS ................................................................. 99

1. INTRODUCTION ........................................................................... 99

2. QUESTIONNAIRE ........................................................................ 100

3. ANSWERS OF STAKEHOLDERS – SUMMARY ......................... 112
   3.1. INTRODUCTION .................................................................... 112
   3.2. ANSWERS OF STAKEHOLDERS (SECTOR-SPECIFIC) ............ 113

PART 4: LEGAL ANALYSIS ................................................................. 148

1. INTRODUCTION ........................................................................... 148

2. THE PROPRIETARY ASPECTS OF ASSIGNMENT: FROM THE ROME CONVENTION TO THE ROME I REGULATION ................................................................. 149
   2.1. THE ROME CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (1980) ................................................................. 149
   2.1.1. Legislative History .......................................................... 149
   2.1.2. Assignment under the Rome Convention ....................... 149
   2.2. THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS ................................................................. 150
   2.2.1. Legislative History .......................................................... 150
   2.2.2. Assignment under the Rome I Regulation ....................... 153

3. INTERACTION WITH INTERNATIONAL AND EU INSTRUMENTS ........ 157
   3.1. UN RECEIVABLES CONVENTION ........................................ 157
   3.2. FACTORING ........................................................................... 159
   3.3. FINANCIAL INSTRUMENTS ................................................... 159
   3.3.1. EU Settlement and Financial Collateral Directives ............ 159
   3.3.2. Insolvency Regulation ...................................................... 160
   3.3.3. Rome II Regulation on the Law Applicable to Non-Contractual Obligations ....................... 162
   3.3.4. Proposed Securities Law Directive ................................. 163
   3.3.5. Hague Securities Convention (2002) ............................... 165

4. NATIONAL REPORTS ................................................................. 168
   A. NATIONAL REPORT BELGIUM ............................................... 169
      1. INTRODUCTION .................................................................... 171
      1.1. Evolution and General Principles ...................................... 171
      1.2. Distinction of Assignment from Other Mechanisms ........... 173
      1.3. Scope of the Report ......................................................... 173
      2. SUBSTANTIVE LAW ISSUES .............................................. 174
      2.1. Art. 1690 of the Belgian Civil Code .................................... 174
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. NATIONAL REPORT POLAND</td>
<td>290</td>
</tr>
<tr>
<td>1. Characterisation and Substantive Law Issues</td>
<td>251</td>
</tr>
<tr>
<td>2. Conflict of Laws Analysis</td>
<td>256</td>
</tr>
<tr>
<td>3. Assignment of Claims under Italian Law: the General Framework</td>
<td>236</td>
</tr>
<tr>
<td>4. Pledge of Claims</td>
<td>238</td>
</tr>
<tr>
<td>5. Factoring</td>
<td>239</td>
</tr>
<tr>
<td>6. Bulk Assignment of Claims and Securitisation</td>
<td>240</td>
</tr>
<tr>
<td>7. Subrogation</td>
<td>240</td>
</tr>
<tr>
<td>8. CONFLICT OF LAWS ANALYSIS</td>
<td>241</td>
</tr>
<tr>
<td>9. Effectiveness of Assignment Against Third Parties within the Rome Convention</td>
<td>241</td>
</tr>
<tr>
<td>10. The Law of the Assignor's Residence Pursuant to Article 13(3) of the Rome I Proposal</td>
<td>242</td>
</tr>
<tr>
<td>11. Article 14 Rome I Regulation</td>
<td>243</td>
</tr>
<tr>
<td>12. The Law Applicable to Transfer of Shares and Book-Entry Securities</td>
<td>244</td>
</tr>
<tr>
<td>13. Effectiveness of Assignment Against Third Parties and Mandatory Rules</td>
<td>245</td>
</tr>
<tr>
<td>14. Assignment of Claims and Insolvency</td>
<td>245</td>
</tr>
<tr>
<td>G. NATIONAL REPORT LUXEMBURG</td>
<td>247</td>
</tr>
<tr>
<td>1. Characterisation and Substantive Law Issues</td>
<td>251</td>
</tr>
<tr>
<td>2. Conflict of Laws Analysis</td>
<td>256</td>
</tr>
<tr>
<td>3. The Case for an Article 14 (3)</td>
<td>259</td>
</tr>
<tr>
<td>4. The Applicable Rule</td>
<td>259</td>
</tr>
<tr>
<td>H. NATIONAL REPORT THE NETHERLANDS</td>
<td>262</td>
</tr>
<tr>
<td>1. Introduction</td>
<td>269</td>
</tr>
<tr>
<td>2. Assignment under Dutch Substantive Law</td>
<td>269</td>
</tr>
<tr>
<td>3. The Hansa-Case</td>
<td>274</td>
</tr>
<tr>
<td>4. The Conflicts Property Act</td>
<td>277</td>
</tr>
<tr>
<td>5. THE ASSIGNMENT'S &quot;OTHER THIRD-PARTY EFFECTS&quot;</td>
<td>285</td>
</tr>
<tr>
<td>6. Assignment and Insolvency Situations</td>
<td>286</td>
</tr>
<tr>
<td>7. Conclusion</td>
<td>288</td>
</tr>
</tbody>
</table>

1.1. Assignment of Claims under Italian Law: the General Framework
1.2. Pledge of Claims
1.3. Factoring
1.4. Bulk Assignment of Claims and Securitisation
1.5. Subrogation
2. CONFLICT OF LAWS ANALYSIS
   2.1. Effectiveness of Assignment Against Third Parties within the Rome Convention
   2.2. The Law of the Assignor's Residence Pursuant to Article 13(3) of the Rome I Proposal
   2.3. Article 14 Rome I Regulation
   2.4. The Law Applicable to Transfer of Shares and Book-Entry Securities
   2.5. Effectiveness of Assignment Against Third Parties and Mandatory Rules
   2.6. Assignment of Claims and Insolvency

G. NATIONAL REPORT LUXEMBURG
1. CHARACTERISATION AND SUBSTANTIVE LAW ISSUES
   1. General Rules
   2. Specific Rules
   3. Pledge over Claims
   4. Securitisation
2. CONFLICT OF LAWS ANALYSIS
   2.1. General Rules
   2.2. Effects of an Assignment Against the Debtor
   2.3. Effects of the Assignment Against Third Parties
   2.4. Particular Rules of Applicable Law for Certain Kinds of Transactions: Securitisation
3. A NEW CONFLICT OF LAWS PROVISION ON PROPRIETARY QUESTIONS IN THE ROME I REGULATION (NEED FOR AN ART. 14(3))
   3.1. The Case for an Article 14 (3)
   3.2. The Applicable Rule

H. NATIONAL REPORT THE NETHERLANDS
1. INTRODUCTION
2. ASSIGNMENT UNDER DUTCH SUBSTANTIVE LAW
   2.1. Hybrid Legal Institution: Obligational and Proprietary Effects
   2.2. Requirements for Assignment
   2.3. Ranking of Multiple (Competing) Assignments
3. ASSIGNMENT UNDER DUTCH PRIVATE INTERNATIONAL LAW
   3.1. The “Hansa”-Case
   3.2. The Conflicts Property Act
4. PARTICULAR ISSUES
   4.1. Multiple (Competing) Assignments
   4.2. Prohibition of Security Assignments
   4.3. Transfer of Security Interests and Other Ancillary Rights
   4.4. The Assignability of a Claim
   4.5. Future Receivables
   4.6. The Position of the Debtor
5. THE ASSIGNMENT’S “OTHER THIRD-PARTY EFFECTS”
6. ASSIGNMENT AND INSOLVENCY SITUATIONS
   6.1. European Insolvency Regulation
   6.2. Dutch Insolvency Law
7. CONCLUSION

I. NATIONAL REPORT POLAND
8.2. Bankruptcy of the Issuing Institution...........................................................................................................335
8.3. Priority Rights................................................................................................................................................335
8.4. Transfer of the Cover Pool in Case of Insolvency .........................................................................................335

L. NATIONAL REPORT ENGLAND......................................................................................................................337
1. SUBSTANTIVE LAW ISSUES ........................................................................................................................343
2. CONFLICT OF LAWS ANALYSIS ................................................................................................................346
  2.1. The “Proprietary” Aspects of an Assignment ..............................................................................................347
  2.2. "General” English Choice of Law Rules Relating to the Proprietary Aspects of an Assignment .........352
  2.3. The Application of the Choice of Law Rules to More Complex Transactions .......................................359
  2.4. English Mandatory Rules and/or Public Policy ..........................................................................................362
  2.5. Renvoi.........................................................................................................................................................363

M. THIRD STATES’ SOLUTIONS (AUSTRALIA, CANADA, JAPAN, RUSSIAN FEDERATION,
SWITZERLAND, USA)..............................................................................................................................................365
1. AUSTRALIA ....................................................................................................................................................365
2. CANADA........................................................................................................................................................366
3. JAPAN .............................................................................................................................................................367
4. RUSSIAN FEDERATION .................................................................................................................................367
5. SWITZERLAND .................................................................................................................................................368
6. UNITED STATES ............................................................................................................................................369

PART 5: DEVELOPING THE RULES ON ASSIGNMENT IN THE ROME I
REGULATION .........................................................................................................................................................373

1. NEED FOR A NEW RULE IN ART. 14 Rome I Regulation...........................................................................373

2. SCOPE, UNCERTAINTIES AND INTERACTION OF THE EXISTING RULES IN ART. 14 AND A
POTENTIAL NEW RULE ....................................................................................................................................375
  2.1. GENERAL LIMITATIONS OF THE REGULATION’S SCOPE IMPACTING ON ART. 14 ROME I
REGULATION ......................................................................................................................................................375
  2.2. COVERAGE OF ART. 14 (1) AND 14 (2) ROME I REGULATION ...........................................................376
  2.2.1. Limitation of Art. 14 Rome I Regulation to Voluntary Assignments .....................................................376
  2.2.2. Issues Subject to Art 14 (1) Rome I Regulation (Law that Applies to the Contract Between Assignor
  and Assignee)....................................................................................................................................................376
  2.2.3. Issues Subject to Art. 14 (2) Rome I Regulation (Law Governing the Assigned Claim) .................377
  2.2.4. Borderline Issues (Uncertain Whether Covered by Art. 14(1) or Art. 14(2) Rome I Regulation or
Outside Current Scope)................................................................................................................................378
  2.3. INTERACTION WITH THE INSOLVENCY REGULATION ......................................................................381
  2.4. INTERACTION WITH THE ROME II REGULATION .................................................................................382
  2.5. SCOPE OF A NEW RULE CONCERNING “THIRD-PARTY” ASPECTS .................................................382
    2.5.1. Art. 27(2) Rome I Regulation ...............................................................................................................382
    2.5.2. Additional Questions Raised by the Study ...........................................................................................383

3. POSSIBLE SOLUTIONS ....................................................................................................................................384
  3.1. NON-VIABLE OPTIONS ..........................................................................................................................384
  3.2. SOLUTION 1: LAW APPLICABLE TO THE CONTRACT BETWEEN ASSIGNOR AND ASSIGNEE ....384
    3.2.1. Advantages..........................................................................................................................................385
    3.2.2. Disadvantages ....................................................................................................................................386
3.2.3. Debated Arguments ..........................................................................................................................387

3.3. SOLUTION 2: LAW APPLICABLE TO THE ASSIGNED CLAIM ......................................................390
  3.3.1. Advantages ......................................................................................................................................390
  3.3.2. Disadvantages ...............................................................................................................................391
  3.3.3. Debated Arguments ..........................................................................................................................392

3.4. SOLUTION 3: LAW OF THE ASSIGNOR’S LOCATION (HABITUAL RESIDENCE) .......................394
  3.4.1. Advantages ......................................................................................................................................394
  3.4.2. Disadvantages ...............................................................................................................................396

3.5. A COMBINATION OF SOLUTIONS ....................................................................................................398
  3.5.1. Limited Party Autonomy ...............................................................................................................398
  3.5.2. Sector-Specific Solutions .............................................................................................................399

3.6. EU SUBSTANTIVE RULES GOVERNING THE THIRD-PARTY EFFECTS OF ASSIGNMENTS.401

5. DRAFTING PROPOSALS ........................................................................................................................404
  5.1. CURRENT TEXT OF THE ROME I REGULATION (FOR COMPARISON) .................................405
  5.2. PROPOSAL A – RESTRICTED APPLICATION OF THE LAW APPLICABLE TO THE CONTRACT BETWEEN ASSIGNOR AND ASSIGNEE .................................................................406
  5.3. PROPOSAL B – LAW GOVERNING ASSIGNED CLAIM [WITH OPTIONAL FACTORING EXCEPTION] .................................................................................................................................411
  5.4. PROPOSAL C - LAW OF THE ASSIGNOR'S LOCATION [WITH OPTIONAL EXCEPTION FOR ASSIGNMENTS OF CLAIMS UNDER FINANCIAL CONTRACTS] .................................................414
EXECUTIVE SUMMARY

1. BACKGROUND OF THE STUDY

The British Institute of International and Comparative Law (BIICL) has been engaged by the European Commission to draft a “Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person”. This study shall serve as a basis for the report that the Commission has to present according to Art. 27 (2) Rome I Regulation and for a potential future proposal to amend Art. 14 Rome I Regulation to provide for a new European conflict of laws solution for the third-party aspects of assignment.

In preparing this study, BIICL has collaborated with national rapporteurs from twelve EU jurisdictions representing a range of legal traditions (Belgium, Czech Republic, Finland, France, Germany, Italy, Luxemburg, The Netherlands, Poland, Spain, Sweden, the United Kingdom), with trade bodies representing the factoring, securitisation and derivatives sectors (ABFA, AFME, ISDA), with the Financial Markets Law Committee of the Bank of England (FMLC) and with a group of eleven experts in the areas of private international law and assignment (Prof. Trevor Hartley, Emeritus, LSE, London, United Kingdom; Prof. Hendrick Verhagen, Radboud University Nijmegen, The Netherlands; Prof. Francisco García Martín Alférez, Universidad Rey Juan Carlos, Madrid, Spain; Prof. Axel Flessner, Emeritus, Humboldt University Berlin, Germany; Prof. Michael Hellner, University of Uppsala, Sweden; Prof. Horatia Muir Watt, Sciences Po, Paris, France; Dorothy Livingston, Herbert Smith LLP; City of London Law Society, United Kingdom; Joanna Perkins, Barrister, South Square Chambers, Director, Financial Markets Law Committee, London, United Kingdom; Peter Werner, Senior Director, ISDA, London, United Kingdom; Richard Hopkin, Consultant, AFME, London, United Kingdom; Kate Sharp, Edward Wilde, AFBA, London, United Kingdom).

2. STRUCTURE OF THE STUDY

The core of the study consists of five parts:

1. A synthesis (Part 1 “Synthesis Report”), outlining the main findings of the study.1

---

1 See pp. 24-47.
2. A **collection of statistical data** (Part 2 “Statistical Analysis”), which provides information in a table format on the importance of economic activities involving assignments (especially on the numbers of transactions per market sector) and on the problems and needs of different market sectors.²

3. An **EU-wide empirical analysis** (Part 3 “Empirical Analysis”) studying the practical problems encountered in different market sectors in cross-border assignment and subrogation cases.³

To assist in the preparation of this analysis, BIICL drafted a questionnaire, which was distributed to approximately 2000-3000 stakeholders. These stakeholders represented businesses, trade bodies and associations, financial market institutions, law societies, law firms and other legal practitioners, academics and other interested parties. The questionnaires provided an opportunity for the various sectors to inform the Commission about their needs in this area. **Thirty-six responses** to that survey were received within an extended deadline.

Stakeholders were asked to provide information on data as to turnover and the relative significance of cross-border transactions; the average legal costs for cross-border transactions; the necessity and extent of legal due diligence within these kinds of transactions; the incidence of problems encountered in securing the effectiveness of assignments against third parties; the categories of third parties with whom stakeholders are concerned; the existing uncertainty regarding the law applicable to third-party aspects of assignment; the need to amend Art. 14 Rome I Regulation; the solutions favoured by stakeholders; and the impact that a uniform EU solution in this area might have on their businesses.

This information has been included in a table format, listing the responses to the different questions per stakeholder. This information has also been further evaluated and integrated in the statistical part of the study.

4. A **legal study** (Part 4 “Legal Analysis”), based on national reports, presenting the current conflict of laws rules applying to the third-party aspects of assignment in **twelve Member States** (Belgium, Czech Republic, Finland, France, Germany, Italy, Luxemburg, The Netherlands, Poland, Spain, Sweden, the United Kingdom). The legal study primarily focuses on third-party aspects of assignment in the conflict of laws but includes, as far as is relevant, information about substantive law rules. It also comprises, as a comparison, the solutions of **six economically important non-Member States** representing a range of different solutions (Australia, Canada, Japan, Russia, Switzerland, USA).⁴

---

² See pp. 48-98.
³ See pp. 99-147.
⁴ See pp. 148-372.
5. A comprehensive analysis (Part 5 “Developing the Rules on Assignment in the Rome I Regulation”) of the question of whether it would be desirable to amend Art. 14 Rome I Regulation to include the third-party aspects of assignment and if so, the possible forms which that amendment could take.

Part 5 contains an in-depth discussion of all the arguments that can be advocated in favour of and against a new conflict of laws solution, taking into account the comments of all stakeholders, national rapporteurs and the expert group.\(^5\)

3. CURRENT DIVERGENCE OF SOLUTIONS IN THE MEMBER STATES

The Member States currently adopt different approaches to the law applicable to the third-party aspects of assignment.

3.1. Approach 1. Law of the contract between assignor and assignee

A party autonomy based solution is favoured in the Netherlands.\(^6\) According to Dutch law, the law applicable to the contract between assignor and assignee is applicable to the effectiveness of an assignment against third parties, i.e. to all its property aspects. In cases of the abuse of party autonomy, recourse can be made to the public policy exception, *fraus legis*, *actio pauliana*, etc. As to the question of priority in the case of multiple (competing) assignments, the law governing the second assignment should decide upon the protection of *bona fide* second acquirers. This approach is also gaining increasing support in other Member States, e.g. in Germany.\(^7\)

By way of comparison, a very liberal party autonomy-based solution has been adopted in Switzerland.\(^8\)

3.2. Approach 2: Law of the underlying debt assigned (as a general rule or in combination with sectoral rules)

Despite the absence of clear case-law, Luxembourg favours the application of the law of the assigned claim to the issue of the effectiveness of an assignment against third parties, although in the specific sector of securitisation, the law applicable to the third-party aspects of the assignment shall be the law of the country in which the assignor is established.\(^9\) In England, there is a strong view which suggests applying the law of the underlying debt to the question which

---

\(^5\) See pp. 373-415.
\(^6\) See Part 4: Legal Analysis, 4.H.3., pp. 274 et seq.
\(^7\) See Part 4: Legal Analysis, 4.E.2.3., p. 229.
assignment takes priority in cases of competing assignments, as this law is the common factor between the assignees.\textsuperscript{10} Also in \textbf{Germany} the majority of authors still suggest applying the law of the debt assigned; judicial decisions, including from the Federal Supreme court, support this position.\textsuperscript{11} \textbf{Spanish} law has also adopted this conflict rule.\textsuperscript{12} Under \textbf{Polish} law, the law of the underlying debt assigned will govern proprietary effects, including its effectiveness against third parties.\textsuperscript{13} In the absence of any case-law on the matter, \textbf{Italian} scholars generally favour the law of the debt assigned. However, some support the introduction of the law of the assignor’s habitual residence for bulk assignments and assignments of future claims.\textsuperscript{14}

By way of comparison, the application of the law underlying the debt assigned is also supported in \textbf{Australia, Canada, Japan} and in the \textbf{Russian Federation}.\textsuperscript{15}

3.3. \textit{Approach 3: Law of the assignor’s habitual residence}

\textbf{Belgian} law opts for the law of the assignor’s habitual residence at the time of the assignment to govern the third-party aspects of the assignment.\textsuperscript{16} By way of comparison, under \textbf{U.S. law}, perfection of most assignments is governed by the law of the assignor’s location.\textsuperscript{17}

3.4. \textit{Approach 4: Lex rei sitae}

The law of the situs of the debt is in theory applicable in \textbf{Czech law}, despite the absence of legislation or any clear case-law on the subject.\textsuperscript{18} \textbf{Swedish} courts apply the \textit{lex rei sitae} to the question of whether a security has been validly perfected. As to dematerialized securities, the issue will be governed by the law of the jurisdiction where the register recording the holder’s/beneficiary’s interest in the securities is located (e.g. bank).\textsuperscript{19}

3.5. \textit{Approach 5: Law of the habitual residence of the debtor}

\textbf{French} case-law supports the law of the habitual residence of the debtor as applicable to third-party aspects of the assignment.\textsuperscript{20}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{10} See Part 4: Legal Analysis, 4.L.2.2., pp. 337 et seq.
\item \textsuperscript{11} See Part 4: Legal Analysis, 4.E.2.2., pp. 228-229.
\item \textsuperscript{12} See Part 4: Legal Analysis, 4.J.2.3., pp. 316-317.
\item \textsuperscript{13} See Part 4: Legal Analysis, 4.I.3.1., p. 304.
\item \textsuperscript{14} See Part 4: Legal Analysis, 4.F.2.1., p. 242.
\item \textsuperscript{15} See Part 4: Legal Analysis, 4.M., pp. 365-367.
\item \textsuperscript{16} See Part 4: Legal Analysis, 4.A.3., p. 180.
\item \textsuperscript{17} See Part 4: Legal Analysis, 4.M.6., pp. 369-372.
\item \textsuperscript{18} See Part 4: Legal Analysis, 4.B.2.1., p. 195.
\item \textsuperscript{19} See Part 4: Legal Analysis, 4.K., pp. 318 et seq.
\item \textsuperscript{20} See Part 4: Legal Analysis, 4.D.2.2., p. 211.
\end{enumerate}
\end{footnotesize}
3.6. Approach 6: No clear preference

Finnish law seems particularly uncertain as to the law governing the effects of assignment to third parties.21

4. PROBLEMS IDENTIFIED

4.1. Statistical/Empirical Study

The statistical data shows that the volume of domestic and international factoring and invoice discounting business per Member State of the European Union increases constantly. The total of international factoring and invoice discounting business within the EU (in terms of claims assigned) has been estimated at over 140 billion EUR during 2010. The volume of European securitisation issuance has increased between 1992 and 2010 from 302.11 million USD to 513,717.03 million USD in each country of the EU, peaking in 2008 at over 1 trillion USD.22

These two important market sectors as well as others have, however, reported various problems with the current incomplete conflict of laws solution in Art. 14 Rome I Regulation and have expressed their preferences for a potential solution.23

The main results were the following:

4.1.1. Practical Problems

47 % of the stakeholders encounter problems in practice in securing the effectiveness of an assignment against third parties.24

4.1.2. Average Legal Costs

The average legal costs for cross-border transactions involving assignments are in many cases considerably high and can, depending on the type of transaction, amount to several hundreds of thousands of Pounds/Euros.25

4.1.3. Need for New Legislation

80 % of the responding stakeholders have expressed a need for a new legislation on the law applicable to third-party effects of an assignment.26

---

21 See Part 4: Legal Analysis, 4.C.2., pp. 202-203
22 See Part 2: Statistical Part, 2.2., pp. 74 et seq.
24 For further information see Part 2: Statistical Part, 2.1.3., pp. 49-56.
4.1.4. **Suggested Solutions**

- **Overall**

As a solution, 44% of the stakeholders favour the **law of the assignor’s habitual residence**; 30% favour the **law of the underlying claim assigned**; 11% opt for the **law chosen by assignor and assignee**.\(^{27}\)

- **Sectoral Perspective**

From the perspective of the different business **sectors**, there is a strong preference for the law of the assignor’s habitual residence in the factoring sector (75%).\(^{28}\)

- **Per Business Type**

From the perspective of business **types**, the majority of **financial institutions** have a preference for the **law of the habitual residence of the assignor (47%)**, while 26% opt for the law of the assigned claim and 20% for the law chosen by assignor and assignee. The law of the habitual residence of the assignor is also favoured by 3 responding association stakeholders representing financial institutions, associations and networks.

In contrast, 43% of the **legal practitioners prefer the law of the underlying claim assigned**. This solution is also favoured by 2 participating association stakeholders representing 14,000 UK lawyers and 68,000 German lawyers.

As to the **academic participants**, 75% favour the **law of the assignor’s habitual residence**.\(^{29}\)

4.1.5. **Impact of Uniform EU Solution**

The vast majority of stakeholders who addressed this particular issue indicated that a **uniform EU solution would be of positive impact to their business**. They highlight the reduction of legal costs and due diligence, increased legal certainty and higher transaction volumes as the potential effects of the introduction of a uniform rule on the property aspects of an assignment.\(^{30}\)

---

\(^{26}\) For further information see Part 2: Statistical Part, 2.1.5., pp. 58-61.  
\(^{27}\) For further information see Part 2: Statistical Part, 2.1.6., pp. 62 et seq.  
\(^{28}\) See Part 2: Statistical Part, 2.1.6., pp. 67-68.  
\(^{29}\) See Part 2: Statistical Part, 2.1.6., pp. 69-70.  
\(^{30}\) See Part 2: Statistical Part, 2.1.7., pp. 71-73.
4.2. Legal Study

Apart from the current heterogeneous legal landscape and the lack of consensus regarding a uniform conflict of laws solution on third-party effects of assignment, the current Art. 14 Rome I Regulation gives rise to further doubts.

It is uncertain if the question of whether the assignee is entitled to bring a direct claim against the debtor or whether he must join the assignor in bringing such a claim is governed by Art. 14(1) or (2) Rome I Regulation; which law applies to claims brought to recover the proceeds or value of the assigned claim; whether and which restrictions on assignment fall under Art. 14(1) or (2); whether Art. 14(2) Rome I Regulation applies to claims under contracts not yet in existence; which rule applies to the effectiveness of an assignment against successors in title and other representatives of the assignor (14(1) Rome I Regulation or a new rule) and which rule governs the ability of the debtor to take an assignment, charge or pledge of his own debt.\(^{31}\)

It is also uncertain how a new assignment provision in the Rome I Regulation would interact with the Insolvency Regulation and the Rome II Regulation. As to the interaction with the EC Insolvency Regulation, it is especially unclear whether the insolvency representative of an insolvent assignor (or assignee) should be treated as assignor (or assignee) or as a third party (application of Art. 14(1) Rome I Regulation or of a new rule); it is of further controversy how Art. 4(2)(b) and Art. 5 Insolvency Regulation would interact with a new rule in Art. 14 Rome I Regulation. Turning to the interaction of the Rome I Regulation with the Rome II Regulation, it needs to be clarified which Regulation applies to the claim to recover proceeds or the value of the assigned claim (Art. 10 Rome II Regulation or Art. 14 Rome I Regulation).\(^{32}\)

Furthermore, and most importantly, the scope of Art. 14(1) in combination with Recital 38 remains unclear. The very generic term of "relationship" in Art. 14(1) Rome I Regulation is imprecise in meaning. The separation between effects of an assignment inter partes and against third parties seems artificial, complicated and incompatible with the erga omnes effect of property law.\(^{33}\)

---

\(^{31}\) For further information see Part 5, 2.2.4., pp. 378-380.

\(^{32}\) See Part 5, 2.3., pp. 380-382.

\(^{33}\) See Part 5, 2.2.3., p. 377.
5. SOLUTIONS PROPOSED

5.1. General Recommendations

In light of the identified current problems and uncertainties surrounding Art. 14 Rome I Regulation, several recommendations are made:34

5.1.1. One rule for all proprietary aspects of assignment

It is suggested that the inclusion of third-party aspects of assignment into the Rome I Regulation should lead to a solution pursuant to which all proprietary aspects of assignment are governed by one rule (subject to the limitations for the protection for the debtor in Art 14 (2) Rome I Regulation) and that the current structure of Art. 14 (and Recital 38) should be revisited.

5.1.2. Distinction between contractual aspects of assignment and its legal effects

It should be clarified that contractual aspects between the assignor and assignee are covered by Art. 3 ff Rome I Regulation directly while Art. 14 only addresses the legal effects of an assignment.

5.1.3. Reduction of potentially applicable laws

It is also suggested to aim at a solution that reduces the number of applicable laws under Art. 14 Rome I Regulation.

5.1.4. No or moderate use of sector-specific rules

It is advised, as far as possible, not to consider sector-specific rules, or if considered, to use them with moderation, as they add complexity and encourage characterisation problems.

5.1.5. Balancing of interests

Account needs to be taken of the interests of all parties involved in an assignment: assignor, assignee, debtor and third parties. They need to be outbalanced in a new rule. Also, it needs to be ensured that the new rule does not hinder but supports trade in the EU.

5.1.6. Clarification of current uncertainties in Recitals

It is also suggested that some unclear issues be clarified in Recitals.35 Thus, it should be clarified that party autonomy as it stands at the moment and as

---

34 See Part 5, 4., pp. 402-403.
35 For further details see Part 5, 5.2., pp. 406-407.
amended prospectively, should not infringe upon the protection of weaker parties under Art. 6 and 8 Rome I Regulation.

Furthermore, it needs to be clarified that the law applicable under Article 14(2) applies to all aspects which directly affect the debtor, including the question of whether the assignee has standing to bring legal proceedings against the debtor and whether the assignor must be joined as a party to such legal proceedings.

In addition, the interaction between the Rome I and Rome II Regulations should be clarified. It should be stated that Article 14 shall also apply to any action to recover the proceeds of a claim, or their value, on the basis of unjust enrichment or otherwise. To this extent, Regulation (EC) No. 1864/2007 on the law applicable to non-contractual obligations (Rome II) shall not apply.

Lastly, a Recital clarification is needed as to the assignment of future claims under existing contracts.

5.1.7 Scope of the Rome I Regulation

It is also suggested to exclude the issue and transfer of shares from the scope of coverage of the Rome I Regulation. By the same token, assignments by operation of law, except insofar as Article 14 determines the priority between a voluntary assignment or contractual subrogation and a competing right arising by operation of law, and assignments or other transfers of judgment debts or intellectual property rights should also be excluded from the ambit of the Rome I Regulation.  

5.1.8. Definition of habitual residence

Finally, habitual residence should be defined differently from Art. 19 Rome I Regulation. For the purposes of establishing a connecting factor for the third-party aspects of the assignment, the place of the operation of a branch, agency or any other establishment (Art. 19 (2) and (3) Rome I Regulation) shall not be relevant.

5.2. Drafting Suggestions

The British Institute has formulated alternative drafting proposals which present the conflict of laws solutions that have been favoured by a significant number of stakeholders and/or experts and can reasonably be considered as an option for legislation. They are based on the premise that a solution should cover all of the proprietary effects of assignment.

36 See Part 5, 5.2., pp. 407-408.
37 See Part 5, 5.2., p. 408.
5.2.1. Proposal A - Solution based on the law of the contract between assignor and assignee

This solution offers a flexible party autonomy-based approach which can suit different market sectors as it allows a certain level of adaptability to their particular needs. Particular sector-specific rules could thus be avoided.\(^{38}\)

To prevent the inherent risk of a party autonomy-based solution prejudicing third parties, the BIICL proposal is based on a restricted application of the law applicable to the contract between assignor and assignee: if the parties have chosen the law governing the assigned or subrogated claim or the law of the country in which the assignor had his habitual residence to govern their contract, this choice will extend to the legal effects of the assignment. In the case where the assignor and assignee do not choose the law applicable to their contract, the law governing the assigned or subrogated claim shall apply.

Only in the case of an assignment of a claim arising under a contract not in existence at the date of the assignment (as opposed to future claims under existing contracts where the applicable law is at least determinable at the date of the assignment), the law of the country in which the assignor had his habitual residence at the date of the assignment shall be applicable.

The priority issues between competing assignees can be resolved by analysing the effects of each transaction in sequence, according to its own applicable law. The analysis would follow the property law principle of *prior tempore, potior iure*, of ‘first in time, first in right and rank’, which is qualified only by rules on good faith acquisition of the following transactions. Each transaction is assessed with the preceding transaction preparing the ground for the following, and the following, by its governing law, may override the effects of the preceding transaction.

- **Arguments\(^{39}\)**

This solution, or a variant of it, is favoured by three out of 11 experts, some commentators and by 11% of the responding stakeholders. This connecting factor is adopted by one of the examined EU Member States (The Netherlands). The solution is also suggested by the Dutch, German and Belgian rapporteurs. One out of six surveyed Third States (Switzerland) has adopted this solution.

Amongst the advantages of this solution are:

- Flexibility for the different sectors,
- no evidence of abuse in practice,

\(^{38}\) For further information see Part 5, 5.2., pp. 408-410.

\(^{39}\) See Part 5, 3.2., pp. 385-389.
• avoidance or reduction of the need for sector-specific rules, reduction of the number of laws applicable to assignment,
• suitability for the assignment of future claims.

The disadvantages of the solution are:
• possible prejudice to third parties, however reduced by the suggested limited party autonomy approach,
• risk of the avoidance of publicity requirements.

The debated (controversial) arguments put forward are: the relevance of the principle of party autonomy throughout the Rome I Regulation; certainty of the applicable law; priority issues in cases of multiple contracts of assignment; and unsuitability for financial claims.

5.2.2. Proposal B - Solution based on the law applicable to the assigned claim

If the law applicable to the assigned claim is used as a basis to govern proprietary aspects of the assignment, Art. 14 can be based on the application of a single law.\(^\text{40}\)

Exceptionally, in the case of an assignment of a claim arising under a contract not in existence at the date of the assignment or, in view of taking the specific needs of the factoring industry into account, an assignment by way of factoring, the third-party aspects of an assignment shall be governed by the law of the country in which the assignor has his habitual residence at the relevant date.

If the issue is one of priority between two or more competing assignments or other rights to the same claim, the relevant date is the date of the last assignment or other event giving rise to a competing right. If the issue is whether the debtor’s obligations have been discharged, the relevant date is the date of performance of the debtor’s obligation in question. For all other issues, the relevant date is the date of the assignment in question.

• **Arguments**\(^\text{41}\)

A solution based on the law of the underlying claim as a general rule is favoured by some experts and commentators and by 30% of the respondents to the BIICL questionnaire. It has to be noted that the participating association stakeholders representing the legal profession (from England and Germany representing 14,000 and 68,000 lawyers respectively) favour this solution. The connecting

\(^{40}\) For further details see Part 5, 5.3., pp. 411-413.

\(^{41}\) See Part 5, 3.3., pp. 390-393.
factor is adopted in six EU Member States (Luxemburg, Poland, Spain, Italy, United Kingdom, Germany) and by four out of six Third States examined (Australia, Canada, Japan and the Russian Federation). It has also been favoured by the national rapporteurs from the Czech Republic, England, Spain and, in combination with certain sector-specific rules, by the Finnish rapporteur.

Amongst the advantages of this solution are:

- reduction of the number of applicable laws to an assignment and, as a result,
- reduction of costs associated with assignment,
- suitability for financial claims.

The disadvantages of the solution are:

- unsuitability for future claims and bulk assignments,
- uncertainty as to the determination of the law applicable to the claim assigned.

Debated (controversial) arguments put forward are: theoretical basis upon which it can be argued that the law applicable to the claim assigned has any relevance to third-party aspects of assignment; possible prejudice to third parties; and the risk of the law governing the claim assigned to change over time.

5.2.2. Proposal C - Solution based on the law of the assignor’s habitual residence

The third option is to subject proprietary aspects of the assignment to the law of the assignor’s habitual residence.\textsuperscript{42}

Exceptionally, it could be envisaged that in the case of an assignment of a claim under an existing contract concluded within the type of system falling within the scope of Article 4(1)(h)\textsuperscript{43} or within a multilateral system for the settlement of payments or other transactions between banks and financial institutions or a claim under a financial instrument, the law governing the assigned or subrogated claim will be applicable to the third-party aspects of assignment.

If the issue is one of priority between two or more competing assignments or other rights to the same claim, the relevant date is the date of the last assignment or other event giving rise to a competing right. If the issue is

\textsuperscript{42} See Part 5, 5.4., pp. 414-416.

\textsuperscript{43} “multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law”.
whether the debtor’s obligations have been discharged, the relevant date is the
date of performance of the debtor’s obligation in question.

- **Arguments**

A solution based on the habitual residence of the assignor is favoured by the
representative of the factoring industry on the expert group, some
commentators and by 44% of the stakeholders, including a significant proportion
of respondents from the factoring industry (75 %). This connecting factor is
adopted in one EU Member State (Belgium) and one third State (USA). It has
also been suggested as a solution by the French and Italian rapporteurs of this
study. The solution corresponds to Art. 22 of the UN Receivables Convention.

Advantages of this solution are:

- predictability for creditors of the assignor,
- suitability for factoring and bulk assignments, as well as assignments of
  future claims,
- synergies with the EC Insolvency Regulation and the UN Convention on
  the Assignment of Receivables in International Trade,
- suitability to resolve conflicts between competing rightholders.

The disadvantages of the solution are:

- inflexibility,
- insertion of another law into the framework of Art. 14 Rome I Regulation,
- problems with the definition of the “habitual residence” under Art. 19
  Rome I Regulation,
- conflicts between different habitual residences of one or more assignors,
- reported problems posed by this connecting factor in practice,
- unsuitability for financial claims.

---

44 See Part 5, 3.4., pp. 394-397.
PART 1: SYNTHESIS REPORT

1. INTRODUCTION

The British Institute of International and Comparative Law (BIICL) has been engaged by the European Commission to draft a study “on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person”. This study shall serve as a basis for the report that the Commission has to present according to Art. 27 (2) Rome I Regulation and for a potential future proposal to amend Art. 14 Rome I Regulation to provide for a new European conflict of laws solution for the proprietary effects of assignment.

In preparing this report, BIICL has worked together with national rapporteurs from 12 EU jurisdictions (representing a range of legal traditions), with trade bodies representing the factoring, securitisation and derivatives sectors and with a group of experts in the areas of private international law and assignment, dealing with their practical application in trade and commerce.

The core of the study consists of four parts:

1. A collection of statistical data (Part 2 “Statistical Analysis”), which provides information on the market sectors that are regularly involved in cross-border assignment, and on the needs of the market in this area.

2. An EU-wide empirical analysis (Part 3 “Empirical Analysis”) regarding the practical importance of cross-border assignment and subrogation in different market sectors. To assist in the preparation of this analysis, BIICL drafted a questionnaire, which was distributed to approximately 2000-3000 stakeholders ranging from businesses, trade bodies and associations, financial market institutions, law societies, law firms and other legal practitioners, academics and other interested parties. The questionnaires provided an opportunity for different market sectors to inform the Commission about their needs in this area. Thirty-six responses to that survey were received within the extended deadline.

3. A legal study (Part 4 “Legal Analysis”), based on national reports, presenting the current approaches to the third-party effects of assignment in 12 Member States (Belgium, Czech Republic, Finland, France, Germany, Italy, Luxemburg, The Netherlands, Poland, Spain, Sweden, the United Kingdom) and as a comparison, in six economically important non-Member States. The legal

---

45 This title corresponds to Art. 27 (2) Rome I Regulation but is misleading. The study deals with the question of the law applicable to the effectiveness of an assignment or subrogation of a claim against third parties and to priority issues (i.e. priority of the assignee of a claim over a right of another person to this claim).
study primarily focuses on third-party effects of assignment in the conflict of laws but also on related substantive law issues.

4. An analysis (Part 5 “Developing the Rules on Assignment in the Rome I Regulation”) of the question of whether it would be desirable to amend Art. 14 Rome I Regulation to include the third-party effects of assignment and if so, the possible forms which that amendment could take.

2. SUMMARY OF THE STATISTICAL, EMPIRICAL AND LEGAL ANALYSIS

2.1. STATISTICAL ANALYSIS

The statistical part of the study contains tables evaluating the responses of stakeholders to the BIICL empirical questionnaire.

In addition, it includes statistical data on the transaction volumes of different market sectors such as factoring and securitisation which are constantly involved in assignment transactions, case law on the third-party effects of assignment and the laws applicable to the third-party effects of assignment within EU Member States and certain third States.

2.1.1. Evaluation of Stakeholder Responses

Firstly, the statistical part of the study highlights problems encountered in securing the effectiveness of an assignment against third parties, as reported by stakeholders. As it appears from this data, 47% of the responding stakeholders have reported problems of this kind.46 Results are presented according to business sectors (factoring, securitisation, loans, guarantees, insurance, more than one sector, other ((no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector))) and according to business types (financial institutions, legal practitioners, academics, associations, unknown).47

Secondly, the study highlights the average legal costs spent on cross-border transactions.48

A third table shows that the vast majority of responding stakeholders (80%) have expressed a need for new legislation on the law applicable to third-party effects of an assignment.49

46 See Part 2: Statistical Analysis, 2.1.3., pp. 50-54.
47 See Part 2: Statistics, Part 2: Statistical Analysis, 2.1.3., Tables 1a and 1b, pp. 50-56.
48 See Part 2: Statistics, 2.1.4., Table 2, pp. 57-58.
Moreover, three separate tables show the solutions to the law applicable to third-party effects of assignment which have been suggested by the stakeholders.\textsuperscript{50} 44\% of all responding stakeholders prefer the law of the assignor’s habitual residence; 30\% suggest the law of the underlying debt; 11\% favour the law chosen by assignor and assignee (see Part 2 “Statistics”, Table 4a). In addition to Table 4a, the suggested solutions by stakeholders are also presented according to business sectors (Table 4b) and business types (Table 4c).

The fifth table indicates the impact of a uniform EU legislative solution on businesses (see Part 2 “Statistics”, Table 5, see pp. 69 – 71 below). The vast majority of stakeholders responding to this question highlight the reduction of legal costs and due diligence, increased legal certainty and higher transaction volumes as the potential effects of the introduction of a uniform rule on the property aspects of an assignment.

\textbf{2.1.2. Transaction Volumes of Market Sectors}

Trade bodies representing industry sectors such as factoring and invoice discounting and securitisation have made data available to BIICL which highlights the size of the industry sector and the numbers of transactions per sector. This data demonstrates the importance of the economic activities involving assignments of claims.

The data reflecting the volume of domestic and international factoring and invoice discounting business per Member State of the European Union shows, for example, that the total of international factoring and invoice discounting business within the EU (in terms of claims assigned) is estimated at over 140 billion EUR during 2010, a figure which is growing year by year.\textsuperscript{51} There was an increase in the total factoring turnover of Member States from 806,938 million EUR in 2006 to 1,045,069 million EUR in 2010, an increase of almost 30\%, notwithstanding the global financial crisis.\textsuperscript{52}

As to securitisation, the volume of European securitisation issuance has increased between 1992 and 2010 from 302.11 million USD to 513,717.03 million USD in each country of the EU,\textsuperscript{53} peaking in 2008 at over 1 trillion USD.\textsuperscript{54} Table 7 presents a breakdown of the European securitisation issuance by country

\textsuperscript{49} See Part 2: Statistics, 2.1.5., Table 3, pp. 58–61.
\textsuperscript{50} See Part 2: Statistics, 2.1.6., Tables 4a-4c, pp. 62-70.
\textsuperscript{51} Information provided by the Factors Chain International.
\textsuperscript{52} Information provided by the Factors Chain International. For further information see Part 2: Statistics, 2.2.1., Table 6, pp. 76–79.
\textsuperscript{54} See Part 2: Statistics, 2.2.2., Table 7, pp. 81–82.
while Table 8 provides a breakdown of the European securitisation issuance by the type of claims assigned.\(^{55}\)

### 2.1.3. Case Law

The statistical part of the study also lists relevant case law cited in the national reports since the date of the Rome Convention (per Member State, in alphabetical order). As this list illustrates, it appears that the issues this study is dealing with are rarely litigated before the courts of Member States, and cases considering Art. 14 Rome I Regulation and its predecessor, Art. 12 Rome Convention are few and far between.\(^{56}\) The importance of assignment transactions with an international element in the commercial life of the EU cannot, however, be underestimated as the data in Section 2 demonstrates.\(^{57}\)

### 2.1.4. National Conflict of Laws Solutions for the Third-Party Effects of Assignment

This part of the statistical analysis presents the laws applicable to the third-party effects of assignment in 12 Member States as well as certain third States.\(^{58}\) The prevailing connecting factor is the law of the underlying debt assigned, which is favoured by six Member States and four third States.

### 2.2. EMPIRICAL ANALYSIS

BIICL has collected empirical data on third-party effects of assignment and the need for a new uniform conflict of laws provision in the area. A detailed questionnaire\(^ {59}\) was sent out to approximately 2000 stakeholders. The targeted stakeholders covered a wide range of sectors from securitisation, factoring and banking to economic think-tanks, law firms and research institutes.

#### 2.2.1. Distribution of the Questionnaire

A list of contacted stakeholders\(^ {60}\) traces the distribution of the questionnaire. For example, the questionnaire has been sent to 1654 contacts in 43 countries through the network of the International Swaps and Derivatives Association (ISDA); to the 43 members of the Asset Based Finance Association (ABFA); to the network of the EU Federation for the Factoring and Commercial Finance Industry (EUF) and to the network of the Association for Financial Markets in


\(^{56}\) See Part 2: Statistics, 2.3., Table 9, pp. 85-95.

\(^{57}\) See also 2.1.2. above.

\(^{58}\) See Part 2: Statistics, 2.4., Table 10, pp. 96-98.


\(^{60}\) See Annex 1.
Europe (AFME). The questionnaire has also been distributed to a broad range of other stakeholders from all 27 Member States of the European Union. The number of interested persons or national authorities contacted from each Member State varied according to the importance of the market and reached 60. Additionally, EU bodies and EU-wide organisations as well as international organisations have been included in the distribution. The questionnaire has also been posted on several relevant blogs on private international law (including conflictinglaws.net, which has several thousand subscribers via e-mail) and on European law and policy with the aim of making it accessible to the greatest possible number of interested persons. The EU Commission has published the questionnaire through the European e-Justice Portal. BIICL has also contacted renowned academics specialising in the field of the conflict of laws. The initial submission deadline of 15 April 2011 was extended to 15 June and subsequently to 15 July to facilitate further responses.

2.2.2. Participation of Stakeholders

Thirty-six (36) responses to the questionnaire were received. At least, three reasons for the low level of responses may be suggested as follows:

1. Some business sectors indicated that their participants had other, more significant financial, legal and regulatory matters to deal with in the last months. As a result, this Study was given a lower priority,

2. A general reluctance to answer questionnaires (although the stakeholders were given the freedom to leave some questions blank),

3. Regulatory exhaustion, i.e. the financial sector has been faced with a gamut of new regulation both at the Member State and EU level.

The responses received are broken down as follows:

According to Business Sector:

<table>
<thead>
<tr>
<th>Business Sector</th>
<th>Number of Stakeholders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring (Businesses and Legal Advisors)</td>
<td>8</td>
</tr>
<tr>
<td>Securitisation (Businesses and Legal Advisors)</td>
<td>3</td>
</tr>
<tr>
<td>Loans</td>
<td>1</td>
</tr>
<tr>
<td>Guarantees</td>
<td>1</td>
</tr>
<tr>
<td>Insurance</td>
<td>1</td>
</tr>
<tr>
<td>More than one sector</td>
<td>15</td>
</tr>
</tbody>
</table>

According to Business Type:

<table>
<thead>
<tr>
<th>Business Type</th>
<th>Number of Stakeholders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Institutions</td>
<td>15</td>
</tr>
<tr>
<td>Legal Practitioners</td>
<td>7</td>
</tr>
<tr>
<td>Academics</td>
<td>4</td>
</tr>
<tr>
<td>Associations</td>
<td>6 (2 Representatives of Legal Practitioners, 3 Financial Institutions, Associations and Networks, 1 Insurance, see table below)</td>
</tr>
<tr>
<td>Unknown</td>
<td>4</td>
</tr>
</tbody>
</table>

Total: 36

Associations per Members’ Business Type, Number and Origin:

<table>
<thead>
<tr>
<th>Business Type</th>
<th>Number of Members</th>
<th>Origin of Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Institutions</td>
<td>430</td>
<td>France</td>
</tr>
<tr>
<td></td>
<td>260</td>
<td>Third State (USA)</td>
</tr>
<tr>
<td>Financial Associations and Networks</td>
<td>17</td>
<td>EU</td>
</tr>
<tr>
<td>Legal Practitioners</td>
<td>68000</td>
<td>Germany</td>
</tr>
<tr>
<td></td>
<td>14 000</td>
<td>UK</td>
</tr>
<tr>
<td>Insurance Companies</td>
<td>464</td>
<td>Germany</td>
</tr>
</tbody>
</table>

Please note that the answers of association stakeholders have been assessed for statistical purposes in the same way as the responses of law firms, banks and individuals. No weighting element has been introduced, as that would lead to arbitrary results. If an association represents a large number of members, it cannot automatically be said that all members adopt the same position as the committee or individual that has responded on behalf of...
the association. However, the statistical tables highlight stakeholders’ responses by reference to their number of members.

### 2.2.3. Presentation of Results

The core of the empirical study summarises the answers of stakeholders in a table format. The responses to the questionnaire are presented per business sector/type and Member State. Please note that business details (names) of individual respondents have not been disclosed if the stakeholder has not expressly consented to the disclosure.

The study shows

- data as to turnover and relative significance of cross-border transactions,
- the average legal costs for cross-border transactions,
- the necessity and extent of legal due diligence within these kinds of transactions,
- the incidence of problems encountered in securing the effectiveness of assignments against third parties,
- the categories of third parties with whom stakeholders are concerned,
- the existing uncertainty regarding the law applicable to third-party effects of assignment,
- the need to amend Art. 14 Rome I Regulation,
- the solutions favoured by stakeholders, and
- the impact that a uniform EU solution in this area might have on their businesses.

It has to be stressed however, that stakeholders were at liberty to only partially complete the questionnaire. Therefore, not all questions have been answered by all stakeholders. This is reflected in the tables (listed as “do not know/no answer”).

---

62 See Part 3: Empirical Analysis, 3.2., pp. 113 et seq.
2.3. LEGAL ANALYSIS - NATIONAL REPORTS

Twelve national rapporteurs have presented the national regime (conflict of laws provisions and related substantive law issues) applicable to the third-party effects of assignment in their respective jurisdiction. The choice of these jurisdictions has been based on the following criteria: representation of legal families; the importance of the market for the assignment of receivables and the existence of relevant case law; or legal reforms recently undertaken.

The national reports follow a parallel main structure (“Summary, Conflict of Laws, Substantive Law”) and deal within this structure, as far as possible, with the same questions. The solutions adopted by these States serve as another building block for a uniform European conflict of laws solution on the third-party effects of the assignment.

2.3.1. Conflict of Laws Issues

2.3.1.1. Distinction between contractual and property aspects of assignment and between property effects inter partes and erga omnes

Many continental legal orders make a distinction between the contractual aspects of an assignment and its proprietary effects (see e.g. the reports on Belgium, Finland, France, Germany, Luxembourg, Poland). English law supports the distinction, though a minority view argues that the assignment raises primarily contractual issues, thus leaving almost no room for proprietary aspects. This minority view seems to lose force in view of the introduction of Recital 38 of the Rome I Regulation. On the contrary, Czech law is unaware of such a distinction.

In line with Recital 38 of the Rome I Regulation (explicitly only referring to proprietary aspects of the assignment inter partes), most legal systems consider that proprietary effects as against third parties of the assignment are not covered by Art. 14 Rome I Regulation (see e.g. Belgium, Finland, France). In other systems, e.g. England and Germany, the majority view believes that

63 See Part 4: Legal Analysis, 4.A.3.1., p. 179.
66 See Part 4: Legal Analysis, 4.E.1.1., pp. 218, 220.
67 See Part 4: Legal Analysis, 4.G.2.1., p. 256.
68 See Part 4: Legal Analysis, 4.I.1.1., p. 298.
69 See Part 4: Legal Analysis, 4.L.2.1., p. 348.
70 See Part 4: Legal Analysis, 4.B.2.2., p. 195.
71 See Part 4: Legal Analysis, 4.A.3.1., p. 179.
73 See Part 4: Legal Analysis, 4.D.2.2., p. 211.
74 See Part 4: Legal Analysis, 4.L.2.1., p. 350.
the third-party effects of assignment are covered by Art. 14(2) Rome I Regulation.

In the Netherlands the law governing the contract between assignor and assignee (Art. 14(1) Rome I Regulation) is applied to all property aspects of the assignment.\(^\text{76}\) This approach (albeit difficult to align with the current wording of Recital 38 Rome I Regulation) guarantees a synchronisation of the law applicable to the contract of assignment and the application of the same law to the effectiveness of an assignment between the parties and as against third parties. This approach is also increasingly gaining support in other countries (as indicated by a growing opinion in Germany\(^\text{77}\)).

### 2.3.1.2. National Conflict of Laws Solutions for the Third-Party Effects of Assignment

The legal systems of the European Union adopt different approaches to the law applicable to the third-party effects of the assignment:

**Approach 1. Law of the contract between assignor and assignee**

This approach is favoured in The Netherlands. According to Dutch law, the law applicable to the contract between assignor and assignee is applicable to the effectiveness of an assignment, i.e. to all its property aspects. The reasons for this are as follows: 1) Art. 14(2) Rome I Regulation is exhaustive in the matters that it covers; 2) otherwise, Art. 14(1) Rome I Regulation would be useless, as it would have just reiterated Art. 3 and 4 Rome I Regulation, without adding any new conflict rule; 3) the conflict rule also fosters party autonomy and contractual efficiency. In cases of the abuse of party autonomy, recourse can be made to the public policy exception, fraus legis, actio pauliana, etc. A single rule is adopted for all transactions which solves characterisation problems. As to the question which law should govern the priority of multiple (competing) assignments, the application of the law of the contract between assignor and assignee is as follows: the law governing the second assignment should decide upon the protection of bona fide second acquirers.\(^\text{78}\) As mentioned above, this approach is also gaining increasing support, e.g. in Germany.

By way of comparison, a party autonomy-based solution has been adopted in Switzerland.\(^\text{79}\)

---

\(^{75}\) See Part 4: Legal Analysis, 4.E.2.1., p. 227.

\(^{76}\) See Part 4: Legal Analysis, 4.H.3., pp. 274 et seq.

\(^{77}\) See Part 4: Legal Analysis, 4.E.2.3., p. 229.

\(^{78}\) See Part 4: Legal Analysis, 4.H.3., pp. 274 et seq.

Approach 2: Law of the underlying debt assigned (as a general rule or in combination with sectoral rules)

The debate on the applicable law question is creating controversy in Germany (see Approach 1. above). Nonetheless, the majority of authors suggest applying the law of the debt assigned. Judicial decisions, including from the Federal Supreme court, support this position.\(^{80}\)

Spanish law has also adopted this conflict rule in light of the implementation of the EC Collateral Directive, although its application is not limited to the sector of collaterals as is argued by scholars.\(^{81}\)

Under Polish law, the law of the underlying debt assigned will govern proprietary effects, including its effectiveness against third parties.\(^{82}\)

The English position is very specific. Although the traditional English approach is to apply the *lex situs* (i.e. residence of the debtor) rule to property, this rule has been strongly eroded with respect to intangibles, mainly in favour of the law governing the assigned debt. Although there is little agreement on the subject, there appears to be a prevailing view which applies different choice of law rules to different proprietary issues. For example, there is a strong view which suggests applying the law of the underlying debt to the question concerning which of a number of competing assignments takes priority as between themselves as this is the common factor between the assignees, whereas the *lex situs* (of the claim) is preferred in relation to the question whether an attachment may trump an (otherwise effective) assignment (obiter in the *Raiffeisen* case). Although it is acknowledged that more complex assignments of bulk debt may raise their own problems (such as the application of multiple laws), there is a strong view that no special rules should apply.\(^{83}\)

In the absence of any case-law on the matter within the Italian legal system, Italian scholars generally favour the law of the debt assigned. However, some support the introduction of the law of the assignor’s habitual residence for bulk assignments and assignments of future claims.\(^{84}\)

Despite the absence of clear case-law, the law of Luxemburg seems to favour the law of the assigned claim for the issue of the effectiveness of assignment against third parties. For the specific sector of securitisation however, the Law on Securitisation provides that the law applicable to the third party effects of the...

---

\(^{80}\) See Part 4: Legal Analysis, 4.E.2.2., pp. 228-229.
\(^{81}\) See Part 4: Legal Analysis, 4.J.2.3., pp. 316-317.
\(^{82}\) See Part 4: Legal Analysis, 4.I.3.1., p. 304.
\(^{83}\) See Part 4: Legal Analysis, 4.L.2.2., pp. 352 *et seq*.
\(^{84}\) See Part 4: Legal Analysis, 4.F.2.2., p. 242.
assignment shall be the law of the jurisdiction where the assignor is established, thus following the UNCITRAL Convention on the assignment of receivables.  

By way of comparison, the application of the law underlying the debt assigned is also supported in Australia, Canada, Japan and in the Russian Federation.

Approach 3: Law of the assignor’s habitual residence

Belgian law opts for the law of the assignor’s habitual residence at the time of the assignment to govern the third-party effects of the assignment. The UNCITRAL Convention on Assignment of Receivables influenced the content of this conflict rule. Habitual residence should (in subsidiary order) be determined by the centre of management or business activities of a legal person or its statutory seat.

Under U.S. law, perfection of most assignments is governed by the law of the assignor’s location. The law which determines the priority of a security interest in a payment right as against competing claimants, however, depends on the nature of the payment right. In the case of accounts and payment intangibles, priority is governed by the law of the state in which the assignor is located. In the case of promissory notes and chattel paper, however, priority is governed by the law of the state in which the promissory note or chattel paper is located.

Approach 4: Lex rei sitae

The law of the situs of the debt is in theory applicable in Czech law, despite the absence of legislation or any clear case-law on the subject.

A Swedish court will apply the lex rei sitae (the place where a chattel in which security interest is created is located) to the question of whether a security has been validly perfected. As to dematerialized securities, the issue will be governed by the law of the jurisdiction where the register recording the holder's/beneficiary’s interest in the securities is located (e.g. bank). This provision incorporates the corresponding provision in the Finality of Payments Directive (98/26/EC) and reflects the equivalent rule in the EC Collateral Directive. As to the directly held registered debt securities, the law applicable is the law where the issuer (and its record) is located.

85 See Part 4: Legal Analysis, 4.G.2.3., pp. 259 et seq.
89 See Part 4: Legal Analysis, 4.B.2.2., p. 195.
90 See Part 4: Legal Analysis, 4.K., pp. 318 et seq.
Approach 5: Law of the habitual residence of the debtor

French law is relatively unique as to the choice of law governing the third-party effects of the assignment. Case-law supports the law of the habitual residence of the debtor as applicable to the matter. This case-law-based solution has been criticised by practitioners and scholars. However, a specific substantive rule for some financial instruments has been adopted and which states that an assignment becomes enforceable against third parties on the date indicated on the transfer deed when delivered, regardless of the law applicable to claims and the law of the country of residence of the debtor.91

Approach 6: No clear preference

Finnish law seems particularly uncertain as to the law governing the effects of assignment to third parties. The doctrine envisages two options: 1) the law of the domicile of the assignor; 2) the law of the centre of main interests of the debtor (in parallel with the Insolvency Regulation), as it is the lex rei sitae of the debt.92

2.3.1.3. Further Uncertainties of Art. 14 Rome I Regulation
Expressly Mentioned by the National Rapporteurs

According to the Belgian report, the concept of “assignability” under Art. 14(2) Rome I Regulation is unclear. According to the majority view in Belgium, it seems that only the issues of assignability seeking to protect the debtor of the claim shall be governed by Art. 14(2) Rome I Regulation. The questions of assignability of future claims and the validity of assignment as security are excluded from the scope of Art. 14(2). It is unclear whether contractual or statutory prohibitions on assignment are covered by Art. 14(2).93

The French report suggests that the use of the word “relationship” in Art. 14 (1) and (2) Rome I Regulation gives rise to uncertainty. This would not be a legal term and it remains unclear as to what types of cases would be covered.94

2.3.1.4. Solutions for a New Rule in the Rome I Regulation as Suggested by National Rapporteurs

The Belgian report argues without any particular reasoning, that only two laws are sufficiently predictable and provide for the application of a single law to third-party effects of the assignment, even in the case of an assignment of a portfolio of claims (where the claims may be governed by the laws of various jurisdictions and/or where the claims may be due by debtors in several jurisdictions): the law of the agreement between assignor and assignee and the

91 See Part 4: Legal Analysis, 4.D.2.2., p. 211.
law of the assignor’s habitual residence. The latter reflects the current solution under Belgian law.95

The Czech report argues in favour of the law applicable to the underlying debt assigned. The rationale of this approach is that it will lead to the application of the same rule towards the whole assignment process and to the equal treatment of third parties and debtors. This proposal reflects the current position under Czech law.96

The Finnish report proposes to apply the law of the underlying debt assigned to the question of third-party effects of the assignment, coupled with certain sector-specific rules, e.g. the law of the domicile of the assignor for factoring transactions. This proposal reflects the personal view of the rapporteur and no particular reasoning is given.97

The French report proposes the law of the habitual residence of the assignor, as it is predictable for third parties and follows the UNICITRAL Convention on the Assignment of Receivables. The French rapporteur criticizes the current French solution - law of the debtor’s residence - as it is maladjusted for portfolio assignments.98 The report also envisages a mutual recognition of any other decision as to characterisation and its effects, as there are divergences in characterising different types of assignments (e.g. some jurisdictions do not recognise the concept of “assignment of a debt by way of security”).

The English99 and Spanish100 reports suggest subjecting the proprietary aspects of the assignment to the law governing the underlying debt assigned. This would eliminate legal uncertainty surrounding the assignment process; avoid characterisation issues related to the differentiation between proprietary issues and issues falling under Art. 14(2); and reduce transaction costs. This proposal reflects the current solutions under English and Spanish laws.

Although the current solution under Italian law is the law of the debt assigned, the Italian report suggests basing a new rule on third party effects of an assignment on the law of the assignor’s habitual residence. The basis of this suggestion is that it would ensure coordination between the Rome I Regulation and the Insolvency Regulation.101

The Dutch rapporteur suggests that no distinction needs to be made between proprietary effects inter partes and erga omnes. The parties should have the

98 See Part 4: Legal Analysis, 4.D.2.2., p. 212.
100 See Part 4: Legal Analysis, 4.J.2.4., p. 317.
101 See Part 4: Legal Analysis, 4.F.2.6., p. 246.
freedom to choose the law applicable to all proprietary aspects of the assignment according to Art. 14 (1). The proposal reflects the current position under Dutch law. 102

The German rapporteur suggests the application of Article 14(1) Rome I Regulation to third party effects of an assignment based on the following arguments: that there would be no disadvantage from the perspective of the debtor who will usually have no legitimate interest either in the validity of the assignment or in its effect towards third parties as long as he may invoke the law governing the assigned claim for his own protection. From the perspective of the creditors of the assignor and competing assignees, the law of the habitual residence of the assignor does not necessarily constitute the most appropriate and convenient solution for (third) parties. They would be forced into a certain substantive law, whereas by applying Article 14(1) Rome I Regulation, each of the competing assignees would be granted freedom of choice with respect to the in rem effect of the assignment. This solution reflects the personal view of the rapporteur, whereas the current solution under German law is the law of the debt assigned. 103

2.3.2. Related Substantive Law Issues

2.3.2.1. Notice Requirement

The majority of states do not require a notice or any type of registration for an assignment to be effective against third parties (e.g. Belgium, 104 Czech Republic, 105 Germany, 106 Poland, 107 Spain, 108 England 109).

On the other hand, some legal systems require notice as a precondition for the effectiveness of the assignment against third parties (Finnish law 110). French 111 and Luxemburg laws, 112 and to some extent Italian law, 113 require either notice to the debtor (by court bailiff in Italy) or the acceptance of the assignment by the debtor in an authentic act (bearing date certain in case of Italian law) in order for the assignment to be effective against third parties. Exceptions are

106 See Part 4: Legal Analysis, 4.E.1.2., p. 220.
107 See Part 4: Legal Analysis, 4.I.1.5., p. 299.
109 See Part 4: Legal Analysis, 4.L.1., pp. 343-344. However, under English law, notice is not required to make an equitable assignment effective against third parties.
110 See Part 4: Legal Analysis, 4.C.1.2., p. 200.
111 See Part 4: Legal Analysis, 4.D.2.2., p. 213.
113 See Part 4: Legal Analysis, 4.F.1.2., p. 238.
provided for special types of assignments, i.e. securitisation and factoring transactions, collateral arrangements.

An intermediary position is taken by the Netherlands. Dutch law distinguishes between disclosed and undisclosed assignments. For the former, a deed of assignment and notification to the assignor are needed, whereas for the latter, a deed is sufficient (the notification only fulfils the function of showing the debtor who he/she is liable to). Completion of these formalities makes the assignment enforceable against third parties.\footnote{See Part 4: Legal Analysis, 4.H.2.2., pp. 270-272.}

### 2.3.2.2. Competing Successive Assignees

The general rule is that priority is given to the first assignee (Belgium,\footnote{See Part 4: Legal Analysis, 4.A.2.3., p. 175.} Czech Republic,\footnote{See Part 4: Legal Analysis, 4.B.1.3., p. 193.} Finland,\footnote{See Part 4: Legal Analysis, 4.C.1.3., p. 201.} Germany,\footnote{See Part 4: Legal Analysis, 4.E.1.2., p. 222.} Italy,\footnote{See Part 4: Legal Analysis, 4.F.1.2., p. 238.} Poland,\footnote{See Part 4: Legal Analysis, 4.I.2.3., p. 302.} the Netherlands,\footnote{See Part 4: Legal Analysis, 4.H.2.3., pp. 272-273.} England\footnote{See Part 4: Legal Analysis, 4.L.1., p. 344.}). Under Dutch and English laws, the criterion for the determination of the priority of the assignment is the notification of the assignment to the debtor. Under English law, this is subject to whether or not a subsequent assignee had knowledge of a prior assignment.

National legal systems differ as to the extent of protection afforded to the second acquirers who were acting in good faith. One group of States is reluctant to afford such protection (Czech, German, Polish and Dutch laws). Under Dutch law, the second \textit{bona fide} assignee is protected only if the absence of the power of disposition of the assignor results from the invalidity of a previous assignment, which itself did not result from the assignor lacking the power of disposition at the time of the earlier assignment.

Finnish, Belgian and English laws grant broader protection to good faith acquirers. Thus, in accordance with Finnish and Belgian laws, the assignee to whom the claim has been assigned earlier, has priority. However, a subsequent assignee would have priority if the assigned debtor has been notified of such assignment earlier and the subsequent assignee was in good faith when giving notice of the assignment. Under English law, the question whether a subsequent assignee needs to acknowledge the (beneficial) rights of a previous assignee (who has not given notice to the debtor) will depend upon whether the assignment or charge has been "perfected". "Perfection" is brought about by the (actual or constructive) knowledge of the subsequent assignee of the previous assignment/charge. Where an assignee takes an assignment of a debt as \textit{bona fide}.
fide purchaser for value and without actual or constructive knowledge of a pre-existing equitable assignment, the subsequent assignment will prevail, in particular where the subsequent assignee gives notice to the debtor first. This priority rule is therefore only of relevance where there is no registration requirement and potential subsequent assignees have no (constructive) knowledge of previous assignments/charges. Under English law, knowledge of third parties may be achieved by registration. Thus, when companies resident in England assign (both future and existing) debts as security by way of a charge or mortgage (actual or constructive) the charge/mortgage must be registered with the Registrar of Companies. As an exception, the assignment or charge of investment securities or other financial collateral is not subject to the registration requirement.

2.3.2.3. Future Claims

The assignment of future claims is subject to a specific regime. Generally, it is accepted that they can be assigned (e.g. Belgium, Germany, Italy, England, Sweden). However, under Belgian, Finnish and German laws future claims need to be identified or identifiable to be subject of an assignment. Swedish law provides that future claims are obligations clearly contemplated by the terms of the relevant security document, without any further actions by the parties.

The assignment of future claims becomes effective, including against third parties, when the debt comes into existence (Finland, Luxemburg, Germany, Italy, the Netherlands, Sweden, England). Under English law the assignment of a future debt, although considered to be an "agreement to assign", renders such assignee a "secured creditor" with quasi-proprietary rights to the yet non-existent debt.

The effect of the institution of insolvency proceedings on the assignment of future claims is controversial. Finnish and Dutch law recognise the assignment of future claims if the asset is created prior to the commencement of insolvency proceedings of the pledgor, whereas Luxemburg law ignores the opening of bankruptcy proceedings against the assignor before the date on which the claim comes into existence (in the securities market). The question is still moot in Belgium.

---

123 See Part 4: Legal Analysis, 4.A.2.6., p. 177.
124 See Part 4: Legal Analysis, 4.E.1.1., pp. 219-220.
126 See Part 4: Legal Analysis, 4.L.1., p. 346.
129 See Part 4: Legal Analysis, 4.G.1.4., p. 256.
2.3.2.4. Limitations on Assignability

Most national legal systems provide for limitations on the assignability of claims. Some categories of claims are not assignable due to a statutory prohibition. Thus, e.g. under Belgian, Dutch, Polish laws *intuitu personae* debts, wages, pensions, etc. cannot be assigned.

The question of contractual non-assignability is unclear in most national laws. In the Czech Republic, Finland and Poland contractual clauses requiring the assignor to obtain the debtor’s consent to assign the claim are effective. Dutch law grants almost absolute effect to contractual clauses on non-assignability. The issue is unclear in Belgium. In Germany, a contractual non-assignment clause would be a bar to the assignment of a debt, except for the assignment of monetary claims, when the debtor is a merchant (and not a bank) and when the underlying claims result from a commercial transaction.

Under Dutch law a legal act which intends to transfer property for the purpose of security or which does not have the purpose of vesting title in the acquirer may not result in a valid legal transfer of that property. Therefore, an assignment by way of security stands a chance of being invalid. Such prohibition does not appear in other legal systems, such as English and Polish laws.

Assignment of portfolio claims, bulk assignments receive diverging answers from EU Member States. Polish law prohibits assignment of portfolio of claims, thus only individual claims can be transferred.

---

133 See Part 4: Legal Analysis, 4.I.1.2., pp. 298-299.
135 See Part 4: Legal Analysis, 4.C.1.3., p. 201.
136 See Part 4: Legal Analysis, 4.I.1.2., p. 299.
137 See Part 4: Legal Analysis, 4.A.2.9., p. 179.
140 See Part 4: Legal Analysis, 4.I.1.4., p. 299.
2.4. LEGAL ANALYSIS - DEVELOPING THE RULES ON ASSIGNMENT IN THE ROME I REGULATION

In cooperation with the expert group, the stakeholders and the national rapporteurs, BIICL has analysed the need for a new rule on the third-party effects of assignment; delimited the scope and the uncertainties of the existing rules in Art. 14 Rome I Regulation and defined the scope of a new rule; examined the interaction of a new rule with other instruments; and detailed the advantages and disadvantages of the potential conflict of laws solutions upon which a new rule might be based.

The main findings can be summarised as follows (please see “Part 5 - Developing the Rules on Assignment in the Rome I Regulation” for further arguments and details):

2.4.1. Need for a New Rule

80 % of the stakeholders as well as the majority of experts and national rapporteurs have clearly expressed a need for a rule on the third-party effects of assignment in the Rome I Regulation.141

2.4.2. Uncertainties of the Existing Art. 14 and its Interaction with a New Rule

The application of Art. 14 in its current form is not without difficulties.142 This needs to be taken into account when conceiving a new rule.

The scope of Art. 14(1) in combination with Recital 38 remains unclear. The very generic term “relationship” in Art. 14(1) Rome I Regulation is imprecise. A separation between effects of an assignment inter partes and against third parties seems artificial, complicated and incompatible with the erga omnes effect of property law.

It is also uncertain if the question of whether the assignee is entitled to bring a direct claim against the debtor or whether he must join the assignor in bringing such a claim is governed by Art. 14(1) or (2) Rome I Regulation; which law applies to claims brought to recover proceeds or value of the assigned claim; whether and which restrictions on assignment fall under Art. 14(1) or (2); whether Art. 14(2) Rome I Regulation applies to claims under contracts not yet in existence; which rule applies to the effectiveness of an assignment against successors in title and other representatives of the assignor (14(1) Rome I Regulation or a new rule) and which rule governs the ability of the debtor to take an assignment, charge or pledge of his own debt.

141 See Part 5, 1., pp. 373-375 below.
142 For further information see Part 5, 2.2., pp. 375-380 below.
2.4.3. Interaction with Other EU Instruments

It is further uncertain how a new assignment provision in the Rome I Regulation would interact with the Insolvency Regulation and the Rome II Regulation.\(^{143}\)

2.4.3.1. Insolvency Regulation

In particular, it is unclear whether the insolvency representative of an insolvent assignor or assignee should be treated as “assignor or assignee” or as a third party (application of Art. 14(1) Rome I Regulation or of a new rule); it is further controversially discussed how Art. 4(2)(b) and Art. 5 Insolvency Regulation would interact with a new rule in Art. 14 Rome I Regulation.

2.4.3.2. Interaction with the Rome II Regulation

It needs to be clarified which Regulation applies to a claim to recover the proceeds or the value of the assigned claim (Art. 10 Rome II Regulation or Art. 14 Rome I Regulation).

2.4.4. Possible Solutions:

2.4.4.1. Law of the Contract Between Assignor and Assignee

2.4.4.1.1. Support by Stakeholders, Experts, Commentators and Rapporteurs

This solution is favoured by three out of 11 experts, 11 % of the responding stakeholders\(^ {144}\) and some commentators.\(^ {145}\) It is adopted by one EU Member State (The Netherlands) and is favoured by the Dutch, German and Belgian rapporteurs. For comparison, the solution has also been adopted in Switzerland (Art. 145 IPRG).\(^ {146}\)

2.4.4.1.2. Arguments in Favour of and Against this Solution\(^ {147}\)

- This approach provides flexibility, enabling the parties to apply the law that best fits the needs of their sector and thereby reducing the need for specific sectoral rules.

- It assures a parallelism between the law applicable to the contract between assignor and assignee and the law applicable to the legal effects of an assignment.

- The solution is reported to work well in practice (e.g. in the Netherlands).

\(^{143}\) See Part 5, 2.3., 2.4., pp. 380-382 below.
\(^{144}\) See Part 2: Statistical Analysis, 2.1.6., pp. 62-70 below.
\(^{145}\) See Part 5, 3.2., p. 384 below.
\(^{147}\) See Part 5, 3.2., pp. 384-389 below.
- It allows for a reduction of applicable laws and complexity: subject to Art. 14(2) Rome I Regulation, this solution would lead to the application of the law of the contract between assignor and assignee to all proprietary aspects of assignment.

- The solution would increase legal certainty in case of assignment of future claims.

- A main disadvantage of this solution is the risk of abuse of party autonomy to the prejudice of third parties and the uncertainty they face to determine the applicable law. This risk could, however, be reduced through a limitation of laws that the parties may choose as to bind third parties (e.g. by only allowing the choice of the law applicable to claim assigned and the law of the assignor’s habitual residence).

- Another disadvantage is that there is no clear solution in cases of competing assignments governed by different laws or competition between an assignment and another type of right to the claim. This conflict is, however, reported to be solvable by an analysis of the effects of each transaction in sequence, according to its own applicable law.

- A default rule needs to be found for the legal effects of an assignment in cases in which the parties have not chosen an applicable law. If Art. 4 Rome I Regulation is not considered to be an adequate solution, a specific default regime in Art.14 Rome I Regulation would need to be found, e.g. by referring to the law applicable to the assigned claim.

2.4.4.2. Law Applicable to the Assigned Claim

2.4.4.2.1. Support by Stakeholders, Experts, Commentators and Rapporteurs

This solution is favoured by 30 % of the responding stakeholders, including both participating association stakeholders from England and Germany, representing 14,000 and 68,000 Members of the legal profession respectively. It has also been recommended by several experts on the expert group and by some commentators. The solution has been favoured by six Member States (Luxemburg, Poland, Spain, Italy, England, Germany) and by four out of the six Third States that have been examined for comparison. In addition, the solution has been favoured by the national rapporteurs from the Czech Republic, England, Spain and in combination with sector-specific rules, Finland.

---

149 See Part 5, 3.3., p. 390 below.
2.4.4.2.2. Arguments in Favour of and Against this Solution\textsuperscript{151}

- There is a lower risk of a conflict between the connecting factors in case of competition between assignees or other rightholders, as the law underlying the claim is rarely changed.

- This solution corresponds to Art. 14(2) Rome I Regulation; if adopted, classification issues as between debtor and third-parties can be avoided.

- If a decision were to be taken to limit the scope of Art. 14 to the legal effects of assignment (as contractual aspects are covered by Art. 3 ff Rome I Regulation) and to cover all legal effects of assignment, Art. 14 could even be reduced to a single rule. As a consequence, transaction costs would be reduced. This does, however, not render inappropriate further investigations on the law applicable at the prospective forum of insolvency proceedings.

- A main disadvantage of this solution is its unsuitability for future claims; a specific provision is needed for these cases.

- The solution would complicate bulk assignments, especially in the factoring and invoice discounting sector, where many different laws would come into play and no due diligence is undertaken with regard to the original claim.

- The law of the underlying claim may not always be easily identifiable in advance of the assignment, especially in cases in which such claims are governed by a uniform law (CISG or a future EU optional contract law instrument) which does not contain any rules on assignment of claims.

2.4.4.3. Law of the Assignor’s Habitual Residence

2.4.4.3.1. Support by Stakeholders, Experts, Commentators and Rapporteurs

The solution is favoured by 44% of the responding stakeholders,\textsuperscript{152} including a significant percentage of the factoring industry (75%), by the representative of the factoring industry on the expert group and by some commentators.\textsuperscript{153} It has been adopted by one out of the twelve examined EU Member States (Belgium) and is followed by one out of six Third States that have been surveyed for comparison (USA). It has also been proposed by the French and Italian rapporteurs and corresponds to the solution of the UNCITRAL Receivables Convention.\textsuperscript{154}

\textsuperscript{151} See Part 5, 3.3., pp. 390-393 below.
\textsuperscript{152} See Part 2: Statistical Analysis, 2.1.6., pp. 62-70 below.
\textsuperscript{153} See Part 2: Statistical Analysis, 2.1.6., pp. 62-70 below.
2.4.4.3.2. Arguments in Favour of and Against this Solution

- The solution points to a single objectively ascertainable connecting factor which creates legal certainty.

- The solution is suitable for bulk assignments and assignments of future claims and is therefore strongly supported by the factoring and invoice discounting sector.

- The solution might in many cases coincide with the most likely venue for insolvency proceedings (although links with the Insolvency Regulation will not be achieved if the assignor changes location).

- A common connecting factor would be found with the UNCITRAL Receivables Convention which follows the same approach (although limited to certain types of transactions).

- The solution is reported to work well in solving the conflict between assignees and other competing rightholders.

- The main disadvantage of this solution is that it would advance the current separation between proprietary aspects as between the parties and as against third parties and increase the number of applicable laws to three, unless this is accompanied by changes to Art. 14(1) and Recital 38.

- It is another disadvantage that the definition of the connecting factor in Art. 19 Rome I Regulation does not correspond to Art. 5(h) of the UNCITRAL Receivables Convention. Art. 19(2) is unsuitable to apply to assignment cases as it would create uncertainty.

- In addition, this approach does not accommodate flexibility and would entail a “territorial segmentation” of the European assignment of claims market, where assignments with certain assignors are preferred based on the most advantageous conditions under the applicable law.

- The solution can lead to a conflict of connecting factors in cases of joint assignors, chains of assignments and in case of a change of habitual residence (especially in cases of SPVs and offshore companies).

- A specific solution might need to be found for financial claims, for which this approach has been reported to be unsuitable.

---

155 See Part 5, 3.4., pp. 394-397 below.
2.4.4.4. Combined Solutions\textsuperscript{156}

- It is conceivable, to allay concerns about the potential prejudice of a party autonomy-based solution, by restricting the choice of law option to certain laws only. This would allow for some flexibility of assignor and assignee and, at the same time, protect third parties.

- It is also conceivable, although potentially leading to characterisation problems, to combine solutions by providing exceptions for certain types of claims or for specific business sectors, e.g. the law of the underlying claim assigned with the law of the assignor’s location for factoring transactions. A single general rule would, however, prevent definitional uncertainty and is favoured by stakeholders.

\textsuperscript{156} See Part 5, 3.5., pp. 398-400 below.
3. SUMMARY OF RECOMMENDATIONS

80% of the stakeholders, the majority of experts and of national rapporteurs clearly expressed the need to introduce a rule on third party effects of an assignment into the Rome I Regulation.

It is suggested that the inclusion of third party effects of assignment into the Rome I Regulation leads to a solution pursuant to which all proprietary aspects of assignment are governed by one rule (subject to the limitations for the protection for the debtor in Art 14 (2) Rome I Regulation) and that the current structure of Art. 14 (and Recital 38) is revisited.

It is suggested to clarify that contractual aspects between assignor and assignee are covered by Art. 3 ff Rome I Regulation directly while Art. 14 only addresses the legal effects of an assignment.

It is suggested to aim at a solution that reduces the number of applicable laws under Art. 14 Rome I Regulation.

It is suggested to envisage, if at all, a moderate use of sector-specific rules, as they add complexity and encourage characterisation problems.

Account needs to be taken of the interests of all parties involved in an assignment: assignor, assignee, debtor and third parties. They need to be outbalanced in a new rule. Also, it needs to be ensured that the new rule does not hinder but support trade in the EU.

It is also suggested that some unclear issues (e.g. the relationship with other instruments such as the Rome II Regulation) be clarified in Recitals.

The British Institute has formulated alternative drafting proposals which present the conflict of laws solutions that have each been favoured by a significant number of stakeholders and/or experts. The proposals are accompanied by a suggestion for amendments of Recital 38, for the insertion of new Recitals and for a change of Art. 1 (2) Rome I Regulation where clarification is deemed to be necessary. Each proposal has been complemented with detailed comments (See p. 400 ff).

Proposal A is based on a restricted application of the law applicable to the contract between assignor and assignee.\textsuperscript{157}

Proposal B follows the approach to apply the law governing the assigned claim.\textsuperscript{158}

\textsuperscript{157} See Part 5, 5.2., p. 406 et seq.
\textsuperscript{158} See Part 5, 5.3., p. 411 et seq.
Proposal C is based on the application of the law of the assignor’s habitual residence.\textsuperscript{159}

In Proposals B and C an optional sectoral exception (in the first case for factoring, in the second for assignment of claims under financial contracts) has been added, but with the above-mentioned precautions.

\textsuperscript{159} See Part 5, 5.4., p. 414 \textit{et seq.}
PART 2: STATISTICAL ANALYSIS

1. INTRODUCTION

BIICL has collected statistical data on business sectors involved with assignment and on the problems encountered in securing the effectiveness of assignments against third parties.

The statistical part includes summaries of responses to the empirical questionnaire received from stakeholders on particular issues such as **problems encountered in securing the effectiveness of an assignment against third parties, suggested solutions as to the law applicable to the third-party effects of an assignment, average legal costs for cross-border transactions and the impact of an EU uniform solution on businesses** (see Tables 1-5). It is stressed, however, that stakeholders were at liberty to partially complete the questionnaire. Not all questions have been answered by all stakeholders. This is reflected in the tables, and the statistics reflect the responses of stakeholders responding to the relevant question.

It has become clear that there is **very little existing research**, collected by the market sectors represented in this study that contains relevant data on the effectiveness of assignments against third parties and the law applicable to the proprietary aspects of assignment. However information that could indirectly be of assistance (such as transaction volumes per sector) has been made available to BIICL by trade bodies such as ABFA, AFME, ISDA, EUF and their networks. This information has been reproduced in table format (see tables 6-8).

In addition to trade bodies, Eurostat and the national statistical offices, Ministries of Justice as well as Ministries of Economy, Commerce and Industry of all EU Member States have been contacted with a request for information on relevant data. We have not received any data from these contacts.

The judiciary has been asked to provide any available information on case law regarding cross-border assignments. BIICL has contacted judicial institutions in all EU Member States (in particular, their Supreme Courts). We have not received any data directly from national courts, but the national reporters have provided tables of case law for their respective Member States (see table 9).
2. TABLES (SECTOR-SPECIFIC)

2.1. SUMMARIES OF RESPONSES FROM STAKEHOLDERS

The following tables list responses of stakeholders according to Member States, business sectors and business types.

2.1.1. Business Sectors

The business sectors have been distinguished as follows, according to the description the participating stakeholders have given themselves and comprise companies, banks and business advisors (law firms) as well as associations active in each sector:

- Factoring
- Securitisation
- Loans
- Guarantees
- Insurance
- More than one sector represented

If a business, a business advisor (law firm) or an association indicated in the questionnaire that they practice in more than one of the above mentioned sectors, e.g. undertake or advise on factoring and securitisation, the stakeholder has been listed under “More than one sector represented”. This is an indicator that the problems they encounter can affect several business sectors alike and the solutions they suggest for a new rule in the Rome I Regulation are not limited to a specific sector only.

- Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)

Some stakeholders have either not indicated any link with a particular market sector or have no inherent linkage with a particular market sector, for example because they are academics/ academic institutions. They have been categorised as “other”.

2.1.2. Business Types

Business types have been broken down as follows:
-**Financial Institutions**

The notion is to be understood broadly and covers banks but also factoring businesses, but not factoring associations (listed as association below).

-**Legal Practitioners**

Only law firms are listed here but not associations of lawyers (listed as association below)

-**Academics**

-**Associations**

Associations of all business sectors are listed here, with indications of the number of Members represented.

-**Unknown**

Some stakeholders have not revealed their identity and only indicated the business sector they are active in without specifying which type of business they carry out.

**2.1.3. Problems Encountered in Securing the Effectiveness of an Assignment Against Third Parties**

The question adressed to the stakeholders was presented as follows: “Have you, in the past 5 years, encountered problems in practice in securing the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element (e.g. a second assignee, a judgment creditor of the assignee)?”.

About half of the responding stakeholders (47%) have encountered problems in securing the effectiveness of assignments against third parties within the last five years.
Table 1a: Problems Encountered in Securing the Effectiveness of an Assignment Against Third Parties (According to Business Sectors)

Table 1a (below) presents the results listed according to business sectors.

<table>
<thead>
<tr>
<th>Business Sector</th>
<th>Member State</th>
<th>Problems encountered in securing effectiveness of assignment against third parties</th>
<th>Business Type</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring</td>
<td>Germany</td>
<td>1 yes</td>
<td>1 Financial Institution</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 no</td>
<td>1 unknown</td>
<td></td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>2 yes</td>
<td>2 Financial Institutions</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 no</td>
<td>1 Financial Institution</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sweden</td>
<td>1 no</td>
<td>1 unknown</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Greece</td>
<td>1 no</td>
<td>1 Financial Institution</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>EU</td>
<td>Do not know/ no answer</td>
<td>1 Association (representing 15 national and 2 international factoring associations)</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 8</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3 yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>4 no</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 do not know/no answer</td>
<td></td>
</tr>
<tr>
<td>Securitisation</td>
<td>France</td>
<td>1 yes</td>
<td>1 Legal Practitioner</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>1 no</td>
<td>1 Financial Institution</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 yes</td>
<td>1 Legal Practitioner</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Subtotal:3</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2 yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 no</td>
<td></td>
</tr>
<tr>
<td>Loans</td>
<td>Luxemburg</td>
<td>1 yes</td>
<td>1 Financial Institution</td>
<td>1</td>
</tr>
<tr>
<td>Guarantee Type</td>
<td>Country</td>
<td>Representation</td>
<td>Sector Representation</td>
<td>Subtotal</td>
</tr>
<tr>
<td>----------------</td>
<td>-----------</td>
<td>----------------</td>
<td>------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Guarantees</td>
<td>Malta</td>
<td>1 no</td>
<td>1 Financial Institution</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 1 no</td>
</tr>
<tr>
<td>Insurance</td>
<td>Germany</td>
<td>1 no</td>
<td>1 Association (representing 464 companies)</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 1 no</td>
</tr>
<tr>
<td>More than one sector represented</td>
<td>UK</td>
<td>1 yes</td>
<td>1 Financial Institution</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 no</td>
<td>1 Legal Practitioner</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 no</td>
<td>1 Financial Institution</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 no</td>
<td>1 Legal Practitioner</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 no</td>
<td>1 Association (law society representing 14,000 lawyers practising in the City of London)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>1 yes</td>
<td>1 Association (representing 430 banks)</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 yes</td>
<td>1 Financial Institution</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 yes</td>
<td>1 Financial Institution</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Germany</td>
<td>1 no</td>
<td>1 unknown</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Belgium</td>
<td>1 yes</td>
<td>1 Legal Practitioner</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>The Netherlands</td>
<td>1 no</td>
<td>1 Legal Practitioners</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Spain</td>
<td>1 no</td>
<td>1 Financial Institution</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>All or Several EU Member States</td>
<td>1 yes</td>
<td>1 Financial Institution</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 no</td>
<td>1 Financial Institution</td>
<td></td>
</tr>
<tr>
<td>Third States (USA)</td>
<td>1 yes</td>
<td>1 Association (representing 260 companies)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>-------------------</td>
<td>-------</td>
<td>-----------------------------------------</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Subtotal: 15</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8 no</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7 yes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector) |
|------------------|--------------|---------------------------------|---|
| Spain | 1 do not know/ no answer | 1 Academic | 1 |
| Austria | 1 do not know/ no answer | 1 Academic | 1 |
| Germany | 1 yes | 1 Academic Institute | 1 |
| | 1 yes | 1 Association (bar association representing 68,000 lawyers) | 1 |
| UK | 1 yes | 1 Academic | 1 |
| France | 1 no | 1 Legal Practitioner | 1 |
| All or Several EU Member States | 1 yes | 1 Legal Practitioner | 1 |
| Subtotal: 7 |
| 4 yes |
| 1 no |
| 2 do not know/no answer |
| Total: 36 responses: |
| 17 - yes |
| 16 - no |
| 3 – do not know/no answer |
Table 1b: Problems Encountered in Securing the Effectiveness of an Assignment Against Third Parties (According to Business Types)

Table 1b (below) presents the results listed according to business types.

<table>
<thead>
<tr>
<th>Business Type</th>
<th>Member State</th>
<th>Problems encountered in securing effectiveness of assignment against third parties</th>
<th>Significance of the stakeholder</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Institutions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>Yes</td>
<td>1 bank</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>1 bank</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Germany</td>
<td>Yes</td>
<td>1 company</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Greece</td>
<td>No</td>
<td>1 company</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Luxemburg</td>
<td>Yes</td>
<td>1 bank</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Malta</td>
<td>No</td>
<td>1 bank</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Spain</td>
<td>No</td>
<td>1 bank</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>No</td>
<td>1 bank</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No</td>
<td>1 bank</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>1 company</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>1 bank</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>1 company</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>No</td>
<td>1 bank</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>No</td>
<td>1 bank</td>
<td></td>
</tr>
<tr>
<td></td>
<td>EU</td>
<td>No</td>
<td>1 multinational institution</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 15</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>7 yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>8 no</td>
<td></td>
</tr>
<tr>
<td>Legal Practitioners</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Belgium</td>
<td>Yes</td>
<td>1 law firm</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>Yes</td>
<td>1 law firm</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>The Netherlands</td>
<td>No</td>
<td>1 law firm</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>Yes</td>
<td>1 law firm</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No</td>
<td>1 law firm</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>1 law firm</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>No</td>
<td>1 law firm</td>
<td></td>
</tr>
<tr>
<td>All or several EU Member States</td>
<td>Yes</td>
<td>1 law firm</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-----</td>
<td>------------</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Subtotal: 8</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 yes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 no</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Academics</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>Do not know/No answer</td>
<td>1 academic</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Yes</td>
<td>1 scientific institute</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>Do not know/No answer</td>
<td>1 academic</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Yes</td>
<td>1 academic</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Subtotal: 4</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 yes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 do not know/ no answer</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associations</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Yes</td>
<td>1 banking federation (430 member banks)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Yes</td>
<td>1 bar association (representing 68,000 members)</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>1 insurance association (representing 464 companies)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>No</td>
<td>1 law society (representing 14,000 lawyers practicing in the City of London)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>UE</td>
<td>Do not know/no answer</td>
<td>1 factoring association (representing 15 national and 2 international factoring associations)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Third State (UAS)</td>
<td>Yes</td>
<td>1 commercial finance association (260)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Category</td>
<td>Yes</td>
<td>No</td>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>------------------------</td>
<td>-----</td>
<td>----</td>
<td>---------</td>
<td></td>
</tr>
<tr>
<td>Legal practitioners</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial Institutions</td>
<td>2</td>
<td>1</td>
<td>1 do not know/no answer</td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>No</td>
<td></td>
<td>1 unknown 1</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>No</td>
<td></td>
<td>1 unknown 1</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>No</td>
<td></td>
<td>1 unknown 1</td>
<td></td>
</tr>
</tbody>
</table>

Subtotal: 6

Subtotal: 3

Total: 36

17 yes

16 no

3 do not know/no answer
### 2.1.4. Average Legal Costs for Cross-Border Transactions per Business Sector

The question addressed to the stakeholders was presented as follows: “What would you (or your clients) budget for legal costs for a typical transaction with a cross-border element?”

**Table 2 (below)** shows that the average legal costs for cross-border transactions involving assignments are in many cases extremely high and can amount to several hundreds of thousands of Pounds/Euros.

<table>
<thead>
<tr>
<th>Business Sector</th>
<th>Member State</th>
<th>Turnover</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring</td>
<td>Germany</td>
<td>30 bn €</td>
<td>15,000 C</td>
</tr>
<tr>
<td></td>
<td>Germany</td>
<td>12 bn €</td>
<td>20,000 C</td>
</tr>
<tr>
<td></td>
<td>Greece</td>
<td>3 bn 380 mn €</td>
<td>1,000 C</td>
</tr>
<tr>
<td></td>
<td>Sweden</td>
<td>unknown</td>
<td>5,000€</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>&gt;50 bn £</td>
<td>15,000 – 20,000 €</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>unknown</td>
<td>350,000 – 1,000,000 £</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td></td>
<td>EU</td>
<td>986 bn €</td>
<td>unknown</td>
</tr>
<tr>
<td>Securitisation</td>
<td>France</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>unknown</td>
<td>50,000-250,000 £</td>
</tr>
<tr>
<td>Loans</td>
<td>Luxemburg</td>
<td>19,240,197 €</td>
<td>unknown</td>
</tr>
<tr>
<td>Guarantees</td>
<td>Malta</td>
<td>442 mn $</td>
<td>2,000-5,000 $</td>
</tr>
<tr>
<td>Insurance</td>
<td>Germany</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td></td>
<td>Belgium</td>
<td>unknown</td>
<td>20,000 – 100,000 €</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>unknown</td>
<td>100,000 €</td>
</tr>
<tr>
<td></td>
<td>Germany</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td></td>
<td>The Netherlands</td>
<td>unknown</td>
<td>25,000-300,000 €</td>
</tr>
<tr>
<td></td>
<td>Spain</td>
<td>unknown</td>
<td>unknown</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>unknown</td>
<td>5,000-40,000 £</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>unknown</td>
<td>vary</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>30 bn £</td>
<td>10,000-50,000 £</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>unknown</td>
<td>20,000 £</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>unknown</td>
<td>Vary (max. hundreds of)</td>
</tr>
</tbody>
</table>
2.1.5. The Need for New Legislation

The answer to the question of whether new legislation on the third-party effects of the assignment is needed was implied from the following questions: “Have you ever encountered problems in practice in identifying which country’s law would be applied by an EU court to determine any dispute regarding the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element?”; “In particular, do you (or your legal advisers) apply those rules [Article 14 of Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), or of the rules contained in its predecessor Article 12 of the 1980 Rome Convention] in determining questions regarding the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element?”; “If “Yes” [Should the EU legislate for a single common rule for all Member States to determine the law applicable to all (or some) questions regarding the effectiveness of assignments against persons other than the assignee and the debtor for all transactions?], what rule would you favour”.

As indicated in Table 3 (below), 80% of the responding stakeholders have expressed a need for new legislation on the law applicable to third-party effects of an assignment.
<table>
<thead>
<tr>
<th>Business Sector</th>
<th>Member State</th>
<th>Business Type</th>
<th>Need to Change Article 14 Rome I</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring</td>
<td>Germany</td>
<td>1 Financial Institution</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 Unknown</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Greece</td>
<td>1 Financial Institution</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>1 Financial Institution</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Sweden</td>
<td>1 Unknown</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Several/all EU Member States</td>
<td>Association (representing 15 national and 2 international factoring associations)</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 8</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>7 Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 Do not know/ No answer</td>
</tr>
<tr>
<td>Securitisation</td>
<td>France</td>
<td>1 Legal Practitioner</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>UK</td>
<td>1 Financial Institution</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 Legal Practitioner</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 3</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3 yes</td>
</tr>
<tr>
<td>Loans</td>
<td>Luxemburg</td>
<td>1 Financial Institution</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 Yes</td>
</tr>
<tr>
<td>Guarantees</td>
<td>Malta</td>
<td>1 Financial Institution</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 Yes</td>
</tr>
<tr>
<td>Insurance</td>
<td>Germany</td>
<td>1 Association (representing 464 companies)</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Subtotal: 1</td>
</tr>
<tr>
<td>More than one sector</td>
<td>Belgium</td>
<td>1 Legal Practitioner</td>
<td>Yes</td>
</tr>
<tr>
<td>----------------------</td>
<td>---------</td>
<td>---------------------</td>
<td>-----</td>
</tr>
<tr>
<td>France</td>
<td>1 Association (banking federation representing 430 banks)</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 Financial Institution</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>1 Unknown</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>The Netherlands</td>
<td>1 Legal Practitioner</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>1 Financial Institution</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>1 Association (Law Society representing 14,000 lawyers practising in the City of London)</td>
<td>No, status quo acceptable</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 Legal Practitioner</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 Legal Practitioner</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 Financial Institution</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 Financial Institution</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Several Member States</td>
<td>1 Financial Institution</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>EU</td>
<td>1 Financial Institution</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
<tr>
<td>Third State (USA)</td>
<td>1 Association (representing 260 members)</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Subtotal: 15</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>12 Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2 No</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 Do not know/ No answer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)</td>
<td>Austria</td>
<td>1 Academic</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>France</td>
<td>1 Legal Practitioner</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Germany</td>
<td>1 Association (Bar Association representing 68,000)</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>lawyers)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------------</td>
<td>----------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>1 Academic institution</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>No, Status quo acceptable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>1 Academic</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Do not know/ No answer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>1 Academic</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All or Several EU</td>
<td>1 Legal Practitioner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Member States</td>
<td>Yes</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Subtotal: 7

5 Yes
1 No
1 Do not know/ No answer

Total: 36

29 Yes
4 No
3 Do not know/ No answer

80% Yes
11% No
9% Do not know/ No answer
2.1.6. Suggested Solutions to the Law Applicable to the Third-Party Effects of Assignment

The question addressed to the stakeholders was presented as follows: “Should the EU legislate for a single common rule for all Member States to determine the law applicable to all (or some) questions regarding the effectiveness of assignments against persons other than the assignee and the debtor for all transactions?”; “If “Yes”, what rule would you favour:”.

**44% of the responding stakeholders favour the law of the assignor’s habitual residence** as the law applicable to the third-party effects of assignment, with precautions in situations involving multiple assignments and assignors.

**30% of the responding stakeholders favour the law of the underlying debt assigned**, sometimes presented in conjunction with other potentially applicable laws.

**11% of the responding stakeholders opt for the law chosen by the assignor and assignee.**

The remaining 15% of responding stakeholders have either not commented on this question at all; favour a sector-specific rule for third-party effects of assignment without any concrete suggestions as to the applicable law; favour the law of the debtor’s habitual residence; or suggest two separate applicable laws to the issue of priority between competing assignees or other third parties and to the question of the validity of an assignment against third parties.

**Table 4a: Suggested Solutions to the Law Applicable to the Third-Party Effects of Assignment (According to Business Sector and Business Type)**

<table>
<thead>
<tr>
<th>Law Applicable to the Third-party Effects of Assignment</th>
<th>Member State</th>
<th>Business Sector</th>
<th>Business Type</th>
<th>Reservations/Comments of Stakeholders</th>
<th>Number of Stakeholders in Favour</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law of the assignor’s location (habitual residence)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>1 Other (no indication of a specific linkage with a particular)</td>
<td>1 Academic</td>
<td>Provides certainty for insolvency scenarios</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Business Sector</td>
<td>Other Categories</td>
<td>Remarks</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>-----------------</td>
<td>-----------------</td>
<td>---------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>More than one business sector</td>
<td>Legal Practitioner</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Securitisation</td>
<td>Legal Practitioner</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>More than one business sector</td>
<td>Association (representing 430 banks)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Financial Institutions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Factoring</td>
<td>Financial Institution</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>unknown</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Greece</td>
<td>Factoring</td>
<td>Financial Institution</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)</td>
<td>Academic</td>
<td>Need to clarify meaning of “habitual residence”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>Factoring</td>
<td>unknown</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Factoring</td>
<td>Financial Institution</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)</td>
<td>Academic</td>
<td>Coherence with UNICTRAL Receivables Convention</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Factoring</td>
<td>Association (representing 15 national and 2 international factoring associations)</td>
<td>Predictability; Coherence with UNCITRAL Receivables Convention</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 More than one business sector</td>
<td>1 Financial Institution</td>
<td>Certainty; Contract between assignor and assignee should not modify relationship between initial debtor and creditor</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Third State (USA)</th>
<th>1 More than one business sector</th>
<th>Association (representing 260 Members)</th>
</tr>
</thead>
</table>

Total: 16 (44%)

6 Factoring
1 Securitisation
6 More than one business sector
3 Other

Law of the assigned claim

<table>
<thead>
<tr>
<th>Germany</th>
<th>1 More than one business sector</th>
<th>unknown</th>
</tr>
</thead>
</table>

1 Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)

<table>
<thead>
<tr>
<th>Luxembourg</th>
<th>Loans</th>
<th>Financial Institution</th>
</tr>
</thead>
</table>

Alternative: Law of habitual residence of the assignor

<table>
<thead>
<tr>
<th>Spain</th>
<th>1 More than one business sector</th>
<th>Financial Institution</th>
</tr>
</thead>
</table>

Favours combination with specific rule for
<table>
<thead>
<tr>
<th>Country</th>
<th>Business Sector</th>
<th>Law Practitioner Type</th>
<th>Main Argument</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 UK</td>
<td>Securitisation</td>
<td>1 Legal Practitioner</td>
<td>Not opposed to combination with specific rule for factoring transactions</td>
</tr>
<tr>
<td></td>
<td>5 More than one business sector</td>
<td>1 Financial Institution</td>
<td>Next best solution is law chosen by assignor and assignee</td>
</tr>
<tr>
<td></td>
<td>1 Association (Law Society representing 14,000 lawyers practicing in the City of London)</td>
<td>1 Legal Practitioner</td>
<td>Clear, predictable and certain solution; consistency with Art. 14 (2) Rome I Regulation</td>
</tr>
<tr>
<td></td>
<td>1 Factoring</td>
<td>1 Financial institution</td>
<td>Preferable to retain flexibility and contractual choice (status quo)</td>
</tr>
</tbody>
</table>

| Law chosen by the assignor and assignee | 1 UK | 1 Factoring | 1 Financial Institution | 4 |

Total: 11 (30%)
<table>
<thead>
<tr>
<th>Country</th>
<th>Sector Description</th>
<th>Institution Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Malta</td>
<td>Guarantees</td>
<td>Financial Institution</td>
<td>The Netherlands</td>
</tr>
<tr>
<td>EU</td>
<td>More than one business sector</td>
<td>Legal Practitioner</td>
<td>Establishes single law applicable to multi-party contracts</td>
</tr>
<tr>
<td>EU</td>
<td>More than one business sector</td>
<td>Multinational Financial Institution</td>
<td>Predictable and cost-efficient</td>
</tr>
<tr>
<td>Law of the debtor's location (habitual residence)</td>
<td>France</td>
<td>Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)</td>
<td>Unknown</td>
</tr>
<tr>
<td>UK</td>
<td>Securitisation</td>
<td>Financial Institution</td>
<td>Flexible rule needed</td>
</tr>
<tr>
<td>EU</td>
<td>Other (no indication of a specific linkage with a particular market sector)</td>
<td>Legal Practitioner</td>
<td>Priority: Law of the assignor’s habitual residence (in line with Regulation (EC))</td>
</tr>
</tbody>
</table>

Total: 4 (11%)
### Table 4b: Suggested Solutions to the Law Applicable to the Third-Party Effects of Assignment (According to Business Sector only)

This table shows the solutions favoured by stakeholders according to business sectors. A clear preference for one solution can only be observed in the factoring sector: the responding stakeholders from this sector strongly favour the law of the assignor’s habitual residence (75%).

<table>
<thead>
<tr>
<th>Business Sector</th>
<th>Number of Stakeholders</th>
<th>Suggested Solution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring</td>
<td>8</td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td></td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Sector</td>
<td>Count</td>
<td>Law</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>Law of assigned claim</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Law chosen by assignor and assignee</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sector</th>
<th>Count</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Securitisation</td>
<td>3</td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sector-specific rule, no suggestion</td>
</tr>
<tr>
<td>Loans</td>
<td>1</td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td>Guarantees</td>
<td>1</td>
<td>Law chosen by assignor and assignee</td>
</tr>
<tr>
<td>Insurance</td>
<td>1</td>
<td>Do not know / No answer</td>
</tr>
<tr>
<td>More than one sector</td>
<td>15</td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Law chosen by assignor and assignee</td>
</tr>
<tr>
<td>Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Law chosen by assignor and assignee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Priority and third party effects subject to separate rules</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Do not know / No answer</td>
</tr>
<tr>
<td>Total: 36</td>
<td></td>
<td>Total: 36</td>
</tr>
</tbody>
</table>
Table 4c: Suggested Solutions as to the Law Applicable to the Third-Party Effects of Assignment (According to Business Type only)

If the data collected is presented according to business types, it indicates that the majority responding stakeholders who are financial institutions prefer the law of the assignor’s habitual residence (47%). 26% opt for the law of the assigned claim and 20% for the law chosen by the assignor and assignee. The law of habitual residence of the assignor is also favoured by all 3 responding association stakeholders representing Financial Institutions, Associations and Networks (EU Factoring Association, representing 15 national and 2 international factoring associations; French banking federation, representing 430 banks; and Third State (USA) commercial finance association, representing 260 members).

43% of the legal practitioners who responded prefer the law of the assigned claim. This solution is also favoured by both responding association stakeholders representing legal practitioners (the UK Law Society representing 14,000 lawyers and the German Bar Association representing 68,000 lawyers).

Three quarters of the participating academics favour the law of the assignor’s habitual residence.

<table>
<thead>
<tr>
<th>Business Type</th>
<th>Number of Stakeholders</th>
<th>Suggested Solution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Institutions</td>
<td>15</td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>Law chosen by assignor and assignee</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Sector-specific rule, no suggestion</td>
</tr>
<tr>
<td>Legal Practitioners</td>
<td>7</td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Law chosen by assignor and assignee</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>Priority and third party effects subject to separate rules</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Academics</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Law of assignor’s habitual residence</td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>Law of assigned claim</td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>Law chosen by assignor and assignee</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Associations</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Financial Institutions, Associations and Networks;</td>
<td></td>
</tr>
<tr>
<td>2 Legal practitioners;</td>
<td></td>
</tr>
<tr>
<td>1 Insurance</td>
<td></td>
</tr>
<tr>
<td>3 Financial Institutions, Associations and Networks</td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td>1 French Banking Federation representing 430 banks</td>
<td></td>
</tr>
<tr>
<td>1 EU factoring association representing 15 national and 2 international factoring associations</td>
<td></td>
</tr>
<tr>
<td>1 Third State (USA) Commercial Finance Association representing 260 Members</td>
<td></td>
</tr>
<tr>
<td>2 Legal practitioners</td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td>1 UK Law Society representing 14,000 lawyers in the City of London</td>
<td></td>
</tr>
<tr>
<td>1 German Bar Association representing 68,000 lawyers</td>
<td></td>
</tr>
<tr>
<td>0</td>
<td>Law chosen by assignor and assignee</td>
</tr>
<tr>
<td>1 Insurance</td>
<td>Do not know/ No answer</td>
</tr>
<tr>
<td>1 German Insurance Association representing 464 companies</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Unknown</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Law of assignor’s habitual residence</td>
</tr>
<tr>
<td>1</td>
<td>Law of assigned claim</td>
</tr>
<tr>
<td>1</td>
<td>Law of debtor’s habitual residence</td>
</tr>
</tbody>
</table>

Total: 36
2.1.7. Impact of a Uniform EU Solution on Businesses

The question addressed to the stakeholders was presented as follows: “If the EU were to adopt the rule that you favour, would this be likely to lead to an increase in the number or value of transactions which you are able to undertake in your business?”; “If the EU were to adopt the rule that you favour, would this be likely to lead to a reduction in your legal due diligence costs and/or an increase in the profitability of your business?”. “If the EU were to adopt the rule that you favour, would this lead you to change your business model?”.  

As appears from Table 5 (below), the majority of the contacted stakeholders who addressed the issue of the potential impact of a new uniform EU conflict of laws solution have highlighted the reduction of legal costs and due diligence, increased legal certainty, and an increase in transaction volumes as potential beneficial effects of the introduction of a uniform conflict of laws rule on the “property”/third-party aspects of an assignment.

A minority of stakeholders considered that a uniform EU-wide solution would have no significant impact on their business or on the due diligence process or might even lead to more complications than the current status quo.

<table>
<thead>
<tr>
<th>Business Sector</th>
<th>Member State</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring</td>
<td>Germany</td>
<td>Lower transaction costs, increased legal certainty, increase in transactions</td>
</tr>
<tr>
<td>Germany</td>
<td></td>
<td>Reduction of legal due diligence costs, increase in transactions</td>
</tr>
<tr>
<td>Greece</td>
<td></td>
<td>Decrease of due diligence costs, to some extent the reform may lead to the change of business model</td>
</tr>
<tr>
<td>UK</td>
<td></td>
<td>Lower transaction costs, lower risks, increased legal certainty</td>
</tr>
<tr>
<td>UK</td>
<td></td>
<td>Increased legal certainty</td>
</tr>
<tr>
<td>UK</td>
<td></td>
<td>Ease for execution, time and cost saving, significant reduction of legal due diligence costs, transaction volume would increase</td>
</tr>
<tr>
<td>Sweden</td>
<td></td>
<td>Reduction of risks and costs of due diligence</td>
</tr>
<tr>
<td>EU</td>
<td></td>
<td>Increase in the number of transactions or their value</td>
</tr>
<tr>
<td>Securitisation</td>
<td>France</td>
<td>Reduction of costs and time of legal due diligence</td>
</tr>
<tr>
<td>Loans</td>
<td>UK</td>
<td>Reduction of costs</td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>Loans</td>
<td>Luxemburg</td>
<td>Do not know/ no answer</td>
</tr>
<tr>
<td>Guarantees</td>
<td>Malta</td>
<td>Facilitation of cross-border transactions</td>
</tr>
<tr>
<td>Insurance</td>
<td>Germany</td>
<td>Do not know/ no answer</td>
</tr>
<tr>
<td>More than one business sector</td>
<td>The Netherlands</td>
<td>Status quo for legal due diligence. Potentially, would lead to the increase in number of transactions or their value.</td>
</tr>
<tr>
<td>UK</td>
<td>Predictability, legal stability</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Minimised costs for due diligence</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>No significant impact on the company</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Reduction of costs and time limits for due diligence</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Reduction of risks and due diligence costs</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
<tr>
<td>More than one/all Member States</td>
<td>Decrease of legal costs</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Less due diligence costs</td>
<td></td>
</tr>
<tr>
<td>USA</td>
<td>Less due diligence costs and less risk</td>
<td></td>
</tr>
<tr>
<td>EU</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Status quo plus coherence with Insolvency Regulation would lead to most legal certainty; not all solutions would lead to cost reduction</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Growth of industry</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Regime change will require additional analysis</td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>Certainty/ reduction of due diligence costs</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Facilitation of transaction processes</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Impact</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>--------</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>Predictability/ legal certainty/ cost reduction</td>
<td></td>
</tr>
<tr>
<td>EU</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>Do not know/ No answer</td>
<td></td>
</tr>
</tbody>
</table>
2.2. TRANSACTION VOLUMES PER SECTOR

2.2.1. Transaction Volumes of the International Factoring and Invoice Discounting Sector

The factoring industry has not been able to make any statistical data available that is directly related to the effectiveness of assignments against third parties or to priority issues. The data which has been disclosed to BIICL reflects transaction volumes and indicates the importance and growth of the sector as well as its cross-border implications.

The total volume for international factoring and invoice discounting business in the European Union amounted to 144.4 billion EUR during the year 2010. Volumes per country greatly varied, from Cyprus counting at only 31 million EUR, to Germany reaching 30 billion EUR.

The top five countries include Germany, France, Italy, the United Kingdom and Spain, overall representing about 70% of the total volume of factoring and invoice discounting business in the European Union.

The factoring and invoice discounting businesses have shown considerable growth during the period 2005-2010.

The largest percentage of international factoring is carried out using the two-factor system. This mechanism involves an export factor and an import factor. The export factor funds the debt, while the import factor insures and collects it. Both would usually sign an assignment contract.

As to the number of transactions, the Factors Chain International (FCI) and the International Factors Group (IFG) have jointly estimated that approximately 670,000 invoices\textsuperscript{160} were transacted through their systems in the European Union in 2010. The reported number excludes the invoice discounting business.

Table 6 (below) presents the volume of international factoring and invoice discounting business per Member State of the European Union. Its volume exceeds the overall volume of the factoring business, but in the former business the client manages the debt on its own, so there would be no import factor involved. Invoice discounting is a bulk funding facility and consequently, individual invoice details are not known to the funder. The table additionally shows the number of factoring companies per State, as well as the ratio between domestic and international factoring.

\textsuperscript{160} Including both import and export, so some double counting could be present.
With regard to international invoice discounting, there is very little specific data available. The data collected on total international factoring and invoice funding business is presented in Table 6.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Nr. of Factoring Companies</td>
<td>Domestic</td>
<td>International</td>
</tr>
<tr>
<td>Austria</td>
<td>3</td>
<td>3,805</td>
<td>928</td>
</tr>
<tr>
<td>Belgium</td>
<td>6</td>
<td>12,200</td>
<td>4,500</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>2</td>
<td>30</td>
<td>5</td>
</tr>
<tr>
<td>Cyprus</td>
<td>3</td>
<td>2,500</td>
<td>46</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>10</td>
<td>3,325</td>
<td>700</td>
</tr>
<tr>
<td>Denmark</td>
<td>9</td>
<td>4,785</td>
<td>2,900</td>
</tr>
<tr>
<td>Estonia</td>
<td>3</td>
<td>2,500</td>
<td>400</td>
</tr>
<tr>
<td>Finland</td>
<td>4</td>
<td>10,500</td>
<td>600</td>
</tr>
<tr>
<td>France</td>
<td>25</td>
<td>90,190</td>
<td>9,819</td>
</tr>
<tr>
<td>Germany</td>
<td>50</td>
<td>52,700</td>
<td>19,300</td>
</tr>
<tr>
<td>Greece</td>
<td>10</td>
<td>4,800</td>
<td>430</td>
</tr>
<tr>
<td>Hungary</td>
<td>25</td>
<td>2,740</td>
<td>140</td>
</tr>
<tr>
<td>Ireland</td>
<td>6</td>
<td>29,393</td>
<td>300</td>
</tr>
<tr>
<td>Italy</td>
<td>40</td>
<td>113,035</td>
<td>7,400</td>
</tr>
<tr>
<td>Latvia</td>
<td>6</td>
<td>150</td>
<td>126</td>
</tr>
<tr>
<td>Lithuania</td>
<td>9</td>
<td>1,292</td>
<td>604</td>
</tr>
<tr>
<td>Luxemburg</td>
<td>1</td>
<td>225</td>
<td>81</td>
</tr>
<tr>
<td>Malta</td>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Netherlands</td>
<td>5</td>
<td>19,550</td>
<td>5,950</td>
</tr>
<tr>
<td>Poland</td>
<td>10</td>
<td>3,850</td>
<td>575</td>
</tr>
<tr>
<td>Portugal</td>
<td>10</td>
<td>15,846</td>
<td>1,040</td>
</tr>
<tr>
<td>Romania</td>
<td>8</td>
<td>500</td>
<td>250</td>
</tr>
<tr>
<td>Slovakia</td>
<td>8</td>
<td>898</td>
<td>413</td>
</tr>
<tr>
<td>Slovenia</td>
<td>3</td>
<td>270</td>
<td>70</td>
</tr>
<tr>
<td>Spain</td>
<td>21</td>
<td>63,048</td>
<td>3,724</td>
</tr>
<tr>
<td>Sweden</td>
<td>60</td>
<td>18,000</td>
<td>3,700</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>100</td>
<td>243,838</td>
<td>4,931</td>
</tr>
<tr>
<td>---------------</td>
<td>-----</td>
<td>---------</td>
<td>-------</td>
</tr>
<tr>
<td>Total Europe</td>
<td>601</td>
<td>732,766</td>
<td>74,217</td>
</tr>
</tbody>
</table>
Table 6. (Continued)\textsuperscript{161}

<table>
<thead>
<tr>
<th>EUROPE</th>
<th>NR. OF INVOICE FINANCE COMPANIES</th>
<th>FACTORING TURNOVER BY COUNTRY IN 2009</th>
<th>FACTORING TURNOVER BY COUNTRY IN 2010</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>International</td>
<td>Total</td>
<td>Domestic</td>
</tr>
<tr>
<td>Austria</td>
<td>5</td>
<td>1,938</td>
<td>6,630</td>
</tr>
<tr>
<td>Belgium</td>
<td>7</td>
<td>9,329</td>
<td>23,921</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>7</td>
<td>65</td>
<td>340</td>
</tr>
<tr>
<td>Cyprus</td>
<td>3</td>
<td>50</td>
<td>3,350</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>8</td>
<td>710</td>
<td>3,760</td>
</tr>
<tr>
<td>Denmark</td>
<td>5</td>
<td>2,400</td>
<td>7,100</td>
</tr>
<tr>
<td>Estonia</td>
<td>4</td>
<td>200</td>
<td>1,000</td>
</tr>
<tr>
<td>Finland</td>
<td>4</td>
<td>552</td>
<td>10,752</td>
</tr>
<tr>
<td>France</td>
<td>15</td>
<td>18,601</td>
<td>128,182</td>
</tr>
<tr>
<td>Germany</td>
<td>55</td>
<td>25,800</td>
<td>96,200</td>
</tr>
<tr>
<td>Greece</td>
<td>12</td>
<td>800</td>
<td>12,300</td>
</tr>
<tr>
<td>Hungary</td>
<td>28</td>
<td>270</td>
<td>2,520</td>
</tr>
<tr>
<td>Ireland</td>
<td>8</td>
<td>1,200</td>
<td>19,364</td>
</tr>
<tr>
<td>Italy</td>
<td>45</td>
<td>11,000</td>
<td>124,250</td>
</tr>
<tr>
<td>Latvia</td>
<td>7</td>
<td>150</td>
<td>900</td>
</tr>
<tr>
<td>Lithuania</td>
<td>8</td>
<td>902</td>
<td>1,755</td>
</tr>
<tr>
<td>Luxemburg</td>
<td>1</td>
<td>188</td>
<td>349</td>
</tr>
<tr>
<td>Malta</td>
<td>3</td>
<td>20</td>
<td>105</td>
</tr>
<tr>
<td>Netherlands</td>
<td>5</td>
<td>10,000</td>
<td>30,000</td>
</tr>
<tr>
<td>Poland</td>
<td>20</td>
<td>440</td>
<td>12,000</td>
</tr>
<tr>
<td>Portugal</td>
<td>13</td>
<td>1,564</td>
<td>17,711</td>
</tr>
<tr>
<td>Romania</td>
<td>14</td>
<td>350</td>
<td>1,400</td>
</tr>
<tr>
<td>Slovakia</td>
<td>8</td>
<td>380</td>
<td>1,130</td>
</tr>
</tbody>
</table>

\textsuperscript{161} Information provided by the Factors Chain International.
<p>| | | | | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Slovenia</td>
<td>5</td>
<td>150</td>
<td>650</td>
<td>5</td>
<td>550</td>
<td>100</td>
<td>650</td>
</tr>
<tr>
<td>Spain</td>
<td>24</td>
<td>9,588</td>
<td>104,222</td>
<td>23</td>
<td>101,796</td>
<td>11,113</td>
<td>112,909</td>
</tr>
<tr>
<td>Sweden</td>
<td>40</td>
<td>1,000</td>
<td>18,760</td>
<td>40</td>
<td>17,760</td>
<td>1,000</td>
<td>18,760</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>12,750</td>
<td>195,613</td>
<td>44</td>
<td>210,745</td>
<td>15,498</td>
<td>226,243</td>
<td></td>
</tr>
<tr>
<td>Total Europe</td>
<td>354</td>
<td>110,397</td>
<td>824,264</td>
<td>592</td>
<td>900,655</td>
<td>144,415</td>
<td>1,045,069</td>
</tr>
</tbody>
</table>
2.2.2. Transaction Volumes of the Securitisation Sector

For the period 2005-2010, the securitisation market of the European Union has shown a trend of overall growth. As shown in Table 7 (below), the total volume of securitisation in 2005 reached more than 300 billion EUR. The peak was reached in 2008, with the total volume amounting to 700 billion EUR. The two subsequent years have shown a considerable decrease of securitisation, almost twice less than in 2008, due to the recession, which had a considerable impact on the market for securitised receivables. Thus, for the year 2010, securitisation products worth only 380 billion Euros were issued in the European market.

The leading Member State of the European Union as to the volume of securitisation is the United Kingdom, with almost one-third of the overall volume of securitisation in 2008. The United Kingdom is followed by The Netherlands, Spain, Italy and Belgium.

It should be borne in mind that the numbers presented above represent the volume of securitisations issued. The whole mass of securitisation is not placed in the market. Thus, in 2010 only 23% were placed in different markets, whereas the remaining 77% were retained by the originators. In 2009, 94% of all issuance has been retained.

The mainstream asset classes are prime residential mortgages, auto loans, CDOs and leases. Table 8 presents the volume of factoring by collateral in each country of the European Union.
<table>
<thead>
<tr>
<th>Year</th>
<th>Belgium</th>
<th>France</th>
<th>Germany</th>
<th>Greece</th>
<th>Ireland</th>
<th>Italy</th>
<th>Netherlands</th>
<th>Other</th>
<th>PanEurope</th>
<th>Portugal</th>
<th>Spain</th>
<th>United Kingdom</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>302.11</td>
</tr>
<tr>
<td>1993</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>854.20</td>
</tr>
<tr>
<td>1994</td>
<td>293.46</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>522.18</td>
</tr>
<tr>
<td>1995</td>
<td>612.90</td>
<td>161.79</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1,097.90</td>
</tr>
<tr>
<td>1996</td>
<td>718.96</td>
<td>1,541.21</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1,900.28</td>
</tr>
<tr>
<td>1997</td>
<td>1,544.83</td>
<td>3,197.98</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,129.64</td>
</tr>
<tr>
<td>1998</td>
<td>1,796.63</td>
<td>3,265.25</td>
<td>3,240.31</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>8,596.78</td>
</tr>
<tr>
<td>1999</td>
<td>821.58</td>
<td>5,665.23</td>
<td>9,167.09</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>24,391.59</td>
</tr>
<tr>
<td>2000</td>
<td>213.55</td>
<td>2,168.10</td>
<td>5,103.10</td>
<td>624.41</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>53,761.03</td>
</tr>
<tr>
<td>2001</td>
<td>5,881.06</td>
<td>5,299.04</td>
<td>509.11</td>
<td>2,624.98</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>73,790.41</td>
</tr>
<tr>
<td>2002</td>
<td>7,610.54</td>
<td>10,208.97</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>139,025.69</td>
</tr>
<tr>
<td>2003</td>
<td>2,778.10</td>
<td>7,173.29</td>
<td>7,007.01</td>
<td>423.04</td>
<td>1,678.05</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>206,169.44</td>
</tr>
<tr>
<td>2004</td>
<td>2,482.51</td>
<td>7,693.47</td>
<td>8,366.30</td>
<td>921.53</td>
<td>35,660.61</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>228,076.41</td>
</tr>
<tr>
<td>2005</td>
<td>586.10</td>
<td>4,027.72</td>
<td>27,649.62</td>
<td>2,770.65</td>
<td>2,042.95</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>324,706.69</td>
</tr>
<tr>
<td>2006</td>
<td>2,943.66</td>
<td>9,029.52</td>
<td>45,740.07</td>
<td>4,475.50</td>
<td>13,140.88</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>481,298.07</td>
</tr>
<tr>
<td>2007</td>
<td>5,715.55</td>
<td>7,645.27</td>
<td>27,870.90</td>
<td>7,488.24</td>
<td>21,216.03</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>719,114.30</td>
</tr>
<tr>
<td>2008</td>
<td>69,465.12</td>
<td>16,164.84</td>
<td>92,433.25</td>
<td>16,686.68</td>
<td>50,876.46</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1,029,060.05</td>
</tr>
<tr>
<td>2009</td>
<td>33,730.83</td>
<td>8,258.72</td>
<td>19,926.81</td>
<td>30,248.41</td>
<td>19,222.35</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>491,611.30</td>
</tr>
<tr>
<td>2010</td>
<td>23,037.77</td>
<td>12,058.18</td>
<td>18,164.42</td>
<td>1,295.28</td>
<td>8,745.23</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>513,717.03</td>
</tr>
<tr>
<td>2011YTD5</td>
<td>6,805.50</td>
<td>4,080.08</td>
<td>1,612.46</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>149,249.01</td>
</tr>
<tr>
<td>2009</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>138,799.54</td>
</tr>
<tr>
<td>Q1</td>
<td>7,185.51</td>
<td></td>
<td></td>
<td>4,243.88</td>
<td>12,386.57</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>14,493.11</td>
</tr>
<tr>
<td>Q2</td>
<td>8,852.24</td>
<td>5,583.60</td>
<td></td>
<td>4,516.71</td>
<td>7,978.53</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>104,075.05</td>
</tr>
<tr>
<td>Q3</td>
<td>7,525.96</td>
<td>9,189.39</td>
<td>7,581.38</td>
<td>40,689.05</td>
<td>2,290.40</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>131,208.42</td>
</tr>
<tr>
<td>Q4</td>
<td>12,435.73</td>
<td>2,675.12</td>
<td>4,166.87</td>
<td>693.92</td>
<td>4,663.64</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>108,397.27</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Q1</th>
<th>Q2</th>
<th>Q3</th>
<th>Q4</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>6,514.45</td>
<td>3,644.41</td>
<td>8,188.79</td>
<td>7,349.73</td>
<td>105,781.68</td>
</tr>
<tr>
<td></td>
<td>1,295.28</td>
<td>653.26</td>
<td>4,443.38</td>
<td>6,553.33</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3,284.53</td>
<td>1,425.58</td>
<td>2,715.93</td>
<td>1,319.20</td>
<td></td>
</tr>
<tr>
<td></td>
<td>784.51</td>
<td>467.46</td>
<td>11,879.90</td>
<td>7,991.73</td>
<td></td>
</tr>
<tr>
<td></td>
<td>71,083.50</td>
<td>7,182.96</td>
<td>27,690.27</td>
<td>84,306.68</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1,376.83</td>
<td>610.00</td>
<td>1,899.26</td>
<td>14,613.98</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1,654.91</td>
<td>1,493.62</td>
<td>1,810.04</td>
<td>15,467.84</td>
<td></td>
</tr>
<tr>
<td></td>
<td>71,083.50</td>
<td>5,154.36</td>
<td>47,945.76</td>
<td>76,648.19</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1,376.83</td>
<td>12,756.33</td>
<td>32,881.65</td>
<td>222,664.44</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Q1</th>
<th>Q2</th>
<th>Q3</th>
<th>Q4</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>6,805.50</td>
<td>4,080.08</td>
<td>11,000.98</td>
<td>9,475.72</td>
</tr>
<tr>
<td></td>
<td>1,612.46</td>
<td>43,282.40</td>
<td>1,908.31</td>
<td>26,314.90</td>
</tr>
<tr>
<td></td>
<td>11,000.98</td>
<td>1,908.31</td>
<td>9,475.72</td>
<td>44,768.66</td>
</tr>
<tr>
<td></td>
<td>4,080.08</td>
<td>43,282.40</td>
<td>26,314.90</td>
<td>149,249.01</td>
</tr>
</tbody>
</table>

**Note:**
1. "Other" countries include countries too small to be displayed: Austria, Sweden, Denmark, Finland, the Channel Islands, Hungary, Iceland, Poland, Switzerland, Turkey, Ukraine, and the United States.
2. "PanEurope" collateral consists of collateral predominantly sourced from multiple European countries.
3. Issuance includes retained securitisations.
4. Year-to-date data is to March 31, 2011.
Table 8. European Securitisation Issuance by Collateral (in USD Millions)\textsuperscript{163}

<table>
<thead>
<tr>
<th>Year</th>
<th>ABS</th>
<th>MBS</th>
<th>SME</th>
<th>WBS</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Year</td>
<td>Auto</td>
<td>Consumer</td>
<td>Credit Cards</td>
<td>Leases</td>
</tr>
<tr>
<td>1992</td>
<td>481.02</td>
<td>302.11</td>
<td>302.11</td>
<td>302.11</td>
<td>302.11</td>
</tr>
<tr>
<td>1993</td>
<td>651.99</td>
<td>1,061.26</td>
<td>827.83</td>
<td>1,907.90</td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>503.35</td>
<td>336.24</td>
<td>42.44</td>
<td>1,907.90</td>
<td></td>
</tr>
<tr>
<td>1995</td>
<td>420.29</td>
<td>259.59</td>
<td>242.95</td>
<td>1,907.90</td>
<td></td>
</tr>
<tr>
<td>1996</td>
<td>2,690.56</td>
<td>5,317.65</td>
<td>4,663.61</td>
<td>117.58</td>
<td>25,782.32</td>
</tr>
<tr>
<td>1997</td>
<td>6,077.02</td>
<td>12,472.69</td>
<td>1,018.75</td>
<td>91,236.15</td>
<td>6,986.62</td>
</tr>
<tr>
<td>1998</td>
<td>11,244.78</td>
<td>17,472.69</td>
<td>1,018.75</td>
<td>91,236.15</td>
<td>6,986.62</td>
</tr>
<tr>
<td>1999</td>
<td>4,680.37</td>
<td>2,946.45</td>
<td>9,944.05</td>
<td>1,959.40</td>
<td>132,379.90</td>
</tr>
<tr>
<td>2000</td>
<td>9,530.89</td>
<td>2,504.17</td>
<td>18,658.94</td>
<td>500.12</td>
<td>3,404.41</td>
</tr>
<tr>
<td>2001</td>
<td>7,956.32</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2002</td>
<td>14,668.18</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2003</td>
<td>19,259.22</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2004</td>
<td>14,668.18</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2005</td>
<td>19,259.22</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2006</td>
<td>24,839.77</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2007</td>
<td>29,429.33</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2008</td>
<td>34,019.34</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>2009</td>
<td>38,609.35</td>
<td>15,818.57</td>
<td>11,059.87</td>
<td>9,218.27</td>
<td>12,465.11</td>
</tr>
<tr>
<td>Q1</td>
<td>2,550.75</td>
<td>9,218.27</td>
<td>12,465.11</td>
<td>67,431.05</td>
<td>34,528.91</td>
</tr>
<tr>
<td>Q2</td>
<td>5,650.23</td>
<td>9,218.27</td>
<td>12,465.11</td>
<td>67,431.05</td>
<td>34,528.91</td>
</tr>
<tr>
<td>Q3</td>
<td>5,013.64</td>
<td>9,218.27</td>
<td>12,465.11</td>
<td>67,431.05</td>
<td>34,528.91</td>
</tr>
<tr>
<td>Q4</td>
<td>6,554.72</td>
<td>9,218.27</td>
<td>12,465.11</td>
<td>67,431.05</td>
<td>34,528.91</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1</td>
<td>5,765.75</td>
<td>8,284.30</td>
</tr>
<tr>
<td></td>
<td>1,295.28</td>
<td>846.78</td>
</tr>
<tr>
<td></td>
<td>1,896.20</td>
<td>2,887.80</td>
</tr>
<tr>
<td></td>
<td>119.50</td>
<td>7,198.28</td>
</tr>
<tr>
<td></td>
<td>2,243.04</td>
<td>8,941.00</td>
</tr>
<tr>
<td></td>
<td>2,319.93</td>
<td>9,943.63</td>
</tr>
<tr>
<td></td>
<td>72,910.31</td>
<td>2,019.07</td>
</tr>
<tr>
<td></td>
<td>18,540.42</td>
<td>93,651.54</td>
</tr>
<tr>
<td></td>
<td>769.00</td>
<td>21,548.40</td>
</tr>
<tr>
<td></td>
<td>105,859.42</td>
<td>2,259.38</td>
</tr>
<tr>
<td>Q2</td>
<td>1,822.67</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>3,087.73</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>663.00</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>1,919.64</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>31,953.56</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>1,591.46</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>41,038.06</td>
<td>0.00</td>
</tr>
<tr>
<td>Q3</td>
<td>4,682.96</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>7,616.85</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>317.33</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>563.09</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>1,777.49</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>34,074.58</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>934.99</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>75,485.99</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>15,900.84</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>3,231.48</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>144,585.59</td>
<td>0.00</td>
</tr>
<tr>
<td>Q4</td>
<td>6,575.79</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>2,032.36</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>2,883.84</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>890.13</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>1,821.43</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>2,845.38</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>841.44</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>187,571.27</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>16,068.77</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>1,904.41</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>223,434.82</td>
<td>0.00</td>
</tr>
</tbody>
</table>

**Sources:** AFME & SIFMA Members, Bloomberg, Thomson Reuters, prospectus filings, Fitch Ratings, Moody’s, S&P, AFME & SIFMA

**Notes:**
1. SME: Small and Medium Enterprises.
2. WBS: Whole Business Securitisation. Certain WBS structures may be bucketed in other categories (ABS and CMBS) based on the nature of the transaction and are evaluated on a case-by-case basis.
3. The first European issue was in 1987.
4. Issuance includes retained securitisations.
5. Year-to-date data is to March 31, 2011.
6. CDO: Collateralised Debt Obligations.
2.3. CASE LAW PROVIDED BY NATIONAL RAPPORTEURS (12 MEMBER STATES)

Although courts in all Member States have been contacted, only the national rapporteurs have made national case law available to BIICL. Courts do not systematically collect case law on specific issues such as on the question of the applicable law to the third-party effects of an assignment. The table below shows that case law relating to the conflict of laws issues to which this study relates is scarce.

Table 9. National Case Law

A) Belgium

None

B) Czech Republic

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>23 Cdo 4892/2008.</td>
<td>Notification is required for the transfer of the right to receive performance to the entitled person; the validity of the assignment by itself is not significant.</td>
</tr>
<tr>
<td>31 Cdo 1328/2007.</td>
<td>If the assignor notified the debtor about the assignment of his claim to assignee, the debtor has no defence when a payment of claim is disputed.</td>
</tr>
</tbody>
</table>
**C) Finland**

None

**D) France**

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of appeal of Paris, September 27, 1984.</td>
<td>The law applicable to the measures of publicity relating to an assignment of debts is the law of the residence of the assigned debtor.</td>
</tr>
<tr>
<td>Court of appeal of Paris, March 26, 1986.</td>
<td>The law applicable to the enforceability against third parties of an assignment of debts in which the assigned debtor is located in France and the assignee and assignor are located in Germany is French law.</td>
</tr>
</tbody>
</table>
E) Germany

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
</table>
| Oberlandesgericht Köln, judgment from 26 June 1986 – 1 U 12/86. | The law governing an assigned claim shall also govern the *in rem* effect of the assignment.  
An agreement between the assignor and assignee stipulating that the assignment is governed by a legal system deviating from the law of the assigned claim is not legally valid without the debtor’s consent. |
| BGH, judgment from 20 June 1990 – VIII ZR 158/89. | The law governing the assigned claim also determines the order between competing assignees.  
The judgment was founded on former Art. 33 para 2 EGBGB. |
| BGH, judgment from 8 December 1998 – XI ZR 302/97. | According to (former) Art. 33 para 2 EGBGB, the law governing the assigned claim determines both its assignability and the order between competing assignees. |
**F) Italy**

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Appeal of Milan, 18 July 2000, IN <em>Banca, borsa e titoli di credito</em>, 2001, II, p. 689.</td>
<td>Holding that the law applicable to the sale and purchase of shares is governed by the Rome Convention.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Corte di Cassazione, 10 May 2005, n. 9761, in <em>Guida al Diritto</em>, 2005, n. 24, p. 79.</td>
<td>None</td>
</tr>
<tr>
<td>Corte di Cassazione, 21 January 2005, n. 1312.</td>
<td>None</td>
</tr>
<tr>
<td>Corte di Cassazione, 5 November 2009, n. 23463.</td>
<td>None</td>
</tr>
<tr>
<td>Corte di Cassazione, 2 Novembre 2010, n. 22280</td>
<td>None</td>
</tr>
<tr>
<td>Corte di Cassazione, 10 May 2005, n. 9761, in <em>Guida al Diritto</em>, 2005, n. 24, p. 79.</td>
<td>None</td>
</tr>
</tbody>
</table>
### G) Luxemburg

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA, 8 December 1959: Pas. 18, p. 84.</td>
<td>The effects of an assignment of claims against the debtor and against third parties are governed by the law of the place where the debtor of the relevant claim is domiciled.</td>
</tr>
<tr>
<td>CA, 1 October 1963: Pas. 19, p. 209.</td>
<td>The effects of an assignment of claims against the debtor and against third parties are governed by the law of the place where the debtor of the relevant claim is domiciled.</td>
</tr>
<tr>
<td>TA Luxemburg, 23 January 1989, n°21/1989 (35.628).</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>CA, 11 July 1995: Pas. 29, p. 411.</td>
<td>Contractual subrogation takes effect against third parties on the date of payment. Even if Art. 1690 of the Civil Code is not applicable, it is necessary to &quot;notify&quot; the subrogation to the debtor in order to prohibit payment to the assignor.</td>
</tr>
<tr>
<td>TA Luxemburg, 20 July 2001, n°573/2001 (49.020).</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>TA Luxemburg, 12 July 2002, n°567/2002 (50.947).</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>CA, 18 February 2009, n°32.861.</td>
<td>The effects of an assignment of claims against third parties are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>TA Luxemburg, 20 February 2009, n°60/2009 (112.905).</td>
<td>The effects of an assignment of claims against the debtor and third parties are governed by the law of the place where the debtor of the relevant claim is domiciled.</td>
</tr>
<tr>
<td>TA Luxemburg, 3 March 2010, n°69/2010 (116.902 &amp; 118.912).</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
</tbody>
</table>
### H) The Netherlands

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hoge Raad 16 May 1997, Nederlandse Jurisprudentie (NJ) 1998, no. 585 (Brandsma q.q./ Hansa Chemie AG).</strong></td>
<td>The conflicts rule of Article 12 (1) Rome Convention does not only apply to the obligational relationship between the assignor and the assignee, but also to the assignment’s proprietary aspects.</td>
</tr>
<tr>
<td><strong>Hoge Raad 11 June 1993, Nederlandse Jurisprudentie (NJ) 1993, no. 776 (Caravan Centrum Zundert et al/ Kreuznacher.</strong></td>
<td>The issue of whether an existing or future claim may be assigned in advance is governed by the proper law of the claim.</td>
</tr>
</tbody>
</table>
### I) Poland

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judgment of the Appellate Court in Gdansk of 14 April 1994, 1 ACr 178/94.</td>
<td>A debtor is not obliged to pay the assignee solely upon notice of the assignment by the assignee. Investigations need to be made by debtor.</td>
</tr>
<tr>
<td>Judgment of the Supreme Court of 27 January 2000, II CKN 702/98.</td>
<td>If a debtor has been notified about an assignment by an assignor and satisfies the debt, that debt ceases to exist irrespective of whether the underlying assignment agreement was invalid or ineffective, unless he knew as much.</td>
</tr>
<tr>
<td>Judgment of the Supreme Court of 29 January 2002, V CKN 695/00.</td>
<td>There are no exceptions to the rule that one may not validly transfer a right of a third person.</td>
</tr>
<tr>
<td>Judgment of the Supreme Court of 19 December 2003, III CK 80/02, OSNC 2005/1/17.</td>
<td>Parties to the assignment of a claim may not select the law governing the assignment of that claim (proprietary effect).</td>
</tr>
<tr>
<td>Judgment of the Supreme Court of 9 August 2005, IV CK 157/05.</td>
<td>Upon assignment of a future claim no transfer of such a claim takes place, as the claim does not exist at that time.</td>
</tr>
<tr>
<td>Judgment of the Appellate Court in Poznan of 10 January 2006, I Aca 1063/05, OSA 2007/1/1.</td>
<td>Assignment (proprietary effect) of a claim is always subject to the law governing that claim.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Judgment of the Supreme Court of 3 October 2007, IV CSK 160/07.</td>
<td>An agreement between a debtor and an assignor, amending a contract which is a basis for the assigned claim without the consent of an assignee, is effective against such an assignee provided that the debtor has not been notified, or has knowledge of that assignment.</td>
</tr>
<tr>
<td>Judgment of the Supreme Court of 14 November 2008, V CSK 95/08.</td>
<td>As a result of an assignment, an assignor ceases to be a creditor of an assigned claim and he may not transfer that claim or otherwise influence its existence or scope.</td>
</tr>
<tr>
<td>Judgment of the Supreme Court of 16 April 2009, I CSK 487/08.</td>
<td>Transfer of a claim which has not been precisely specified in the assignment agreement is effective if it is possible to determine such a claim on the basis of the legal relationship upon which the claim exists.</td>
</tr>
</tbody>
</table>
J) Spain
None

K) Sweden
None

L) UK (England)

<table>
<thead>
<tr>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Re Paramount Airways Ltd (No 2) [1993] Ch 223 (CA).</td>
<td>Avoidance rules contained in English insolvency law will be applied to a foreign transaction provided the party against whom avoidance is sought is sufficiently connected with England for it to be just and proper to make an order avoiding the transaction. One of the factors to be taken into account will be whether, under any relevant foreign law, the party has acquired a title free of any claims even if the insolvent had been adjudged bankrupt or wound up locally.</td>
</tr>
<tr>
<td>Macmillan Inc v Bishopsgate Investment Trust Plc (No 3) [1996] 1 WLR 387 (CA).</td>
<td>The transfer of shares is considered to fall outside the scope of Art. 12 of the Rome Convention, as Art. 1 (2)(e) seems to exclude the shares from the coverage of the Rome Convention.</td>
</tr>
<tr>
<td>Raiffeisen Zentralbank Oesterreich AG v Five Star Trading LLC [2001] QB 825</td>
<td>The question of whether an earlier assignment was effective in relation to a third party seeking a subsequent attachment of the assigned debt was contractual in nature and was therefore governed by Art. 12(2) Rome Convention. The relevant issue was, what steps, by way of notice or otherwise, were required to be taken to make an assignment effective without differentiating between effectiveness as between assignee, assignor and debtor on the one hand, and in relation to third</td>
</tr>
<tr>
<td>parties on the other hand.</td>
<td></td>
</tr>
</tbody>
</table>
2.4. NATIONAL CONFLICT OF LAWS SOLUTIONS FOR THE THIRD-PARTY EFFECTS OF ASSIGNMENT

The table below shows the laws applicable to the third-party effects of assignment in twelve EU Member States, as well as a number of third States.

Table 10. National Conflict of Laws Solutions

<table>
<thead>
<tr>
<th>Law Applicable to the Third-party Effects of Assignment</th>
<th>Member State</th>
<th>Sector specific rule</th>
<th>Reservations/ Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law of the assignor’s location (habitual residence)</td>
<td>Belgium</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Third State (USA)</td>
<td></td>
<td>For priority issues of promissory notes and chattel papers – law of the jurisdiction where those promissory notes and chattel papers are located.</td>
<td></td>
</tr>
<tr>
<td>Law of the underlying debt assigned</td>
<td>Luxemburg</td>
<td>For securitisation – the law of the jurisdiction where the assignor is established.</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td></td>
<td>Although there is a growing opinion that the law of the contract between assignor and assignee should apply</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Law</td>
<td>Description</td>
<td></td>
</tr>
<tr>
<td>------------------------------</td>
<td>---------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>For the assignment of intermediated (book-entry) securities or investments – the law of the location of the intermediary on whose books interest in dispute is credited.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>England</td>
<td></td>
<td>For the question of priority of competing assignments - the law chosen by the assignor and assignee for the second assignment should decide upon the protection of <em>bona fide</em> second acquirers.</td>
<td></td>
</tr>
<tr>
<td>Third States (Australia, Canada, Japan, the Russian Federation)</td>
<td></td>
<td>For the question of priority of competing assignments - the law chosen by the assignor and assignee for the second assignment should decide upon the protection of <em>bona fide</em> second acquirers.</td>
<td></td>
</tr>
<tr>
<td>The Netherlands</td>
<td></td>
<td>For the question of priority of competing assignments - the law chosen by the assignor and assignee for the second assignment should decide upon the protection of <em>bona fide</em> second acquirers.</td>
<td></td>
</tr>
<tr>
<td>Switzerland</td>
<td></td>
<td>For the question of priority of competing assignments - the law chosen by the assignor and assignee for the second assignment should decide upon the protection of <em>bona fide</em> second acquirers.</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Specific rules for some financial instruments – assignment becomes enforceable against third parties on the date indicated on the transfer deed when delivered, regardless of the law applicable.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Czech Republic</td>
<td></td>
<td>The debt is located at the place of its performance.</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td></td>
<td>The location of the debt is the place where the register recording the holder’s/beneficiary’s interest in the securities is located, or the place where the chattel in which security interest is located.</td>
<td></td>
</tr>
<tr>
<td>No clear solution</td>
<td>Finland</td>
<td>Neither case law, nor the doctrine have favoured any particular law. Suggestions are: the law of the domicile of the assignor; 2) the law of the centre of main interests of the debtor (in parallel with the Insolvency Regulation), as it is the <em>lex rei sitae</em> of the debt.</td>
<td></td>
</tr>
</tbody>
</table>
PART 3: EMPIRICAL ANALYSIS

1. INTRODUCTION

For the purpose of collecting empirical data on the third-party effects of assignment and the need for a new uniform conflict of laws provision in the area, BIICL has drafted a comprehensive questionnaire and contacted potentially interested stakeholders.

The questionnaire has been distributed by the trade bodies participating in this study: to 1654 contacts in 43 countries via the network of the International Swaps and Derivatives Association (ISDA); to the 43 members of the Asset Based Finance Association (ABFA); to the network of the EU Federation for the Factoring and Commercial Finance Industry (EUF); and to the network of the Association for Financial Markets in Europe (AFME).

Moreover, stakeholders from all 27 Member States of the European Union have received the questionnaire via e-mail or letter through BIICL. The number of interested persons or national authorities contacted from each Member State varied and reached up to 60, considering the volume of transactions (including financial) involving assignments.

Additionally, EU bodies and EU-wide organisations, as well as international organisations have been included in the mailing list.

The questionnaire has also been posted on several relevant blogs on private international law (including conflictoflaws.net, which has several thousand subscribers via e-mail) and on European law and policy, with the aim of making it accessible to the widest possible number of interested persons. The EU Commission has also published it through the European e-Justice Portal.

Considering the legal complexity of the subject matter of this study, BIICL has also contacted renowned academics specialising in the field of the conflict of laws.

The empirical research has covered a wide range of sectors, from securitisation, factoring and banking to the economic think-tanks, law firms and research institutes (the complete list of contacted stakeholders is presented in Annex 1). Most stakeholders have been contacted at least twice with the request of contributing to this study.
2. QUESTIONNAIRE

# Cross-Border Assignment Questionnaire

## I. INTRODUCTION AND GUIDANCE NOTES

### 1. Objective

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

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

### 2. Definitions

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

- “Assignment“ includes outright assignments or other transfers, assignments or transfers by way of security and pledges or other security rights, and “assignor” and “assignee” should be understood accordingly.
“Debts” includes claims and any other right arising out of or in connection with a contract, but not interests in land or goods in physical form, and “debtor” should be understood accordingly.

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

3. **What we ask you to do**

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

Part 1: YOUR BUSINESS

1. Business Details

1.1. Individual Respondent’s Name (not compulsory):

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

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

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

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

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

2. Financial Information

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

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

3. **Legal Costs per Transaction**

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

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

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

4. **Other**

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

**PART 2: LEGAL ISSUES**

5. **Legal Due Diligence**

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

5.1. Analysis of each underlying debt individually  yes □  no □
If yes, please specify which elements you verify (e.g. assignability, legal enforceability against debtor, effectiveness of assignment against third parties under law applicable to debt)

5.2. Analysis of a selection of underlying debts  yes ☐ no ☐
If yes, please specify the basis upon which you choose the debts to be analysed and specify which elements you verify (e.g. assignability, legal enforceability against debtor, effectiveness of assignment against third parties under law applicable to debt)

5.3. Analysis of enforceability of assignment against assignor  yes ☐ no ☐
If yes, please specify which types of enquiries you undertake

5.4. Analysis of enforceability of assignment against third parties  yes ☐ no ☐
If yes, please specify which categories of third parties are of concern to you and which types of enquiries you undertake

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

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

If “Yes”:
- How frequently do difficulties of these kinds arise in practice?

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

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

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

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


7.2. Have you ever encountered problems in practice in identifying which country’s law would be applied by an EU court to determine any dispute regarding the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element? yes ☐ no ☐

If “Yes”:
- How frequently do difficulties of these kinds arise in practice?


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


- Please give short particulars of as many situations as possible in which these problems have arisen (including whether you were able to overcome the problems and, if so, how)
7.3. Are you aware of the rules contained in Article 14 of Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), or of the rules contained in its predecessor Article 12 of the 1980 Rome Convention, specifying the law applicable to assignments? yes □ no □

If “Yes”:
- Do you (or your legal advisers) apply those rules to your transactions with a cross-border element? yes □ no □
- Do you (or your legal advisers) find those rules are useful in practice? yes □ no □

Please give short reasons for your answer

- In particular, do you (or your legal advisers) apply those rules in determining questions regarding the effectiveness of assignments against persons other than the assignee and the debtor in transactions with a cross-border element? yes □ no □

Please explain what effect you consider Art. 14 (or Art. 12) to have to these situations

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

PART 3: POLICY OPTIONS
8. **A single common rule or specific rules per sector?**

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

- [ ] yes  
- [ ] no  

*Please give short reasons for your answer*

If “Yes”, what rule would you favour:

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

*Please give short reasons for your answer*

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

Please give short reasons for your answer


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

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


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


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

<table>
<thead>
<tr>
<th>9. Impact of policy options on your individual business</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.1. If the EU were to adopt the rule that you favour, would this be likely to lead to an increase the number or value of transactions which you are able to undertake in your business? yes ☐ no ☐ Please give reasons</td>
</tr>
<tr>
<td>9.2. If the EU were to adopt the rule that you favour, would this be likely to lead to a reduction in your legal due diligence costs and/or an increase the profitability of your business? yes ☐ no ☐ Please give reasons</td>
</tr>
<tr>
<td>9.3. If the EU were to adopt the rule that you favour, would this lead you to change your business model? yes ☐ no ☐ Please give reasons</td>
</tr>
</tbody>
</table>
9.4.. Do you have any other comments regarding policy issues in this area?
3. ANSWERS OF STAKEHOLDERS – SUMMARY

3.1. INTRODUCTION

The reactions to the questionnaire have not been uniform. Some of the contacted persons and authorities have responded within the deadline, with exhaustive answers to all questions; others have only answered some questions; some have responded that they have encountered no problems in the area; the majority of contacted stakeholders did not react or even deleted our e-mail without reading it. Also, it has been reported from the trade bodies that their members currently have prior concerns to deal with other than the issue of cross-border assignment.

Despite the fact that the empirical data collected below cannot be considered to be exhaustive, it nevertheless represents a considerable part of the interested stakeholders.

The summaries in the table below are a short analysis of each questionnaire, focusing on the most relevant issues, with a special focus on uncertainty regarding the applicable law, the need to change Art. 14 Rome I Regulation and the suggested solution of the responding market sector.

The filled in questionnaires can be consulted in full length in Annex 2.
3.2. ANSWERS OF STAKEHOLDERS (SECTOR-SPECIFIC)

**Factoring**

<table>
<thead>
<tr>
<th>Business</th>
<th>Member State</th>
<th>Turnover and Cross-Border Transactions</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
<th>Legal Due Diligence</th>
<th>Problems encountered in securing the effectiveness of Assignments against Third Parties</th>
<th>Categories of Third Parties</th>
<th>Uncertainty Regarding Applicable Law</th>
<th>Need to Change Art. 14 Rome I</th>
<th>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring</td>
<td>Germany</td>
<td>30 bn € 30% Cross-border</td>
<td>15,000€</td>
<td>Only enforceability of assignment</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule, Law of the assignor’s habitual residence</td>
<td>Lower transaction costs, increased legal certainty, increase in transactions</td>
</tr>
<tr>
<td>Factoring</td>
<td>UK</td>
<td>Over 50 bn £ 15,000-20,000€</td>
<td>Enforceability of assignment and selection of underlying debts</td>
<td>No as limited cross-border transaction</td>
<td>Yes (Apply in practice law applicable to contractual relationship)</td>
<td>Yes</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Yes</td>
<td>Single Rule, Law of assignor’s habitual residence</td>
<td>Lower transaction costs, lower risks, increased legal certainty,</td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categori es of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
</tr>
<tr>
<td>----------</td>
<td>--------------</td>
<td>--------------------------------------</td>
<td>--------------------------------------------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td>Factoring</td>
<td>Germany</td>
<td>12 bn € 30% Cross-border</td>
<td>20,000 C</td>
<td>Enforceability of assignment and selection of underlying debts</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule of assignor’s habitual residence</td>
<td>Reduction of legal due diligence costs, increase in transactions</td>
</tr>
<tr>
<td>Factoring</td>
<td>UK</td>
<td></td>
<td></td>
<td>Enforceability of assignment and selection of underlying debts</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Not aware of Art. 14 Rome I</td>
<td>Single Rule of the underlying debt assigned</td>
<td>Increased legal certainty</td>
</tr>
<tr>
<td>Factoring</td>
<td>UK</td>
<td>Limited number of cross-border transactions but high value transactions (50-300 mn €), 4 assignments</td>
<td>350,000-1 mn £</td>
<td>Each underlying debt individually, Enforceability of assignment</td>
<td>Yes</td>
<td>Supplier pool, creditor s, administrators</td>
<td>Yes</td>
<td>Yes</td>
<td>Law chosen by assignor and assignee</td>
<td>Ease for execution, time and cost saving, significant reduction of legal due diligence costs, transaction volume would</td>
</tr>
<tr>
<td>Factoring EU Federation for the Factoring and Commercial Finance Industry (EUF)</td>
<td>Representing all EU Member States</td>
<td>986 bn € 15%</td>
<td>Yes</td>
<td>Yes</td>
<td>Single rule. Law of the assignor’s habitual residence, as it is predictable, provides a single law for multiple assignments, and is in line with 2001 UN Convention on the Assignment of Receivables in International Trade.</td>
<td>Increase in the number of transactions or their value</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
</tr>
<tr>
<td>----------</td>
<td>--------------</td>
<td>----------------------------------------</td>
<td>-----------------------------------------------</td>
<td>-------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>----------------------------------------</td>
<td>-----------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td>Factoring</td>
<td>Greece</td>
<td>3 bn 380 mn</td>
<td>1000 €</td>
<td>Assignability, legal enforceability against debtor</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule: Law of the assignor’s habitual residence</td>
<td>Decrease of due diligence costs, to some extent the reform may lead to the change of business model</td>
</tr>
<tr>
<td>Factoring</td>
<td>Sweden</td>
<td>5000 €</td>
<td>Enforceability against the assignor, third parties</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule: Law of the assignor’s habitual residence</td>
<td>Reduction of risks and costs of due diligence</td>
<td></td>
</tr>
</tbody>
</table>
## Securitisation

<table>
<thead>
<tr>
<th>Business</th>
<th>Member State</th>
<th>Turnover and Cross-Border Transactions</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
<th>Legal Due Diligence</th>
<th>Problems encountered in securing the effectiveness of Assignments against Third Parties</th>
<th>Categories of Third Parties</th>
<th>Uncertainty Regarding Applicable Law</th>
<th>Need to Change Art. 14 Rome I</th>
<th>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Securitisation</td>
<td>France</td>
<td>50% - cross-border transactions</td>
<td>Assignability of the claim, formalities to be performed, enforceability against third parties, proprietary effects of the assignment, the transfer of the security interests and other ancillary rights of the claims</td>
<td>Yes</td>
<td>All third parties</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule (The law of the assignor’s habitual residence)</td>
<td>Reduction of costs and time of legal due diligence</td>
<td></td>
</tr>
<tr>
<td>Securitisation, secured corporate transactions</td>
<td>UK</td>
<td>60% - cross-border transactions</td>
<td>Assignability and enforceability of the underlying debt</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Sector-specific rule (Any conflict of law rule flexible enough to deal with particular)</td>
<td>Reduction of costs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Securitisation, legal profession</td>
<td>UK</td>
<td>Varies</td>
<td>Enforceability against assignor (formal and material validity of the assignment), against third parties</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Single, but not opposing a modified rule for factoring transactions. Law applicable to the underlying debt assigned. The law of assignor's habitual residence is not always clear due to the imprecision of the concept of habitual residence under art. 19 of the</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rome Regulation and the difficulties related to successive assignments and possible existence of multiple assignors involved in one transaction.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Selection of the law of the assignor’s habitual residence will result in increased due diligence costs.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountere d in securing the effectivene ss of Assignment s against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------</td>
<td>----------------------------------------</td>
<td>--------------------------------------------------</td>
<td>--------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>--------------------------------------</td>
<td>-----------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Consumer loans, mortgage loans</td>
<td>Luxemburg</td>
<td>19,240-19,660 € 20% cross-border transactions</td>
<td>Presence of printed documents signed by the debtor, effectiveness, assignability, legal enforceability, case of excessive debt, presence of working relationship</td>
<td>Yes</td>
<td>Lawyers, judicial mandatories</td>
<td>No</td>
<td>Yes</td>
<td>Single rule</td>
<td>The law applicable to the underlying debt assigned; the law of creditor's habitual residence</td>
<td></td>
</tr>
</tbody>
</table>
## Guarantees

<p>| Business Assignment of proceeds under letters of credit or guarantees | Member State | Turnover and Cross-Border Transactions | Average Legal Costs for Cross-Border Transactions | Legal Due Diligence | Problems encountered in securing the effectiveness of Assignments against Third Parties | Categories of Third Parties | Uncertainty Regarding Applicable Law | Need to Change Art. 14 Rome I | Suggested Solution (Single Rule or Sector-Specific Rule, Which Law) | Impact of Uniform EU Solution on Business |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Malta | 44 mn $ | 10% cross-border transactions | 2000 – 5000 $ | Depends on the transaction type | No | | | Yes | Single rule Apply the law chosen by assignor and assignee | It would generally facilitate the product offering in the EU region not particularly to our business as we are not very active in the EU. |</p>
<table>
<thead>
<tr>
<th>Business</th>
<th>Member State</th>
<th>Turnover and Cross-Border Transactions</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
<th>Legal Due Diligence</th>
<th>Problems encountered in securing the effectiveness of Assignments against Third Parties</th>
<th>Categories of Third Parties</th>
<th>Uncertainty Regarding Applicable Law</th>
<th>Need to Change Art. 14 Rome I</th>
<th>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insurance</td>
<td>Germany</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
**More than one business sector**

<table>
<thead>
<tr>
<th>Business Services, securitisation, other secured transactions</th>
<th>Member State</th>
<th>Turnover and Cross-Border Transactions</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
<th>Legal Due Diligence Problems encountered in securing the effectiveness of Assignments against Third Parties</th>
<th>Categories of Third Parties</th>
<th>Uncertainty Regarding Applicable Law</th>
<th>Need to Change Art. 14 Rome I</th>
<th>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Netherlands</td>
<td>50-75%</td>
<td>25,000 - 300,000 €</td>
<td>Debts that need to be analysed are selected on the basis of the value of contracts and reviewing assignor’s standard form product documentation Local counsel checks perfection requirements for an assignment. Elements to be verified: assignability, legal enforceability against debtor, transfer of</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Single rule. Law chosen by assignor and assignee, as it provides efficiency for transactions, and establishes a single law to be applied to multiple claims.</td>
<td>Single rule. Status quo for legal due diligence. Potentially, would lead to the increase of number of transactions or their value.</td>
<td></td>
</tr>
</tbody>
</table>
rights.
<table>
<thead>
<tr>
<th>Business Participation, Securitisation, Other secured transaction, Legal profession</th>
<th>Member State</th>
<th>Turnover and Cross-Border Transactions</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
<th>Legal Due Diligence Problems encountered in securing the effectiveness of Assignments against Third Parties</th>
<th>Categories of Third Parties</th>
<th>Uncertainty Regarding Applicable Law</th>
<th>Need to Change Art. 14 Rome I</th>
<th>Suggested Solution (Single Rule or Sector Specific Rule, Which Law)</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tods Murray LLP</td>
<td>UK, Scotland</td>
<td>5-40,000 £</td>
<td>Only when small number of large value receivables/contracts involved rather than pool of similar receivables. All aspects tend to be analysed.</td>
<td>No as due diligence is done</td>
<td>Insolvency and attaching creditors</td>
<td>Yes</td>
<td>Yes</td>
<td>Single rule: The uncertainty caused by a special rule for a special transaction type cannot be justified by practical advantages for a given transaction type. The law applicable to the underlying debt assigned</td>
<td>Predictability, legal stability, easy to find, for due diligence purposes that law will be anyway consulted as it would be applicable under the Art. 14. Currently operates on the basis of the application of the rule favoured.</td>
</tr>
<tr>
<td>Factoring, securitisation, other secured transactions, legal profession</td>
<td>France</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Single</td>
<td>Minimised costs for due diligence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>French Banking Federation (representing 430 banks)</td>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business and Cross-Border Transactions</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>--------------</td>
<td>---------------------------------------</td>
<td>--------------------------------------------------</td>
<td>--------------------</td>
<td>-----------------------------------------------------------------</td>
<td>----------------------------</td>
<td>-------------------------------------</td>
<td>-----------------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Legal profession, secured lending and securitisation</td>
<td>Belgium</td>
<td>20,000 - 100,000 €</td>
<td>Assignability, governing law, effectiveness against third parties, in most cases based on general terms and conditions</td>
<td>Yes, regularly</td>
<td>Creditors of assignor</td>
<td>Yes, regularly</td>
<td>Yes</td>
<td>Single rule</td>
<td>The law of the assignor’s habitual residence</td>
</tr>
<tr>
<td>Factoring, securitisation, other secured transactions (syndicated loans)</td>
<td>Spain</td>
<td>As to factoring, our institution belongs to an institutional framework (GRIF) which provides a framework to avoid the need for due diligence of underlying debts. As regards syndicated loans, usual practice is to follow the law</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Sector-specific rules</td>
<td>General rule: Law of the underlying debt; for factoring and Securitisati on assignor’s law of habitual residence.</td>
<td>No significant impact on the company</td>
<td></td>
</tr>
<tr>
<td>applicable to the syndicated loan to try to minimise problems.</td>
<td>coincide with applicable law in insolvency proceedings</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
</tr>
<tr>
<td>---------------------</td>
<td>--------------</td>
<td>----------------------------------------</td>
<td>---------------------------------------------------</td>
<td>---------------------</td>
<td>-----------------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>----------------------------------------</td>
<td>---------------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Factoring, securitisation, legal profession, other secured transactions</td>
<td>France</td>
<td></td>
<td></td>
<td></td>
<td>Assignability of the claim(s), legal enforceability against debtors, law applicable to the assignor’s bankruptcy, the assignee’s capacity, other regulatory burdens and effectiveness of the assignment against third parties.</td>
<td>Yes</td>
<td>Assignor’s creditors, the receiver of the assignor and of the assigned debtor, and other potential assignees.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Business Activities</td>
<td>Member States</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
</tr>
<tr>
<td>--------------------------------------------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>----------------------------------------</td>
<td>---------------------------------------------------</td>
<td>--------------------</td>
<td>---------------------------------------------------------------------------------------</td>
<td>---------------------------</td>
<td>--------------------------------------</td>
<td>-------------------------------</td>
<td>---------------------------------------------------------------</td>
</tr>
<tr>
<td>Factoring, securitisation, other secured transactions, legal profession, other</td>
<td>France, other jurisdictions</td>
<td>20% - 99% for cross-border transactions</td>
<td>100,000 €</td>
<td>Yes</td>
<td>Assignability of each receivable, the formalities applicable to the assignment, the law of the assigned debt, the enforceability of the assignment in case of bankruptcy of the assignor.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Single</td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>--------------</td>
<td>----------------------------------------</td>
<td>--------------------------------------------------</td>
<td>---------------------</td>
<td>----------------------------------------</td>
<td>-----------------------------</td>
<td>-----------------------------------</td>
<td>------------------------</td>
<td>----------------------------------------------------------------</td>
</tr>
<tr>
<td>Factoring, securitisation, other secured transactions, legal profession</td>
<td>Germany</td>
<td></td>
<td></td>
<td>Only assignability, as relying on warranties.</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Single Rule</td>
</tr>
<tr>
<td>Invoice discounting and asset based lending institution.</td>
<td>UK, Belgium, France, Germany, Ireland, The Netherlands, Spain</td>
<td>41 bn 2,5%</td>
<td>Varies considerably with number of jurisdictions</td>
<td>Analysis of enforceability includes: 1. perfection requirements, 2. enforceability of the assignment against debtors, 3. third-party rights, 4. possible conflicts of law,</td>
<td>Yes, infrequently, but potentially resulting in great loss.</td>
<td>Principally second assignees, as well as suppliers to the assignor, other creditors and insolvency administrators</td>
<td>Yes</td>
<td>Yes. Need to harmonise rules applicable to cross-border assignments throughout the EU.</td>
<td>Single rule. Law of the assignor’s habitual residence (certainty, contract between assignor and assignee should not modify the relationship between initial debtor and creditor)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>5. insolvency laws.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business and Turnover and Cross-Border Transactions</td>
<td>Member State</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>--------------</td>
<td>--------------------------------------------------</td>
<td>---------------------</td>
<td>-----------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>-----------------------------------</td>
<td>-------------------------------</td>
<td>-------------------------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Factoring, Structured trade finance transactions including pre-export and advance payment financing and invoice discounting</td>
<td>UK</td>
<td>£20,000</td>
<td>Legal due diligence includes: Assignability, legal enforceability against debtor, effectiveness of assignment against third parties under law applicable to debt, the value of the debt being assigned, the ability of the debtor to perform under the contract being assigned, existence of any insurance, the ability to claim set off,</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Single Rule The law applicable to the underlying debt assigned.</td>
<td>Less due diligence costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
<td>------------------</td>
<td></td>
</tr>
<tr>
<td><strong>risks of</strong></td>
<td><strong>counterclaim</strong></td>
<td><strong>and deduction.</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
</tr>
<tr>
<td>----------</td>
<td>--------------</td>
<td>----------------------------------------</td>
<td>--------------------------------------------------</td>
<td>---------------------</td>
<td>-----------------------------------------------------------------</td>
<td>--------------------------</td>
<td>-----------------------------------</td>
<td>----------------------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td>Factoring, other secured transactions, asset-based lending Commercial Finance Association (representing 260 members)</td>
<td>United States of America</td>
<td>More than 400 bn $</td>
<td>Assignability, legal enforceability against the debtor, effectiveness of the assignment against third parties under law applicable to debt</td>
<td>Yes</td>
<td>Insolvency administrator, another funding company</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule</td>
<td>The law of the assignor’s habitual residence.</td>
</tr>
<tr>
<td>Securitisation, guarantees European Investment Fund (EIF)</td>
<td>EU multinational institution</td>
<td></td>
<td>Assignability, legal enforceability against debtor, clawback risk in case of insolvency of the assignor</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Single rule</td>
<td>Law chosen by the assignor and assignee, as it is predictable and cost-efficient</td>
<td></td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categorisation of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
</tr>
<tr>
<td>----------</td>
<td>--------------</td>
<td>----------------------------------------</td>
<td>-----------------------------------------------</td>
<td>-------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>-----------------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Factoring, Securitisation, Other secured transactions, Legal Profession</td>
<td>UK</td>
<td>Varying transaction costs pursuant to type of involved transaction</td>
<td>Depends on transaction. For Cash CLO or securitisation of small pool of debts – analysis of each underlying debt. Otherwise (e.g. securitisation of large pool of debts) selection of underlying debts. <em>Analysis of enforceability: counsel in the jurisdiction of governing law of assignment agreement</em></td>
<td>No</td>
<td>Yes (multiple legal analysis required, potential for conflict)</td>
<td>Specific problems in insolvency cases</td>
<td>Art. 14 in combination with Recital 38 of Rome I produces a sensible outcome for the market. Recital 38 provides for the proprietary aspects of an assignment as between assignor and assignee to also be decided according to the applicable law of the assignment. Application of Art. 14 also to third party issue.</td>
<td>Status quo is acceptable</td>
<td>Any change introducing legal uncertainty would not be welcomed. If a rule were to be introduced, then a single rule based on the law applicable to the underlying debt assigned. This solution is clear, practicable</td>
</tr>
</tbody>
</table>
Scenario has rarely arisen in practice, however.

<table>
<thead>
<tr>
<th>Scenario has rarely arisen in practice, however.</th>
<th>and certain. Such a rule would create consistency with Art. 14 (2) Rome I Regulation and the law applicable to successive assignment; also, the right to choose the applicable law should not be excluded.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 2 (g) (defining the situs of assets) of the Insolvency Regulation (EC) No. 1346/2000 should be made consistent with the provisions of the Rome I Regulation.</td>
<td>create uncertainty.</td>
</tr>
</tbody>
</table>
This would enable consistent conflicts rules as between assignees and the original debtor, whether prior to or in insolvency.
<table>
<thead>
<tr>
<th>Business</th>
<th>Member State</th>
<th>Turnover and Cross-Border Transactions</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
<th>Legal Due Diligence</th>
<th>Problems encountered in securing the effectiveness of Assignments against Third Parties</th>
<th>Categories of Third Parties</th>
<th>Uncertainty Regarding Applicable Law</th>
<th>Need to Change Art. 14 Rome I</th>
<th>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factoring, securitisation, other secured transactions</td>
<td>UK</td>
<td>30 bn £</td>
<td>10,000 - 50,000 £</td>
<td>Yes</td>
<td>Legal enforceability against debtor and third parties, remedies, language, credit risk (debtor), third party rights and cost of collection/recovery</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Single rule Law applicable to the underlying debt assigned, next best is the law chosen by the assignor and assignee</td>
<td>The industry will grow if the policy is efficient</td>
</tr>
<tr>
<td>Business</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence Problems encountered in securing the effectiveness of Assignment against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
<td></td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>--------------</td>
<td>----------------------------------------</td>
<td>---------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>-------------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------------------------------------------------------------</td>
<td>---------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Securitisation, secured financings, acquisition financings and derivatives, legal profession</td>
<td>UK</td>
<td>Varies from tens of thousand to hundreds of thousand of pounds</td>
<td>Legal enforceability against debtor and third parties, No</td>
<td>No Governmental and revenue authorities, other creditors of the assignor No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Single rule. Assessing which transactions fall into which category would increase the complexity and associated costs of financing transactions. <em>Status quo preferred</em></td>
<td>In case the EU decides to legislate, the law applicable to the</td>
<td></td>
</tr>
</tbody>
</table>
underlying debt assigned is favoured, though it is more preferable to retain flexibility and contractual choice.
### Other (no indication of a specific linkage with a particular market sector/no inherent linkage with a particular market sector)

<table>
<thead>
<tr>
<th>Business</th>
<th>Member State</th>
<th>Turnover and Cross-Border Transactions</th>
<th>Average Legal Costs for Cross-Border Transactions</th>
<th>Legal Due Diligence</th>
<th>Problems encountered in securing the effectiveness of Assignments against Third Parties</th>
<th>Categories of Third Parties</th>
<th>Uncertainty Regarding Applicable Law</th>
<th>Need to Change Art. 14 Rome I</th>
<th>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</th>
<th>Impact of Uniform EU Solution on Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Higher Education</td>
<td>Spain</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Single Law of the assignor’s habitual residence, but need to reach consensus on the meaning of “habitual residence”</td>
<td></td>
</tr>
<tr>
<td>Scientific institute</td>
<td>Germany</td>
<td>960,000 €</td>
<td>25% cross-border transactions</td>
<td>Yes</td>
<td>Governmental organisations</td>
<td>No</td>
<td>No</td>
<td>Status quo acceptable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business Member State</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence Problems Encountered in Securing the Effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>-----------------------------------</td>
<td>-------------------------</td>
<td>-----------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Higher Education, Newcastle University Dr. Orkun Akseli</td>
<td>UK</td>
<td>Yes, when third party rights are involved and when there is a priority dispute</td>
<td></td>
<td></td>
<td></td>
<td>Single Rule The law of the assignor’s habitual residence, which is the law of the assignor’s place of business, understood as the centre of administration This is also the approach followed by the UN Convention on the</td>
<td>Amendment will foster predictability and certainty, protects the rights of all parties, Has the potential to reduce the cost of credit based on the above two reasons, Is useful in the assignment of future and bulk receivables.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assignment of Receivables and the UNCITRAL Legislative Guide on Secured Transactions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
<td>----------------------------------------</td>
<td>-----------------------------------------------</td>
<td>--------------------</td>
<td>---------------------------------------------</td>
<td>-----------------</td>
<td>-----------------------------------</td>
<td>----------------</td>
<td>---------------------------------</td>
<td>---------------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Legal profession</strong></td>
<td><strong>France</strong></td>
<td>From 5000-7000 € for straightforward matters to several thousand euros for complex matters</td>
<td>Depends on the type of transaction</td>
<td>No</td>
<td>Other creditors of the company whose assets are secured/assigned/ transferred</td>
<td>Yes, rarely</td>
<td>Yes</td>
<td>Single</td>
<td>The amendment would facilitate transaction processes</td>
<td></td>
</tr>
<tr>
<td><strong>Legal Profession</strong></td>
<td><strong>Mayer Brown</strong></td>
<td>Global law firm, with subsidiaries in Europe</td>
<td>Yes</td>
<td>Liquidator of assignor (not considered as a third-party when standing in the shoes of the assignor, unless the liquidator of the assignor is using the additional</td>
<td>Yes</td>
<td>Yes</td>
<td>For the priority of assignments – law of the assignor’s habitual residence (aligned to the EC Insolvency Regulation), validity of the assignment as regards</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>third parties</td>
<td>should be governed by the law governing the assignment.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>unsecured creditor of assignor</td>
<td>rights given by the legislation)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business and Technical Assistance Activities, Including Research, Teaching and Writing</td>
<td>Member State</td>
<td>Turnover and Cross-Border Transactions</td>
<td>Average Legal Costs for Cross-Border Transactions</td>
<td>Legal Due Diligence</td>
<td>Problems encountered in securing the effectiveness of Assignments against Third Parties</td>
<td>Categories of Third Parties</td>
<td>Uncertainty Regarding Applicable Law</td>
<td>Need to Change Art. 14 Rome I</td>
<td>Suggested Solution (Single Rule or Sector-Specific Rule, Which Law)</td>
<td>Impact of Uniform EU Solution on Business</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Legislative and technical assistance activities, including research, teaching and writing Academic</td>
<td>Austria</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule</td>
<td>Law of the assignor’s habitual residence. This law provides certainty for insolvency scenarios.</td>
<td>The solution will provide certainty and reduce due diligence costs</td>
<td>Yes</td>
<td>Yes</td>
<td>Single Rule</td>
<td>Law of the underlying debt assigned, subject to special laws such as insolvency.</td>
</tr>
<tr>
<td>Legal profession German Bar Association (representing 68,000 lawyers)</td>
<td>Germany</td>
<td>Yes</td>
<td>Competing assignees</td>
<td>Yes</td>
<td>Single Rule</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
PART 4: LEGAL ANALYSIS

1. INTRODUCTION

The legal study firstly traces the legislative history of the Rome Convention and the Rome I Regulation on the specific issue of assignment, and in particular on the proprietary aspects of assignment. It includes suggestions of conflict rules that have been made during the legislative process of the Rome I Regulation (see under “2. The Proprietary Aspects of Assignment: From the Rome Convention to the Rome I Regulation”).

It furthermore pictures the interaction of a rule including the proprietary aspects of assignment with other EU instruments and international conventions (see under “3. Interaction with International and EU Instruments”).

The core of the legal study consists of 12 national reports demonstrating the current national choice of law rules on proprietary effects of an assignment and relevant case law from Member States with various legal traditions (Belgium, Czech Republic, Finland, France, Germany, Italy, Luxemburg, The Netherlands, Poland, Spain, Sweden, United Kingdom). The legal study also refers to substantive law issues as far as considered relevant in Part I.5 of the COM document JLS/2010/JCIV/PR/0007/E4 (including, in particular: the assignment of future claims, formal requirements, notification issues, specific legislation on securitisation, the legal position of the involved parties, especially of second assignees in good faith), see under “4. National Reports”.

The legal analysis concludes with the presentation of the conflict of laws solutions of a selection of economically important non EU Member States (Australia, Canada, Japan, Russia, Switzerland, the United States), see under “4. National Reports, M. Third States’ Solutions”.
2. THE PROPRIETARY ASPECTS OF ASSIGNMENT: FROM THE ROME CONVENTION TO THE ROME I REGULATION

2.1. THE ROME CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (1980)

2.1.1. Legislative History

In 1968, Belgium, the Netherlands and Luxemburg initiated the process of collaboration for the unification of private international law and codification of conflict of laws rules within the European Community to eliminate the inconveniences arising from the diversity of national rules, notably in the field of contract law, resulting in 1972 in a draft convention on the law applicable to contractual and non-contractual obligations (containing, in Art. 16, provisions concerning the law applicable to assignment). In May 1979 a draft Convention on the Law Applicable to Contractual Obligations was sent to the Council. On 16 January 1980 an ad hoc working party was set up to finalize the Convention text in light of the comments made by Member States' Governments and to consider whether, and if so within what limits, the Court of Justice of the European Communities should be given jurisdiction to interpret the Convention, which was a subject of great controversy. The Convention was signed on 19 June 1980 by Belgium, Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxemburg, the Netherlands and the United Kingdom. Subsequently, new Member States adhered to the Convention on joining the EU. In December 1988, two Protocols on the interpretation of the Convention were signed. While the first Protocol defined the ECJ’s scope of jurisdiction, the second Protocol conferred powers of interpretation to the Court. As the entry into force of the two Protocols was interrelated and the second Protocol was ratified by Belgium on 5 May 2004 only, ECJ case law on the Rome Convention is scarce.

2.1.2. Assignment under the Rome Convention

Art. 12(1) of the Rome Convention provided that the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person (the debtor) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.
The Giuliano-Lagarde Report on the Convention Applicable to Contractual Obligations construed the expression “mutual obligations” as meaning the “relationship” between the parties.\textsuperscript{164}

According to Art. 12(2) of the Rome Convention, the law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

The Giuliano-Lagarde Report also explained that the words “conditions under which the assignment can be invoked” cover the conditions of transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor.\textsuperscript{165}

It may also be noted that the Giuliano-Lagarde Report provides that Art. 9 of the Convention (formal validity of acts) does not concern the rules as to “where an act is to be valid against third parties, for example the need in English law for a notice of a statutory assignment of a chose in action.”

Art. 12 Rome Convention did not specifically address the third party effects of an assignment. Article 16 of the EEC draft convention on the law applicable to contractual and non-contractual obligations\textsuperscript{166} had originally subjected the “conditions under which the assignment may be invoked against ... third parties” to the law of the claim assigned, but this provision was not carried forward into the Convention in its final form.

2.2. THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS

2.2.1. Legislative History

In 2003 the European Commission issued a Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.\textsuperscript{167}

The Green Paper sought to modernise some conflict rules of the Convention. In particular, for present purposes, it acknowledged the absence of any rules

\textsuperscript{164} Official Journal C 282, 31/10/1980, p. 34.
\textsuperscript{165} Ibid., pp. 34–35.
\textsuperscript{167} COM(2002) 654 final.
on the proprietary effects of the assignment and suggested a number of possible solutions:

1) law of the contract of assignment,

2) law of the original claim,

3) law of the assignment debtor,

4) law of the assignor’s residence,

5) a material rule giving priority to whoever brings the first action while taking into account the good or bad faith of the competing creditors.\footnote{COM (2002) 650 final, pp. 40-41.}

The Green Paper also referred to the potential overlap between Art. 12 (assignment) and Art. 13 (subrogation) of the Rome Convention.

Following the responses to the Green Paper, the European Commission prepared its Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).\footnote{COM (2005) 650 final, 2005/0261 (COD).} Art. 13 of that Proposal, concerning the third party effects of assignment, provided:

“\(\text{The question whether the assignment or subrogation may be relied on against third parties shall be governed by the law of the country in which the assignor or the author of the subrogation has his habitual residence at the material time.}\)"

In its accompanying explanatory memorandum, the Commission explained (p. 8):

“Voluntary assignment and contractual subrogation perform a similar economic function and are now covered by a single Article. Paragraph 3 introduces a new conflict rule relating to the possibility of pleading an assignment of a claim against a third party; the solution is the one recommended by the great majority of respondents, which was also adopted in the 2001 UNCITRAL Convention on the assignment of receivables in international trade.”

The Opinion of the European Economic and Social Committee approved this aspect of the Commission’s proposal on the basis that the “rule rightly
follows the solution adopted by the United Nations Convention on the assignment of receivables in international trade of 12 December 2001”. 170

Initially, the European Parliament also endorsed the proposal of the European Commission as to the issue of third-party effects of the assignment, specifying that the relevant time for the question of habitual residence of the assignor is the time of the assignment. 171

However, this solution was not accepted in the Council. 172 In 2007 the German Presidency and incoming Portuguese Presidency of the Council of the European Union tabled two options for Art. 13:

1. third-party effects of the assignment should not be regulated by the Rome I Regulation,

2. if the solution favoured by the Commission (application of the law of the assignor’s habitual residence) is to be retained, it should be reflected whether the scope of this paragraph should be more restricted (as is the UNCITRAL Convention’s scope in this respect, see, in particular, Article 4(2) of that Convention). (e.g. funds held in an account (bank deposits etc.) and claims related to contracts concluded at a financial market could be excluded). 173

In answer to this proposal, the European Parliament deleted the paragraph on third-party effects of assignment from the text of the proposal of the Rome I Regulation. 174

The Council of the European Union approved the text amended by the European Parliament and the Rome Convention was converted into the Rome I Regulation.

171 Amendments 86-96, Draft Report by Cristian Dumitrescu (PE 374.427v01-00).
172 The drafting of this element of the proposal, and in particular its use of the general definition of “habitual residence” was also criticised by commentators (see, e.g. Eva-Maria Kieninger, Harry Sigman, The Rome I Proposed Regulation and the Assignment of Receivables, 1-2006 EU Legal Forum 1, favouring the Commission’s solution but not its formulation of the connecting factor).
2.2.2. Assignment under the Rome I Regulation

As a result, the general structure of the Art. 12 of the Rome Convention has been kept unchanged by the Rome I Regulation. Nevertheless, some significant amendments to the text of the new Art. 14 of the Rome I Regulation have been imported. Thus, the apparently rather limited expression “mutual obligations of assignor and assignee” was substituted by a more embracing wording - “the relationship between assignor and assignee”.

In this connection, a Recital 38 to the Rome I Regulation was also introduced providing that:

“In the context of voluntary assignment, the term ‘relationship’ should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term ‘relationship’ should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.”

The intention of the Recital, drafted at a time when the Commission’s proposed rule governing third party effects remained in the draft Regulation, was to clarify that, although the effectiveness of an assignment against third parties would be subject to the proposed new rule, favouring the assignor’s habitual residence, the “proprietary” effectiveness of the transaction between assignor and assignee (and only those parties) would continue to be subject to the law applicable to their transaction. Recital (38) remained when the Commission’s proposal was dropped, but its effect on the scope of Art. 14(1) remains unaffected.175

A new Art. 14(3) was also added defining the “assignment” as outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

The new Article 27 (2) of the Rome Regulation states that by 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the

effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

During the discussions held in the Council of the European Union for the conversion of the Rome Convention into the Rome I Regulation, Member States favoured two approaches to the law applicable to the property aspects of the assignment:

1. the application of the law of the habitual residence of the assignor,

2. the application of the law governing the assigned claim.\(^{176}\)

It was also proposed to combine these two approaches by adopting one of the rules as the general rule, and the other as an exception for certain kinds of claims. The law of the assignor’s habitual residence was considered to be the most well suited connecting factor for operations such as factoring, invoice-discounting and other transactions based on the assignment of a mixed portfolio of receivables. With regards to the law of the assigned claim, Member States believed that this connecting factor was more appropriate for the following types of claims: bank deposits, receivables arising from securities, etc.\(^{177}\)

The relevant part of securitisation sector supported the law of the assigned claim, whereas another part of the same sector did not object to the law of assignor’s habitual residence, because the latter law would often be part of the due diligence considering that it is the law applicable to the insolvency proceedings.\(^{178}\)

Some Member States proposed their own solutions for the issue of property aspects of the assignment. Thus, the United Kingdom tabled the following proposal:\(^{179}\)

“3. In the case of:

(a) a bulk assignment of debts made by way of a business activity undertaken by the assignee (“the financier”), which purchases debts owed to the assignor (“the client”) arising from the supply of goods or

\(^{176}\) See F.J. Garcimartín-Alférez, op. cit., pp. 246-247.

\(^{177}\) F.J. Garcimartín-Alférez, ibid.

\(^{178}\) F.J. Garcimartín-Alférez, op. cit., p. 247.

services by the client to third parties, for the sole purpose of recovering and collecting those debts and in circumstances where the financier invoices the client in respect of a commission or fee; or¹⁸⁰

(b) an assignment by a natural person acting outside the course of his business or profession, unless the assignment concerns a claim which has arisen through the holding of a bank account or financial instrument;¹⁸¹

the question of the effectiveness of the assignment or subrogation against third parties and priority of the assigned or subrogated claims over a right of another person shall be governed by the law of the country where the assignor or the author of the subrogation has his habitual residence. For the purposes of this paragraph and notwithstanding Article 18(1), the habitual residence of a company or other body, incorporate or unincorporated, shall be its place of business or, if it has a place of business in more than one country, the place of its central administration.

4. In other cases, the question of the effectiveness of the assignment or subrogation against third parties and priority of the assigned or subrogated claim over a right of another person shall be governed by the law of the country designated by paragraph 2.

5. If conflicting rights to a claim result from different assignments some of which fall under paragraph 3 and some of which fall under paragraph 4 (and each of the rights is effective against third parties under the governing law identified in the relevant paragraph), the question of priority is governed by paragraph 3.

6. The concept of assignment in this article includes outright transfers of claims, transfers of claims by way of security as well as the creation of a pledge or other security right.”

¹⁸⁰“A recital should make it clear that “factoring”, “quasi-factoring” and “invoice discounting” are contemplated here. Furthermore, it is essential to retain the reference to the payment of a commission or fee in the text if securitisation is to be excluded from this paragraph.”

¹⁸¹“A recital should make it clear that the Rome I Regulation applies not only to claims under commercial law, but also to civil law claims, such as the claims for which the formalities in Article 1690 of the French Code Civil were provided. The relevant assignments are usually restricted to a single claim, for example the assignment to a lender (as a guarantee or as a transfer of property) of a rent claim. For these assignments, it may be that the law of the assignor is the appropriate law. However, the recital should also make it clear that the law of the assignor’s residence is clearly not appropriate for retail bank accounts or the holding of transferable securities (and interests therein) by retail investors, since the possibility that the individual may change his location would cause unacceptable levels of certainty for the bank or financial markets participant by whom the debt or claim is owed.”
The Spanish delegation came up with the following proposal:

Option 1: general rule = law of the assignor, special rule = law of the assigned credit

“3. Subject to paragraph 4, the question of effectiveness of the assignment or subrogation (...) against third parties and priority of the assigned or subrogated claim over a right of another person shall be governed by the law of the country where the assignor or the author of the subrogation has his habitual residence (...). For the purposes of this paragraph and notwithstanding Article 18(1), the habitual residence of a company or other body, incorporate or unincorporated, shall be its place of business or, if it has a place of business in more than one country, the place of its central administration:

4. The question of effectiveness of the assignment or subrogation (...) against third parties and priority of the assigned or subrogated claim arising under or from:

- Transactions on a regulated exchange or other financial markets;
- Financial contracts governed by netting agreements;
- Inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments;
- The transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;
- Bank deposits;
- A letter of credit or independent guarantee.

shall be governed by the law of the country designated in paragraph 2 of this article.\(^{183}\)

Option 2: general rule = law of the assigned credit, special rule = law of the assignor

\(^{182}\) The addition of a reference to determine the relevant time must be discussed.

\(^{183}\) The definition contained in article 5 (k) and (l) of the UNCITRAL Convention on “financial contracts” and netting agreements” could be included in the recitals.
“3. Subject to paragraph 4, the question of effectiveness of the assignment or subrogation (...) against third parties and priority of the assigned or subrogated claim over a right of another person shall be governed by the law of the country designated by paragraph 2.

4. In case of assignment of future receivables and of receivables that are not specifically or individually identified (bulk assignment)\(^{184}\), the question of effectiveness of the assignment or subrogation (...) against third parties and priority of the assigned or subrogated claims over a right of another person shall be governed by the law of the country where the assignor or the author of the subrogation has his habitual residence (...).\(^{185}\) For the purposes of this paragraph and notwithstanding Article 18(1), the habitual residence of a company or other body, incorporate or unincorporated, shall be its place of business or, if it has a place of business in more than one country, the place of its central administration.”

3. INTERACTION WITH INTERNATIONAL AND EU INSTRUMENTS

3.1. UN RECEIVABLES CONVENTION

The United Nations Convention on the Assignment of Receivables in the International Trade (2004),\(^ {186}\) which is not yet in force,\(^ {187}\) provides in its Art. 22 that

“the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.”

Art. 5 of the same Convention defines “location” as

“the State in which a person has its place of business. If the assignor has a place of business in more than one State, the place of business

\(^{184}\) A recital shall clarify the concept of bulk assignment, in particular, that “bulk assignments” implies "the assignment of trade receivables (arising from the supply of goods, construction or services between businesses), loan receivables (arising from the extension of credit to an undetermined number of persons), consumer receivables (arising from consumer transactions)", or "asset-based lending, factoring, forfaiting (?) and Securitisation".

\(^{185}\) The addition of a reference to determine the relevant time must be discussed.


\(^{187}\) To date, only Liberia has ratified the UN Convention, although Luxemburg, Madagascar and the United States of America are signatories.
is that place where the central administration of the assignor is exercised."

Location of the assignor needs to be determined at the time when the contract of assignment is concluded. The notion of “competing claimant” is defined in Art. 5(m) of the same Convention.

Exceptionally, public policy and mandatory rules can be applied (Art. 23). Separate provision is made for the proceeds of receivables (Art. 24).

Art. 30 of the UN Convention, within the autonomous conflict of laws rules in Chapter V, provides:

“1. The law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.

2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located.

3. Notwithstanding paragraph 2 of this article, in an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.”

The Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Assignment of Receivables in International Trade enumerates the reasons for choosing the law of the assignor’s location:

1) the law of the assignor’s location is easily determinable;

2) it is most likely to be the place in which the main insolvency proceeding with respect to the assignor will be opened.

It has to be noted that the UN Convention does not apply to a considerable number of assignments (see Art. 4).

3.2. FACTORING

The UNIDROIT (Ottawa) Convention on International Factoring (1988),\(^{190}\) which is in force,\(^{191}\) provides for a number of substantive rules in the area of factoring. For instance, Art. 6(1) of the said Convention prohibits contractual clauses as to non-assignability of the claim.\(^{192}\) It does not contain rules of applicable law, or substantive rules governing the effectiveness of assignments against third parties.

3.3. FINANCIAL INSTRUMENTS

3.3.1. EU Settlement and Financial Collateral Directives

The Directive 98/26/EC on settlement finality in payment and securities settlement systems, modified through Directive 2009/44/EC of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, aims to reduce the systemic risk inherent in payment and securities settlement systems and to minimise the disruption caused by the insolvency of a participant in such a system. It is applicable to systems, defined as a formal arrangement between three or more participants, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the execution of transfer orders between the participants (Art. 2(a)).

The Directive 2002/47/EC on financial collateral arrangements, modified through Directive 2009/44, aims to limit the credit risk in financial transactions through the provision of securities and cash as collateral. The Directive reduces the formal requirements for collateral requirements and harmonises and clarifies the collateral process at minimum level. The Directive is applicable when at least one of the parties to the arrangement is a public authority, a financial institution, etc. (Art. 1(2)).

The two said EU financial directives provide for special conflict of laws rules, see Art. 9(2) of Directive 98/26/EC on settlement finality in payment and securities settlement systems\(^{193}\) and Art. 9(2) 2002/47/EC on financial

\(^{191}\) To date, 7 States (France, Germany, Hungary, Italy, Latvia, Nigeria, Ukraine) ratified the Convention, although 15 States (Belgium, Czech Republic, Finland, Ghana, Guinea, Morocco, Philippines, Slovak Republic, Tanzania, United Kingdom, United States of America) are signatories.
\(^{192}\) Belgium made a reservation in respect of this provision.
\(^{193}\) Where securities (including rights in securities) are provided as collateral security to participants and/or central banks of the Member States or the future European central bank as
collateral arrangements, modified through Directive 2009/44.\textsuperscript{194} Both Directives favour the law of the State where the account, register or the centralised deposit system is located.

Consideration might be given to the fact that the Financial Collateral Directive does not set out any special connecting factor for cash collaterals, \textit{i.e.} collaterals created over money deposited in a bank account. Absent any special provision, Art. 14 of Rome I Regulation should apply.

The relationship of both Directives to the Rome I Regulation is subject to uncertainty. Art. 23 of the Rome I Regulation states that “this Regulation should not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations”. It is notable that the scope of this rule is limited to “contractual obligations”. Allegedly, the rule does not extend to a conflict between Community instruments as regards property aspects of obligations.

However, it is arguable that the said two directives would still prevail over the Rome I Regulation with respect to the property aspects of assignments due to the fall-back on the general principle of \textit{lex specialis}.

\textbf{3.3.2. Insolvency Regulation}

The Insolvency Regulation 1346/2000/EC\textsuperscript{195} contains rules of jurisdiction and applicable law concerning insolvency proceedings where the insolvent debtor has its centre of main interests (COMI) in the EU.

Under Art. 4 of the Insolvency Regulation, the law applicable to insolvency proceedings within the Regulation’s shall be the law of the Member State in which proceedings have been opened. That law shall apply, in particular, to questions as to “the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of proceedings”. In principle, the doctrine of \textit{renvoi} is excluded, and Art. 4 does

\begin{flushleft}
\textsuperscript{194} “Where securities including rights in securities are provided as collateral security to participants, system operators or to central banks of the Member States or the European Central Bank as described in paragraph 1, and their right or that of any nominee, agent or third party acting on their behalf with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.”
\end{flushleft}

\begin{flushleft}
\textsuperscript{195} \textit{Official Journal} L 160, 30/06/2000, pp. 1–18.
\end{flushleft}
not refer therefore to the private international law rules of the *lex concursus*.\textsuperscript{196} Nevertheless, it is submitted that this cannot preclude account being taken of an otherwise applicable foreign law insofar as this is relevant to the application of rules of the insolvency law of the Member State of opening of proceedings. For example, if the law of that Member State were to consider that all assets owned by the debtor 6 months before the opening of proceedings, or over which a floating security interest has not crystallised at the date of opening, it would be permissible for a court to refer to other rules of private international law (including, insofar as applicable to claims and to the issue in question, the Rome I Regulation) to determine whether an asset with a foreign connection was “owned” by the debtor at the relevant date or whether a security interest has “crystallised”.

Art. 5(1) of the Insolvency Regulation provides that rights *in rem* of creditors or third parties in respect of the debtor’s tangible or intangible, movable or immovable assets which are situated within the territory of another Member State at the time of the opening of insolvency proceedings shall not be affected by the opening of the proceedings. This rule applies inter alia to rights created by the assignment, pledging or charging of debts.\textsuperscript{197} For this purpose, claims are considered to be situated in the Member State within the territory of which the third party required to meet them (i.e. in the language of the Rome I Regulation, the “debtor”) has its COMI (Art. 2 (g), third hyphen).

Recital (25) of the Insolvency Regulation provides that whether or not such a right *in rem* exists will "normally" be determined by the *lex situs* of the asset in question.

However, neither Art. 5, nor Recital (25) constitutes a choice of law rule\textsuperscript{198} and the law which determines the effectiveness of a right that is protected from the effects of insolvency proceedings by Art. 5 must be fixed in accordance with the private international law rules of the forum Member State, including Art. 14 of the Rome I Regulation, insofar as the relevant issue falls within its scope. If one does come to the conclusion that a right *in rem* has been created under the applicable law, Article 5 does not preclude

\textsuperscript{196} Idem, para. 87.

\textsuperscript{197} Rights *in rem* are defined in Art. 5(2) of the EC Insolvency regulation as follows:

“(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
(d) a right in rem to the beneficial use of assets.”

\textsuperscript{198} Virgos-Schmidt Report on the Convention on Insolvency Proceedings, para. 95.
the application of the law of the Member State where insolvency proceedings have been opened relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors (Articles 5(4) and 4(2)(m)). This qualification is, however, itself subject to Article 13 which bars interference pursuant to the opening court’s bankruptcy laws where the law governing the assignment (being the law of a different Member State) "does not allow any means of challenging the act in the relevant case", e.g. where the law governing the assignment would not consider the assignment to be a voidable preference or transaction at an undervalue.

The possible impact of the Rome I Regulation, in its current form or amended so as to fix the law applicable to third party effects of assignments, raises issues of great importance in practice, which have been much debated. For example, it presently remains unclear whether the assignors insolvency representative is to be treated as standing in the shoes of the “assignor” (with the result, therefore, that his relationship with the assignee falls to be governed by the law applicable under Art. 14(1)) or as a “third party” (with the result that Art. 14(1) does not, in its present form, apply) or whether the answer to this question depends on a more precise examination of the laws by reference to which the representative draws his authority. It may be that different national laws would answer this question differently (for example, under some insolvency laws the assets of the insolvent entity are transferred to an insolvency administrator (in effect a statutory assignment) whereas in others they remain with the entity, but the insolvency administrator has control of actions relating to the assets of the insolvent entity and of the distribution of the assets collected in.

3.3.3. Rome II Regulation on the Law Applicable to Non-Contractual Obligations

It may also be argued that the Rome II Regulation on the law applicable to non-contractual obligations\(^{199}\) should be applied to at least some third-party effects of the assignment, as the relationship between the assignee and third parties may (in many instances) by aptly-characterised as being “non-contractual” in character. In particular, a monetary claim by an assignee against a third party (including, for this purpose, another assignee of the same claim) where the debtor has paid the assigned debt to the said third party and therefore discharged his obligations, in circumstances where the assignee considers to have a better title on the assigned debt, may without too much difficulty be characterised as raising a non-contractual obligation arising out of unjust enrichment within Art. 10 of the Rome II Regulation.

The relationship between Art. 14 of the Rome I Regulation (insofar as it is extended to cover third party effect) and the Rome II Regulation must, therefore, be considered. One possibility might be to make clear, for example by way of a Recital, that the Rome I Regulation covers the entire field, including monetary claims between assignee and a third party. Another would be to allow the Rome II Regulation to apply to the obligation based claim, but fix the law applicable to the question of priority (here, a precondition to the “unjust” nature of the enrichment) by reference to a new rule in the Rome II Regulation. In any event, it cannot presently be said that the Rome II Regulation provides a satisfactory solution to the broader issues described in this Study. In particular, in a case such as that described above, the reference to the “country in which the enrichment took place” (Art. 10(3)) may be thought to favour either the place where the debtor actually paid the defendant or the place where payment was contractually due. Neither place corresponds to any of the solutions which have generally been considered as suitable for determining the third party effects of assignment.\textsuperscript{200}

\textbf{3.3.4. Proposed Securities Law Directive}

The European Commission has proposed to harmonise the law governing the holding and disposing of securities, to apply where rights to securities are held through or against intermediaries and systems (in contrast to cases where company law applies as between the issuer and the immediate holder of the security). The Consultation document issued by the Directorate-General International Market and Services provides a conflicts-of-laws rule for interests in such securities.\textsuperscript{201} In principle, the law of the country where the account provider maintains the relevant securities account would be applicable.\textsuperscript{202} The matters covered by the said law seem to include third-

\textsuperscript{200} The “escape clause” in Art. 10(4) offers a possible way out by treating the claim as being manifestly more closely connected with the law applicable to the claim assigned, which will likely be common to both parties’ relationships with the debtor, and (therefore) connected both to the defendant’s enrichment and the claimant’s lost value.

\textsuperscript{201} DG Markt G2 MET/OT/acq D(2010) 768690.

\textsuperscript{202} “14 – Determination of the applicable law.
1. The national law should provide that any question with respect to any of the matters specified in paragraph 3 arising in relation to account-held securities should be governed by the national law of the country where the relevant securities account is maintained by the account provider. Where an account provider has branches located in jurisdictions different from the head offices' jurisdiction, the account is maintained by the branch which handles the relationship with the account holder in relation to the securities account, otherwise by the head office.
2. An account provider is responsible for communicating in writing to the account holder whether the head office or a branch and, if applicable, which branch, handles the relationship with the account holder. The communication itself does not alter the determination of the applicable law under paragraph 1. The communication should be standardised.
party effects (art. 14 (3)(b) and (e)). It appears that para. 2 will be deleted as there is no consensus in between Member States. It is yet unclear and under current debate if the wording of para. 1 needs to be changed to further specify the "place where the account is located". As rights to securities are frequently held through a chain of intermediaries leading back to a relationship with the issuer, this would mean that a separate determination was made at each level in the chain with regard to the persons interested at that level and relevant third parties with claims against the holder or the intermediary at that level. These would include persons to whom a holder has granted a charge over securities (which may also be an assignment of monetary claims arising from the securities in question (e.g. the right to be paid dividends or interest received by the intermediary). Those would normally be claims against the intermediary (so this will often, though not invariably, be aligned with the law of the assigned claim because the relationship between the intermediary and its account holder will often, but not invariably, be the law of the place of the account). It will not be aligned with the place of habitual residence of the assignor/account holder, unless this happens to be the same as the place of the account.

Art. 22(a) defines "securities" by referring to Annex I Section C of Directive 2004/39/EC. 203

<table>
<thead>
<tr>
<th></th>
<th>The matters referred to in paragraph 1 are:</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.</td>
<td>(a) the legal nature of account-held securities;</td>
</tr>
<tr>
<td></td>
<td>(b) the legal nature and the requirements of an acquisition or disposition of account-held securities as well as its effects between the parties and against third parties;</td>
</tr>
<tr>
<td></td>
<td>(c) whether a disposition of account-held securities extends to entitlements to dividends or other distributions, or redemption, sale or other proceeds;</td>
</tr>
<tr>
<td></td>
<td>(d) the effectiveness of an acquisition or disposition and whether it can be invalidated, reversed or otherwise be undone;</td>
</tr>
<tr>
<td></td>
<td>(e) whether a person's interest in account-held securities extinguishes or has priority over another person's interest;</td>
</tr>
<tr>
<td></td>
<td>(f) the duties, if any, of an account provider to a person other than the account holder who asserts in competition with the account holder or another person an interest in account-held securities;</td>
</tr>
<tr>
<td></td>
<td>(g) the requirements, if any, for the realisation of an interest in account-held securities.</td>
</tr>
</tbody>
</table>

4. Paragraph 1 determines the applicable law regardless of the legal nature of the rights conferred upon the account holder upon crediting of account-held securities to his securities account."

203 The latter lists the following securities:

"(1) Transferable securities;
(2) Money-market instruments;
(3) Units in collective investment undertakings;
(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;"
The relationship of the Securities Law Directive, if adopted, to the Rome I Regulation is subject to the same logic as the interrelation between EU Directives and the Rome I Regulation (see above p. 140).

### 3.3.5. Hague Securities Convention (2002)

The Convention on the law applicable to certain rights in respect of securities held with an intermediary or the Hague Securities Convention (2006) is not in force.\(^{204}\) The Hague Convention’s primary rule is to provide for the ability of parties to choose a governing law for the account which may be different from the lex situs (Art. 4 of the Convention), subject to the proviso that the law chosen will only apply if the relevant intermediary has, at the time of the agreement, a qualifying office\(^ {205}\) in the state of the chosen law. Only in the absence of such a party choice does Art. 5 of the Convention apply the law of the state where the office of the intermediary is located through which the account agreement was entered into (Article 5(1)), or the law of the state under which the relevant intermediary is incorporated or otherwise organised (Article 5(2)), or the law of the state in which the relevant intermediary has its principle place of business (Article 5(3)).

---

(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences.

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls."

\(^{204}\) To date, only Mauritius and Switzerland have ratified the Convention, and the United States of America is a signatory.

\(^{205}\) Under the Hague Securities Convention, “office” means, in relation to an intermediary, a place of business at which any of the activities of the intermediary are carried on, excluding a place of business which is intended to be merely temporary and a place of business of any person other than the intermediary (Art. 1.1 (j)).
The European Commission has withdrawn its proposal for a Council Decision concerning the signing of the Hague Securities Convention. Nevertheless, a number of stakeholders who responded to the Second Consultation on Legislation on Legal Certainty of Securities Holding and Dispositions favoured the Hague Convention’s approach to determining the law applicable to securities.

In case the Hague Securities Convention is ratified within the European Union, the issue of its conflict with the Rome I Regulation might arise, in particular the question of which instrument should prevail within the European Union. Art. 25(1) of the Rome I Regulation states that the “Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.” It follows that conventions later in time as compared to the Regulation should cede to the Regulation. As the Member States of the European Union still need to become parties to the Hague Convention, it seems that the Rome I Regulation (in force from July 24, 2008) would prevail over the Hague Securities Convention.

In contrast to this position, it has been suggested that the conflict between a treaty and an EU instrument should be treated as a conflict between international law and “something that comes perilously close to domestic law”. In that case, international law, i.e. a treaty, should prevail over an EU instrument.

Lastly, a convincing argument can still be made for the application of the general principles of *lex specialis* and *lex posteriori* to support the application of the Hague Securities Convention by treating the Hague Securities Convention as regulating a special area of securities and therefore prevailing over the Rome I Regulation which covers a broader range of issues, as well as being posterior to the Rome I Regulation.

---


208 In a similar vein, see Case C-466/98, Commission v. United Kingdom [2002] ECR I-9427.


The UNIDROIT Convention on Substantive Rules for Intermediated Securities or the Geneva Securities Convention (2009), not yet in force,\textsuperscript{211} contains substantive law provisions regulating intermediated securities.

Of relevance for the Study are the rules on priority among competing interests (Art. 19 - 20), protection of an innocent acquirer (Art. 18), as well as effectiveness in insolvency (Art. 14).

\textsuperscript{211} To date only Bangladesh signed the Convention.
4. NATIONAL REPORTS
A. NATIONAL REPORT BELGIUM

SUMMARY

1. Substantive Law

Pursuant to article 1690 of the Belgian Civil Code (as amended in 1994), the assignment of a claim is effective vis-à-vis third parties other than the claims debtor as a result of the parties entering into the assignment agreement. A notification of the assignment to the claims debtor (or recognition of the assignment by the claims debtor) is required only in order for the assignment to be effective as against the debtor.

2. Conflict of Laws

Pursuant to article 87§3 of the Belgian Conflicts of Laws Code (Law of 16 July 2004), the law applicable to the proprietary aspects of an assignment of a claim is the law of the State where the assignor had its habitual residence at the time of the assignment. Belgian authors unanimously consider that article 14 of the Rome I Regulation does not determine the law applicable to the proprietary aspects of an assignment of a claim.

212 Hélène Volkova / Lounia Czupper, Clifford Chance LLP, Brussels.
<table>
<thead>
<tr>
<th>TABLE OF STATUTES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A) Substantive Law</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provision</th>
</tr>
</thead>
</table>
| Belgian Civil Code (*Code Civil belge / Belgisch Burgerlijk Wetboek*), amended by the Law of 6 July 1994 | Article 1690 § 1:  
The assignment of a claim is effective against third parties other than the claims debtor by the mere conclusion of the assignment agreement.  
The assignment is effective against the debtor only if and when it has been notified to the claims debtor or recognised by the claims debtor.  
If the assignor has assigned the same rights to several assignees, an assignee who, in good faith, has first notified the assignment to the debtor, or has first obtained recognition of the assignment by the debtor, shall have priority.  
The assignment is not effective against a creditor in good faith of the assignor to whom the debtor has, in good faith et before the assignment was notified to it, validly paid. |

| Belgian Judicial Code (*Code Judiciaire belge / Belgisch Gerechtelijk Wetboek*) | Articles 1409 sqq.:  
certain workers' wages, pension claims, and similar receivables cannot be transferred or are subject to transfer restrictions. |

specific procedural requirements in order to render the assignment of wages effective against third parties |

| Law of 24 December 1993 on public procurement contracts and on certain contracts for work, supplies and services | Article 23 of this law provides for a specific set of rules applicable to receivables arising under public procurement contracts |

| **B) Conflicts of Laws** |

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
</table>
| Belgian Conflicts of Laws Code (*Code de Droit International Privé / Wetboek van Internationaal Privaatrecht*) (Law of 16 July 2004) | Article 87§3:  
The creation of rights in rem in respect of a claim and the effects of the transfer of the claim on such rights is governed by the law of State on the territory of which the party that created these rights in rem or transferred the claim had its habitual residence at the time of the creation of the rights or of the assignment.  
The effects of a conventional subrogation of rights in rem are governed by the law of the State on the territory of which the author of the subrogation had its habitual residence at |
the time of the transfer.

| Article 4 § 2 and § 3:  
§ 2. For the purpose of this law, the notion of habitual residence shall be defined as:  
(...)  
2° the place where a legal person has its main establishment.  
§ 3. For the purpose of this law, the notion of main establishment of a legal person must be determined taking into account, in particular, its centre of management, as well as the centre of its business activities and, in subsidiary order, its statutory seat. |

| Belgian Mortgage Law (Loi Hypothécaire / Hypotheekwet)  
| Article 5:  
The assignment of a preferential claim or a claim secured by a registered mortgage, or subrogation in respect of such claim, is effective against third parties only if [the transfer agreement is notarised], and if it is registered with the mortgage office by way of a side mention (...). |

## 1. INTRODUCTION

### 1.1. Evolution and General Principles

In Belgian law, as in other legal systems, a claim (créance / schuldvordering) can be transferred to a third party without the consent of the debtor, by a process called cession / overdracht or assignment.

Assignments of claims have not always been possible. Originally in Roman law, claims were considered to be inseparable from the personae of the debtor and the creditor, and therefore could not be transferred by way of assignment. Nevertheless, a similar result could be achieved by using other mechanisms, such as novation or procedural representation (procuratio in rem suam).²¹³

Practical considerations later led lawyers in civil law systems to admit that a claim could be transferred by way of assignment. This view subsequently found its way into the Napoleonic Civil Code. However, the authors of the Civil Code failed to formulate a general theory on the assignment of claims,

---

but simply inserted a section on the assignment of claims in the chapter relating to the contract of sale.²¹⁴

This configuration can be misleading, as a claim can be assigned not only through a contract of sale, but also by other means, such as for example a contribution to the share capital of a company, a donation, an exchange or a payment in kind.

Therefore, rather than relying on theoretical reasoning, the possibility to assign a claim appears to be primarily based on practical considerations. In a market perspective, a claim is an asset, and hence it should be possible to sell it, to exchange it, to donate it, etc. In legal terms, this is generally translated into a claim being an intangible good, which as such can be the subject of property rights.²¹⁵

Furthermore, it normally does not really matter for the claims debtor whether he must pay to the original creditor of the claim or to an assignee,²¹⁶ so that his position is in principle not adversely affected by the assignment. Based on these considerations, it is now admitted that a claim can be assigned without the debtor's consent.

On the other hand, however, it is necessary to protect the debtor against the risk of having to pay twice (first to the assignor and then also to the assignee). In addition, the debtor should not lose the ability of raising defences simply because of the transfer of the claim. The Civil Code contains a number of rules (relating to the information of the debtor and the defences of the debtor) which seek to address these concerns.

By way of conclusion, the assignment of a claim is a hybrid institution, as it has both contractual effects vis-à-vis the debtor (as the existing creditor is replaced with a new creditor), and proprietary effects vis-à-vis third parties (as the claim, considered as an intangible good, is transferred to the assignee). The hybrid nature of the assignment of a claim gives rise to a number of uncertainties, both in terms of substantive law and in terms of conflicts of laws. This being said, a great deal of legal certainty has been achieved in recent years in Belgium, notably on conflicts of laws rules since the enactment of the Belgian Conflicts of Laws Code in 2004.²¹⁷

²¹⁴ Marcel Fontaine, Harmoniser le régime de la transmission des obligations, in Liber amicorum Jacques Herbots, 2002, p. 133.
²¹⁵ Fontaine, op. cit., p. 133.
²¹⁶ The same does not apply to an assignment of a debt where the identity of the debtor is relevant for the creditor.
1.2. Distinction of Assignment from Other Mechanisms

An assignment of a claim is to be distinguished from other mechanisms that have a similar effect, but do not involve a proper transfer of a claim, such as novation by substitution of creditor (which does not involve any transfer of claim, as the existing claim is replaced with a new claim), or delegation (which does not involve any transfer of claim, as the claim of the obligee against the delegatee is independent from the initial claim against the delegator).

An assignment of a claim is also to be distinguished from subrogation in the rights of the creditor further to a payment of the debt by a third party. However, subrogation involves a transfer of the claim similar to an assignment. Therefore, the conflicts of laws rules applicable to subrogation will be the same as the rules applicable to assignments.

Finally, an assignment of a claim is to be distinguished from the creation of a security interest over a claim. However, again, a security interest over a claim should be subject to the same conflicts of laws rules as regards their effectiveness as against third parties as the rules applicable to an assignment of claims.

1.3. Scope of the Report

This report covers the Belgian conflicts of laws rules (both present and past) relating to the proprietary effects of an assignment of a claim. The notion of claim is to be understood as referring to contractual claims which are not incorporated in securities.

This report also briefly describes Belgian substantive law.

---

218 The Civil Code organises two types of subrogation: legal subrogation (article 1251) and conventional subrogation (article 1250). A number of specific statutes also organise specific instances of legal subrogation.

219 It is interesting to note that before the changes made to article 1690 of Belgian Civil Code in 1994 (ie, before article 1690 was amended so that an assignment of claims is effective against third parties as soon as the assignment agreement is entered into), parties sometimes used payment with subrogation (which does not, and did not at the time, require the fulfilment of any formality in order to be effective as against third parties) as an alternative to assignment. Another alternative to assignment was offered by a procedure called endossement de facture / endossement van factuur. These techniques are no longer commonly used in Belgium nowadays.
2. SUBSTANTIVE LAW ISSUES

2.1. Art. 1690 of the Belgian Civil Code

Art. 1690 of the Belgian Civil Code provides that the assignment of a receivable is effective vis-à-vis third parties other than the claims debtor as a result of the parties entering into the assignment agreement.\(^{220}\)

A notification of the assignment to the claims debtor (or recognition of the assignment by the claims debtor) is required only in order for the assignment to be effective as against the debtor, but not for the assignment to be effective against other third parties. This has not always been the case, and before the 1994 reform, notification of the assignment to the claims debtor (or acceptance of the transfer by the claims debtor by way of a notarial deed) was required in order to render the transfer effective not only as against the debtor, but also as against third parties. Legal authors and practitioners often criticised this rule, notably because it was extremely burdensome and unsuitable for modern receivables financing transactions.\(^{221}\)

Furthermore, a number of specific statutes provide for additional formalities with respect to certain types of claims (see below).

2.2. Effectiveness as Against the Claims Debtor

2.2.1. Principle

Article 1690 of the Belgian Civil Code provides that the assignment is effective as against the claims debtor when the assignment has been notified to (or recognised by) the claims debtor. Accordingly, until the assignment has been notified to (or recognised by) the debtor, the latter may validly discharge its debt under the assigned claim to the assignor.\(^{222}\)

2.2.2. No Formal Requirements for Notification to Debtor

During the preparatory works of the 1994 reform, certain participants expressed the view that the notification to the debtor must be made in writing. However, article 1690 does not expressly require that the notification be made in writing (but of course, prudent parties would ensure that they keep written proof of notification).

\(^{222}\) This is confirmed by art. 1691 of the Belgian Civil Code ("the debtor who pays in good faith before the assignment is notified to him or before he recognises the assignment has paid validly").
The notification can be made either by the transferor or by the transeree.

It is sufficient that the notification states the fact of the assignment, *ie*, it is not necessary that it states the conditions and modalities of the assignment.

As mentioned above, as an alternative to notification, recognition of the assignment by claims debtor also has the effect of rendering the assignment effective as against the latter.

### 2.3. Priority Issues

Articles 1690 §1, 3rd and 4th subparagraphs contain two rules which qualify the principle that the assignment of a claim is effective as against third parties by the mere conclusion of the assignment agreement.

The first rule states that a subsequent assignment or transfer\(^{223}\) of the claims to a third party in respect of which notice is given first, in good faith,\(^ {224} \)\(^ {225}\) would take priority over the previous assignment. Various legal writers have criticised this rule on the basis of the fact that the requirement to notify the assignment to the debtor in order to secure priority over a previous or subsequent transfer is inconsistent with the starting point of the 1994 reform (*ie*, that the effectiveness of the assignment as against third parties is not linked to the effectiveness as against the claims debtor).\(^ {226}\)

Secondly, the assignment will not be effective as against a third-party creditor of the assignor (such as, typically, a creditor having made an

---

\(^{223}\) Authors are divided on the precise scope of this rule. It certainly covers conflicts between two assignments, or between an assignment and a pledge. It is less clear whether it also applies to conflicts between an assignment and a subrogation, a delegation or a direct action (*action directe / rechtreekse vordering*). A further view is that it would also be applicable in the case of an executory seizure over the claim, or in the case of bankruptcy proceedings. However, the latter view has not found much support, notably because it would actually be tantamount to applying pre-1994 article 1690. See Eric Dirix, *Art. 1690-1691 BW*, in Bijdondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer, Mechelen, 2006, pp. 24 et seq.; Van Ommeslaghe, *op. cit.*, pp. 533 et seq.

\(^{224}\) Or which is first recognised by the debtor, provided again that the subsequent transferee is in good faith.

\(^{225}\) Good faith refers to the absence of knowledge of the previous assignment (at the time of the notification of the second transfer).

attachment on the claims) in good faith\textsuperscript{227} to whom the debtor would, in good faith,\textsuperscript{228} have paid the claim before having received notice of the assignment.

### 2.4. No Registration Requirements

Under Belgian law, there are no requirements for companies to register pledges or charges over claims, or assignments of claims. As a result, third parties are not protected against the risk of dealing with companies falsely appearing to own claims, which they have in fact assigned or pledged. The first one to perfect the pledge or assignment (by notifying the pledge or assignment to the claims debtor, or by obtaining recognition of the pledge or assignment by the claims debtor) takes priority.

### 2.5. Defences of the Debtor, Including Set-Off

Until the claims debtors are notified of the assignment of the claim due to them, these claims debtors will be entitled to set-off any amounts owed by them under the assigned claims against any amount owed to them by the assignor (provided that all conditions for set-off are met before the notification of the assignment of the relevant claim (such as \textit{inter alia} that both debts are due and payable between the parties, etc.).

As from the date that a claims debtor is notified of the assignment of the claim due by it, the claims debtor will no longer be entitled to apply set-off rights except:

(a) for amounts in respect of which the conditions for set-off were satisfied prior to notice being given to the claims debtor (this is statutory or legal set-off);

(b) where the parties have contractually agreed that they shall be entitled to exercise set-off (this is contractual set-off);\textsuperscript{229}

(c) possibly, where the amounts owing under the assigned claims are closely connected with other amounts due by the assignor to the claims debtor.\textsuperscript{230}

\textsuperscript{227} Good faith of the third-party creditor of the assignor means that he/she does not have knowledge of the assignment.

\textsuperscript{228} The best view is that mere knowledge of the assignment is not sufficient to conclude to the absence of good faith of the debtor: rather, it is required that the transfer is effective as against the debtor (further to notification or recognition).

\textsuperscript{229} This provision is set out in article 14 of the Belgian Law on Financial Collateral. Note, however, that following a decision of the Belgian Constitution Court on 27 November 2008, there are doubts as to whether this provision of the Belgian Law on Financial Collateral applies to individuals that are not merchants.
2.6. The Assignment of Future Claims

2.6.1. General Rule

Belgian law does not prohibit the assignment of future claims. Case law has consistently confirmed that future claims can indeed be assigned if such claims are determined or capable of being determined.231 It is not required that the parties already know the identity of the claims debtors or the precise amount of the assigned claims at the time of the assignment agreement, provided that the assigned claims can be subsequently identified on the basis of criteria specified in the assignment agreement.

Accordingly, bulk assignments of present and future claims are possible under Belgian law. The de-formalisation reform in 1994 furthermore greatly facilitated such bulk assignments. However, the parties are advised to provide for clear-cut criteria in their agreement regarding the scope of the assignment, in order to avoid any risk that the judge would consider that the claims being assigned are not capable of being determined.

2.6.2. Assignment of Future Claims and Insolvency Proceedings Against the Assignor

Authors are divided on the question of whether an assignment of a claim which comes into existence after the commencement of bankruptcy proceedings against the assignor is effective as against the liquidator.

First, it is important to understand what is meant by "future" claims or claims which have not yet "come into existence". A claim is existent even if it not presently due and payable, provided that the legal instrument from which the claim will arise already exists.232 For example, claims consisting in the payment of rent pursuant to a lease agreement which has already been signed are present not future claims.

The issue regarding bankruptcy proceedings against the assignor relates only to proper future claims. One view is that the assignment of a claim which only comes into existence after the commencement of the bankruptcy proceedings is not effective as against the liquidator, as the property of the

---

230 The question of close connection for set-off rights has been addressed by the Belgian Supreme Court (Cour de Cassation / Hof van Cassatie) on 26 June 2003, where the Court held that the existence of close connection between two debts should not be sufficient to allow for an exception to the prohibition on set-off after notification of an assignment. This decision has been criticised by various legal scholars.


232 Feltkamp, op. cit., p. 142.
claim could not have been transferred before the claim came into existence. However, another view is that the assignment is effective as against the liquidator, as the principle under Belgian law is that an assignment is effective as against third parties (including the liquidator) by the mere conclusion of the assignment agreement.233

2.7. Specific Rules and Regulations for Certain Claims

Under Belgian law, certain claims will not be transferable, or their assignment will be subject to a specific set of rules. This applies, for instance, to the following claims:

(a) certain workers' wages, pension claims, and similar claims cannot be transferred by law or are subject to transfer restrictions;234

(b) claims arising from consumer credit agreements can only be assigned to entities listed in article 25 of the Belgian law of 12 June 1991 on consumer credit;

(c) a specific set of rules applies to claims arising under public procurement contracts;235

(d) claims that are considered as "intuitu personae" (ie, where the identity of the creditor is an essential element of the claim) cannot be transferred;

(e) certain claims of the Belgian state or of other public entities cannot be transferred or are subject to transfer restrictions; and

(f) claims for which a bills of exchange, promissory notes or other negotiable instruments have been transferred, but the bills of exchange, promissory notes or other negotiable instruments would not "follow" the sale, and payments made under the assigned claims would go to the assignor instead of the assignee; in case of insolvency of the relevant assignor, the negotiable instruments which have not been endorsed to the assignee will form part of the insolvent estate of the assignor, and a liquidator will be entitled to collect under the negotiable instruments in the name, and for the account of, the insolvent assignor.


234 Articles 1409 sqq. of the Belgian Judicial Code. In addition, article 1390ter of the Judicial Code provides for specific formalities which must be complied with to render the assignment effective as against third parties.

2.8. Retention of Title Provisions

Under Belgian law, if a good subject to a retention of title agreement is sold, the retention of title will, subject to certain conditions being satisfied, be "transferred" to the claim arising from the on-sale and the rights of the person benefitting from such retention of title will take priority over the rights of the assignee of the relevant claim. Some authors have argued that the assignee will nevertheless be protected if it has acted in good faith (but it is generally difficult for a professional lender to argue that it has acted in good faith, as it has a duty to investigate the claims being assigned).

A similar issue arises with respect to the unpaid seller's lien.

2.9. The Effect of Contractual Prohibitions of Assignment

Belgian authors are divided on the effects of contractual prohibitions of assignment. One view is that the prohibition has an *erga omnes* effect, *ie* the claim cannot be validly assigned. Some authors consider that such a prohibition is valid only if it is limited in time and justified by a legitimate interest.

Another view is that the contractual prohibition only has effects *inter partes*. Therefore, the claim can be validly assigned despite the prohibition, but the assignee may still be liable on the basis of third-party assistance to breach of contract if the contract counterparty suffered a loss from the assignment of the relevant claim (*tierce complicité / derde-medeplichtigheid*).

3. CONFLICT OF LAWS ANALYSIS

3.1. The Law Applicable to the Proprietary Effects of an Assignment

3.1.1. Introduction

Belgian authors unanimously consider that article 14 of the Rome I Regulation (and previously article 12 of the Rome Convention) only applies to what it explicitly refers to, that is, (i) to the obligations between the assignor

---

238 Article 20-5°, first subparagraph of the Belgian Mortgage law.
240 Feltkamp, op. cit., no 129, p. 139.
and the assignee and (ii) to the effects of the assignment vis-à-vis the underlying debtor. Accordingly, article 14 does not determine the law applicable to the effectiveness of the assignment as against third parties other than the underlying debtor (that is, creditors of the assignor, creditors of the assignee, their liquidators, and any other "interested" persons), and does not determine the law applicable to priority issues between successive assignees, pledges or transferees of the same claim. Such issues (which are often referred to as the proprietary or in rem effects of an assignment) are therefore to be resolved by reference to Belgian national rules of conflicts of laws and/or other instruments, such as the European Regulation 1346/2000 on insolvency proceedings, as the case may be.

As detailed below, the Belgian national rules of conflicts of laws relating to the proprietary effects of assignment have evolved in recent years. Today, pursuant to an express provision contained in the Belgian Conflicts of Laws Code, the applicable law is the law of the assignor. The rules stemming from the European Regulation on insolvency proceedings will also be briefly discussed below.

### 3.1.2. Article 87§3 of the Belgian Conflicts of Laws Code

Article 87§3 of the Belgian Conflicts of Laws Code (Code de Droit International Privé / Wetboek van Internationaal Privaatrecht) (Law of 16 July 2004) provides that the law applicable to the proprietary aspects of an assignment of a claim (créance / schuldvordering) is the law of the State where the assignor had its habitual residence at the time of the assignment.

Pursuant to the same article 87§3, the same conflicts of laws rule applies mutatis mutandis to the creation of rights in rem in respect of a claim (such as a pledge, a usufruct, or a foreign law right in rem, such as a floating charge), and to the effectiveness of such rights against third parties. In other words, the creation of rights in rem over a claim and their effectiveness against third parties is governed by the law of the State where the party that created the rights had its habitual residence at the time of creation of the rights.

---

242 Article 14(1).
243 Article 14(2).
246 Note that the wording of Article 87§3 of the Belgian Conflicts of Laws Code is rather confusing: what it actually says is that "the creation of rights in rem in respect of a claim and the effects of the transfer of the claim on such rights" is governed by the law of the party that created the rights or transferred the claim. Literally, therefore, this provision does not apply to
Article 4 §2 and 3 of the Belgian Conflicts of Laws defines the notion of habitual residence of a legal person\(^{247}\) as the place of its main establishment, which must be determined taking into account primarily its centre of management, as well as the centre of its business activities.

The reference to the habitual residence of the assignor is clearly influenced by articles 22 and 30 of the UNCITRAL Convention on Assignment of Receivables. The above mentioned rule has the following advantages:\(^{248}\)

(i) it is predictable (not only for the assignee, but also for third parties);\(^{249}\)

(ii) it leads to the application of a single law, even in the case of the assignment of a portfolio of claims (where the claims may be governed by the laws of various jurisdictions and/or where the claims may be due by debtors in several jurisdictions);\(^{250}\)

(iii) it would generally correspond to the *lex concursus* under European Regulation 1346/2000 on insolvency proceedings,\(^{251}\) which contributes to legal certainty, predictability and consistency. Note, however, that the "habitual residence" rule referred to in the Belgian provision does not necessarily correspond to the "centre of main interests" or "COMI" rule because the "centre of main interests" of a person must for the purposes of the above mentioned European Regulation 1346/2000, be determined at the time of the opening of insolvency proceedings, whereas article 87 §3 of the Belgian Conflicts of Laws Code refers to the habitual residence at the time of the assignment.

\(^{247}\) Article 4 §2 also defines the notion of habitual residence of a natural person, on which we will not elaborate.


\(^{249}\) Marquette, Stuer, *op. cit.*, p. 102, n° 64; Vincent Sagaert, *De zakenrechtelijke werking van de cessie: de nieuwe IPR-regeling na de wet van 2 augustus 2002*, T.P.R., 2003, pp. 561 ff., p. 597. By contrast, the *lex domicilii debitoris* does not offer the same degree of predictability. The law of the assignment agreement is predictable as far as the assignee is concerned, but it is less predictable for third parties.

\(^{250}\) Marquette, Stuer, *op. cit.*, p. 102, n° 64. By contrast, the *lex domicilii debitoris* leads to the application of the law of each debtor.

By way of conclusion, Belgium has a rule of conflicts of laws that refers to the habitual residence (place of main establishment) of the assignor. This rule of conflicts of laws has greatly enhanced legal certainty for receivables financing transactions.

3.1.3. Situation Prior to the Entry into Force of the Belgian Conflicts of Laws Code

3.1.3.1. The Belgian Law of 2 August 2002

Article 145 of the law of 2 August 2002 on the supervision of financial markets and on financial services provided that the effectiveness of an assignment of a claim as against third parties other than the claims debtor was to be determined in accordance with the law of the assignment agreement.

This provision reflected a lobbying effort by the banking sector in Belgium. It had the effect of aligning the law applicable to third party effects of assignment of a claim, to the law applicable inter partes pursuant to article 14(1) of the Rome I Regulation (as did the famous Hansa decision in the Netherlands).

However, some Belgian authors criticised this provision, inter alia because it could lead to a deadlock in the case of several assignments of the same claim pursuant to several assignment agreements governed by different national laws. As described above, the Belgian legislator took the opportunity offered by the enactment of the Conflicts of Laws Code in 2004 to reverse the rule and choose the law of the habitual residence of the assignor.

3.1.3.2. Prior to the law of 2 August 2002

Before the entry into force of the Belgian law of 2 August 2002, the Belgian legal framework for determining what law was applicable to the enforceability against third parties of an assignment of claims was very uncertain. There were various theories on this question, and each theory lead to another conclusion. The main theories on this question are described below.

---

253 Especially Vincent Sagaert, De zakenrechtelijke werking van de cessie van schuldvorderingen na de Wet van 2 augustus 2002 op het financiële toezicht: consensus over consensualisme?, T.P.R. 2003, pp. 561 et seq.
3.1.3.2.1. Location of the debtor

Under this theory, the effectiveness of an assignment or pledge of a claim as against third parties depended on the law of the place where the debtor of that claim was established.

This theory represented the "classical" view in Belgian legal doctrine and case law.\textsuperscript{255} It was also the approach under French law, which has an influence over Belgian law.\textsuperscript{256}

It was based on the idea that the law applicable to third party effects of an assignment (or pledge) of a claim had to be the law applicable to transfer of property rights, ie the *lex rei sitae*. As a claim does not have a real *situs*, it was necessary to have recourse to a fictitious *situs*. The fictitious *situs* was found at the location of the debtor, as it was considered to be the place to which the claim had the closest connection. The main argument for this assertion was that the formalities required to render the assignment effective as against claims debtor (and previously against all third parties) must be performed at the location of the debtor.

3.1.3.2.2. Location of the debtor’s head office

This second theory was a variation on the first one: effectiveness as against third parties depended on the location of the debtor, but the relevant location was the place of the debtor’s head office.

This variation to the first approach derived from the European Regulation on insolvency proceedings. Article 2(g) of the Regulation provides that claims are deemed to be situated “in the Member State within the territory of which the third party required to meet them [ie the debtor] has the centre of his main interests”. Although the general view is that the Regulation does not aim at setting out a rule of conflicts of laws on this question, it created an argument in the then uncertain context of Belgian law that the location criterion of its Article 2(g) should also be applied, for the sake of consistency, to the selection of the law that governs the perfection of an assignment or pledge of a claim.


3.1.3.2.3. Governing law of the assignment or pledge agreement

The third theory was adopted by the famous Hansa judgment of the Dutch supreme court:257 the effectiveness of the assignment of a claim as against third parties depends on the law chosen by the assignor and the assignee as the governing law for their agreement. The judgment contains a detailed reasoning by the court, which is based entirely on the Rome Convention on the law applicable to contractual obligations, its legislative history and its internal consistency. As this Convention was also in force in Belgium, there was an argument that the Dutch judgment could have authoritative influence before the Belgian courts.258 Subsequently, as mentioned above, the Belgian legislator adopted this solution in the law of 2 August 2002,259 before finally choosing the law of the habitual residence of the assignor in the 2004 Conflicts of Laws Code.

3.1.3.2.4. Governing law of the assigned claim

A fourth theory, which was supported by part of the legal doctrine,260 argued that the law applicable to third party effects was the law that governed the claim being assigned.

3.1.3.2.5. Location of the assignor or pledgor

Eventually, there was a theory that when the assignment or pledge concerned a portfolio of claims, with debtors located in various jurisdictions, one need not have looked at each debtor or claim individually, and effectiveness as against third parties in respect of the whole portfolio was governed by the law of the location of the assignor or pledgor.261

---

258 This influence, however, does not seem to have been recognised by the Belgian legal doctrine: see Matthias Storme, Van trust gespeend? Trusts en fiduciaire figuren in het Belgisch privaatrecht, TPR, 1998, p. 703, n° 169; Dirix en Sagaert, op. cit., n° 34 and footnote 75. On the other hand the theory of the Dutch supreme court was also supported, for other reasons, by part of the Belgian legal doctrine: A. Verbeke en I. Peeters, Vijf jaar voorrechten, hypotheken en andere zekerheden 1991-1995, n° 306.
259 At least as far as assignments of claims are concerned. The relevant provision (article 145 of the law of 2 August 2002) did not expressly mention pledges.
261 Naddi Watté, L’opposabilité des sûretés dans le nouveau règlement européen des procédures d’insolvabilité, n° 28; contra: Naddi Watté, Questions de droit international privé
3.1.4. The Scope of Article 14(2) of the Rome I Regulation

Article 14(2) of the Rome I Regulation regulates, *inter alia*, the "assignability" of a claim. However, the wording and structure of this Article give rise to uncertainty as to the definition of "assignability". The better view seems to be that article 14(2) is intended to protect the claims debtor (against having to deal with a different law than the law of the claim), and should therefore be construed according to this purpose. Accordingly, the notion of "assignability" covers the effects of a contractual prohibition of assignment, but not the conditions under which future claims can be assigned, or the question whether an assignment for security purposes is valid, as these issues are not directly relevant to the claims debtor. However, another view is that article 14(2) does cover these issues as well as restrictions on assignments.

It is also unclear whether article 14(2) covers statutory prohibitions of assignment or only contractual restrictions on assignment. If the reasoning described above is followed, then the conclusion would generally be that Article 14(2) does not cover statutory prohibitions on assignment.

---


263 Under Belgian law, an absolute sale of claims for security purposes does not function if the claims are not financial instruments within the meaning of the Belgian Financial Collateral Law of 15 December 2004: see the 1996 Sart-Tilman decision of the Court of Cassation (decision of 17 October 1996, R.W., 1996-1997, pp. 1395 sqq. (no effect against third parties), recently overruled by a decision of the Court of Cassation of 3 december 2010 (C.09.0459.N) (sale recharactarised as pledge). A detailed conflicts of laws analysis regarding absolute sale of claims for security purposes would fall outside the scope of this report.


266 As regards the question of assignment of future claims: Sagaert, *op. cit.*, pp. 574-75, n° 15 (this author does not agree with this view); Looyens, *Cessie en subrogatie in het international privaatrecht*, T.B.H., 1994, p. 688 (this author does not express any preference for one or the other view).

The Dutch supreme court has decided that the conditions under which future claims can be assigned are governed by the law of the claim: Hoge Raad, 11 June 1993, N.J., 1993, pp. 3207 sqq.

267 For example, the limitations on the assignability of workers' wages (articles 1409 sqq. of the Belgian Judicial Code) are intended to protect the worker, not the employer.
3.1.5. The Ottawa Convention (UNIDROIT Convention of 28 May 1988 on International Factoring)

The Ottawa Convention on International Factoring (which provides for uniform rules in respect of international factoring agreements) entered into force in Belgium on 1 October 2010. To the extent that the Convention is applicable, it does not substantially modify the applicable Belgian rules. Nevertheless, the Convention provides that the assignment of a claim by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment. However, Belgium has made a reservation in respect of this provision. As a result, this provision does not apply to a debtor which, at the time of conclusion of the contract of sale of goods, has its place of business in Belgium.

3.1.6. Battle of Forms

In commercial transactions the question often arises as to what conditions apply to the sale of goods or the provision of services and hence to the claims arising from such sale of services. This question is relevant for the following reasons: (i) the law applicable to a claim will determine whether such a claim is assignable, (ii) the law applicable to a claim will determine how the assignment of such a claim is made enforceable against the claims debtor, and (iii) the law applicable to a claim will determine certain rights of the claims debtor, such as set-off rights.

The general rules for determining what conditions are applicable to an international sale are laid down in the Vienna Convention of 1980, but the Vienna Convention would only apply to sales between companies established in two different jurisdictions that have both ratified the Vienna Convention, or to sales where the applicable conditions refer to the rules set out in the Vienna Convention.

3.1.7. Uncertainty for Claims Secured by a Mortgage

The effectiveness against third-parties of the transfer of receivables secured by a mortgage is a complex question.

If the matter were to be governed by Belgian law, then the effectiveness of the transfer will be subject to the transfer agreement being notarised and registered with the mortgage office by way of a side mention (mention 268 Law of 21 February 2010 approving the Convention. 269 In particular, article 5 of the Convention confirms that bulk assignments of present and future claims are valid. 270 Article 6(1) of the Convention. See below on the effect of contractual prohibitions of assignment in Belgian law.}
under Belgian rules of conflicts of laws, matters relating to real estate (eg the effectiveness of a mortgage) are governed by the law of the location of the property, but the effectiveness against third parties of a transfer of claims is governed by the law of the place of principal establishment of the transferor (see above). In the case of the transfer of a claim secured by a mortgage, it is not entirely clear which one of these two rules must apply. We believe the better view is that the "transfer of claims" regime applies, ie that Belgian law (and the side mention requirement) will not apply when the assignment is performed by a non-Belgian entity. This is because the mortgage is only ancillary (accessoire) to the claim, and because the loans remain "movable" assets despite the fact that they are secured by a mortgage on real estate. The issue, however, may be debatable.

4. A NEW CONFLICT OF LAWS PROVISION ON THE PROPRIETARY EFFECTS OF ASSIGNMENT IN THE ROME I REGULATION?

A new conflicts of laws rule on the proprietary effects of an assignment of claim would be satisfactory only if it (i) offered a high degree of predictability as to the law applicable to the proprietary effects of an assignment, both for the assignee and for third parties and (ii) led to the application of a single law, even in the case of an assignment of a portfolio of claims (where the claims may be governed by the laws of various jurisdictions and/or where the claims may be due by debtors in several jurisdictions).

If the conflicts of laws rule would refer to the law of the claims debtor, or the law of the assigned claim, then this is likely to lead to significant difficulties in transactions involving the assignment of a portfolio of claims which are governed by the law of several jurisdictions and/or which are due by debtors located in several jurisdictions (e.g., in the case of an assignment of a portfolio of claims, the law of the claims debtor leads to the application of the law of each debtor).

By contrast, both the law of the assignment agreement (as was provided for by article 145 of the Belgian law of 2 August 2002) and the law of the assignor (as currently provided for by article 87§3 of the Belgian Conflicts of Laws Code) would lead to satisfactory results.

---

271 Belgian Mortgage law, art. 5.
B. NATIONAL REPORT THE CZECH REPUBLIC²⁷²

SUMMARY

1. Substantive Law

Under Czech law a creditor (assignor) may assign his claims (in Czech: *pohledávka*) (together with appurtenances and all attached rights) to another person (assignee) by a written contract.

The assignment is effective against all parties other than the assigned debtor from the moment the assignment agreement comes into effect. The assignment is effective against the assigned debtor from the moment when it is notified to him by the assignor or proven to him by the assignee. The notification has no other effects as a matter of law.

2. Conflict of Laws

Czech national law does not contain any directly applicable rules regarding the assignment of claims or specifically effects of that assignment against third parties.

²⁷² Robert Pavlu, Allen & Overy, Prague.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Relevant provision</th>
</tr>
</thead>
</table>
| Act No 40/1964 Coll., Civil Code | Section 524  
(1) The creditor may assign his claim to another person by a written contract even without the debtor's consent.  
(2) The appurtenances of a claim and all rights attached thereto shall also be transferred with the assigned claim. |
| Section 525 |  
(1) It shall not be possible to assign a receivable if it expires no later than upon the creditor's death or if its terms would be modified by a change in the person of the creditor. Nor shall it be possible to assign a claim if it cannot be made subject to the execution of a judgement.  
(2) A claim may not be assigned where such assignment would be contrary to the agreement concluded with the debtor. |
| Section 526 |  
(1) The assignor (the original creditor) must notify the debtor, without undue delay, of assigning of the claim. Until the debtor is notified of the assignment, or until the assignee proves to the debtor the assignment of the claim, the debtor shall relieve himself of his debt by rendering performance to the assignor.  
(2) Where the assignor notifies the debtor of assignment of the claim, the debtor is not entitled to demand that such contract of assignment be proved to him. |
| Section 529 |  
(1) Defences against the claim which the debtor could have raised at the time of assignment shall remain available to him even after assignment of the claim.  
(2) The debtor may also use to set off against the assignee claims which the debtor had against the assignor at the time when he was notified of the assignment or when the assignment was proved to him (section 526) provided that he informed the assignor thereof without undue delay. The debtor has this right even if his claims were not yet mature at the time of such notice, or at the time when the assignment was proved to him. |
**Act No 408/2010 Coll., on Financial Collateral**

**Section 10 (List of credit claims)**

(1) In case of credit claims, the requirement to prove the creation of financial collateral is met also when the list of credit claims (the "list") is conveyed to the collateral taker in writing. The list contains credit claims that belong to financial collateral.

(2) Unless stipulated otherwise by the agreement, it shall be deemed that a credit claim included in the list has been assigned by the assignor to the assignee with a condition precedent that there will occur a default in the performance of a secured claim of financial nature, or that there will occur another fact stipulated in the agreement by which the financial collateral arrangement has been agreed or another fact agreed as part of close-out netting, whereas the legal effects of the assignment shall occur only regarding the credit claims which the assignee chooses from the list by the exercise of the right to satisfaction.

(3) When the list is submitted to the financial collateral taker, the provider cannot dispose of credit claim included in the list.

(4) Neither financial collateral taker nor the provider is obliged to notify the debtor, that is liable to perform respective claim, about the inclusion of the credit claim in the list.
### B) Conflict of Laws

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No 97/1963 Coll., Act on Private International and Procedural Law</td>
<td><strong>Section 5:</strong> Rights relating to real and movable assets shall be governed by the law of the place where the asset is located, unless this Act or special regulations provide otherwise.</td>
</tr>
<tr>
<td></td>
<td><strong>Section 6:</strong> The creation and termination of rights relating to movable assets shall be governed by the law of the place where the asset was located at the time of the event which creates or extinguishes such rights. If a movable asset is involved, which is being transported under a contract, the creation and extinction of such rights shall be governed by the law of the place from which such asset was dispatched.</td>
</tr>
<tr>
<td></td>
<td><strong>Section 11:</strong> The law determined under Section 9 and 10 shall also be applicable with respect to changes, security and consequences of breaches of obligations listed therein, unless the intent of the parties or the nature of the matter indicate otherwise.</td>
</tr>
</tbody>
</table>

### C) Table of case law

<table>
<thead>
<tr>
<th>Decision</th>
<th>Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>29 Odo 606/2003</td>
<td>If the assignee proved to the debtor the assignment, by the contract of assignment that was found void because the assignor acted under the mental stress (a disorder), that rendered him incapable of engaging in such an act in law (s.38 paragraph 2 of the Act No 40/1964 Coll., Civil Code), and if the debtor afterwards performed his debt to the assignee, the debt is discharged, unless the debtor knew about the assignment contract being void.</td>
</tr>
<tr>
<td>23 Cdo 4892/2008</td>
<td>The question of the validity of assignment is not significant for the relationship between the assignee and the debtor, because the debtor is not able to determine whether the assignment was duly performed and whether the assignment contract is valid or not. The legal fact that is required for the transfer of the right to receive performance to the entitled person is the notification; it is not significant if the assignment was truly performed. Otherwise the debtor would be uncertain whether he fulfilled his obligation to</td>
</tr>
</tbody>
</table>

---

273 This is the law governing the relevant claim (or corresponding obligation).
the entitled person or not. This system is set forth to protect the debtor. The notification implies that the person entitled to receive performance is the assignee even though the assignment was not performed or the assignment was found to be invalid.

31 Cdo 1328/2007

If the assignor notified the debtor about the assignment of his claim to the assignee, in case of a dispute about the payment of the claim, the debtor has no defence (except ones mentioned in Section 525 of the Act No 40/1964 Coll., Civil Code as amended, or when the debtor proves that the assignment implied a change/aggravation of his legal position) against the assignee based on the invalidity of the assignment agreement.

1. CHARACTERISATION AND SUBSTANTIVE LAW ISSUES

1.1. General

Under Czech law the creditor (assignor) may assign his claim (together with appurtenances and all attached rights) to another person (assignee) by a written contract. The general rules on assignment are set out in Sections 524 – 530 of the Act No 40/1964 Coll., Civil Code as amended, in the part entitled “Law of Obligations”, subsection “Changes to the Creditor or Debtor” (which follows a subsection entitled “Changes to the Contents of Obligations”). The assignment agreement must be in writing and must contain specification of the claims to be assigned. Besides contractual assignment, Czech law also recognizes assignment by operation of law or by a court decision. The generally accepted view is that it is possible to assign future (including conditional) claims, however the assigned claims (in most cases those arising from commercial contracts) have to be specified sufficiently, for example by reference to the underlying contract. There is no duty to register a charge over claim in the Czech Republic.

1.2. Notification

The assignor must notify the assignment to the assigned debtor without undue delay. This duty to notify without undue delay does not apply in the case of an assignment of credit claims (in Czech: úvěrové pohledávky) under the Act No. 408/2010 Coll., on Financial Collateral, as amended.

Until the notification is made, or the assignee proves the assignment to the debtor, the debtor may discharge his obligation by performance to the assignor. The notification has no other effects as a matter of law. The assignment is therefore effective against all parties other than the assigned debtor from the moment the assignment agreement comes into effect. From the moment of effectiveness of the assignment agreement, creditors of the assignor will not be able to attach the assigned claim as that claim no longer forms part of the estate of the assignor.\textsuperscript{275}

Where the assignment is notified to the debtor by the assignor, the debtor is not entitled to demand the assignment contract to be proved to him and therefore in such situations the potential invalidity of the assignment contract between the assignor and the assignee does not affect the fact that the debtor validly discharged its obligations by performance (even though this occurred on the basis of an invalid assignment agreement) to the assignee (case law of the Supreme Court 29 Odo 606/2003).

1.3. Good Faith

There is no general concept of protection of good faith acquirers (including assignees) under Czech law. Good faith acquirers are protected only where specifically legislated for. Such specific protections are granted with respect to purchase of goods under the Act No. 513/1991 Coll., the Commercial Code, as amended, and transfers of securities under Act No. 591/1992 Coll., on Securities, as amended. It is unlikely that these rules would be extended to assignment of claims by way of analogy. Therefore, where the assignor was not permitted to assign a claim, whether as a result of a provision of the law or as a result of the assignor's agreement with the assignee, the assignment agreement would be invalid \textit{ab initio}.

1.4. Consent of the Debtor

No consent of the debtor is required for the assignment to a third party, unless this is requested in the agreement between the debtor and the assignor specifically and such agreement therefore prohibits the assignment of claims to a third party without the debtor's consent being given (in most case prior to the assignment and in written form).

1.5. Set-off

The general rule is that none of the rights of the debtor against the assignor existing at the moment of assignment (including the right to set-off) are affected by the assignment. Moreover, the debtor may in the future set-off

\textsuperscript{275} Švestka, Spáčil, Škárová, Hulmák a kol., ibid.
against the assigned claim (i.e. against the assignee) any claims it had against the assignor at the time the assignment was notified or proven to it.\textsuperscript{276}

Set-off applies only to claims of the debtor against the assignor (both due and undue) existing and held by the debtor at the moment the assignment is notified or proven to the debtor. The debtor has to inform the assignee about such claims without undue delay. All counterclaims (objections) which the debtor could have raised against the assignor at the time of assignment can be raised after the assignment even against the assignee.

If requested by the assignee, the assignor may enforce the claims in its own name on the account of the assignee. In such a case, the debtor can only set-off mutual claims existing at the time of enforcement between the debtor and the assignor and not the assignee (which would be the case of direct enforcement by the assignee).

1.6. Specific Transactions

Other than as mentioned in section "Notification" above in relation to financial collateral arrangements, Czech law does not contain any relevant rules specific for certain types of transaction, such as securitisations etc.

2. CONFLICT OF LAWS ANALYSIS

2.1. National Conflict Rules

The Act No. 97/1963 Coll., Act on Private International and Procedural Law (the "PIL Act") contains no directly applicable rules regarding the assignment of claims or specifically its effects against third parties and neither did it contain such rules before the Rome Convention on the law applicable to contractual obligations (the Rome Convention) and the Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (the Rome I Regulation) came into effect. Nor has the research revealed any useful decisions of Czech courts.

It is therefore unclear which conflict of laws rule Czech courts would apply to determine the law applicable to the effectiveness of an assignment against third parties.

The only applicable conflict rule possibly relating to assignment at the national level was included in Section 11 of the PIL Act stating that the law

\textsuperscript{276} Švestka, Spáčil, Škárová, Hulmák a kol., ibid.
applicable with respect to charges, security and consequences of breaches of obligations shall be governed by the law governing the relevant obligation.\textsuperscript{277} Since the entry into effect of the Rome Convention and the Rome I Regulation in the Czech Republic, Section 11 of the PIL Act is not applicable.

In theory, a Czech court could apply, by way of analogy, rules applicable to rights in rem to movables. They are governed by the laws of the place where the movable is located (\textit{lex rei sitae}) (Section 5 of the PIL Act)\textsuperscript{278} and the creation and extinction of these rights in rem is governed by the law of the place, where the movable was located at the time of the creation or extinction of the right (Section 6 of the PIL Act).\textsuperscript{279}

In this respect we are aware of a stand-alone decision of a High Court (5 Cmo 26/2003) where the court decided that a claim has its domicile, that being the place of performance of such a claim, albeit for the purpose of assessment which of the courts had competence do resolve the dispute.

However, applying the \textit{lex rei sitae} rule would presuppose that there are "proprietary effects" (or rights in rem) involved in an assignment, which is doubtful given that Czech substantive rules on assignment and notification of assignment, as described in section \textit{Notification} above, seem to suggest that assignment under Czech law is purely contractual in nature.\textsuperscript{280}

Having said the above, if an assignment were found to involve proprietary effects, then those proprietary effects would also include effects against third parties.\textsuperscript{281}

No conflict of law rules relating to claims have been adopted under Czech law in connection with the implementation of the Directive 2009/44/EC or 2002/47/EC.

\textbf{2.2. New Conflict of Laws Rule in Rome I}

With respect to new conflict of laws rules on the assignment of claims and its effects against third parties, we tend to believe that the sector-specific approach should not be followed, and in relation to third parties, the law

\textsuperscript{278} Kučera, ibid.
\textsuperscript{279} Kučera, ibid.
\textsuperscript{280} Zdeněk Kučera, Luboš Tichý, \textit{Zákon o mezinárodním právu soukromém a procesním. Komentář.}, 1989, Prague, p. 82., expressed the view that the object of rights in rem can be things but not rights. On the other hand, this commentary has long not been updated and, for example, the Act No. 441/2003 Coll., on trademarks, as amended, which was adopted after the above view has been expressed, provides for an ownership right to a trademark.
\textsuperscript{281} Kučera, Tichý, ibid.
governing the original claim (as the law determining the assignability of the claim, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged) should be applicable in order to apply the same consistent approach towards the whole assignment process and to treat the third parties and the debtors equally.
C. NATIONAL REPORT FINLAND

SUMMARY

1. Substantive Law

Under Finnish substantive law, an assignment is effective against third parties once the assigned debtor has been given notice of the assignment.

2. Conflict of Laws

Under Finnish law, it is unclear which conflict of law rule(s) applies to the proprietary effects of an assignment. No statutory or case law guidance is available which would allow for providing even a qualified opinion on what the Finnish courts would deem to be the applicable Finnish conflict of law rule to the proprietary effects of assignment.

---

282 Jari Tukiainen, Hannes Snellmann, Helsinki.
<table>
<thead>
<tr>
<th>TABLE OF STATUTES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A) Substantive law</td>
<td></td>
</tr>
<tr>
<td><strong>Promissory Notes Act (Fin: velkakirjalaki, 622/1947, as amended)</strong></td>
<td><strong>Article 10:</strong></td>
</tr>
<tr>
<td></td>
<td>The provisions of this chapter on the transfer of promissory note shall be applied also to the pledging of said document.</td>
</tr>
<tr>
<td><strong>Article 27:</strong></td>
<td>When a non-negotiable promissory note is transferred or assigned, the transferee shall not have a better right against the debtor than the transferor had unless expressly otherwise stipulated.</td>
</tr>
<tr>
<td><strong>Article 28:</strong></td>
<td>The debtor may set a claim that he has against the credit or unless he acquired said claim after he had been notified of a transfer of non-negotiable promissory note or after he has reason to assume that it had been transferred. If his claim did not become due until thereafter and later than the promissory note, the debtor shall not have the right to set-off.</td>
</tr>
<tr>
<td><strong>Article 29:</strong></td>
<td>A payment made by debtor after a transfer of non-negotiable promissory note to the transferor shall, however, be valid unless the debtor knew or should have known that the transferor no longer was entitled to the payment.</td>
</tr>
</tbody>
</table>
Article 31.1-2:
The transfer of non-negotiable promissory note shall not be valid against the creditors of the transferor unless the debtor has been informed of the transfer by either the transferor or the transferee; if the transfer was a gift, it shall be governed by the provisions of gifts.

If a non-negotiable promissory note is transferred to more than one person, an earlier transfer shall prevail over later one; a later transfer shall, however, prevail if the debtor has been notified thereof in accordance with the above provisions and if the transferee was in good faith.

There is no applicable conflict of laws statute nor case law relating to the proprietary effects of assignments in cross-border relations that we are aware of.
The purpose of this report is to briefly outline the general legal framework in Finland with respect to conflict of laws insofar as it relates to the rules on the law applicable to the third party effects of assignment of claims, notably in relation to the assignor’s creditors and second assignees. In this memorandum we also discuss Finnish substantive law to the extent it is relevant for the purposes of assessing Finnish conflict of law rules or where we have deemed it to be of interest to provide an overview of the content of the Finnish legal regime regarding assignment of claims.

1. SUBSTANTIVE LAW ISSUES

The rules of the Finnish Promissory Notes Act (in Finnish: velkakirjalaki, 622/1947, as amended) are applicable to the assignment of claims.

1.1. Formal Requirements

Under Finnish national law and practice, in order to create effectiveness against third parties, an assignment of a claim must, as a main rule, be notified to the assigned debtor. The rules applicable to an assignment of a claim and on a pledge of a claim with respect to effectiveness as against third parties are the same.

There are no formal requirements as to the form of the notice of assignment under statutory law. However, in case law it has been held that the notice of pledge of claims must comply with certain minimum requirements to be effective.

There are no requirements in Finland for companies or other grantors of security to register security interests over debts. In fact, no register exists to which such security interests could be registered.

1.2. Effectiveness of an Assignment

Finnish law does not as such require notification for the validity of the assignment of a claim inter partes. As a matter of Finnish law, an assignment is binding between assignor and assignee on the basis of the assignment agreement. On the other hand, the assignment of a claim is not binding on competing third parties unless the assignor or the assignee has notified the debtor of the assignment.

As to general creditors of the assignor or its insolvency administrator, the assignment becomes valid and effective on such third parties upon notice of the assignment to the assigned debtor.
As to competing assignees (in case of double or subsequent assignments), if the claim is assigned to more than one person, the assignee to whom the claim has been assigned to earlier has priority; however, a subsequent assignee has priority if the assigned debtor has been notified of such assignment earlier and the subsequent assignee was in good faith when giving notice of the assignment.

Notification as such is not required to create effectiveness against the debtor, but if no notice is given and the assigned debtor acting in good faith pays the assignor instead of the assignee, such payment will be effective against the assignee (assigned debtor receives good discharge of its obligations in making payment to the original creditor).

**1.3. Right to Assign, Set-off, Etc.**

The assigned debtor is entitled to make payments to the assignor until it gains knowledge or receives notice that the claim has been assigned to the assignee. Under Finnish law, unless otherwise provided in the contract or other document evidencing the debt, the original creditor (lender, assignor) has the right to assign or pledge its receivable from the debtor (borrower) to a third party (assignee).

The Finnish Promissory Notes Act provides that the assignment of a claim does not give the assignee (new creditor) any rights vis-à-vis the debtor in excess of the rights that the assignor (original creditor) had. Therefore, the assigned debtor may effectively challenge payment under the loan also against the new creditor, e.g. on the basis that the assigned debtor had discharged its obligations fully under the loan or that the loan is unenforceable due to, e.g. the obligation being void. Further, despite the assignment, the assigned debtor maintains a right of set-off against the assignee (new creditor) for any obligation of the assignor (original creditor) that was valid prior to the notice of the assignment served to the assigned debtor.

The assigned debtor’s right to suspend performance is not affected by the assignment. The assigned debtor is entitled to set off a counter-claim from the assignor against the assigned claim provided that it has acquired such counter-claim before it has gained knowledge of the assignment or had sufficient reason to expect that it had occurred. Further, if the counterclaim fell due only after the said point in time and later than the original claim, there is no right of set-off.

As a main rule, the legal position of the assigned debtor with regard to its duty to perform is not influenced by the assignment of the claim. It is possible to contractually prohibit assignment.
As a matter of Finnish law, it is not certain in all respects to what extent identifiable future claims can be pledged with binding effect as against third parties. In view of recent rulings of the Finnish Supreme Court (in Finnish: Korkein oikeus) the position of Finnish law, based on such rulings, appears to be that security can be taken also over future (unearned) receivables, and that such security becomes effective when the asset is acquired or earned provided that this takes place prior to the commencement of insolvency proceedings of the pledgor.

No specific legislation regarding securitisation or factoring has been enacted in Finland.

2. CONFLICT OF LAWS ANALYSIS

Under Finnish law, the proprietary effects of assignment are understood as meaning the effects of assignment as against third parties (the term ‘third party’ here excludes the assigned debtor).

Finnish law makes a clear distinction between (a) the contractual relationship between assignor (original creditor) and assignee (new creditor), (b) the effectiveness of the assignment of a claim against the assigned debtor, and (c) the effectiveness of the assignment of a claim against third parties, that is, general creditors of the assignor, its insolvency administrator and competing claimants such as subsequent assignees. Of such relationships, the Rome I Regulation provides a rule for which law is applicable as between assignor and assignee, and as between assignee and assigned debtor, but not for the relationship against third parties.

The Rome I Regulation and the Rome II Regulation are, as European Union regulations, binding and directly applicable in Finland. Apart from the applicable provisions in the respective regulations, Finnish law contains no conflict of laws rules that determine the law applicable to the effectiveness of the assignment of a claim against the creditors of the assignor or against other competing third parties. In the absence of statutory Finnish law it is therefore uncertain which law would be applied to the third party effects of assignment. Unfortunately there is no relevant case law in this area, either.

In Finland some legal scholars have, mostly before the Rome I Regulation entered into force, but also to some extent after, discussed in legal articles the conflict of law in relation to assignment of claims. In general, Finnish scholars have so far avoided taking final positions as to the question of the rule governing the third party effects of assignment.

Instead of definite advocacy of one rule alternative or another, the discussion mainly consists of weighing their advantages and drawbacks. For these
reasons, as well as due to the scarcity of writings on the topic, the discussion has not brought about a common opinion on the optimal rule. All this adds to the difficulty of predicting which rule a Finnish court would apply.

Two scholars have argued that, in the context of factoring, the law applicable to the third party effects of assignment of claims should be the law of the domicile of the assignor. According to this view, the law applicable to the third party effects of assignment of factoring receivables should be the law of the domicile of the seller because this would be the most natural solution given that the seller is the party who transfers its receivable to the factoring company (sale or pledge).

Another Finnish scholar has argued in favour of *lex rei sitae* as the applicable conflict of laws provision and suggested that the centre of main interest (COMI) rules set out in Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings with respect to locating claims could be used as a basis for determining the law applicable to the third party effects of an assignment of claim. In essence, this would mean that the applicable law to the third party effects of assignment of a claim would be the law of the COMI of the debtor.

Lastly, one Finnish scholar has reviewed the matter in the context of the consolidation of European rules on conflict of laws and been agreeable to the original proposal of the European Commission according to which the applicable law to the third party effects of an assignment of claim should be the law of the domicile of the assignor.

There are certain particular rules applicable to certain specific types of transactions, such as financial collateral, netting and winding up of credit institutions and insurance undertakings. Such rules are based on applicable EU legislation (directives implemented into Finnish law).

In any court proceedings taken against a Finnish assigned debtor overriding mandatory provisions of Finnish law may be applied by the Finnish courts to the extent permitted by Article 9 of the Rome I Regulation.

In our view, it may be useful to have either an Article 14 (3) or sector-specific solutions. Possibly the most preferable alternative would be to have as a starting point, for the law governing the question of when an assignment is effective against third parties, to be the law governing the assigned claim coupled with certain sector-specific solutions for various purposes, e.g. the law of the domicile of the assignor for factoring transactions.
D. NATIONAL REPORT FRANCE

SUMMARY

1. Substantive Law

Conditions under French law for an assignment to be effective against third parties:

- depend on the types of assignment;

- may be without formalities on the date of the assignment, or by performing registration on a public registry or by notifying the debtor.

2. Conflict of Laws

For an assignment presenting a cross-border element, French conflict of laws rules applicable to determine the laws governing the proprietary effects are:

- between assignee and assignor: Article 14§1 of the Rome I Regulations;

- vis-à-vis the debtor (i.e. enforceability): Article 14§2 of the Rome I Regulations;

- vis-à-vis third parties (i.e. enforceability): French case law from a decision of the court of appeal of Paris dated 27 September 1984 which refers to the law of the country of residence of the assigned debtor.

---

# Table of Statutes

## A) Substantive Law

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>French civil code</td>
<td>Article 1690</td>
</tr>
<tr>
<td></td>
<td>The assignee is vested towards third parties only by the notification of the assignment to the debtor delivered by a bailiff.</td>
</tr>
<tr>
<td></td>
<td>Nevertheless, the assignee may also be vested by the acceptance of the assignment through an authentic act.</td>
</tr>
<tr>
<td>Article 2361</td>
<td>The pledge of a debt, existing or future, takes effect between the parties and becomes enforceable against third parties as from the date of the deed.</td>
</tr>
<tr>
<td>Article 2018-2</td>
<td>The assignment of debts realised through a trust (fiducie) is enforceable against third parties as from the date of the trust agreement or of the amendment evidencing it.</td>
</tr>
<tr>
<td>Law n°81-1 of 2 January 2001 facilitating business credit (Dailly Law)</td>
<td>Article L. 313-27 para. 1</td>
</tr>
<tr>
<td>(French monetary and financial code)</td>
<td>The assignment or pledge takes effect between the parties and becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered, regardless of the origination date, maturity date or due date of the debts, without any other formality being necessary, and regardless of the law applicable to debts and the law of the country of domicile of the debtors.</td>
</tr>
<tr>
<td>French monetary and financial code</td>
<td>Article L. 214-43 para. 8</td>
</tr>
<tr>
<td></td>
<td>The assignment of debts [...] takes effect between the parties and becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered, regardless of the debts’ origination date, maturity date or due date, without any other formality being necessary, and regardless of the law applicable to the debts and the law of the debtors’ country of domicile.</td>
</tr>
</tbody>
</table>
The assignment takes effect between the parties and becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered, regardless of the origination date, maturity date or due date of the debts, and without any other formality being necessary, regardless of the law applicable to debts and the law of the country of domicile of the debtors”.

The assignment of debts related to financial obligations as defined in article L. 211-36 is enforceable against third parties as from the date the debtor is notified of the assignment of debts.

As a collateral for present or future financial obligations as defined in article L.211-36, the parties may organize transfer of full ownership, enforceable against third parties without any other formality, of securities, effects, debts, contracts or sums of money, or the creation of a security interest over the assigned debts or rights.

B) Conflict of laws

In consideration of certain types of assignment of debts listed below, the French legislator has introduced in the relevant statutes specific conflict of laws rules. For the other types of assignment, reference is made to the French case listed in paragraph "Table of case law" below.

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>French monetary and financial code</td>
<td>Article L. 214-43 para. 8</td>
</tr>
<tr>
<td></td>
<td>The assignment of debts [...] takes effect between the parties and becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered, regardless of the debts’ origination date, maturity date or due date, without any other formality being necessary, and regardless of the law applicable to the debts and the law of the debtors’ country of domicile.</td>
</tr>
</tbody>
</table>
The assignment takes effect between the parties and becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered, regardless of the origination date, maturity date or due date of the debts, and without any other formality being necessary, regardless of the law applicable to debts and the law of the country of domicile of the debtors.

The assignment or pledge takes effect between the parties and becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered, regardless of the origination date, maturity date or due date of the debts, without any other formality being necessary, and regardless of the law applicable to debts and the law of the country of domicile of the debtors.

C) Table of case law

<table>
<thead>
<tr>
<th>Decision</th>
<th>Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of appeal of Paris, February 11, 1969</td>
<td>The relationships between the parties which are entered into an assignment of a debt over a third party are governed by the law which governs such assignment contract. However, the rights and obligations of the assigned debtor are necessarily determined by the law governing the assigned debt.</td>
</tr>
<tr>
<td>Court of appeal of Paris, September 27, 1984</td>
<td>The law applicable to the measures of publicity relating to an assignment of debts is the law of the residence of the assigned debtor.</td>
</tr>
<tr>
<td>Court of appeal of Paris, March 26, 1986</td>
<td>The law applicable to the enforceability against third parties of an assignment of debts in which the assigned debtor is located in France and the assignee and assignor are located in Germany is the French law.</td>
</tr>
</tbody>
</table>
1. CHARACTERISATION AND SUBSTANTIVE LAW ISSUES

As explained below, the conflict of laws rule applicable in France to the enforceability against third parties of an assignment of debts refers to the law of the country of residence of the debtor.

Nevertheless, the conflict of laws rule applicable to the enforceability against third parties of an assignment of debts in the jurisdiction in which the assigned debtor has its residence may refer to another law, such as the law of residence of the assignor or the assignee.

In such a case, formalities required by the law of the different jurisdictions involved in the assignment with a cross-border element shall have to be performed but there is still an uncertainty as to whether the transfer of debts is perfect between the assignee and the assignor and enforceable against third parties.

The French conflict of laws rule applicable to the enforceability against third parties of an assignment of debts raises other difficulties when the type of assignment chosen by the assignor and the assignee is not contemplated by the law of residence of the assigned debtor.

French law actually knows several types of assignment or transfer of debts by way of security: Dailly law assignment since 1981 and transfer of full title of a debt for collateral purpose under a financial collateral arrangement since 2005 (as a result of the implementation in France of the Collateral Directive 2002/47/CE).

However, some jurisdictions do not know the concept of "assignment of a debt by way of security". For example, some jurisdictions have not yet implemented directive 2009/44/CE and the transfer of property by way of security over debts is not contemplated by their laws.

In such a situation, even if the assignment contract is governed by French law, and the Rome I Regulation includes the assignment by way of security, as French conflict of laws rule refers to the law of the country of residence of the assigned debtor concerning the enforceability against third parties, there is an uncertainty as to whether the judge of the country of residence of the assigned debtor would recognize the full effects to such assignment.

Should a foreign judge recharacterise the assignment by way of security (governed by French law) into either an outright assignment or a pledge, this raises various issues: which formalities are to be performed in such a case
(formalities for the pledge or formalities for the outright assignment, which could be problematic if different)?

Moreover, in certain jurisdictions, there is a risk raised by local legal advisers that the local judge would even deny any effects to this assignment by way of security on the basis that this instrument is unknown and, as such, could be considered as contrary to internal public policy. This creates a great uncertainty that is not suitable to the security of transactions.

We believe that the lack of provision in the Rome I Regulation, in respect of the enforceability of an assignment of debts against third parties, creates a strong legal insecurity due to the unpredictability of the law applicable to such issues.

2. CONFLICT OF LAWS ANALYSIS

2.1. Types of Assignments under French Law and Rules Applicable to the Proprietary Effects

French law actually recognises various types of assignment of debts [créances]: outright assignment or transfer, assignment and transfer by way of security and pledge.

It should be noted that:

- whatever the type of assignment, French law generally makes a distinction between (i) proprietary effects between the assignor and the assignee, (ii) enforceability of such proprietary effects towards the debtor and (iii) enforceability of such proprietary effects towards third parties (other than the debtor);

- rules and formalities applicable under French law in relation to the effects between the assignor and the assignee, enforceability towards the debtor and enforceability towards third parties may differ amongst themselves and may also differ depending on the type of assignment; however, such rules are common whatever the nature of the assigned debts (commercial debts, unsecured loan debts, mortgage loan debts,284 etc.); and

- French law provides for assignments governed by the French civil code (outright assignment of debts, subrogation and pledge over debts) and for other types of assignment governed by specific derogating law providing for a simplified means of transfer without formalities to be

284 Subject to formalities on mortgage registry, unless specified otherwise in the applicable legal regime of assignment.
performed for the proprietary effects to be enforceable towards third parties (other than the debtor). Such other specific types of assignments may be either outright assignment of debts, transfer or assignment by way of security or pledges.

Please refer to Annex 1 for detailed presentation of all the types of assignment provided for by French law and the relevant French rules and formalities applicable for enforceability towards third parties (other than the debtor).

2.2. Laws Applicable to the Proprietary Effects of Assignments Presenting a Cross-Border Element

As a preliminary remark, the fact that Article 14(3) of the Rome I Regulation now expressly provides that the rules of conflict of laws set out in Articles 14(1) and 14(2) apply to all types of assignment of debts presenting a cross-border element contributes to clarify and harmonise the interpretation of the Rome I Regulation by French courts and legal doctrine.

2.2.1. Law Applicable to the "Relationship" Between the Assignor and the Assignee

The French judge applies the provisions of Article 14(1) of the Rome I Regulations to the relationship between the assignor and the assignee.

It should be noted that the previous Article 12(1) of the Rome Convention raised some debates between French authors as to whether this rule of conflict of law also applied to the proprietary effect of the assignment (right in rem) between the assignor and the assignee whereas legal practitioners generally considered that this was the case. Such a position seems to be now supported by the provisions of Article 14(1) as construed in accordance with paragraph 38 of the introduction of the Rome 1 Regulation.

2.2.2. Law Applicable to the Enforceability of the Assignment Against the Debtor

The French judge applies the provisions of Article 14(2) of the Rome I Regulations to the assignability of the debt, the relationship between the

---


286 See Audit who now expressly states that "such law (of the assignment contract) applies to the transfer strictly speaking of the debt", in the last updated version of its book *Droit international privé*, Economica, 6ème éd., §784, p. 682.
assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor’s obligations have been discharged.

French legal scholars generally consider that the "law governing the assigned debt" means the law of the source of the debt, e.g. the law of the contract from which it arises if the assigned debt is a contractual debt.\textsuperscript{287}

This construction results from the fact that, as far as such law determines the rights held by the assignor over the debtor and on the basis of the adage "\textit{Nemo plus juris ad alium transferre potest quam ipse habet}", such law should also logically apply to determine the rights of the assignee over the debtor and the question of whether such debt is transferable.

\textbf{2.2.3. Law Applicable to the Enforceability Against Third Parties}

There is no distinction made under French law (French case law or French doctrine) between different classes of third parties other than the debtor. Such third parties may either be, for instance, the creditors of the assignor, the creditors of the assignee or any successive assignee of the same debt.

Since the Rome I Regulation does not provide for a rule of determination of the law to govern the enforceability of the assignment towards third parties other than the debtor, the question is referred to internal rules of conflict of laws applicable by the competent judge who will have to recognise a dispute arising from the assignment.

With respect to France, the French conflict of law rules applicable to the enforceability of an assignment of debts against third parties was determined by case law (Court of appeal of Paris, 27 September 1984) and refers to the law of the country of residence of the assigned debtor.

The application of the law of the country of residence of the debtor to the enforceability against third parties is criticized by the majority of the professionals and the French legal scholars. In particular, when the assignment is made over a portfolio of debts involving several debtors located in different countries, such a rule makes this assignment practically impossible or very cumbersome.

In order to alleviate such difficulties for certain types of assignment, the French legislator introduced express provisions in the relevant text to prevent the application of such French case law. Pursuant to the provisions of Article L. 214- 43, Article L.313-27 and Article L. 515-21 of the French monetary and financial code, respectively applicable to assignments of debts to French

\textsuperscript{287} D’Avout, \textit{Sur les solutions du conflit de lois en droit des biens}, \textit{op. cit.}, §81, p. 115.
securitisation vehicles, assignment of debts to a credit institution in consideration of a credit granted by it to a legal entity (private or public legal entity) or to an individual in connection with its business activities (Dailly law), and assignments of debts to French covered bonds issuers "[the assignment] takes effect between the parties and becomes enforceable against third parties on the date indicated on the transfer deed when delivered, [...] regardless of the law applicable to debts and the law of the country of residence of the debtors".  

However, these derogating legal provisions would only be applicable by a French judge. They also proved to be inefficient in the case where the type of assignment used (e.g. Dailly law assignment by way of security) is not known by the law governing the debt or the law of the jurisdiction where the debtor is located (see above section 2).

We understand that the present study aims at proposing a rule of conflict of laws for the effects and recognition of the proprietary effects of the assignment by third parties (other than the debtor) in the Rome I Regulation which could solve this issue provided that, if the Rome I Regulation provides for such a conflict of law rule, it does not refer to the law of the place of location of the debtor which already proved to be maladjusted to assignment of portfolio of debts presenting cross-boarder elements.

On the contrary, it is our view that the law of the country of residence of the assignor would present various advantages since such law is known by third parties (i.e. the creditors of the assignor and the assignee or the successive assignees) which are connected with the assignor and not with the debtor. Moreover, other international conventions have chosen the law of the assignor to govern the issues relating to the enforceability of the assignment against third parties. For example, the United Nations Convention on the Assignment of Receivables in International Trade dated 12 December 2001 refers to such law in articles 22 and 30§1.

However, it should be made clear in a new Article 14(3) of the Rome I Regulation that if an assignment or subrogation is made through, or relates to a debt registered in the books of, a branch of a credit institution, reference should be made to the law of the "home Member State" in the meaning Article 2 of Regulations 2001/24/EC dated 4 April 2001, notwithstanding the provisions of Article 19(2) of the Rome I Regulations.

---

288 See Table of Statutes "Conflict of laws applicable in France to the proprietary effects of an assignment presenting a cross-border element."
ANNEX 1
PRESENTATION OF THE DIFFERENT TYPES OF ASSIGNMENT PROVIDED BY FRENCH LAW

<table>
<thead>
<tr>
<th>Type of assignment</th>
<th>Framework</th>
<th>Enforceability against third parties</th>
<th>Registration requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assignment of debts under general law</td>
<td>Articles 1689 et seq. of the French civil code.</td>
<td>Pursuant to the provisions of Article 1690 of the French civil code, the assignment becomes enforceable against third parties upon the signification of the assignment to the debtor or its acceptance of the assignment in an authentic act.</td>
<td>No formalities of registration are required.*</td>
</tr>
<tr>
<td>Pledge of debts under general law</td>
<td>Articles 2355 et seq. of the French civil code.</td>
<td>The pledge becomes enforceable against third parties at the date of the written document evidencing the pledge.</td>
<td>No formalities of registration are required.*</td>
</tr>
<tr>
<td>Trust (fiducie)</td>
<td>Articles 2011 et seq. of the French civil code</td>
<td>The assignment of debts realised through a trust (fiducie) is enforceable against third parties as from the date of the trust agreement or of the amendment evidencing it</td>
<td>Mandatory, if not registered, the trust is null and void. The registration of the trust agreement with the tax authorities is required within a specific timeframe provided by the law.*</td>
</tr>
<tr>
<td>Dailly Law</td>
<td>Articles L. 313-23 to L. 313-34 of the French monetary and financial code.</td>
<td>The assignment or the pledge becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered by the assignor or the pledgor, without any other formality being necessary.</td>
<td>No formalities of registration are required.*</td>
</tr>
<tr>
<td>Assignment to a French securitisation vehicle</td>
<td>Articles L. 214-43 to L. 214-48 of the French monetary and financial code.</td>
<td>The assignment becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered by the assignor, without any other formality being necessary.</td>
<td>No formalities of registration are required.*</td>
</tr>
<tr>
<td>Assignment to a French covered bonds issuer</td>
<td>Articles L. 515-13 to L. 515-33 of the French monetary and financial code.</td>
<td>The assignment becomes enforceable against third parties on the date indicated on the transfer deed when it is delivered</td>
<td>No formalities of registration are required.*</td>
</tr>
<tr>
<td>Assignment of debts linked to financial obligations</td>
<td>Articles L. 211-37 of the French monetary and financial code.</td>
<td>The assignment is binding as against third parties from the date the debtor is notified of the assignment of debts.</td>
<td>No formalities of registration are required.*</td>
</tr>
<tr>
<td>Transfer of debts for collateral purpose under a financial collateral arrangement</td>
<td>Article L. 211-38 of the French monetary and financial code</td>
<td>The transfer of debts for collateral purpose under a financial collateral arrangement is enforceable against third parties, without any additional formalities being necessary. When the collateral arrangement relates to &quot;financial obligations&quot; (as defined under Article L. 211-36 of the French monetary and financial code), the perfection of such collateral arrangement (whether it be a full transfer collateral arrangement or a security interest collateral arrangement) arises from (i) the transfer of the relevant debts to the beneficiary, (ii) the assignor’s dispossess of such debts, or (iii) the beneficiary’s control over the relevant debts.</td>
<td>No formalities of registration are required.*</td>
</tr>
</tbody>
</table>

* subject to formalities required, as the case may be, for the transfer, together with the assigned debt, of any related charge over real assets (mortgage, charge over stocks or vehicle...).
E. NATIONAL REPORT GERMANY

SUMMARY

Third party effects of assignments are, according to majority view, covered by Article 14 (2) Rome I Regulation (this corresponds with the position of the Bundesgerichtshof under Art. 12 Rome Convention). Others argue that the invocation of an assignment against third parties is not covered by EU wide regulation and there is still ongoing dispute on which law is best suited.

The suggested solutions are:

- the law of the assignor's habitual residence

Arguments pro: allows the application of one single law even if multiple claims are transferred and is predictable for third parties, especially in the case of future claims.

Arguments contra: tensions might arise as possible divergence between law applicable to the assignment contract, especially if chosen by the parties under Art. 3 Rome I Regulation, and the proprietary aspects of the assignment, especially where there is no link to the applicable law other than the habitual residence of a company.

- the law of the original claim ("Forderungsstatut"), Art. 14 (2) Rome I Regulation.

Arguments pro: As the provision covers assignability, it would, via extending interpretation, cover the invocation of an assignment vis-à-vis third parties; would lead to consistency and predictability.

- Application of Art. 14 (1) Rome I Regulation ("Abtretungsstatut"):

Arguments pro: The issue of third party effects is closely linked to the proprietary aspects between assignor and assignee, which are subject to 14 (1) Rome I Regulation. 14 (2) protects the debtor who has no legitimate interest in the law applicable to third party effects. Solution would lead to a uniform conflict of law assessment of the relationships between assignor and assignee and towards third parties. Party autonomy would be the fairest solution for all parties and correspond most to a pluralistic European and international area of civil law.

Arguments contra: can lead to uncertainty in cases of competing assignments.

289 Ilka Breuer/ Peter Scherer, Clifford Chance LLP, Frankfurt.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>BGB</td>
<td>Sec. 398</td>
</tr>
<tr>
<td></td>
<td>Assignment</td>
</tr>
<tr>
<td></td>
<td>Sec. 399, alternative 1</td>
</tr>
<tr>
<td></td>
<td>Prohibition of assignment in case of change of content</td>
</tr>
<tr>
<td></td>
<td>Sec. 399, alternative 2</td>
</tr>
<tr>
<td></td>
<td>Prohibition of assignment by contractual obligation</td>
</tr>
<tr>
<td></td>
<td>Sec. 404</td>
</tr>
<tr>
<td></td>
<td>Right of debtor to invoke all defenses originating from the agreement with the assignor against the assignee</td>
</tr>
<tr>
<td></td>
<td>Sec. 405</td>
</tr>
<tr>
<td></td>
<td>Bona fide acquisition of claims which are represented by a certificate</td>
</tr>
<tr>
<td></td>
<td>Sec. 406, 387</td>
</tr>
<tr>
<td></td>
<td>Right of debtor to set off against assignee a claim the debtor has against the assignor</td>
</tr>
<tr>
<td></td>
<td>Sec. 407</td>
</tr>
<tr>
<td></td>
<td>Qualification of payments of debtor to the assignor as proper performance</td>
</tr>
<tr>
<td></td>
<td>Sec. 408</td>
</tr>
<tr>
<td></td>
<td>In case of multiple assignments principle of priority prevails; Qualification of payments of debtor to the second assignee as proper performance</td>
</tr>
<tr>
<td></td>
<td>Sec. 409</td>
</tr>
<tr>
<td></td>
<td>Qualification of payments of debtor to the assignee as proper performance in case of notification of assignment by assignor to debtor or in case of the assignee presenting certificate of assignment to debtor</td>
</tr>
<tr>
<td>HGB</td>
<td>Sec. 354a</td>
</tr>
<tr>
<td></td>
<td>Validity of assignment despite prohibition on assignment pursuant to sec. 399 alternative 2 in case of a commercial transaction</td>
</tr>
<tr>
<td>InsO</td>
<td>Sec. 130</td>
</tr>
<tr>
<td></td>
<td>Right of insolvency administrator to challenge legal acts under specified</td>
</tr>
</tbody>
</table>
### 1. SUBSTANTIVE LAW ISSUES

#### 1.1. Legal Requirements for Assignments under German Substantive Law

**1.1.1. Contract between Assignor and Assignee**

Under German law, an assignment of a claim is effected by a contract between the assignor and the assignee (Abtretungsvertrag, the "Assignment Contract"), by means of which the claim is transferred to the assignee with *in rem* effect, i.e. the assignee acquires legal title to the relevant claim (section 398 of the German Civil Code (*Bürgerliches Gesetzbuch* - "BGB")).

---

290 Please note that Article 33 EGBGB has been invalidated by the coming into force of the Rome I Regulation and replaced by its Article 14. At the present time, Germany does not have any conflict of laws rules as to the proprietary effect of an assignment.
In this context, please note that a distinction has to be made between the Assignment Contract and the contractual agreement which relates to the transaction underlying the assignment (usually a purchase of a claim or the provision of collateral). According to the German law ‘principle of abstraction’ (Abstraktionsprinzip), the proprietary aspects of a contract are treated separately from the aspects under the law of obligations and hence these two sets of aspects are dealt with in two separate contracts. As a consequence from the 'principle of abstraction' (Abstraktionsprinzip), transactions concerning rights in rem are valid irrespective of the existence or validity of any underlying obligation which may bind the relevant parties to perform the in rem transaction.

1.1.2. Principle of Identifiability (Bestimmbarkeit)

Under German law, an in rem disposition (Verfügung) of rights and claims, such as by way of any assignment, is only effective if the rights and claims to be disposed over (verfügt) are clearly identified (bestimmt) or at least identifiable (bestimmbar) and specified at the time of disposal (the latter requirement is of particular relevance with respect to assignments of future claims, please see below).

Assigned rights and claims are deemed to be identifiable if a third party, having knowledge of the contractual agreements, is able to identify such claims and rights without having to inquire outside of the contractual arrangements. In this context, German courts have held that, for example, if an agreement to assign provides for an assignee to be informed as to the details of the relevant claims and rights after the Assignment Contract has been concluded, the assignment becomes effective only when such information is provided to such assignee.  

With respect to the assignment of a multitude of rights or claims, German courts have held that the assignment of all claims arising out of a particular business operation (Geschäftsbetrieb) or a particular type of legal transaction (Rechtsgeschäft) is effective.

In general, identifiability of claims is subject to extensive case law (for example, relating to global assignments or to storehouses and other stocks of merchandise) and thus to be assessed on a case-by-case basis.

1.1.3. No Prohibition of Assignment (Abtretungsverbot)

Finally, the relevant claim must not be subject to a prohibition of assignment (Abtretungsverbot). Generally, a claim cannot be validly assigned under German law (i) if the performance cannot be made to a person other than the original oblige

---

292 Judgment by the German Federal Supreme Court in Civil Matters (Bundesgerichtshof – "BGH") dated 4 October 1965, in: Neue Juristische Wochenschriften ("NJW") 1966, p. 13 et seq.
without a change of the content (*Inhaltsänderung*) of the claim (section 399 alternative 1 of the BGB) or (ii) if the creditor and the debtor of the claim have contractually restricted the assignment of the claim (section 399 alternative 2 of the BGB).

However, under an exception to section 399 alternative 2 of the BGB (which does, for the avoidance of doubt, not apply to section 399 alternative 1 of the BGB) contained in section 354a para 1 of the German Commercial Code (*Handelsgesetzbuch* – "HGB"), the assignment of monetary claims (i.e. claims for the payment of money) governed by German law is valid despite a prohibition on assignment if the underlying agreement between the contracting parties constitutes a commercial transaction (*Handelsgeschäft*) provided that the debtor under such claim is a merchant (*Kaufmann*). Notwithstanding that courts would not enforce restrictions on the assignment of monetary claims to the extent to which section 354a para 1 of the HGB provides that they are not enforceable (i.e. a prohibition on assignment is not invalid but the assignment is valid despite of it), that same section allows the debtor of an assigned claim to pay and/or otherwise discharge its obligations (including by way of set-off against claims owing by a particular debtor to the assignor at the time of such set-off) to the original creditor, even if it is notified of the assignment of its debt obligation.

However, pursuant to section 354a para 2 of the HGB, section 354a para 1 of the HGB does not apply to claims constituted under a loan agreement which has been entered into after 18 August 2008 by a lender which is a credit institution within the meaning of the German Banking Act (*Kreditwesengesetz* – "KWG"). As a consequence, contractually stipulated restrictions on assignment with respect to such claims would render any assignment in violation of such restrictions to be invalid (section 399 alternative 2 of the BGB). This new rule has been inserted by the "Risikobegrenzungsgesetz" to protect debtors against 'vulture funds'.

### 1.1.4. Formal Requirements / Notification of Assignment

German statutory law does neither provide for any form requirements for an Assignment Contract nor is notice to the debtor a prerequisite for its validity. However, the debtor and the assignee may contract that a claim may only be assigned with the debtor's agreement or after prior notification to the debtor. Non-fulfillment of such formal requirement would result in a prohibition of assignment.

### 1.1.5. Assignment of Future Claims

As set out above, an assignment is only effective if the relevant claim subject to such assignment is clearly identified (*bestimmt*) or at least identifiable

---

(bestimmbar) and specified at the time of the assignment. With respect to the assignment of future rights and claims, the requirement of identifiability must be fulfilled upon the relevant right or claim coming into existence.  

1.2. Proprietary Effects of Assignments

1.2.1. Introduction

Under German law, an assignment of a claim is effected by a contract between the assignor and the assignee (Abtretungsvertrag, the "Assignment Contract") by means of which legal title to such claim is transferred to the assignee with in rem effect, i.e. the assignee acquires legal title to the relevant claim (section 398 of the BGB).

According to the German legal doctrine, any such transfer of legal title to a claim has a proprietary or in rem effect, meaning an absolute legal effect in the sense that –following a valid transfer of legal title – only the assignee is entitled to assert or dispose of such claim. The in rem effect of an assignment generally excludes any interference with respect to the relevant claim from a third party other than the assignee (dingliche Wirkung). The assignor, on the other hand, entirely loses its legal position with respect to the assigned claim. As a consequence, the assignor is no longer entitled to dispose over the relevant claim and the claim does no longer form part of the assignor's insolvency estate.

The afore-said also applies with respect to an assignment for security purposes (Sicherungsabtretung). By virtue of such an assignment for security purposes (Sicherungsabtretung), the assignee acquires full legal title to the relevant claim with in rem effect and is therefore in a legal position to on-transfer such claim with in rem effect, even if this would violate the assignee's obligations under the fiduciary contract (Sicherungsabrede) between the assignor and the assignee which ties the assignment for security purposes to its sole purpose to provide collateral for debts. However, in the insolvency of the assignor, the insolvency administrator of such assignor is authorised to enforce the assigned claim (on behalf of the assignee) and the assignee is accordingly barred from selling and enforcing the claim itself or through an agent (section 166 para 2 of the German Insolvency Code (Insolvenzordnung – "InsO"). The insolvency administrator is obliged to transfer the proceeds from such enforcement of the transferred claim to

---

the assignee but may, however, deduct the costs (including his fees) from such proceeds. 296

1.2.2. Position of Debtor

As a general principle under German law, the position of the debtor may not be adversely affected as a result of the assignment. Hence, sections 404 et seq. of the BGB provide for a system of debtor protection as further detailed below. Please note that sections 404 et seq. of the BGB do not constitute mandatory law, i.e. these rules may be waived by contractual agreement between the debtor and the assignor.

Pursuant to section 404 of the BGB, a debtor may invoke against an assignee all defences resulting in a right of such debtor to suspend performance (including such defences for which the legal cause existed at the time of the assignment) he had against the assignor already at the time of the assignment of the claim.

Under section 406 of the BGB, a debtor may set off against the assignee an existing claim (including such claims for which the legal cause existed at the time of the assignment) which the debtor has against the assignor. However, a debtor cannot effect such set-off where it knew of the assignment at the time of acquiring its claim against the assignor, or where such claim of the debtor did not become due until after the debtor had acquired such knowledge and such claim of the debtor only matures after the claims of the assignee.

The statutory right of a debtor to set-off a claim owed by it against a claim owed to it is governed by section 387 of the BGB which requires, as a general rule, that the creditor of the claim against which another claim is to be set-off is identical to the debtor of such other claim (Gegenseitigkeit der Ansprüche). Certain exceptions from this general rule may arise from contractual agreements between the relevant parties, specific exemptions provided under German law (such as the above-mentioned section 406 of the BGB) and under exceptional circumstances pursuant to the general German law principle of good faith (Treu und Glauben).

Pursuant to section 407 of the BGB, if a debtor makes a payment to the assignor, not knowing about the assignment, this qualifies as proper performance and satisfaction of its duties under its contract with the assignor. In other words: An assignee must give credit for an act of fulfilment by the debtor in favour of the assignor after the assignment and any other legal transaction entered into after the assignment between the debtor and the assignor in respect of the debt will have effect against the assignee, unless the debtor knew of the assignment at the time

---

296 The insolvency administrator's fees may amount to 4 per cent (for the determination of the relevant assigned claims) plus (for the enforcement process) up to a further 5 per cent (or under certain conditions more or less than 5 per cent) of the enforcement proceeds, plus applicable VAT and thus in toto approximately 9 per cent.
of performance of, or of entering into, the legal transaction. If a final judgment is delivered in any court action between the debtor and the assignor subsequent to the assignment, the assignee will be bound by that judgment, unless the debtor knew of the assignment at the date when the action was first commenced.

In contrast, if the assignor notifies the debtor that it has assigned the principal debt or has delivered a document of assignment to the assignee named in the document and the latter presents it to the debtor, any payment made by such debtor to such assignee as well as any other legal act is, according to section 409 of the BGB, effective \textit{vis-à-vis} the assignor (even if the assignment has in fact not been made or were ineffective).

1.2.3. Position of Assignee

1.2.3.1. Bona Fide Acquisition of Claims

German law does not recognise any \textit{bona fide} acquisition of claims. As a consequence, if the assignor turns out not to have been the legal owner of the relevant claim subject to an assignment, the assignee will not acquire legal title to such claim. Section 405 of the BGB provides for an exception from this principle with respect to claims which are represented by a certificate issued by the relevant debtor (\textit{verbriehte Forderungen}) and transferred by way of assignment\textsuperscript{297}. In the context of section 405 of the BGB, each document which has been designated to prove the existence of the relevant claim qualifies as a 'certificate'. In case that such claim is assigned upon presentation of the certificate, the debtor is not entitled to defend itself against the assignee by arguing that the relevant claim resulted from a fictitious transaction and would therefore be null and void or that the debtor and the assignor had contractually agreed that the relevant claim was not assignable.

1.2.3.2. Competing assignees (\textit{Mehrfachabtretung})

In the case that the same claim has been assigned by the assignor to several assignees, the so-called 'principle of priority' (\textit{Prioritätsgrundsatz}) applies. As a consequence of applying this principle of priority, the assignment later in time, with respect of which the assignor was no longer owner of the relevant claim subject to the previous assignment, is ineffective\textsuperscript{298}. As set out above, a \textit{bona fide} acquisition of the relevant claim by the second assignee is generally not possible. However, the first assignee (which is now the legal owner of the relevant claim) is entitled to consent to the second assignment and thus render it effective\textsuperscript{299}.

\textsuperscript{297} Section 405 of the BGB does not cover bearer bonds (\textit{Inhaberschuldverschreibungen}) since the rights under such bearer bond are transferred by an \textit{in rem} transfer of the bond certificate rather than an assignment.

\textsuperscript{298} Judgment by the BGH dated 24 April 1968, in: NJW 1968, p. 1516 \textit{et seq}.

\textsuperscript{299} Judgment by the BGH dated 15 January 1990, in: NJW 1990, p. 2678 \textit{et seq}.
Pursuant to section 408 of the BGB, the first assignee must give credit for an act of fulfilment by the debtor in favour of the second assignee after the assignment and any other legal transaction entered into after the assignment between the debtor and the second assignee in respect of the debt will have effect against the first assignee, unless the debtor knew of the first assignment at the time of performance or of entering into the legal transaction. If a final judgment is delivered in any court action between the debtor and the second assignee subsequent to the assignment, the first assignee will be bound by that judgment, unless the debtor knew of the first assignment at the date when the action was first commenced.

1.3. Position of Third Parties (Other than Debtor or Assignee)

1.3.1. General
As a result of the *in rem* effect of a valid assignment of a claim (please see above), the assignment can generally be invoked by the relevant assignee *vis-à-vis* third parties like, for example, the assignor's insolvency administrator, a creditor of the assignor or a competing assignee.

However, as an exception, in the insolvency of the assignor, the assignee may be barred from invoking the assignment *vis-à-vis* the assignor's insolvency administrator as further detailed under 1.3.2. below.

1.3.2. Insolvency of assignor
Following the opening of insolvency proceedings against the assets of the assignor, any legal act (Rechtshandlung), including the assignment of a claim, may be challenged by the insolvency administrator of the assignor in accordance with sections 129 to 147 of the InsO based on the allegation that such legal act (Rechtshandlung) resulted in a discrimination of the insolvent assignor's creditors. In this context, we would in particular like to draw attention to sections 130 and 131 of the InsO as further detailed below:

Pursuant to section 130 of the InsO, the appointed insolvency administrator of the assignor is entitled to challenge any legal act, including the assignment of a claim, by such assignor if:

---

300 According to the provisions of the InsO, the opening of insolvency proceedings requires the existence of a reason to open insolvency proceedings (*Insolvenzeröffnungsgrund*) (section 16 of the InsO). The statutory reasons for the opening of insolvency proceedings are illiquidity (*Zahlungsunfähigkeit*), impending illiquidity (*drohende Zahlungsunfähigkeit*) and over-indebtedness (*Überschuldung*) (sections 17 to 19 of the InsO). The opening of insolvency proceedings is initiated by a petition to commence insolvency proceedings which, depending on the reason for the insolvency, may be filed by a creditor and/or by the debtor to the relevant local court (*Amtsgericht*) at the debtor's seat (*Sitz*) or the centre of its main business activities (if different from its seat).
- such assignment was made within three months before the application for the filing of insolvency proceedings provided that (x) at the date of such assignment the assignor was unable to pay its debts when due (zahlungsunfähig) and (y) the relevant assignee knew or should have known at the time such legal act was made of the assignor's inability to pay its debts when due (Zahlungsunfähigkeit); or

- such assignment was made after the application for the filing of insolvency proceedings and, at the time such assignment was completed, the assignee knew or should have known of either (x) the inability of the assignor to pay its debts when due (Zahlungsunfähigkeit) or (y) such application for the filing of insolvency proceedings.

Moreover, pursuant to section 131 (Inkongruente Deckung) of the InsO, any legal act, including the assignment of a claim, is subject to challenge by the insolvency administrator of the assignor if it is:

- made during a period of one month prior to, or subsequent to, the filing of the insolvency petition and results in or puts the relevant assignee in a position to obtain or seek, credit support or satisfaction, respectively, which such assignee is not entitled to in such way or at such time or at all (section 131 para 1 no. 1 of the InsO); or

- made during the second or third month prior to the filing of the insolvency petition and results in or puts the assignee in a position to obtain or seek credit support or satisfaction, respectively, where the assignee is not entitled to in such way or at such time or at all, where the assignor is insolvent at the time of such transaction (section 131 para 1 no. 2 of the InsO) or the assignee has knowledge at the time of such Transaction that it has adverse effects on the ordinary creditors (Insolvenzgläubiger) of the assignor or has knowledge of the relevant facts supporting a compelling conclusion with respect to those adverse effects (section 131 para 1 no. 3 of the InsO).

1.4. Assignments in the Context of Securitisation Transactions

1.4.1. No Specific Securitisation Law

The German legal system does not provide for a specific securitisation law. Instead, the general provisions of the BGB and the HGB as referred to in this memorandum have to be applied with respect to assignments made in the context of securitisation transactions.

1.4.2. Insolvency Treatment of Assigned Rights and Claims in a Securitisation Transaction

With respect to the insolvency treatment of rights and claims which have been sold and assigned in the context of a securitisation transaction, please note that there
are ongoing discussions whether a sale and assignment of such rights and claims grants the assignee a segregation right (Aussonderungsrecht) in the insolvency of the assignor (i.e. whether such sale and assignment qualifies as a "true sale").

Whether such segregation right exists depends, in particular, but without limitation, on the question whether or not a sale can be re-characterised into a secured loan pursuant to section 166 of the InsO (with the consequence that the insolvency administrator of the assignor is entitled to enforce the assigned claim on behalf of the assignee and to deduct the costs (including his fees) from such proceeds, please see above).

In accordance with the interpretation of the former German Bankruptcy Code (Konkursordnung) which should also apply to the InsO, Section 166 of the InsO (and thus a re-characterisation) does not apply to claims that are effectively sold by the relevant assignor as, for example in the case of genuine factoring (echtes Factoring). German law differentiates between genuine (echtes) and non-genuine (unechtes) factoring. The difference between genuine and non-genuine factoring is important for the purpose of deciding whether, in the case of a global assignment of rights and claims to a financing entity, such global assignment is upheld as a sale of such rights and claims (as it is done in case of genuine factoring) or not (as in case of non-genuine factoring).

In relation to the InsO, there are no guidelines as to whether genuine factoring requires only the transfer of risks (in particular, without limitation, the credit default risk) relating to the debtors of purchased claims (Delkredererisiko) from the relevant seller/assignor to the relevant purchaser/assignee (as is indicated in the court decisions based on the former German Bankruptcy Code (Konkursordnung)) and in academic writings), or whether genuine factoring also requires the transfer of the economic chances related to such claims, as it may be concluded from certain cases decided by the BGH. The reasoning of the BGH in these decisions implies that one can speak of genuine factoring only if the relevant purchaser of a claim holds the transferred claim for its "own account". This could be interpreted to mean that a transfer of both risks and chances is required for genuine factoring to exist. However, there are, to our knowledge, no court decisions which would expressly state that a transfer of chances is a pre-condition for genuine factoring. In fact, German courts have stressed the transfer of the credit default risk in various judgments as a pre-condition for genuine factoring but have, to our knowledge, not referred to a missing transfer of chances as being detrimental to a classification of a factoring transaction as "genuine".

Furthermore, there are, to our knowledge, also no court decisions which would expressly state that a purchaser has to gain full effective control over the claims in order to qualify as genuine factoring. As a general rule, it can be said to be an

---

underlying concept of a purchase transaction that the relevant purchaser/assignee of a claim obtains control over the claim such that it can effectively transfer it or collect the acquired claims.

Although not necessarily in itself determinative for the insolvency treatment of a transaction which is expressed to be intended as an assignment in the context of a sale (rather than a security assignment in the context of a secured lending), the German accounting treatment of a transaction may be a strong indicative factor for the relevance of a re-characterisation risk. Where a transaction which is expressed to constitute a sale is regarded to be "off-balance" for German accounting purposes, it is not likely to be treated as a secured lending on the basis that the BGH has expressed repeatedly that the analysis of whether a sale constitutes a secured lending or a sale has to follow a "commercial approach". Conversely, however, where a transaction is treated as a secured lending for accounting and/or tax purposes, the risk of it also being treated as a secured lending for legal purposes (including for the purposes of an analysis in the context of section 166 of the InsO) increases.

Ultimately, the assessment whether a sale and assignment of rights and claims in the context of a securitisation transaction grants the assignee a segregation right in the insolvency of the assignor can only be made on a case-by-case basis, taking into account the aforementioned aspects.

2. CONFLICT OF LAWS ANALYSIS

From a German law perspective, the scope of the Rome I Regulation with respect to the effects of an assignment vis-à-vis third parties (other than the debtor) is discussed controversially. The implementation of the new Article 14 of the Rome I Regulation has been only of limited success as a means to settle the ongoing dispute in German legal literature. As Article 14 of the Rome I Regulation – similar to its preceding provision Article 12 of the Rome Convention ("EVÜ") which was incorporated into domestic law by Article 33 Introductory Act to the Civil Code ("EGBGB") – does not contain explicit language in this respect, it is questionable whether the effects of an assignment in relation to third parties are covered at all by its scope.

There have been voices in legal literature arguing that the invocation of an assignment against third parties has never been subject of regulation in Article 12 of the EVÜ and in Article 33 of the EGBGB, respectively. Particularly by comparing Article 12 of the EVÜ with the early 1972 draft of the Article 16 para. 2 of the EVÜ which did contain specific language regarding the relationship between the assignor and the assignee vis-à-vis third parties, some legal authors took the view that

Article 12 of the EVÜ would evince a systematical gap in that respect. Accordingly, it was proposed that a solution to this problem were to be searched solely on the basis of the general domestic conflict rules. Despite its modified wording, this argumentation has been maintained by some legal authors after the adoption of the new Article 14 of the Rome I Regulation in 2009.

However, especially due to systematic and teleological considerations, the broad majority of legal authors is of the opinion that the issue of third-party effects of assignments is covered by Article 14 of the Rome I Regulation. This was also the position of the Bundesgerichtshof under Art. 12 of the Rome Convention, the court applying Art. 12 (2). With a view to the obligation of the Commission to submit to the European Parliament, the Council and the European and Social Committee a report on this question by June 2010 pursuant to Article 27 para 2 of the Rome I Regulation, it is argued that this obligation presupposes the existence of a provision governing third-party effects of an assignment. Further, the possibility of the EU leaving third-party effects for the national legislation of the Member States by way of "residual jurisdiction" is regarded to be very unlikely.

Notwithstanding, the opinions on the law applicable under Article 14 of the Rome I Regulation, which have largely been present in the discussion prior to the entry into force of the new Rome I Regulation, differ considerably. Insofar, mainly three different views have developed.

2.1. Law of the Habitual Residence of the Assignor

One view considers the law of the assignor’s habitual residence the most appropriate link to govern the issue of third party effects. As this solution was not...
only proposed by the Commission in the 2005 draft of the Rome I Regulation, but is also similarly foreseen in the United Nations Convention on the Assignment of Receivables in International Trade ("UNCITRAL") from 2001, it is acknowledged that this approach allows the application of one single system of domestic law rules even if multiple claims are transferred.\textsuperscript{309} It is also emphasized that the question of which law applies thus becomes predictable for third parties, an aspect which could prove especially favorable in the case of the assignment of future claims in which the person of the debtor is commonly unknown.\textsuperscript{310} By eliminating this legal uncertainty, the reference to the assignor’s habitual residence as statutory law is supposed to be likely to gain international acceptance. Nevertheless, it is also admitted that, according to this solution, some aspects of third party effects can be covered by a different legal system than the original claim.\textsuperscript{311} Further tensions are said to arise due to a possible divergence between the law applicable to the assignment contract, especially in case of an individually selected law pursuant to the parties’ freedom of choice in Article 3 of the Rome I Regulation, and the proprietary aspects of the assignment.\textsuperscript{312} It is stressed that this divergence may lead to extremely disconcerting constellations for all parties involved, if for example there is no link to the applicable law other than the habitual residence of a company.\textsuperscript{313} Eventually, it is pointed out that a preclusion of the free choice of law concerning the question of third party effects might potentially even constitute a violation against the European Fundamental Freedoms.\textsuperscript{314}

\section*{2.2. Law of the Original Claim}

The prevailing view to date claims that the question whether the assignment may have an \textit{in rem} effect \textit{vis-à-vis} third parties should be governed by the law that is applicable to the original claim (the "Forderungsstatut"). Accordingly, the applicable provision is supposed to be Article 33 para 2 of the EGBGB which corresponds to the current version of Article 14 para 2 of the Rome I Regulation. Due to the assumed restriction of former Article 33 para 1 of the EGBGB to legal aspects \textit{in personam} between the assignor and the assignee, this view has not only been

\begin{itemize}
\item \textit{Kooperation.} Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag ("FS Sonnenberger"), 2004, p. 703 et seq.
\item \textit{Kieninger, Schütze, op. cit.}, IPRax, p. 202; \textit{Martiny, op. cit.}, Internationales Vertragsrecht, p. 302
\end{itemize}
assumed by legal authors\textsuperscript{315}, but also by German courts, including the BGH.\textsuperscript{316} As Article 33 para 2 of the EGBGB stated that the law governing the assigned or subrogated claim shall determine, among other aspects, its assignability, it was argued that by means of an extending interpretation (erweiternde Auslegung) this provision would also include the invocation of an assignment \textit{vis-à-vis} third parties.\textsuperscript{317} Thereby, it was suggested that this solution would lead to a high level of consistency and predictability.\textsuperscript{318} Although the implementation of the Rome I Regulation has brought with it a change as to the wording of the now corresponding provision Article 14 para 1 of the Rome I Regulation, the mentioned view does not seem to have been affected by this change. Even though Article 14 para 1 of the Rome I Regulation is, according to the Regulation's 38\textsuperscript{th} recital, designated to be applicable for both the \textit{in personam} and the \textit{in rem} aspects of the Assignment Contract, a possible inclusion of third party effects is by all means denied by this view.

\textbf{2.3. Application of Art. 14 (1) Rome I}

However, there is also a growing opinion in literature which with respect to the modified wording in Article 14 para 1 of the Rome I Regulation rejects the assumption of the prevailing view to date. Accordingly, it is argued that due to the explicit inclusion of proprietary aspects by Article 14 para 1 of the Rome I Regulation the reference to an assumed consistency ensured by the application of Article 14 para 2 of the Rome I Regulation could not and would not form a valid argument any more.\textsuperscript{319} Furthermore, with regard to the specific character of Article 14 para 2 of the Rome I Regulation as a debtor-protective provision it is emphasized that there is no necessity to apply this provision when it comes to the question of third party effects.\textsuperscript{320} In fact, it is doubted whether the debtor may have any legitimate interest in the question of which legal statute has to deal with third party effects of an assignment. Rather, according to this view, the issue of third party effects is so closely linked to the proprietary aspect of an assignment between the assignor and the assignee that the former, being the "essence" of the latter, constitutes a complementary part of it.\textsuperscript{321} Therefore, the supporters of this approach claim that the question of the invocation of an assignment against third parties has to be governed by Article 14 para 1 of the Rome I Regulation (the

\begin{itemize}
\item \textsuperscript{316} Judgment by the BGH dated 20 June 1990, in: NJW 1991, p.637 \textit{et seq.}
\item \textsuperscript{317} Ludwig, Rosch, \textit{op. cit.}, jurisPK-BGB, 2010, Art. 14 Rom I-VO, recital 31; Ludwig, Rosch, \textit{op. cit.}, jurisPK-BGB, 2010, Art. 33 EGBGB, recital 21
\item \textsuperscript{318} Judgment by the BGH dated 20 June 1990, in: NJW 1991, p.638.
\item \textsuperscript{319} Flessner, \textit{op. cit.}, IPRax, p. 39 \textit{et seq.}
\item \textsuperscript{320} Flessner, \textit{op. cit.}, IPRax, p. 39 \textit{et seq.}
\item \textsuperscript{321} Flessner, \textit{op. cit.}, IPRax, p. 40 \textit{et seq.}
\end{itemize}
"Abtretungsstatut").\textsuperscript{322} It is also stressed that this view has, from a practical point of view, the beneficial effect to lead to a uniform conflict of law assessment of the relationship between assignor and assignee on the one hand and the relationship towards third parties on the other hand.\textsuperscript{323} Finally, it is emphasized that the freedom of choice guaranteed in Article 14 para 1 not only is the fairest solution for all parties, third parties included, but also the one which corresponds most to the principle of freedom of scope in a pluralistic European and international area of civil law.\textsuperscript{324} Nonetheless, this solution is rejected by many legal authors due to the consideration that in case of multiple assignment of a claim the competing assignees do not know by which law the competing assignment has been executed.\textsuperscript{325} Thus, it may be possible that the law finally applicable is different from the law the inferior assignee assumed to be applicable.

\textbf{2.4. Conclusion and Outlook}

The controversy between the aforementioned views leads to remarkable legal uncertainty being widely regretted in the legal discourse in Germany. This uncertainty not only covers the constellation of creditors of the assignor or the assignee proceeding for the assigned claim, but extends to the question of multiple assignments as well. In principle, any of the portrayed opinions will come to a different case-by-case solution as to the applicable law.

Overall, the application of Article 14 para 1 of the Rome I Regulation appears to be the most convincing solution for the dispute about third party effects of an assignment. From a debtor's perspective, there would be no disadvantage when it comes to the application of Article 14 para I Rome I Regulation as the debtor will usually have no legitimate interest neither in the validity of the assignment nor in its effect towards third parties as long as he may invoke the law governing the assigned claim (which he of course may pursuant to Article 14 para II Rome I Regulation). From the perspective of creditors of the assignor and competing assignees, certainly both the link to the habitual residence of the assignor and the application of Article 14 para I Rome I Regulation would have their benefits. Without a doubt, the application of the law of the assignor’s habitual residence does in some degree provide legal certainty. However, it has to be kept in mind that it would not necessarily constitute the most appropriate and convenient solution for the (third) parties. As a result, they would be forced into a certain substantive law, whereas by applying Article 14 para I Rome I Regulation each of the competing

\textsuperscript{323} Flessner, \textit{op. cit.}, IPRax, p. 40
\textsuperscript{324} Flessner, \textit{op. cit.}, FS Kühne, p. 715
\textsuperscript{325} Martiny, \textit{op. cit.}, \textit{Internationales Vertragsrecht}, p. 302; Bernd von Hoffmann, Ulrike Höpping, \textit{Zur Anknüpfung kausaler Forderungs zessionen}, IPRax 1993, p. 303
assignees would be granted freedom of choice with respect to the *in rem* effect of the assignment. Further, the argument of Article 14 para I Rome I Regulation lacking legal certainty when creditors of the assignor are involved is invalid because in case of a debtor acting on a European market, there cannot be a legitimate expectation that this debtor is legally bound only by the rules of the country of his habitual residence. If there is a premise that the European market should correspond to a European legal area – at least when it comes to conflict of law rules -, Article 14 para I Rome I Regulation complies best with it.

It should also be noted that, after the coming into force of Article 14 of the Rome I Regulation down to the present day, there has been no ruling by a German court upon the applicable law in case of third-party effects of an assignment. But even if a court were to rule upon this controversial issue, a judgment would not necessarily lead to more legal certainty from a conflict of law-based point of view, mainly because the wording of Article 14 Rome I (para I) Regulation has been remaining open to interpretation.

In our opinion, Article 14 para I Rome I Regulation should therefore apply to proprietary effects of an assignment. We would propose, however, to modify its wording insofar as it is made clear that this provision comprises the effects of an assignment to competing assignees and to creditors of the assignor.
F. NATIONAL REPORT ITALY

SUMMARY

1. Substantive Law

Conditions required by Italian law to render an assignment effective against third parties vary according to the kind of assignment/transaction entered into, i.e. ordinary assignment of claims governed by the Civil Code (CC), factoring, securitisation. The specific formalities provided by each discipline are the following:

The CC requires fulfilment of (i) service of notice by court bailiff on the assigned debtor; or (ii) acknowledgement of the assignment by the assigned debtor by statement bearing date certain.

The Factoring Law (as defined below) requires payment of the purchase price by the factor, bearing date certain.

The Securitisation Law (as defined below) requires, in combination with Article 58, para. 2, of the Banking Law (as defined below), (i) registration of the assignment in the companies’ register of the assignee credit institution; (ii) publication of the assignment in the Official Journal of the Republic of Italy.

2. Conflict of Laws

Under the Rome Convention regime, notwithstanding uncertainty of the relevant provisions, there was some consensus among Italian scholars that the law of the debt (i.e. Article 12, para. 2, Rome Convention) should govern effectiveness of the assignment against third parties and priority among competing claimants.

The introduction of the ad hoc connecting factor of the law of the assignor’s residence by Article 13, para. 3, of the Proposal Rome I Regulation, was well received by some Italian scholars.

Only one scholar had the chance to thoroughly comment on Article 14 of the Rome I Regulation. In the view of this author, as already maintained in regard to the Rome Convention, effectiveness of the assignment against third parties should be governed by the law of the assigned debt. Arguments in favour of supplementing this rule with the application of the law of the assignment agreement to govern complex transactions, such as bulk assignments and assignment of future claims are also put forward.

326 Dr. Anna Gardella, Università Cattolica, Milan.
<table>
<thead>
<tr>
<th>TABLE OF STATUTES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A) Substantive law</td>
<td></td>
</tr>
<tr>
<td><strong>Civil Code</strong></td>
<td></td>
</tr>
<tr>
<td>Article 1264:</td>
<td></td>
</tr>
<tr>
<td><em>Efficacia della cessione riguardo al debitore ceduto.</em> - La cessione ha effetti</td>
<td></td>
</tr>
<tr>
<td>nei confronti del debitore ceduto quando questi l’ha accettata o quando gli è stata</td>
<td></td>
</tr>
<tr>
<td>notificata.</td>
<td></td>
</tr>
<tr>
<td>Tuttavia, anche prima della notificazione, il debitore che paga al cedente non è</td>
<td></td>
</tr>
<tr>
<td>liberato, se il cessionario prova che il debitore medesimo era a conoscenza</td>
<td></td>
</tr>
<tr>
<td>dell’avvenuta cessione.</td>
<td></td>
</tr>
<tr>
<td>Article 1265:</td>
<td></td>
</tr>
<tr>
<td><em>Efficacia della cessione riguardo ai terzi.</em> – Se il medesimo credito ha formato</td>
<td></td>
</tr>
<tr>
<td>oggetto di più cessioni a persone diverse, prevale la cessione notificata per</td>
<td></td>
</tr>
<tr>
<td>prima al debitore, o quella che è stata prima accettata dal debitore con atto d</td>
<td></td>
</tr>
<tr>
<td>data certa, anché essa sia di data posteriore.</td>
<td></td>
</tr>
<tr>
<td>Article 2914:</td>
<td></td>
</tr>
<tr>
<td><em>Alienazione anteriore al pignoramento.</em> – Non hanno effetto in pregiudizio del</td>
<td></td>
</tr>
<tr>
<td>creditore pignorante e dei creditori che intervengono nell’esecuzione, sebbene</td>
<td></td>
</tr>
<tr>
<td>anteriori al pignoramento:</td>
<td></td>
</tr>
<tr>
<td>[…..];</td>
<td></td>
</tr>
<tr>
<td>le cessioni di crediti che siano state notificate al debitore ceduto o accettate</td>
<td></td>
</tr>
<tr>
<td>dal medesimo successivamente al pignoramento.</td>
<td></td>
</tr>
<tr>
<td>[…..];</td>
<td></td>
</tr>
<tr>
<td>[…..].</td>
<td></td>
</tr>
<tr>
<td><strong>Bankruptcy Law</strong></td>
<td></td>
</tr>
<tr>
<td>Article 45:</td>
<td></td>
</tr>
<tr>
<td><em>Formalità eseguite dopo la dichiarazione di fallimento.</em> - Le formalità necessarie</td>
<td></td>
</tr>
<tr>
<td>per rendere opponibili gli atti ai terzi, se compiute dopo la data della</td>
<td></td>
</tr>
<tr>
<td>dichiarazione di fallimento, sono senza effetto rispetto ai creditori.</td>
<td></td>
</tr>
<tr>
<td><strong>Factoring Law</strong></td>
<td></td>
</tr>
<tr>
<td>Article 5:</td>
<td></td>
</tr>
<tr>
<td><em>Efficacia della cessione nei confronti dei terzi.</em> – 1. Qualora il cessionario abbia</td>
<td></td>
</tr>
<tr>
<td>pagato in tutto o in parte il corrispettivo della cessione ed il pagamento abbia</td>
<td></td>
</tr>
<tr>
<td>data certa, la cessione è opponibile:</td>
<td></td>
</tr>
<tr>
<td>agli altri aventi causa del cedente, il cui titolo di acquisto non sia stato reso</td>
<td></td>
</tr>
<tr>
<td>efficace verso i terzi anteriormente alla data del pagamento;</td>
<td></td>
</tr>
<tr>
<td>al creditore del cedente, che abbia pignorato il credito dopo la data del</td>
<td></td>
</tr>
<tr>
<td>pignoramento;</td>
<td></td>
</tr>
</tbody>
</table>
al fallimento del cedente dichiarato dopo la data del pagamento, salvo quanto disposto dall’art. 7, comma 1.

2. È fatta salva per il cessionario la facoltà di rendere la cessione opponibile ai terzi nei modi previsti dal codice civile.

3. È fatta salva l’efficacia liberatoria secondo le norme del codice civile dei pagamenti eseguiti dal debitore ai terzi.

<table>
<thead>
<tr>
<th>Banking Law</th>
<th>Article 58:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cessione di rapporti giuridici. –</td>
<td></td>
</tr>
<tr>
<td>La Banca d’Italia emana istruzioni per la cessione a banche di aziende, di rami d’azienda, di beni e rapporti giuridici individuabili in blocco. Le istruzioni possono prevedere che le operazioni di maggiore rilevanza siano sottoposte ad autorizzazione della Banca d’Italia.</td>
<td></td>
</tr>
<tr>
<td>La banca cessionaria dà notizia dell’avvenuta cessione mediante iscrizione nel registro delle imprese e pubblicazione nella Gazzetta Ufficiale della Repubblica Italiana. La Banca d’Italia può stabilire forme integrative di pubblicità.</td>
<td></td>
</tr>
<tr>
<td>Nei confronti dei debitori ceduti gli adempimenti pubblicitari previsti dal comma 2 producono gli effetti dell’art. 1264 del codice civile.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Securitisation Law</th>
<th>Article 4:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Modalità ed efficacia della cessione. –</td>
<td></td>
</tr>
<tr>
<td>Alle cessioni dei crediti poste in essere ai sensi della presente legge si applicano le disposizioni contenute nell’art. 58, commi 2, 3, e 4, del testo unico bancario.</td>
<td></td>
</tr>
<tr>
<td>dalla data della pubblicazione della notizia dell’avvenuta cessione nella Gazzetta Ufficiale, sui crediti acquistati e sulle somme corrisposte dai debitori ceduti sono ammesse azioni soltanto a tutela dei diritti di cui all’art. 1, comma 1, lett. b). Dalla stessa data la cessione dei crediti è opponibile:</td>
<td></td>
</tr>
<tr>
<td>agli altri aventi causa del cedente, il cui titolo di acquisto non sia stato reso efficace verso i terzi in data anteriore;</td>
<td></td>
</tr>
<tr>
<td>ai creditori del cedente che non abbiano pignorato il credito prima della pubblicazione della cessione.</td>
<td></td>
</tr>
<tr>
<td>[...].</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B) Conflict of Laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>D.lgs. n. 170 /2004 (transposing Directive 2002/47/EC into Italian law)</td>
</tr>
<tr>
<td>1. Quando i diritti, che hanno ad oggetto o sono relativi a strumenti finanziari, risultino da registrazioni o annotazioni in un libro contabile, conto o sistema di gestione o di deposito accentrato, le modalità di trasferimento di tali diritti, nonché di costituzione e di realizzazione delle garanzie e degli altri vincoli sugli stessi, sono disciplinati esclusivamente dalla legge dell’ordinamento dello Stato in cui e’ situato il libro contabile, il conto o il sistema di gestione o di</td>
</tr>
</tbody>
</table>
deposito accentrato in cui vengono effettuate le registrazioni o annotazioni direttamente a favore del titolare del diritto, con esclusione del rinvio alla legge di un altro Stato.

2. Gli eventuali patti in deroga al comma 1 sono nulli.

3. Qualora il libro contabile, il conto o il sistema di gestione o deposito accentrato sia situato in Italia e gli strumenti finanziari non siano immessi in un sistema italiano in regime di dematerializzazione ai sensi dell’articolo 28 del decreto legislativo 24 giugno 1998, n. 213, le modalità di trasferimento dei diritti, nonché di costituzione e realizzazione delle garanzie e degli altri vincoli sugli stessi sono regolate dalle disposizioni del titolo V del medesimo decreto legislativo, in quanto applicabili.

C) Case law


Court of Appeal of Milan, 18 July 2000, IN Banca, borsa e titoli di credito, 2001, II, p. 689, holding that the law applicable to the sale and purchase of shares is governed by the Rome Convention.


Corte di Cassazione, 10 May 2005, n. 9761, in Guida al Diritto, 2005, n. 24, p. 79.

Corte di Cassazione, 10 May 2005, n. 9761, in Guida al Diritto, 2005, n. 24, p. 79.


Corte di Cassazione, 5 November 2009, n. 23463.

Corte di Cassazione, 2 November 2010, n. 22280

Corte di Cassazione, 28 July 2010, n. 17669, in Guida al diritto, 2010, n. 40, p. 76

1. SUBSTANTIVE LAW ISSUES

This part of the study addresses the main features of assignment of claims from a substantive law perspective. After an overview of the general discipline of the assignment of claims set forth in the Italian Civil Code (“CC”) and of the formalities required to invoke assignment against third parties, the attention is directed to complex transactions involving assignment of claims, such as factoring and securitisation with a focus on the more flexible discipline required by these laws to invoke assignment of claims against third parties.
1.1. Assignment of Claims under Italian Law: the General Framework

1.1.1. Nature of the Transfer Agreement

Under Italian law, assignment of claims (cessione del credito) is governed by Articles 1260-1266 CC, relating to the law of obligations.

Assignment of claims is not an autonomous contract,\(^{327}\) rather it is usually associated with an underlying contract, such as sale, donation or security, providing for the economic justification ("causa") for the transfer of the claim.\(^{328}\) To give an example, claims may be assigned to replace actual performance of an obligation (cessione in luogo di adempimento) or to fulfil security purposes. To this end, a pledge over claims may also be created.

The expression assignment of claims encompasses both the circulation of claims and the transfer of the legal title to the claim from the assignor's property to the assignee.

1.1.2. Assignable Claims: Future Claims

Single and present claims may be assigned, whereas assignment of future claims is restricted under Italian law. The predominant view is that future claims may be assigned provided that the contract from which they arise has already been executed at the moment in time when claims are assigned. Therefore, assignment of the claim shall be notified to the assigned debtor pursuant to Article 1264 CC, upon coming into existence of the claim. Transfer of the claim out of the assignor's property to the property of the assignee occurs upon coming into existence of the claim, before such moment the contract produces only personal obligations between the parties and does not entail any outright transfer of the legal title to the claim.\(^{329}\)

A more flexible view maintains that future claims may be assigned, provided their originating source (rather than the actual contract giving rise to the claims) is determined at the moment in time when the assignment is entered into.\(^{330}\) This

---

\(^{327}\) Aldo Dolmetta, Guiseppe Portale, *Cessione del credito e cessione in garanzia nell’ordinamento italiano*, in *Banca, borsa, titoli di credito*, 1999, I, p. 77. Inexistence of a general and autonomous contract for the transfer of rights also applies to the transfer of rights in rem, transfer of which is achieved by distinct contracts depending on the purpose pursued by the parties, such as contract of sale, donation etc.


view has been embodied in the special law on factoring, its application to ordinary assignment of claims, though, is disputed.

1.1.3. Transfer of a Claim out of the Assignor’s Property

Transfer of the claim out of the assignor’s property to the assignee is immediately effective upon exchange of consent by the parties,\(^{331}\) the assigned debtor’s consent not being required for the transfer of the claim (Article 1260 CC). As a consequence, the assignee is entitled to collect the claim from the debtor as of entering into the contract with the assignor without the accomplishment of any further formalities. Such rules apply to any assignment of claims, regardless of the economic purpose (simple payment or security) underlying the assignment.

This is the predominant view, which implies that the debtor may validly discharge the debt by paying the assignee, regardless of prior fulfilment of the formalities set forth in Article 1264 CC. However, should the debtor ignore the assignment, he may validly discharge its debt by paying the assignor, unless the assignee demonstrates that the debtor was aware that the claim had been assigned (Article 1264, para. 2, CC).

A minority view still maintains the opposite solution, according to which a claim is actually transferred out of the assignor's assets, upon fulfilment of the formalities set out in Article 1264, para. 1, CC, i.e. that (i) notice of the assignment has been duly served by court bailiff on the debtor; or (ii) the debtor has acknowledged the assignment by a statement bearing date certain.\(^{332}\)

It should be noted, however, that regardless of conceptual disputes, such formalities are often fulfilled in practice, notably to exclude claw-back of payments made by the assigned debtor to the assignee in case of insolvency of the assigned debtor.

The effects of the transfer achieved by simple exchange of consent (without any further formality), though, are limited to the relationships among assignor, assignee and the debtor. By contrast, effectiveness \textit{erga omnes} (other than the debtor) is reached only upon perfection of the assignment, which is achieved by communication to the debtor bearing date certain (i.e. service of notice on the debtor, or acknowledgment of the assignment by the debtor or receipt of payment of the purchase price by the assignor in case of factoring, see para. 1.3. below).


As mentioned above (see para. 1.1.2), assignment of future claims is subject to a different rule as far as transfer out of the assignor's property to the property is concerned. This occurs upon coming into existence of the claim, before such moment the contract only entails personal obligations and no outright transfer of the legal title to the claim.333

1.1.4. Effectiveness of the Assignment Against Third Parties

Effectiveness of the assignment against third parties is achieved by fulfillment of any of the following formalities: (i) service of notice of the assignment by court bailiff on the debtor or (ii) statement of acknowledgement by the debtor bearing date certain. Both provide date certain and are taken as the criterium to resolve conflicts among competing claimants or creditors. Priority in time of service of the notice on the debtor or of acknowledgment of the assignment by the debtor, regardless of priority in time of the assignment agreement, determines:

(a) priority among competing assignees (Article 1265 CC);
(b) effectiveness of the assignment against the assignor's creditors (Article 2914, n. 2, CC) and
(c) effectiveness of the assignment against the administrator of the assignor's insolvency (Article 45, Royal Decree n. 267 of 16 March 1942, "Bankruptcy Law").

1.2. Pledge of Claims

Security purposes may also be fulfilled by taking a pledge over claims. Despite sharing the same economic purposes of the assignment of claims by security, it is governed by the Section of the CC relating to pledges (i.e. in rem security interests) rather than by the Section relating to the law of obligations which includes assignment of claims (Articles 1260-1266 CC). The different regime impacts on (2.2.1) perfection requirements; (2.2.2) moment in time of the transfer of the claim out of the pledgor's property (corresponding to the assignor's property).

1.2.1. Perfection Requirements

Pursuant to Article 2800 CC, a pledge of claims is perfected upon:

1. entering into of a pledge agreement in writing between the pledgor and the pledgee;

2. service of notice of the pledge by court bailiff on the debtor, or acknowledgement of the pledge by the debtor by a statement bearing date

---

certain. Pursuant to Article 1265 CC which is applicable also to pledge of claims, fulfilment of such requirements also determines priority among competing claimants.

1.2.2. Transfer of the Claim out of the Pledgor’s Property.

Unlike assignment of claims by security, which entails the immediate transfer of the claim out of the assignor's property to the assignee, and consistently with the general rules applicable to pledges, the pledgee is exclusively entitled to a charge over the claims - a ius exigendi - to be enforced in the event of the debtor's default. This difference impacts on the bankruptcy regime and on the pari passu rule.

1.3. Factoring

1.3.1. General Overview

Under Italian law, factoring is governed by Law 21 February 1991, n. 52 ("Factoring Law") setting out a flexible regime for assignment of mass and future claims, relaxing formal requirements otherwise applicable pursuant to the CC.

The scope of application of the Factoring Law is limited (a) from an objective standpoint, to trade receivables originating from the company's business; and (b) from a subjective standpoint, to those transactions where at least one of the parties (the factor) is a credit institution or a financial intermediary pursuing the corporate business of claims purchasing (Article 1, let. c), Factoring Law), and the counterparty (the assignor) is a business entity.

Pursuant to Article 3, Factoring Law, the special regime covers either assignment of mass claims or future claims, regardless of the fact that the contracts originating such claims have already been entered into in the moment in time when the factoring agreement is executed.

1.3.2. Effectiveness of the Assignment Against Third Parties

Effectiveness against third parties is governed by Article 5, Factoring Law, pursuant to which payment by the factor, in whole or in part, of the purchase price of the assigned claims, or acknowledgement of such payment bearing date certain, establish effectiveness of the assignment against third parties. In so doing, Article 5 has abolished service of notice on the debtor or acknowledgement by the debtor, by replacing such formalities with a single act bearing date certain.

Fulfillment of this requirement makes the assignment effective against (i) the assignor’s creditors; (ii) the assignor’s trustee in case of bankruptcy; furthermore (iii) it also determines priorities in case of competing claimants.

1.4. Bulk Assignment of Claims and Securitisation

Global assignment of claims is governed by Article 58 of D.lgs. 1 September 1993, n. 385, ("Banking Law") providing a special regime for bulk assignment of claims to credit institutions or to financial intermediaries registered in the special register set forth set forth in Article 107, Banking Law.

Pursuant to Article 58, para. 2, Banking Law, effectiveness of the assignment against the debtor is achieved by (i) registration of the assignment in the companies’ register of the assignee credit institution and (ii) publication of such assignment in the Official Journal of the Republic of Italy. As against the debtor, such formalities have the same effect of the formalities provided by Article 1264 CC.

Under law of 30 April 1999 n. 130 on securitisation ("Securitisation Law"), effectiveness of the bulk assignment of claims is achieved in accordance with Article 58, para. 2, Banking Law. Furthermore Article 4, Securitisation Law, specifies that formalities set out in such provision make the assignment effective against either the debtors or the third parties.335

1.5. Subrogation

Under Italian law subrogation is disciplined by Articles 1201-1205 CC, contained in the Section relating to the law of obligations.

Despite subrogation is not conceived for purposes of circulation of claims, subrogation at the creditor’s request may nonetheless attain economic effects equivalent to the assignment of claims. Recourse to subrogation has the advantage of not requiring service of notice on the debtor for effectiveness purposes. Its operation, though, is subject to strict requirements, excluding that it is tantamount to assignment of claims.

Pursuant to Article 1201 CC, a third party paying out a creditor’s claim is subrogated by the latter in his rights against the debtor. To this end, subrogation must be declared by the creditor at the same time he receives the payment by the third party. A further restriction to the recourse to subrogation as an equivalent to assignment of claims is the circumstance that the subrogee must be subrogated in exactly the same title (amount of claim and attached rights) to which the creditor is entitled to, implying that there must be an absolute equivalence between the

335 For an overview of the European law and private international law aspects of these disciplines, see Luca Radicati di Brozolo, La cessione dei crediti in blocco ex art. 58 T.U.: riflessi di diritto comunitario ed internazionale privato, in Banca, borsa e titoli di credito, 1997, I, p. 510; Id., La nuova legge sulla cartolarizzazione e la cessione dei crediti a soggetti esteri, in Diritto del commercio internazionale, 1999, p. 1061.
amount of the payment by the third party (i.e. the purchase price) and the face value of the claim.

2. CONFLICT OF LAWS ANALYSIS

The second part of the study focuses on conflict of laws. Absent Italian case law relating to Article 12 of the Rome Convention and to Article 14 of the Rome I Regulation, the Italian law standpoint will be outlined having regard to the opinions expressed in legal writings both before and after the conversion of the Rome Convention into Rome I Regulation

2.1. Effectiveness of Assignment Against Third Parties within the Rome Convention

As a preliminary remark, it is worth spending a couple of words on the notion of “proprietary aspects”. Among Italian scholars, Malatesta has challenged such expression arguing that from the theoretical perspective it is more appropriate to characterise effectiveness against third parties as contractual in nature, rather than proprietary, on ground that claims pertain to the law of obligations.\(^{336}\) As a consequence, according to Malatesta, the property exclusion from the scope of application of the Rome Convention does not impact on the effectiveness of the assignment against third parties which is to be included in its framework.

Regardless of the characterisation, the question whether the issue falls within the scope of application of the Rome Convention was controversial and unclear. The few authors who had investigated the matter, have argued in favour of its inclusion within the Rome Convention, either because assignment against the debtor, which is a third party to the assignment, is covered by the Rome Convention, or because it is advisable that the PIL system on assignment of claims be considered complete and comprehensive.\(^{337}\) Italian scholars have therefore refrained from attributing a situs to the debt and from advocating the application of the law of the debtor's domicile to govern effectiveness of the assignment against third parties.\(^{338}\) From a different perspective, it is hardly questionable that under Italian substantive law, assignment of claims entails proprietary aspects, given that the assignment agreement achieves an outright transfer of the claim from the property of the assignor to the assignee. In this line of reasoning, it may be claimed that according

---

\(^{336}\) Alberto Malatesta, *Some answers to the Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into community instrument and its modernisation*.


\(^{338}\) This however does not exclude that in practice the assignee may want to voluntarily fulfill the formal requirements set forth by Italian law as the law of the debtor's domicile, with the view to preventing claw back actions of the payments in the event of the assigned debtor's insolvency.
to Italian scholars, *inter partes* proprietary issues did already fall within the scope of application of the Rome Convention and that they are now covered by Article 14, para.1, Rome I Regulation.\(^{339}\)

Within the framework of the Rome Convention, Italian scholars have favoured the application of Article 12, para. 2,\(^{340}\) i.e. the law of the assigned debt, to govern effectiveness against third parties and priority among competing claimants, arguing that this provision covers effectiveness of the assignment against the debtor, which is a third party to the assignment. The application of the law of the assigned debt has serious shortcomings when dealing with complex transactions such as bulk assignments or assignment of portfolio of claims, since it might entail the application of multiple laws if the assigned debts are governed by different laws; notwithstanding this weakness, in the view of Italian scholars, Article 12, para. 2, is the most appropriate provision within the framework of the Rome Convention to govern such aspects.\(^{341}\)

Italian authors have rejected the application of Article 12, para. 1, of the Rome Convention, *i.e.* the law of the assignment contract, to govern the "proprietary aspects" of the assignment of claims, arguing that (i) it is inadequate to govern subsequent assignments of the same claims, in case the different assignment contracts are not governed by the same law; (ii) it may not be protective enough of the third parties interests, to the extent that it is chosen autonomously by the assignor and the assignee and their choice is not necessarily known by third parties; (iii) it is flawed in the event that the parties fail to choose the applicable law (even if this argument is as well applicable to Article 12, para. 2).\(^{342}\)

### 2.2. The Law of the Assignor's Residence Pursuant to Article 13(3) of the Rome I Proposal

In light of the shortcomings and overall uncertainty of Article 12 of the Rome Convention, the Proposal of Rome I Regulation has deserved the highest attention by Italian scholars. The introduction of an *ad hoc* connecting factor, the law of the


assignor's registered office, embodied in Article 13, para. 3, of the Proposal of Rome I Regulation, to govern effectiveness of the assignment against third parties, has encountered mixed reactions.

Despite some criticism, focusing in particular on the inadequacy of the provision to govern subsequent assignments of the same claim and on the increase in number of laws involved in the discipline of cross-border assignment of claims\textsuperscript{343}, Malatesta and Bonomi have praised this solution.\textsuperscript{344} To make the provision more efficient and to avoid duplication of formalities, Malatesta has argued to include effectiveness of assignment against the debtor within the scope of application of Article 13, para. 3, Proposal of Rome I Regulation, \textit{i.e.} the law of the assignor's residence. This view, though, has been criticized by Bonomi, arguing that it is not protective enough of the debtor's interests. Furthermore, unlike other scholars who maintain that assignment of future claims is to be included within the scope of application of the law of the assignor's residence,\textsuperscript{345} in that it affects third creditors rights over the assignor's patrimony, Malatesta is of the view that this aspect should be governed by the law of the assignment contract, since it is a matter of the validity of the assignment transaction.\textsuperscript{346}

In light of the inadequacy of the proposed connecting factor set out in Article 13, para. 3, to solve all problems, another author has maintained that application of Article 12, para. 2, of the Rome Convention should not be waived in favor of the proposed new connecting factor.\textsuperscript{347}

\textbf{2.3. Article 14 Rome I Regulation}

The solution embodied in Article 14 of the Rome I Regulation has not attracted the attention of many. Given the silence of the provision as to the law applicable to effectiveness against third parties and competing claims, those who have tackled the issue have confirmed the opinion expressed in the past in relation to Article 12 of the Rome Convention. This is the view of Leandro who has restated the application of the law of the assigned debt (Article 14, para. 2) to invoke assignment against third parties. This author, though, has mitigated his view by supporting the introduction of a special rule to govern complex transactions, such as bulk assignment and assignment of future claims, to be discussed within the review provided by Article 27, para. 2, Rome I Regulation. This author, in particular


\textsuperscript{344} Andrea Bonomi, \textit{La cessione del credito}, \textit{op. cit.}, p. 170; Alberto Malatesta, \textit{Some answers, op. cit.}, p. 1.


\textsuperscript{346} Alberto Malatesta, \textit{Some answers, op. cit.}, p. 4.

\textsuperscript{347} Antonio Leandro, \textit{La disciplina dell’opponibilità della cessione del credito, op. cit.}, p. 681.
puts forwards arguments in favor of the application of Article 14, para. 1, i.e. the law of the assignment agreement, whenever such law is more closely connected to the transaction.\footnote{Antonio Leandro, Commento all’Articolo 14, cit., p. 862; Marongiu Bonaiuti, Commento all’articolo 27, 28, 29, in Salerno, Franzina (eds.), Commentario al Regolamento Roma I, op. Cit., p. 952, maintains that the current framework relating to the law applicable to the assignment of claims reproduces the uncertainties of the regime set out in the Rome Convention.}

\subsection*{2.4. The Law Applicable to Transfer of Shares and Book-Entry Securities}

It is common view that Article 14, Rome I Regulation, does not apply to the transfer of shares, either in paper certificates or dematerialized securities. Such transaction is rather governed (i) by the law applicable to the contract, notably the law chosen by the parties pursuant to Article 3, or the law applicable by default rules as per Article 4, Rome I Regulation, and (ii) by the \textit{lex tituli} with specific regard to the effectiveness against the company.\footnote{Court of Appeal of Milan, 18 July 2000, case note by Gardella, Conflitti di legge e ambito di applicazione della Convenzione di Roma del 1980 nei trasferimenti di pacchetti azionari, in Banca, borsa e titoli di credito, 2001, II, p. 689; Io., Commento all’Articolo 1, lett. f), in Francesco Salerno, Pietro Franzina (eds.), Commentario al Regolamento Roma I, in Le Nuove Leggi Civili Commentate, 2009, p. 577.}

The law applicable to the proprietary aspects of rights over book-entry securities is set out in Legislative Decree 21 May 2004, n. 170, implementing into Italian law Directive n. 2002/47/EC on financial collateral arrangements (“Financial Collateral Directive”), which provides the PRIMA (\textit{Place of the Relevant Intermediary Approach}) connecting factor. According to this rule, the proprietary aspects of a collateral arrangement over book-entry securities are governed by the law of the place where “the relevant account is maintained” by the relevant intermediary.\footnote{See Gardella, Le garanzie finanziarie nel diritto internazionale privato, Giuffrè, Milano, 2007, p. 220.}

Given the difficulty of localizing the securities account in certain cases, the European Commission is considering amending the PRIMA in order to better identify the exact place where such relevant account is maintained.\footnote{European Commission, Second Consultation on the Legislation on Legal Certainty of Security Holdings and Dispositions, 2010, p. 23. A recent decision of the Corte di Cassazione, 8 April 2011, n. 8034, on file with the author, shows the shortcomings of the PRIMA rules, in that it localizes the securities account at the seat of the relevant intermediary, see Gardella, \textit{Il caso Madoff non sfugge alla giurisdizione italiana: responsabilità transfronteristica da prospetto e localizzazione degli strumenti finanziari dematerializzati}, forthcoming in Banca, borsa e titoli di credito, 2011, II.}

Consideration might be given to the fact that the Financial Collateral Directive does not set out any special connecting factor for cash collaterals, \textit{i.e.} collaterals created over money deposited in a bank account. Despite the Proposal of the Financial Collateral Directive included cash collateral within the scope of application of the
PRIMA, cash has been subsequently excluded from the substantive scope of application of Article 9 of the Financial Collateral Directive. Absent any special provision, Article 14, Rome I Regulation, should apply; for sake of comparison, however, it is interesting to note that bank deposits are excluded from the scope of application of the 2001 UNCITRAL Convention. Having regard to the specific features of bank deposits and of cash financial collaterals, arguments may be put forward in favor of the application of the law of bank account agreement to govern effectiveness of assignment against third parties.  

2.5. Effectiveness of Assignment Against Third Parties and Mandatory Rules

It is disputed under Italian law whether formalities required to make assignment effective against third parties are mandatory rules. Absent case law, in legal literature the view has been expressed against such characterisation, although the issue is controversial. With specific regard to bankruptcy scenarios, in the event an insolvency proceedings is opened in Italy, it is unclear whether the trustee would refer to Article 45 of the Bankruptcy Law to set aside the assignment claims in case the "proprietary aspects" are governed by a law other than Italian law, on grounds that formal requirements provided for Italian law have not been complied with and, as a consequence, priority in time of the assignment over the opening of the bankruptcy proceeding has not been established by means of date certain.

2.6. Assignment of Claims and Insolvency

Along the lines of the previous paragraph, it could be argued that on top of the considerations regarding the determination of the law applicable to the effectiveness of the assignment against third parties at the contractual level, irrespective of the law set out to govern effectiveness of assignment against third parties, consideration should be given to the introduction of a provision providing that such law cannot be affected by the application of formalities imposed by the lex fori concursus to make the assignment effective against third parties, including the trustee in a bankruptcy. A rule alike would foster coordination and consistency between the Rome I Regulation and Regulation EC n. 1346/2000 on insolvency proceedings (“Insolvency Regulation”).

353 Gardella, Le garanzie finanziarie, op. cit., p. 244.
354 Malatesta, La cessione del credito, op. cit., p. 86, spec. p. 89, with specific regard to service of notice by court bailiff.
355 Gardella, Prevedibilità contro flessibilità? op. cit., p. 649; Leandro, Commento all'Articolo 14, op. cit., p. 862.
It is submitted that adoption of the law of the assignor's residence pursues such coordination goal, in that it would most of the times coincide with the *lex fori concursus*. However consideration should be given to the circumstance that the current phenomenon of migration and of rebuttal of the presumption that the COMI is localized at the debtor’s registered office might not provide an adequate level of legal certainty. To this end, an express provision exempting the effectiveness of the assignment against third parties from the application of the *lex fori concursus* might be considered. Should the Commission opt for the adoption of a connection factor other than the law of the assignor's residence to govern effectiveness of the assignment against third parties, a rule establishing this coordination and consistency of regimes might be appropriate.

With regard to the interaction between the Rome I Regulation and the Insolvency Regulation, the attention should also be directed at the interplay of the rule governing effectiveness against third parties of the assignment of claims, with Articles 5 and 2, lett. *g*), Insolvency Regulation. Article 5, relating to third parties’ rights *in rem* over assets of the debtor located in a Member State other than that where the principal proceedings has been opened, provides that such rights, including “the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee”, *shall not be affected* by the opening of the principal proceedings. Such rights, including their creation, validity and existence, continue to be governed by the law of the place where they are located, rather than by the *lex fori concursus*. Pursuant to Article 2, lett. *g*), a claim is located at the debtor’s COMI (*i.e.* the debtor of the claim not the bankrupt debtor), therefore it is up to this law to govern the creation, validity and existence of the rights over the claim. The combined reading of Article 5 and of Article 2, lett. *g*), Insolvency Regulation, might conflict with the Rome I Regulation. To avoid any contrast, arguments have been put forward in favor of considering Article 2, let. *g*), Insolvency Regulation, simply a localization provision and not a conflict of laws provision, as such unable to determine the applicable law with regard to the effectiveness of the assignment against third parties. This aspect would be exclusively governed by the Rome I Regulation and its discipline would be binding on the *lex fori concursus*.

---

SUMMARY

1. Substantive Law

It is necessary to distinguish between the effects against third parties and the effects against the debtor.

With regard to the effects against the debtor, it is in all circumstances necessary to make sure he is aware of the assignment, as he may validly discharge his obligation by performance rendered to the assignor unless it is proved that he had knowledge of the assignment.

With regard to the effects against third parties, in certain circumstances - i.e. in presence of financial collateral arrangements or in the context of Securitisation - the conclusion of the contract of assignment is sufficient, but in general it is necessary to notify the assignment to the debtor.

2. Conflict of Laws

In general, under Luxemburg law, the law applicable to the effects of the assignment of claims ("créances") against the debtor is the law of the assigned claim. In the absence of clear rules set out by law or by case law, it is not sure that the same law applies with regard to its effects against third parties. Special rules are applicable to Securitisation. In this context, the law distinguishes between the law applicable to the effects against the debtor (the law of the assigned claim) and the law applicable to the effects against third parties (the law of the assignor's residence).

---

357 Marc Mehlen/Stefanie Ferring, Clifford Chance LLP.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
</table>
| **Civil Code**                         | **Article 1130 (1):**                                                                                                  
|                                        | Future things may be the object of an obligation.                                                                           |
|                                        | **Article 1249:**                                                                                                  
|                                        | Subrogation to the rights ("droits") of a creditor for the benefit of a third person who pays its debt is either by contract or by law. |
|                                        | **Article 1250:**                                                                                                  
|                                        | Such subrogation is conventional:                                                                                           |
|                                        | 1° If a creditor receiving his payment from a third person subrogates him into his rights, actions, liens or mortgages against the debtor: subrogation must be express and made at the same time as the payment; |
|                                        | 2° If a debtor borrows a sum for the purpose of paying his debt, and of subrogating the lender to the rights of the creditor. Such subrogation is only valid if the instrument of loan and the receipt have been drawn up by notary public; additionally it must be declared in the loan that the sum was borrowed in order to make the payment, and it must be declared in the receipt that the payment has been made with monies provided for this purpose by the new creditor. That subrogation has its effect without the concurrence of the wish of the creditor. |
|                                        | **Article 1691:**                                                                                                  
|                                        | If the debtor has paid the assignor before he has been notified by the assignor or the assignee, he is validly discharged, unless it is proved that he had knowledge of the assignment. |
| **Law of 22 March 2004 on Securitisation** | **Article 55:**                                                                                                  
|                                        | (1) The assignment of an existing claim to or by a securitisation undertaking becomes effective between the parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in such agreement. |
|                                        | (2) A future claim which arises out of an existing or future agreement is capable of being assigned to or by a securitisation undertaking provided that it can be identified as being part of the assignment at the time it comes into existence or at any other time agreed between the parties. |
|                                        | (3) The assignment of a future claim is conditional upon its coming into existence, but when the claim does come into existence, the assignment becomes effective between parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in such agreement, notwithstanding the opening of bankruptcy proceedings or any other collective proceedings against the assignor before the date on which the claim comes into existence. |
Article 56:

(3) The assigned debtor is validly discharged from its payment obligations by payment to the assignor as long as it has not gained knowledge of the assignment.

Law of 5 August 2005 on Financial Collateral Arrangements

Article 4:

Parties to a pledge agreement may agree that, in order to collateralize the relevant financial obligations of a debtor, all collateral presently or in the future owned by the collateral provider are or will be subject to the pledge without the need to specifically designate it.

Article 5:

(1) The privilege only subsists over the pledged collateral if the collateral has been and has remained or shall be deemed to have remained in the possession of the creditor or of a third party custodian agreed upon between the parties.

Article 5 (until 30 June 2011):

(3) If the pledge is over claims or financial instruments other than the ones described in paragraph (2), the transfer of possession is effected as against all third parties when, for claims, the pledge has been notified to the debtor of the pledged claims or acknowledged by him, and, for financial instruments, when the pledge has been notified to or acknowledged by the issuer of the pledged financial instruments or, in case the financial instruments are held by a third party custodian, when the pledge has been notified to or acknowledged by the third party custodian.

The notification and the acknowledgment of the pledge are made either in authentic form or under private seal. In this latter case, if a third party challenges the date of notification or acknowledgment of the pledge, such date may be evidenced by any means.

Even before the notification or the acknowledgment, the pledge may be enforced against the debtor if it can be proved that he was aware of such pledge.

Article 13:

(1) This law applies to transactions involving a transfer of title to collateral for security purposes, including by way of fiduciary transfer. If the transfer is done on a fiduciary basis, the fiduciary must be a financial sector professional.

(2) The transactions referred to in the preceding paragraph consist in the transfer of title to collateral presently or in the future owned by the transferor, without need to specially designate the collateral, by the transferor to the transferee in order to secure the relevant financial obligations of the transferor or of a third party to the transferee and include an undertaking of the transferee to retransfer the collateral transferred or equivalent collateral as agreed by the parties, except in the event of total or partial non-performance of the relevant financial obligations.
Article 14:

(2) Transfer of ownership for collateral purposes of financial instruments not recorded in an account or of claims takes effect between the parties and becomes enforceable against third parties from the time of the agreement between the parties. Nonetheless, the debtor of an assigned claim may validly discharge his obligation by performance rendered to the transferor as long as he has no knowledge of the transfer of his obligation to the transferee. [...]

B) Conflict of Laws

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law of 22 March 2004 on Securitisation</td>
<td>Article 58:</td>
</tr>
<tr>
<td></td>
<td>(1) The law governing the assigned claim determines the assignability of such claim, the relationship between the assignee and the debtor, the conditions under which the assignment is effective against the debtor and whether the debtor's obligations have been validly discharged.</td>
</tr>
<tr>
<td></td>
<td>(2) The law of the State in which the assignor is located governs the conditions under which the assignment is effective against third parties.</td>
</tr>
</tbody>
</table>

C) Table of Case Law

<table>
<thead>
<tr>
<th>Decision</th>
<th>Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA, 8 December 1959: Pas. 18, p. 84.</td>
<td>The effects of an assignment of claims against the debtor and against third parties are governed by the law of the place where the debtor of the relevant claim is domiciled.</td>
</tr>
<tr>
<td>CA, 1 October 1963: Pas. 19, p. 209.</td>
<td>The effects of an assignment of claims against the debtor and against third parties are governed by the law of the place where the debtor of the relevant claim is domiciled.</td>
</tr>
<tr>
<td>TA Luxemburg, 23 January 1989, n°21/1989 (35.628).</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>CA, 11 July 1995: Pas. 29, p. 411.</td>
<td>Contractual subrogation takes effect against third parties on the date of payment. Even if article 1690 of the Civil Code is not applicable, it is necessary to &quot;notify&quot; the subrogation to the debtor in order to prohibit payment to the assignor.</td>
</tr>
<tr>
<td>TA Luxemburg, 20 July 2001, n°573/2001 (49.020).</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>TA Luxemburg, 12 July 2002, n°567/2002 (50.947).</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>CA, 18 February 2009, n°32.861.</td>
<td>The effects of an assignment of claims against third parties are governed by the law of the assigned claim.</td>
</tr>
<tr>
<td>TA Luxemburg, 20 February 2009, n°60/2009 (112.905).</td>
<td>The effects of an assignment of claims against the debtor and third parties are governed by the law of the place where the debtor of the relevant claim is domiciled.</td>
</tr>
<tr>
<td>TA Luxemburg, 3 March 2010, n°69/2010 (116.902)</td>
<td>The effects of an assignment of claims against the debtor are governed by the law of the assigned claim.</td>
</tr>
</tbody>
</table>
1. CHARACTERISATION AND SUBSTANTIVE LAW ISSUES

1.1. General Rules

Under Luxemburg law there is no requirement for companies to register charges over debts.

1.1.1. Assignment of Claims ("cession de créances")

1.1.1.1. General Rules

The assignment of claims is a transfer of claims governed, in general, by Articles 1689 et seq. of the Luxemburg Civil Code. Parties may transfer the claim at a certain price which they fix and which may be different from its nominal amount.

There are no formal requirements regarding the validity of an assignment between the parties. If the general rules governing validity of contract have been followed, no further steps have to be taken. Parties to the assignment are bound as of the date of the conclusion of the contract. Consent of the debtor is not necessary for the assignment to be valid.

According to Article 1690 of the Civil Code, the assignment is binding on third parties either after the debtor has been notified of the transfer (for example, by registered letter with acknowledgement of receipt), or after the assignment has been accepted by the debtor (for example, a copy of the contract of assignment is countersigned by the debtor). There is no particular requirement regarding the form of the notification or of the acceptance by the debtor, except that for evidence reasons it is preferable to have at least some kind of written document.

As to the effects against the debtor, it is not sure whether notification to, or consent of, the debtor is really necessary. Actually, Article 1691 of the Civil Code provides that before notification of the assignment, the debtor may validly discharge his obligation by performance rendered to the assignor unless it is proved that he had knowledge of the assignment of his obligation to the assignee. One may thus conclude that notification of the debtor is not necessary for the assignment to take effect against the debtor. Basically, notification is only a means to make sure the debtor is not able to validly discharge his obligation by performance to the assignor. If the debtor has knowledge of the assignment, he cannot claim to be in good faith if he pays the assignor.

358 The rules regarding Assignment of Claims being very similar to the rules contained in the French Civil Code, Luxemburg Courts will also refer to French case law for guidance.
1.1.1.2. Assignment of Future Claims

The assignment of future claims is very widely admitted as Article 1130 of the Civil Code provides that "future things may be the object of an obligation".359 Furthermore, the transfer of future claims for collateral purposes has been expressly recognized in the Law of 5 August 2005 on Financial Collateral Arrangements (the "Law on Financial Collateral Arrangements")360, although even before the entry into force of such law such possibility was already permitted due to the general application of Article 1130 of the Civil Code.361 In such circumstances it is useful to notify the assignment to any person who may become a debtor. The assignment is then effective against third parties as of the date of the existence of the claim. Moreover, the debtor is not able to claim to be in good faith if he pays the assignor as he had knowledge of the assignment even before the coming into existence of the claim.

1.1.2. Contractual Subrogation

Contractual subrogation is provided for in Articles 1249 and 1250 of the Civil Code. It is mainly used in the context of factoring. The assignee, often a professional of the financial sector in the context of factoring transactions, pays to the assignor the nominal amount of a receivable in exchange for a receipt. As a consequence of his payment, the assignee is subrogated into the claims of the assignor. The main difference between assignment and contractual subrogation is that in case of a subrogation, the assignee is entitled to the subrogated claims up to the amount paid to the assignor only, whereas an assignment entitles the assignee to the nominal value of the claim even if the amount paid is much lower.

The Luxemburg Court of Appeal has held on 11 July 1995362 that Article 1690 of the Civil Code is not applicable to subrogation. It takes effect against third parties on the date of payment. But, the Court of Appeal adds that it is necessary to "notify" the subrogation to the debtor in order to prohibit payment to the assignor. As a matter of fact, as long as the debtor is not informed, he may claim to be in good faith when discharging his obligation by performance rendered to the assignor. As to the means of notification, the Court of Appeal decides that it is sufficient for the debtor to be informed of the subrogation. The assignee is thus free to choose the means of information. This comes however with a certain risk, as the burden of proof of the information lies upon the assignee. For this reason, it is certainly prudent to get some written evidence of the information of the debtor.

359 "Les choses futures peuvent être l'objet d'une obligation."
360 The Law on Financial Collateral Arrangements recognizes the transfer of ownership of future claims for collateral purposes (see part 2.3.1.2.) and the pledge over future claims (see part 2.3.2.2.).
361 See, e.g. Doc. parl. 2564/6, p. 12 (opinion given by the Diekirch District Court) & p. 26 (opinion given by the Diekirch Justice of the Peace)
1.2. Specific Rules

1.2.1. Transfer of Ownership for Collateral Purposes ("Transfert de propriété à titre de garantie")

1.2.1.1. General Rules

The transfer of a claim can be used for collateral purposes in accordance with the Law on Financial Collateral Arrangements which has implemented into Luxemburg law Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements (the "Financial Collateral Directive").

Following Article 14 (2) of the Law on Financial Collateral Arrangements, "transfer of ownership for collateral purposes [...] of claims takes effect between the parties and becomes enforceable against third parties from the time of the agreement between the parties". This Article pursues: "Nonetheless, the debtor of an assigned claim may validly discharge his obligation by performance rendered to the transferor as long as he has no knowledge of the transfer of his obligation to the transferee."

It is thus clear that there is a difference between the effectiveness against the debtor and against third parties. Transfer of title takes effect against third parties as of the date of the contract. But, the debtor may in good faith ignore the transfer as long as he has no knowledge of the transfer. If notification is not necessary for the effect against third parties, it is still useful to make sure that the debtor is no longer able to discharge his obligation by payment made to the transferor.

1.2.1.2. Transfer of Ownership for Collateral Purposes of Future Claims

Article 13 of the Law on Financial Collateral Arrangements provides for the transfer of future claims. In fact, the transfer of title for security purposes concerns "the transfer of title to collateral presently or in the future owned by the transferor". This article is an application of the general principles developed earlier. Even if this had not been provided for, in the absence of a provision to the contrary, there would be no reason for not admitting the transfer of future claims.

1.3. Pledge over Claims

1.3.1. General Rules

The scope of the rules regarding pledge agreements in the Law on Financial Collateral Arrangements is larger than the scope in the Financial Collateral Directive. They apply to all pledges over claims securing financial obligations whether the parties are professionals or not.
According to Article 5 (1) of the Law on Financial Collateral Arrangements, a pledge is only valid if "[the claim] has been and has remained or shall be deemed to have remained in the possession of the creditor [...]".

It is thus necessary to describe how the creditor takes possession of the claim. The applicable rules have been amended recently, and these amendments have entered into force on 30 June 2011.

**1.3.1.1. Rules until 30 June 2011**

Pursuant to Article 5 (3) of the Law on Financial Collateral Arrangements in the presence of a pledge over claims, "the transfer of possession is effected as against all third parties when [...] the pledge has been notified to the debtor of the pledged claims or acknowledged by him [...]".

"The notification and the acknowledgment of the pledge are made either in authentic form or under private seal." It is clear that if notification or acknowledgement are made under private seal, third parties might want to challenge the date of such act. For this specific situation, Article 5 (3) of the Law on Financial Collateral Arrangements provides that, "[i]n this latter case, if a third party challenges the date of notification or acknowledgment of the pledge, such date may be evidenced by any means". The burden of proof of the date of the date of the notification or acknowledgement lies with the pledgee.

The same Article 5 (3) specifies that "[e]ven before the notification or the acknowledgment, the pledge may be enforced against the debtor if it can be evidenced that he was aware of such pledge."

It is thus clear that, regarding effectiveness of the pledge, debtors and third parties are treated in different ways. Acknowledgement by or notification to the debtor is necessary for the effectiveness against third parties. But when it comes to the effectiveness against the debtor, his knowledge is sufficient.

**1.3.1.2. Rules as from 30 June 2011**

The above rules have been amended recently, and the amendments have entered into force on 30 June 2011.


---

363 *Memorial* n°104, p. 1637.
This text, introducing a new Article 5 (4) into the Law on Financial Collateral Arrangements, provides that "the transfer of possession is effected against the debtor and against all third parties by the conclusion of the pledge agreement". There will be no need of notification or acknowledgement anymore, and the pledge is effective against third parties as of the conclusion of the pledge agreement.

But with regard to the effectiveness against the debtor, this same article 5 (4) adds that the latter "may validly discharge his obligation by performance rendered to the pledgor as long as he has no knowledge of the pledge of his obligation". It is thus necessary to make sure the debtor has knowledge of the pledge. And one should assume that the pledgee has the burden to prove that he has informed the debtor or that, at least, the debtor could not ignore the pledge.

1.3.2. Pledge of Future Claims

According to Article 4 of the Law on Financial Collateral Arrangements, future claims may be pledged. It provides that "[p]arties to a pledge agreement may agree that [...] all collateral presently or in the future owned by the collateral provider are or will be subject to the pledge without the need to specifically designate it". It is clear from this article that the pledge may be agreed upon before the pledged property is owned by the pledgor, but the pledge itself over such claim will only exist once the claim has come into existence.

1.4. Securitisation

1.4.1. General Rules

Pursuant to Article 55 (1) of the Securitisation Law, "the assignment of an existing claim to or by a Securitisation undertaking becomes effective between the parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in such agreement". The validity of the assignment is not conditioned by the consent of the debtor.

As to the effects against third parties, Article 55 of the Securitisation Law does not distinguish between the debtor and third parties. But this distinction appears in Article 56 (3) of the Securitisation Law which provides that "the assigned debtor is validly discharged from its payment obligations by payment to the assignor as long as it has not gained knowledge of the assignment".

It is thus clear that the same general rule applies to Securitisation. As long as the assignment has not been notified to the debtor, and as long as it is not possible to prove that he had knowledge of the assignment, he may validly claim to be discharged by payment to the assignor.
1.4.2. Future Claims

The assignment of future claims is admitted in Article 55 (2) of the Securitisation Law, as long as the future claim can be identified as being part of the assignment. According to Article 55 (3) of the Securitisation Law "the assignment of a future claim is conditional upon its coming into existence". In the absence of provisions to the contrary, once the claim has come into existence, the assignment becomes effective between the parties and against third parties from the moment the assignment has been agreed upon. This rule applies "notwithstanding the opening of bankruptcy proceedings or any other collective proceedings against the assignor before the date on which the claim comes into existence".

2. CONFLICT OF LAWS ANALYSIS

2.1. General Rules

2.1.1. Traditional Approach of the Luxemburg Courts prior to the entry into force of the Rome Convention (as defined below)

In the traditional practice of the Luxemburg courts, in the absence of any statutory provision dealing with the subject-matter, the effects of an assignment of claims against the debtor and third parties were both governed by the law of the place where the debtor of the relevant claim was domiciled.

Cases submitted to Luxemburg courts only dealt with the effects of an assignment of claims against the debtor, but the Luxemburg Court of Appeal (CA) decided per obiter that the same rules applied to the effect of an assignment of claims against both the debtor and third parties in a decision of 8 December 1959.

The same has recently been held by the Luxemburg District Court (Tribunal d'Arrondissement (TA)), in a judgment of 20 February 2009, in circumstances in which the effectiveness against the debtor only was questioned.

2.1.2. Developments after the Rome Convention


---

364 "(2) A future claim which arises out of an existing or future agreement is capable of being assigned to or by a Securitisation undertaking provided that it can be identified as being part of the assignment at the time it comes into existence or at any other time agreed between the parties."

365 Article 55 (3) of the Securitisation Law.

366 CA, 8 December 1959: Pas. 18, p. 84. The same has been held in CA, 1st October 1963: Pas. 19, p. 209.


solution has been partially abandoned and a difference is now made between the law applicable to the effects of an assignment against the debtor and the one applicable to the effects of an assignment against third parties.

2.2. Effects of an Assignment Against the Debtor

With regard to the effects of an assignment against the debtor, Luxemburg tribunals have decided that, after the entry into force of the Rome Convention, the law applicable is the law of the assigned claim. This has been held even in circumstances in which the Rome Convention was not applicable, i.e. where the claim had been assigned before the entry into force of the Rome Convention (TA Luxemburg, 23 January 1989\textsuperscript{369}). This approach has, since, been followed in a number of cases applying article 12 (2) of the Rome Convention (TA Luxemburg, 20 July 2001,\textsuperscript{370} 12 July 2002,\textsuperscript{371} 3 March 2010\textsuperscript{372}).

Such solution remains unchanged with the entry into force of the Rome I Regulation which has furthermore the benefit of widening the meaning of "assignment". Moreover, it should be noted that the conflict of law rules set out above in this paragraph and above are not only applied in case of outright assignment of claims, but also notably in case of transfers of ownership for collateral purposes and pledges over claims.

2.3. Effects of the Assignment Against Third Parties

Recently, the Luxemburg Court of Appeal has adopted the same solution regarding the effectiveness of an assignment against third parties. In a decision of 18 February 2009,\textsuperscript{373} the Court of Appeal decides that the law of the assigned claim is applicable to its effects against third parties. Interestingly, to reach this conclusion, the Court of Appeal applies Article 12 (2) of the Rome Convention (the Court cites the following part of it : "The law governing the right to which the assignment relates shall determine [...] the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor [...] ").

The Court of Appeal does not indicate any reasons for its interpretation of the Rome Convention, but it seems to consider that, since the law applicable to the assigned claim determines the effects of the assignment against the debtor, the same law should be applicable to its effects against third parties. One should however note that in this particular case, the law applicable to the assigned claim was identical to the law of the residence of the debtor. A prudent approach would thus be to await

\begin{itemize}
\item \textsuperscript{369} TA Luxemburg, 23 January 1989, n\textdegree{}21/1989 (35.628).
\item \textsuperscript{370} TA Luxemburg, 20 July 2001, n\textdegree{}573/2001 (49.020).
\item \textsuperscript{371} TA Luxemburg, 12 July 2002, n\textdegree{}567/2002 (50.947).
\item \textsuperscript{372} TA Luxemburg, 3 March 2010, n\textdegree{}69/2010 (116.902 & 118.912).
\item \textsuperscript{373} CA, 18 February 2009, n\textdegree{}32.861.
\end{itemize}
further developments in case law to be sure that courts have chosen a new direction.

For this reason, in practice, it is probably necessary to take into account the case law before and after the entry into force of the Rome Convention and to make sure that the law of the domicile of the debtor as well as the law of the assigned claim have been taken into account with regard to the effectiveness of an assignment against third parties.

2.4. Particular Rules of Applicable Law for Certain Kinds of Transactions: Securitisation

The law dated of 22 March 2004 on Securitisation (the "Securitisation Law") contains specific choice of law rules to determine the law applicable to the different aspects of the assignment of claims in the context of a Securitisation.\(^{374}\)

According to Article 58 (1) of the Securitisation Law, the assignable character of claims, the relationship between the assignee and the debtor, the enforceability of the assignment towards the debtor as well as the discharge of the debtor are governed by the law that applies to the assigned claim.

The enforceability of the assignment towards third parties is governed by the law of the jurisdiction in which the assignor is established (Article 58 (2) of the Securitisation Law).

The Securitisation Law follows the choice of law rules laid down by the United Nations Convention on the Assignment of Receivables of 12 December 2001 (the "UNCITRAL Convention"). This Convention was signed by Luxemburg on 12 June 2002 but has not yet been ratified by the Luxemburg legislator. The avowed purpose of the Luxemburg legislator when adopting Article 58 of the Securitisation Law was to fill the gap left by Article 12 of the Rome Convention regarding the effects of the assignment of claims against third parties.\(^{375}\)

---

374 The term "Securitisation" is defined by Article 1 (1) of the Securitisation Law: «Securitisation», within the meaning of this law, means the transaction by which a Securitisation undertaking acquires or assumes, directly or through another undertaking, risks relating to claims, other assets, or obligations assumed by third parties or inherent to all or part of the activities of third parties and issues securities, whose value or yield depends on such risks.

375 Doc. parl. 5199/00, p. 31.
3. A NEW CONFLICT OF LAWS PROVISION ON PROPRIETARY QUESTIONS IN THE ROME I REGULATION (NEED FOR AN ART. 14(3))

3.1. The Case for an Article 14 (3)

As it has been made clear in part 2, except in the somehow limited context of Securitisation, there is no clear answer to the question regarding the law applicable to the effectiveness of assignment against third parties under Luxemburg law as it is necessary to await further developments of Luxemburg case law.

In practice, for that reason, most of the time it is made sure that formalities regarding the effectiveness against third parties provided for under the law of the debtor and under the law of the assigned claim have been respected. The uncertainty comes with a cost. If a group of claims against debtors residing in different jurisdictions is transferred, the assignee needs to know the formalities applicable in different jurisdictions which will take some time. Moreover, the assignee might need legal counsel in different jurisdictions as to be sure how to proceed.

It would certainly be useful for the situation to be clarified. From a practical point of view, it is very important to have one single clear rule applicable to transactions in different contexts. We are thus of the opinion that there is a need for a rule regarding effectiveness of assignment against third parties in the Rome I Regulation.

3.2. The Applicable Rule

The applicable rule should be the law of the habitual residence of the assignor on the date of the assignment.

3.2.1. The Law of the Habitual Residence of the Assignor

Regarding the choice of the applicable rule the main criterion should be simplicity and legal security. From this point of view, the ideal choice is the law of the habitual residence of the assignor.

There are three other laws which could be chosen, but none of them has the advantages of the law of the habitual residence of the assignor and all of them have certain disadvantages.

3.2.1.1. Advantages of the Law of the Habitual Residence of the Assignor

Firstly, if the applicable law is the law of the assignor, the formalities regarding the effectiveness against third parties are determined by one single law. And this law is the same whether the transfer concerns only one claim or a certain number of
claims against debtors residing in different jurisdictions. The cost of the transaction is thus reduced.

Secondly, assignor and assignee are party to the assignment. It is thus easy for the assignee, who is most likely to take care of the necessary formalities, to know the applicable law as he is in a direct relationship with the assignor.

Thirdly, the debtor has probably been in a contractual relationship with the assignor and he is thus informed on the habitual residence of the assignor. The solution does not bear any element of surprise for him.

Fourthly, third parties are mainly creditors of the assignor or subsequent assignees of the same claim. They do know the assignor and, for this reason, they can easily find out about the law applicable to this person. Third parties do not necessarily know the law of the debtor(s) and the research of this comes with a certain cost.

In conclusion, the law of the habitual residence of the assignor is the most interesting solution as third parties are normally in a contractual relationship with the assignor. This is also the reason why it seems that this solution is the most efficient one from an economic point of view.

This solution would have another positive effect from a Luxemburg point of view. This choice implies the unification of the legal rules on the law applicable to the effectiveness of assignment against third parties under Luxemburg law. In fact, we have seen sub part 1.2 that there is a specific rule applicable in the context of Securitisation which designates the law of the jurisdiction in which the assignor is established.

3.2.1.2. Disadvantages of Other Laws

The law of the habitual residence of the debtor has one certain disadvantage. It makes the assignment of a portfolio of claims more difficult as one operation might be subject to several different laws, and it adds a certain cost. In fact, one needs to identify and apply formalities applicable in a certain number of different jurisdictions. One may thus assume that this solution is not efficient from an economic point of view.

The law of the assigned claim and the law of the contract of assignment have another disadvantage. Third parties are not parties to the contract of assignment and they most certainly ignore the law of the assigned claim or of the contract of assignment. It is thus almost impossible for third parties to know or to find out about the substantive rules regarding the effectiveness of a given assignment against third parties.
3.2.2. The Habitual Residence of the Assignor on the Date of the Assignment

If it is admitted that the law applicable is the law of the assignor, there is one important question that has to be answered. This question regards the moment to be taken into account to determine the habitual residence of the assignor.

The place of residence of the assignor, as defined in article 19 of the Rome I Regulation, could change between the moment of the assignment and the accomplishment of the formalities necessary for effectiveness against third parties. Which law should be taken into account?

In our opinion, the safest solution would be to refer to the place of residence at the moment of conclusion of the contract of assignment. One may assume that this place is known to the parties as well as to third parties as this place should have been mentioned in the contract of assignment. This location is the same for existing and for future claims.
H. NATIONAL REPORT THE NETHERLANDS\textsuperscript{376}

SUMMARY

1. Substantive Law

Under Dutch substantive law a distinction is made between disclosed and undisclosed assignments. The effectiveness of both types of assignment requires the fulfillment of the general conditions for the transfer of property: (i) a valid legal basis (title, normally: a contract), (ii) the assignor having the power of disposition (beschikkingsbevoegdheid) of the claim to be assigned, and (iii) a "delivery" (levering) of the claim to the assignee (see article 3:84(3) Dutch Civil Code). In case of a disclosed assignment the delivery requires a deed of assignment and notification of the assignment to the debtor. An undisclosed requirement is effected by either an authentic (notarial) deed or a private deed that has to be registered in a non-public register held by the Dutch tax authorities.

2. Conflict of Laws

According to Dutch private international law, the proprietary effects of an assignment are governed by the proper law of the contract pursuant to which the assignment of the claim takes place, in other words the underlying contract between the assignor and the assignee (see article 10(2) Conflicts Property Act). This conflict rule does not differentiate between proprietary effects "inter partes" and proprietary effects "erga omnes" and equally applies to all cross-border assignments, irrespective of the kind of transaction within which the assignment takes place.

\textsuperscript{376} Sanne van Dongen/ Hendrik L.E. Verhagen, Radboud University Nijmegen.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dutch Civil Code</td>
<td>Art. 3:45:</td>
</tr>
<tr>
<td></td>
<td>1. If a debtor, in the performance of a juridical act to which he was not obliged, knew or ought to have known that this would adversely affect the possibility of recourse of one or more of his creditors, the juridical act may be annulled; any creditor whose possibility of recourse has been adversely affected by the juridical act may invoke this ground for annulment, irrespective of whether his claim arose before or after the act.</td>
</tr>
<tr>
<td></td>
<td>2. Except for gratuitous acts, a juridical act, either multilateral or unilateral and directed at either one or more specific persons, can only be annulled because of prejudice to a creditor, if the persons with whom or in respect of whom the debtor performed the juridical act also knew or ought to have known that prejudice to one or more creditors would result from it.</td>
</tr>
<tr>
<td></td>
<td>3. Where a gratuitous juridical act is annulled because of prejudice, the annulment has no effect against a beneficiary who neither knew nor ought to have known that prejudice to one or more creditors would be the result of the juridical act, but only to the extent that he demonstrates that, at the time of the declaration or institution of the annulment action, he did not derive benefit from the juridical act.</td>
</tr>
<tr>
<td></td>
<td>4. A creditor attacking a juridical act as being prejudicial to him, can only annul the act on his own behalf and not to a larger extent than necessary to remove the prejudice to himself.</td>
</tr>
<tr>
<td></td>
<td>5. Proprietary rights on assets that were the subject of an annulled juridical act and that have been acquired by third parties in good faith, other than by gratuitous title, shall be respected. A third party acting in good faith who has acquired property by gratuitous title shall not be affected by the annulment to the extent that he shows that, at the time the property is claimed from him, he did not benefit from the juridical act.</td>
</tr>
<tr>
<td>Art. 3:83:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1. Ownership, limited rights and claims are transferable, unless it is precluded by law or by the nature of the right.</td>
</tr>
<tr>
<td></td>
<td>2. Transferability of claims may also be excluded by an agreement between creditor and debtor.</td>
</tr>
<tr>
<td></td>
<td>3. Other rights are only transferable where the law so provides.</td>
</tr>
<tr>
<td>Art. 3:84:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1. Transfer of property requires delivery pursuant to a valid title by a person who has the right to dispose of the property.</td>
</tr>
</tbody>
</table>
|                         | 2. The title must describe the property in a sufficiently precise
manner.

3. A juridical act intended to transfer property for purposes of security or which does not have the purpose of vesting title in the acquirer after transfer, does not constitute valid title for transfer of that property.

4. Where a delivery is made in the performance of a conditional obligation, the right thus acquired is subject to the same condition as the obligation.

Art. 3:88:

1. Although a transferor lacks the right to dispose of property, the transfer of registered property, a personal right or other property to which Article 86 does not apply, is valid if the acquirer is in good faith and if the lack of the right to dispose results from the invalidity of a previous transfer, which itself did not result from the transferor's lack of the right to dispose at that time.

2. Paragraph 1 cannot be invoked in respect of claims referred to in Article 86a, paragraphs 1 and 2 and Article 86b, paragraph 1.

Art. 3:94:

1. In cases other than those provided for in the preceding article, rights to be exercised against one or more specific persons are delivered by means of an appropriate deed and notice thereof given by either the alienator or the acquirer to those persons.

2. Delivery of a right exercisable against a specific person, who is however unknown on the day when the deed is drawn up, shall be retroactive to that day, provided that the right belongs to the alienator on that day and that notification is made with due speed once that person has been ascertained.

3. These rights can also be delivered by an authentic or registered private deed made for such purpose without notification to the persons against whom such rights will be exercised, provided the rights already exist at the time of the delivery or will be acquired directly from a legal relationship which already exists at that time. The delivery may not be opposed vis-à-vis the persons against whom such rights must be exercised except after the alienator or the acquirer has informed them thereof. Article 88, paragraph 1 applies only in respect of an acquirer of a right delivered in accordance with the first sentence, when the acquirer is in good faith at the time the information referred to in the second sentence is given.

4. The persons against whom the right is to be exercised can demand that they be given an extract, certified by the alienator, of the instrument and the title upon which it is based. Stipulations which are of no importance to these persons need not be included in the extract. If no deed has been drawn up stating the title upon which the right is based, they must be notified in writing of the contents of the title to the extent that this is of importance to them.
1. With the exception of registered property and property which is prohibited to be the subject matter of a contract, future property may be delivered in advance.

2. Delivery in advance of future property has no effect against a person who has acquired the property in advance as a result of an earlier delivery. In the case of a movable asset, the delivery is effective against such a person from the time the asset came into the actual possession of the acquirer.

Art. 6:34:

1. A debtor who has paid a person who was not authorized to receive payment, can invoke the payment as a discharge against the person to whom the payment should have been made, if he had reasonable grounds to believe that the recipient of the payment was entitled to the performance as a creditor or that payment was to be made to him for another reason.

2. If a person loses his right to claim payment in such a way that the right vests retroactively in another person, the debtor may, with respect to that other person, invoke a payment made in the meantime, unless he should have refrained from payment on account of what he could have foreseen with regard to the loss of the right to claim payment.

Art. 6:142:

1. On the transmission of a claim, the new creditor also acquires its accessory rights, such as rights of pledge and mortgage, rights arising under surety, priority rights and the right to enforce enforceable judgments, orders and deeds relating to the claim and its accessory rights.

2. Accessory rights include the right of the predecessor creditor to contractually agreed interest, to a penalty or to a forfeited penalty sum for non-compliance, except to the extent the interest was already due and payable or the penalty or penalty forfeited for non-compliance had already been forfeited at the time of transmission.

Art. 7:633(1):

1. A transfer, pledge or any other act as a result of which the employee grants any right to his wages to third parties shall be valid only to the extent that a seizure by garnishment of his wages would be valid.

2. A power of attorney to claim wages must be granted in writing. Such a power of attorney may be revoked at any time.

3. There shall be no derogation from this article.

Code of civil procedure Art. 156:

1. Deeds are signed pieces of writing, intended to serve as evidence.
2. Authentic deeds are deeds in the required form that have been drawn up by officials, to whom it has under or pursuant to the law been referred to produce evidence of their observations and actions in such a manner.

3. Private deeds are all deeds that may not be characterized as authentic deeds.

Art. 475b:

1. An attachment at a third party over one or more claims for periodic payments against the debtor that are exempt from attachment up to the protected earnings level is only valid to the extent that a periodic payment exceeds the protected earnings level.

2. In case of attachments at several third parties over claims for periodic payments against the debtor that are exempt from attachment up to the protected earnings level, the protected earnings level will be allocated according to the amount of the periodic payments.

3. Attachment over supplementary payments is only valid to the extent that it would have been valid if the payment was made in time during the attachment.

Art. 475h:

1. A disposition, charge, waiver or administration order of a claim covered by the attachment, that is effected after the levy of the attachment, cannot be invoked against the creditor who levied the attachment. The same applies to a payment or surrender in spite of the attachment, unless the third party has done everything that could reasonably have been asked from him in order to prevent the payment or surrender.

2. Article 453a applies by way of analogy to assets covered by the attachment.

Art. 720:

1. The Articles 475a-475i, 476a and 476b, 479 and 479a are applicably by way of analogy. In the case of Article 475a(3), the claim over which an attachment is levied has to be explicitly defined in the application intended to obtain permission of the judge in interlocutory proceedings. Permission to levy attachment over a claim to a periodic payment stated in Article 475c may only be granted after the debtor has either been heard or has allowed the opportunity to be heard to pass.

Bankruptcy Act Art. 35:

1. If on the date of the bankruptcy order not all acts required for delivery by the debtor have been performed, the delivery can no longer be validly effected.

2. If prior to the date of the bankruptcy order the debtor has delivered a future asset in advance, this will belong to the estate if it was acquired by him only after the beginning of the date of
the bankruptcy order, unless it consists of fruit or plants not yet
harvested and to which the debtor was entitled before the
bankruptcy order by virtue of a right in rem or a lease or an
agricultural lease.

3. For the purposes of Articles 86 and 238 of Book 3 of the Civil
Code a person acquiring from the debtor is deemed to have been
aware of the debtor`s lack of legal capacity after the publication
of the bankruptcy order referred to in paragraph 3 of Article 14.

Art. 63a:

1. On the application of each interested party or ex officio, the
bankruptcy judge may issue a written order stipulating that, for
a stay-period not exceeding two months, each right of third
parties to recourse against property belonging to the estate or to
claim property under the control of the insolvent debtor or the
liquidator may only be exercised with his authorization. The
bankruptcy judge may extend this period once for a period of no
more than two months.

2. The bankruptcy judge may restrict his order to specific third
parties and attach conditions both to his order and to the
authorization of a third person to exercise a right to which the
latter is entitled.

3. If a third party has set the liquidator a reasonable time in
respect of the former`s entitlement, such a period shall be
stayed during the stay-period.

4. When so required by the applicant of the bankruptcy or by the
debtor, the stay-period may also be announced by the court
which issues the bankruptcy order. The stay-period which is
announced simultaneously with the declaration of bankruptcy
has effect from the date on which the bankruptcy order is
issued, that day included therein.
### B) Conflict of Laws

<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conflicts Property Act</td>
<td>Art. 10:&lt;br&gt;1. The assignability or chargeability of a personal claim is governed by the proper law of the assigned claim.&lt;br&gt;2. In all other respects, the property law regime regarding a personal claim is governed by the proper law of the contract requiring the assignment or charge. That law especially determines: which requirements apply to a valid and effective assignment or charge; who is entitled to exercise the rights implied in the claim; by which rights the claim may be encumbered and the nature and content of such rights; in what way such rights may be altered, transferred and cease to exist, and the mutual relationship of such rights. 3. The relationships between the assignee, respectively the creditor of the claim, and the debtor, the conditions under which the assignment or charge of the claim may be invoked against the debtor, as well as the question whether performance by the debtor leads to a discharge of his obligations, are governed by the proper law of the assigned claim.</td>
</tr>
</tbody>
</table>

### C) Table of Case Law

<table>
<thead>
<tr>
<th>Decision</th>
<th>Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hoge Raad 16 mei 1997, Nederlandse Jurisprudentie (NJ) 1998, no. 585 (Brandsma q.q./Hansa Chemie AG)</td>
<td>The conflicts rule of Article 12(1) Rome Convention does not only apply to the obligational relationship between the assignor and the assignee, but also to the assignment’s proprietary aspects. The proprietary effects of a cross-border assignment are therefore governed by the law applicable to the underlying contract between the assignor and the assignee.</td>
</tr>
<tr>
<td>Hoge Raad 11 June 1993, Nederlandse Jurisprudentie (NJ) 1993, no. 776 (Caravan Centrum Zundert et al/Kreuznacher Volksbank AG I)</td>
<td>The issue of whether an existing or future claim may be assigned in advance is governed by the proper law of the claim.</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

This report considers the general legal framework relating to the assignment of receivables in the Netherlands, in particular in respect of the law governing the proprietary effects of a cross-border assignment. A brief outline of assignment under Dutch substantive law and an explanation of what we consider to be the assignment’s proprietary effects will be provided in paragraph 2. In paragraph 3 the conflict rules regarding an international assignment will be discussed. In paragraph 4 we will examine some particular issues in more detail, such as multiple (competing) assignments, the prohibition on security assignments and the assignment of future claims. Paragraph 5 will subsequently deal with the assignment’s “other third party effects”, e.g. relating to the avoidance of an assignment as constituting a voidable preference (actio pauliana). Finally, insolvency situations will be discussed in paragraph 6.

2. ASSIGNMENT UNDER DUTCH SUBSTANTIVE LAW

2.1. Hybrid Legal Institution: Obligational and Proprietary Effects

Assignment may be characterised as a hybrid legal institution, involving features that belong to both the law of obligations and the law of property. The assignment’s hybrid character is apparent in the assigned claim being the object of the assignment, as well as in the assignment itself. The assigned claim can be described as a personal right, of either a contractual or a non-contractual (e.g. a tort claim) nature, the substance of which is determined by the law of obligations. At the same time, the assigned claim is an (intangible) asset, a chose in action, which is itself capable of being transferred, charged or otherwise encumbered under the law of property. Its hybrid character is also visible in the assignment itself. At the level of the law of property assignment is a disposition of a claim, while at the level of the law of obligations it constitutes the replacement of the creditor of a claim. The obligational effects of assignment involve questions relating to the replacement of the original creditor (the assignor) by a new creditor (the assignee) and the implications thereof for the debtor. One such question is whether and to what extent the debtor is allowed to raise against the assignee the defences that he

---

377 In this report the terms “claims” and “receivables” will be used interchangeably, to indicate personal rights which are enforceable against specific obligors only and which have not been expressed to be payable on bearer or order (vorderingen op naam). Usually (but not necessarily), assignments relate to contractual claims to the payment of money. Whereas the terms "claims" and "receivables" are used to indicate the active side of an obligation (verbintenis), the term “debt” is used to indicate its passive side, e.g. what is payable by the debtor to the creditor. The wording "proprietary effects” is deemed to have the same meaning as "property aspects", the expression that is used in recital 38 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177/16 ("Rome I").

would have been able to raise against the assignor if the assignment had not taken place.  

This report will focus on the proprietary effects of an assignment, which essentially concern the requirements for a valid transfer of the claim from the patrimony of the assignor to that of the assignee and the ranking of competing proprietary interests in respect of the same claim. This includes issues as to whether the transfer of the claim requires the giving of notice to the debtor, whether the assignment requires a valid underlying contract or other “cause”, who acquires title to the claim in case of multiple (competing) assignments and whether a claim may be assigned by way of security. These issues will be further elaborated on in the following paragraphs of this report.

Often, the obligational and proprietary effects of claims and assignment interact. A good example of this is provided by the effect of a contractual limitation on the assignment of a claim. The question as to whether the assignor and the debtor have agreed to such a limitation is obviously a matter belonging to the law of obligations, or more precisely the law of contract. The same is true for the question of whether a subsequent assignment results in a default of the assignor towards the debtor, which will mean that damages have to be paid. However, the question as to whether such a contractual limitation actually prevents the transfer of a claim, as it does in some jurisdictions, including the Netherlands, will fall under the law of property (see also paragraph 4.4 below).

2.2. Requirements for Assignment

Under Dutch law an assignment may either be disclosed or undisclosed. Both types of assignment share the general requirements for the transfer of property of (i) a valid legal basis (title, normally: a contract), (ii) the assignor having the power of disposition (beschikkingsbevoegdheid) of the claim to be assigned, and (iii) a "delivery" (levering) of the claim to the assignee, as provided in article 3:84(1) of the Dutch Civil Code. The delivery in case of a disclosed assignment requires a deed

---

381 See also Axel Flessner, Hendrik Verhagen, Assignment in European Private International Law, Munich 2006, p. 1.
382 See also Hendrik Verhagen, Sanne van Dongen, Cross-Border Assignments under Rome I, Journal of Private International Law 2010, p. 3.
of assignment and notification of the assignment to the debtor.\footnote{383} In case of trade receivables, however, it is more common to use an undisclosed assignment, which is effected by either an authentic (usually a notarial) deed or a registered private deed.\footnote{384} Registration is in a non-public register held by the Dutch tax authorities and only serves to fix the date of the assignment.\footnote{385} Both a disclosed and an undisclosed assignment must sufficiently identify the receivables to be assigned. It is established case-law of the Dutch Supreme Court, the \textit{Hoge Raad}, that this requirement is fulfilled if the deed of pledge contains such data, that it is possible to determine to which receivables it pertains - if necessary in retrospect. This means that a generic description in the deed of pledge may suffice.\footnote{386}

By fulfilling the aforementioned requirements the receivable will be transferred from the assignor to the assignee. It is important to note that this transfer is not only effective as between the assignor and the assignee, but also as against any interested third party, such as creditors of the assignor and/or the assignee. It is in this respect that in the observation in recital 38 of the preamble to Rome I, that “article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee” the underlined part may be considered rather ambiguous. Under Dutch and German law, for instance the wording “property aspects” (or proprietary effects) inevitably includes the effects towards third parties.\footnote{387} What is \textit{not} included, are the assignment’s “other third party effects”. These are issues that - while being outside the scope of the assignment’s proprietary effects - are nevertheless closely related to them. The most important examples are rules on recourse by creditors against assets owned by their debtor or on voidable preference (\textit{actio pauliana}, see further paragraph 5 below).

\footnote{383} See article 3:94(1) in conjunction with article 3:84(1) Dutch Civil Code. A private deed suffices, which may in accordance with article 156(1) and (3) of the Dutch Code of Civil Procedure (Wetboek van burgerlijke rechtsvordering) be any piece of writing that intends to serve as evidence.

\footnote{384} See article 3:94(3) in conjunction with article 3:84(1) Dutch Civil Code. In article 156(2) of the Dutch Code of Civil Procedure it is stated that authentic deeds are deeds in the required form that have been drawn up by a qualified official or by any other person that has been given equivalent rights. The undisclosed assignment has been (re)introduced in the Dutch Civil Code in 2004 in order to facilitate legal practice. See with respect to this issue Hendrik Verhagen, M.H.E. Rongen, \textit{Cessie (preliminary advice Association for Civil Law (Vereniging voor Burgerlijk Recht))}, Deventer 2000, p. 14-15 and 21-35; M.H.E. Rongen, Hendrik Verhagen, \textit{De cessie naar huidig en komend recht: de cirkel is weer rond}, Weekblad voor privaatrecht, notariaat en registratie (WPNR) 2003.

\footnote{385} It should be noted that Dutch law does not impose requirements on companies to register charges over debts.


The effectiveness of an assignment under the law of property, in other words the assignment’s proprietary effects, has to be separated from the obligational question as to whom the debtor must make payments. Assuming that the assignment is valid, the answer to this latter question entirely depends on whether the debtor has been notified.\(^{388}\) After notification of the assignment the debtor is no longer able to discharge his obligations by making payments to the assignor, but is instead obliged to make payments to the assignee. As has been stated above, notification also serves as one of the requirements that need to be fulfilled for a disclosed assignment. In case of such an assignment, notification will consequently usually determine both the point in time on which the assignment becomes effective, and the point in time from which the debtor can only discharge himself by making payments to the assignee.\(^{389}\) This is, however, different in the case of an undisclosed assignment, where notification only serves to determine to whom the debtor must make payments. In this respect the second sentence of article 3:94(3) Dutch Civil Code states that (its effectiveness notwithstanding) the undisclosed assignment \textit{may not be invoked} against the debtor before notification by the assignor or the assignee.\(^{390}\) Even a debtor who has not been notified of the assignment but who does have factual knowledge of it, may not be able to discharge himself by making payments to the assignee.\(^{391}\)

2.3. Ranking of Multiple (Competing) Assignments

If the same receivable happens to be assigned twice, obviously only one of the (intended) assignees will become entitled to the claim. Under Dutch law priority is given to the assignment that has been completed first. This means that in case of two disclosed assignments, priority is granted to the assignment that has been notified to the debtor first. In the situation of two undisclosed assignments, priority will also be given to the firstly completed assignment. For an authentic deed the date of completion is the date of signature by the qualified official (usually a civil law notary); for a registered private deed it is the date of registration, which is deemed to be the date on which the deed is provided for registration with the tax

\(^{388}\) In case of an invalid assignment on the other hand, the debtor will not be able to discharge himself by making payments to the assignee, unless he does so in good faith (see article 6:34 Dutch Civil Code).

\(^{389}\) Usually, because notification may also be effected before the drawing up of the deed of assignment. See Henk Snijders, Eline Benoeming Rank-Berenschot, \textit{Goederenrecht (Studiereeks Burgerlijk Recht)}, Deventer 2007, p. 302, with further references.

\(^{390}\) As stated in article 3:94(3), second sentence, Dutch Civil Code (original text: “De levering kan niet worden tegengeworpen aan de personen tegen wie deze rechten moeten worden uitgeoefend dan na mededeling daarvan aan die personen door de vervreemder of de verkrijger”).

It has to be emphasized that with respect to priority issues an undisclosed assignment is considered equivalent to a disclosed assignment, e.g. meaning that if notification of a disclosed assignment occurs after the date of registration of the private deed of an undisclosed assignment, it is the disclosed assignment that will produce no effect.

The aforementioned priority rules will in most cases be decisive as to determine who is entitled to the claim, for Dutch law offers only limited protection to a bona fide second assignee. It follows from article 3:88(1) Dutch Civil Code that a bona fide second assignee is only protected if the absence of power of disposition of the assignor results from the invalidity of a previous assignment, which itself did not result from the assignor lacking the power of disposition at the time of the earlier assignment.

Example 1. A claim is assigned from assignor A to assignee B and subsequently from assignor B to assignee C. After the assignment B-C it appears that the assignment A-B is invalid because the underlying contract has been rescinded for mistake. Given that such a rescission has retroactive effect, B is deemed to have never been entitled to the claim, as a result of which the assignment B-C is invalid as well.

Example 2. Assignor A firstly assigns its claim against his debtor to assignee B and secondly to assignee C.

Since in the first example the invalidity of the previous assignment A-B has not resulted from the assignor lacking the power of disposition, but instead from the absence of a valid cause (contract), C may be able to invoke the protection of article 3:88(1) Dutch Civil Code, provided that he acted in good faith at the time of the assignment B-C. Depending on the type of assignment, however, a further limitation may apply, which forms an exception to the principle mentioned above, that an undisclosed assignment is considered equivalent to a disclosed assignment. For, in case of an undisclosed second assignment, protection will only be provided if the assignee notifies the debtor and is in good faith at the time of notification.

---


In the second example, article 3:88(1) Dutch Civil Code may not be relied on by C, because the absence of power of disposition of A at the time of the second assignment A-C does not result from the invalidity of a previous assignment. The assignment A-B will consequently prevail over the second assignment A-C, being the assignment that has been completed first.

3. ASSIGNMENT UNDER DUTCH PRIVATE INTERNATIONAL LAW

3.1. The “Hansa”-Case

The Dutch conflict rule relating to the proprietary effects of an international assignment has been formulated by the Dutch Supreme Court in the case of Brandsma q.q./Hansa Chemie AG. In this judgment the Supreme Court decided that the proprietary effects of a cross-border assignment are governed by the law applicable to the underlying contract between the assignor and the assignee.

The facts of this case are the following. A German seller, Hansa Chemie AG (“Hansa”) had sold chemicals to a Dutch purchaser, Bechem Chemie BV (“Bechem”). Hansa's general conditions provided that the transfer of the chemicals was subject to a so-called verlängter Eigentumsvorbehalt, a prolonged retention of title, more specifically an Eigentumsvorbehalt mit Vorausabtretungsklausel (a retention of title prolonged by an assignment in advance). This clause allowed Bechem to sell on the chemicals before payment of the purchase price to Hansa, on the condition of a security assignment in advance of all future claims against subsequent buyers. A day after the first sale Bechem did indeed sell on the chemicals to another Dutch purchaser, Senzora BV (“Senzora”). The purchase price for the first sale had not yet been paid, when Bechem was declared bankrupt a few weeks later. The first purchase agreement between Hansa (also the assignee) and Bechem (the assignor) was governed by German law; Dutch law on the other hand was applicable to the second purchase agreement between Bechem (the assignor) and Senzora (the debtor) and therefore to the claim to be assigned.

The question that arose was whether the effectiveness of the assignment had to be determined in accordance with Dutch or German law. In other words: which law was applicable to the assignment of a claim that was itself governed by Dutch law,

395 Hoge Raad 16 mei 1997, Nederlandse Jurisprudentie (NJ) 1998, no. 585 (Brandsma q.q./Hansa Chemie AG).
396 See the first part of par. 3.5 of the Supreme Court’s judgment. The judgment is, however, slightly ambiguous. From the second part that same paragraph it could be derived that the assignment’s proprietary effects are governed by the law chosen for the assignment specifically, which may be different from the law chosen for the underlying agreement between the assignor and the assignee pursuant to which the assignment takes place.
but that took place in accordance with an agreement governed by German law? The answer to this question was crucial in order to determine whether the assignment was effective. Under Dutch law it would most likely have been ineffective, since (i) security transfers are generally prohibited in article 3:84(3) Dutch Civil Code (see further paragraph 4.2 below), and (ii) not all requirements had been fulfilled before Bechem was declared insolvent. As a consequence of this invalidity the claim against Senzora would still form part of Bechem’s insolvent estate. German law, on the other hand, provided the possibility to effect an assignment by a mere agreement between the assignor and the assignee, without any restrictions relating to the assignment of future claims by way of security. The applicability of German law would therefore mean that Hansa could seek recovery from the assigned claim.

In its judgment the Supreme Court first examines whether the proprietary effects of an assignment are within the scope of article 12 of the (then applicable) Convention on the law applicable to contractual obligations of 1980 (the “Rome Convention”).

The Court admits that this cannot be deduced from the wording of article 12 Rome Convention. On the basis of a historical interpretation of this provision, however, the Court rules that it also applies to “the contract of assignment, the juristic act by which the claim is transferred” (our italics). In this regard the Court considers most decisive that it follows from the Giuliano/Lagarde Report that the text of article 12(1) Rome Convention was not intended to exclude from its scope the transfer of the claim itself, in other words the assignment’s proprietary effects. The drafters only decided not to use the originally intended words “the assignment of a right by agreement” because this could have created the misunderstanding that the law designated by article 12(1) Rome Convention would also govern the effects of the assignment for the debtor, exactly what article 12(2) Rome Convention aims to prevent.

The Supreme Court subsequently considers whether, given the applicability of article 12 Rome Convention, the assignment’s proprietary effects are addressed by the first or by the second paragraph of article 12, in other words by the law applicable to the underlying contract between the assignor and the assignee (article

---

398 More particularly Senzora had not yet been notified, a crucial requirement in a time when the only type of assignment recognized under Dutch substantive law was the disclosed assignment.
399 OJ 2005, C 334/1 (consolidated version). See par. 3.4.1 of the Supreme Court’s judgment.
400 See par. 3.4.2-3.4.4 of the Supreme Court’s judgment (original text in par. 3.4.4: “de overeenkomst van cessie, de rechtshandeling waarbij de vordering wordt overgedragen”).
401 See par. 3.4.4-3.4.6 of the Supreme Court’s judgment. Cf. Giuliano/Lagarde Report, comment to article 12 Rome Convention (OJ 1980, C 282/34): “Such a form of words had in fact been approved initially by most of the delegations, but it was subsequently abandoned because of the difficulties of interpretation which might have arisen in German law, where the expression “assignment” of a right by agreement includes the effects of it upon the debtor: this was expressly excluded by Article 12(2)”. See also Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich, 2006, p. 9.
12(1)) or by the proper law of the assigned claim (article 12(2)). Here the Court deems important the apparently exhaustive character of the enumeration in article 12(2) Rome Convention and the observation in the Giuliani Lagarde Report referred to above. Since the assignment’s proprietary effects are not mentioned in article 12(2) Rome Convention, one has to conclude that they are within the scope of article 12(1) Rome Convention. Additional grounds for this decision are that (i) if article 12(1) Rome Convention solely applied to the contractual agreement between the assignor and the assignee, it would be redundant, lacking any independent significance beside the general rules of article 3 (choice of law) and 4 (objective conflict rule) of the Rome Convention; (ii) application of the proper law of the assigned claim in accordance with article 12(2) Rome Convention would often lead to the undesirable situation that the legal relationship between the assignor and assignee is governed by two different legal systems, and (iii) application of the proper law of the assigned claim would deprive the assignor and the assignee of the possibility to choose the law governing the assignment.  

The Hansa-judgment has been thoroughly discussed by both Dutch and foreign authors and has found proponents as well as opponents. One of the main criticisms that has been put forward by the opponents is that by adhering to the rule that the proprietary effects of a cross-border assignment are governed by the law applicable to the underlying contract between the assignor and the assignee, the Dutch Supreme Court effectively allows the assignor and the assignee to agree on the law that governs the assignment. The supposed dangers of party autonomy - that have, as it should be underlined, however, not presented themselves in the fourteen years that have passed since the Hansa-judgment - notwithstanding, the conflict rule formulated by the Dutch Supreme Court has been codified in article 10(2) of the Dutch Conflicts Property Act (Wet conflictenrecht goederenrecht, ”Conflicts Property Act”), which took effect on 1 May 2008.

---

402 See par. 3.5 of the Supreme Court’s judgment; Axel Flessner, Hendrik Verhagen, Assignment in European Private International Law, Munich 2006, pp. 9-10.
405 See in more detail on the argument of party autonomy Hendrik Verhagen, Sanna van Dongen, Cross-Border Assignments under Rome I, Journal of Private International Law 2010, p. 17; Axel
3.2. The Conflicts Property Act

Article 10 of the Conflicts Property Act contains the Dutch conflict rules relating to an international assignment. The provision reads as follows:

1. The assignability or chargeability of a personal claim is governed by the proper law of the assigned claim.

2. In all other respects, the property law regime regarding a personal claim is governed by the proper law of the contract requiring the assignment or charge. That law especially determines:

a. which requirements apply to a valid and effective assignment or charge;

b. who is entitled to exercise the rights implied in the claim;

c. by which rights the claim may be encumbered and the nature and content of such rights;

d. in what way such rights may be altered, transferred and cease to exist, and the mutual relationship of such rights.

3. The relationships between the assignee, respectively the creditor of the claim, and the debtor, the conditions under which the assignment or charge of the claim may be invoked against the debtor, as well as the question whether performance by the debtor leads to a discharge of his obligations, are governed by the proper law of the assigned claim.

The issues mentioned in article 10(1) and 10(3) Conflicts Property Act are also - and beyond all doubt - regulated by article 14(2) Rome I. The Conflicts Property Act additionally provides that the pledging or charging of receivables should, for the purpose of finding the applicable law, be treated in the same way as their assignment. This is also in accordance with article 14(3) Rome I. In case of a concurrence between both provisions, article 14 Rome I naturally prevails. With respect to this issue the State Committee makes the - in our view disputable - observation that article 10 of the Conflicts Property Act also applies to the assignment of claims arising from other sources than contracts, e.g. tort claims, thereby indicating that the assignment of such claims is not governed by article 14 Rome I.


406 For the sake of simplicity and because most of our observations equally apply to both concepts, we will however continue to limit ourselves to the assignment of claims.

407 See the Report of the State Committee, p. 44. We would, however, argue that as a consequence of a systematic interpretation of Rome I and its counterpart, Regulation 864/2007 of the European
Whether the proprietary effects of an assignment are also regulated by article 14 Rome I is on the other hand highly controversial.\textsuperscript{408} As long as this issue is not clarified by either the EU Court of Justice, or the EU legislator, the proprietary effects of assignment will in practice be deemed to be governed by the rule laid down in article 10(2) Conflicts Property Act. This leads to the assignment’s proprietary effects being governed by the proper law of the contract pursuant to which the assignment of the claims takes place, in other words the underlying contract between the assignor and the assignee. It should be underlined that this conflict rule does not differentiate between the proprietary effects as between the assignor and the assignee (sometimes referred to as proprietary effects “\textit{inter partes}”) and the proprietary effects in respect of third parties (effects “\textit{erga omnes}”). Such a distinction is incongruous with the system of Dutch substantive property law (see also paragraph 2.2 above).\textsuperscript{409} Moreover, the conflict rule equally applies to all cross-border assignments, irrespective of the kind of transaction (e.g. factoring, securitisation) within which such an assignment takes place. A differentiation according to various types of transactions would not only be redundant, but would also lead to characterisation problems.\textsuperscript{410} It is therefore preferable to have a conflict rule which itself allows to have the assignment’s proprietary effects governed by the law that is most suitable to structure different types of transactions as efficiently as possible.

Article 10(2) Conflicts Property Act refers to the proper law of the underlying contract between the assignor and the assignee. The law applicable to this contract has to be determined by article 3 (choice of law) or articles 4-8 (objective conflict rules) Rome I. In commercial transactions the applicable law will usually be the law chosen in accordance with article 3 Rome I. In this respect article 3(1) Rome I generally allows the parties to an agreement to make a choice of law for only a part of the agreement, which is sometimes also called “\textit{depeçage}”. The possibility to make a partial choice of law enables the parties to have the proprietary effects of an international assignment governed by a separate law (see article 3(1), second sentence, Rome I).

\textsuperscript{408} This has been argued by Axel Flessner, \textit{Die internationale Forderungsabtretung nach der Rom I Verordnung}, IPRax: Praxis des Internationalen Privat- und Verfahrensrecht 2009, p. 38-43; Hendrik Verhagen, Sanne van Dongen, \textit{Cross-Border Assignments under Rome I}, Journal of Private International Law 2010, pp. 5-13, with further references to authors supporting this interpretation as well as authors arguing against it. See e.g. contra Jeroen van der Weide, \textit{De internationale cessie en verpanding van vorderingen Europees geregeld?!}, Maandblad voor Vermogensrecht (MvV) 2008, p. 107.

\textsuperscript{409} See also Hendrik Verhagen, Sanne van Dongen, \textit{Cross-Border Assignments under Rome I}, Journal of Private International Law 2010, p. 5.

\textsuperscript{410} See \textit{ibid.}, p. 19.
Example. A bank provides credit under a loan agreement to a Dutch lessor that leases rolling stock to lessees in various jurisdictions, including Germany. The loan agreement is governed by English law. The lessor wants to assign the lease instalments arising from its lease agreement with the German lessee by way of a German *Sicherungsabtretung*.

In this example, the option to partially choose the applicable law allows the parties to the loan agreement to agree that the obligation to assign the lease instalments owed by the German lessee is not governed by English law, but instead by German law. Since a choice of law may in accordance with article 3(2) Rome I also be modified after the conclusion of a contract, such a partial choice of law relating to the proprietary effects of an international assignment may also be made afterwards, for example in the deed of assignment.\(^{411}\)

### 4. PARTICULAR ISSUES

#### 4.1. Multiple (Competing) Assignments

A particular issue that should be tackled first is that of multiple (competing) assignments. The conflict rule laid down in article 10(2) Conflicts Property Act, which refers the proprietary effects of assignment to the law applicable to the underlying contract between the assignor and the assignee, is perfectly able to solve situations of multiple (competing) assignments. Unfortunately, opponents to such a conflict rule usually claim that it is not. The rule has even been accused of leading to a deadlock situation in circumstances in which a receivable has been assigned multiple times and each assignment is governed by a different law. Such a multiple assignment would lead to a priority conflict between the various assignees, for which a conflict rule referring assignment to the law governing the underlying contract between the assignor and the assignee would provide no solution.\(^{412}\) This point of criticism is clearly wrong and is based on a - regrettably very persistent - misunderstanding. The proper approach to any situation of multiple (competing) assignments is to bear in mind that even if a claim has been assigned multiple times, there will always be a first and a second assignment. The validity of each assignment has to be determined in accordance with the law governing that assignment. In assessing the validity of the second assignment, however, possible

---


proprietary rights that have, by virtue of the first assignment, been established in accordance with the law governing the first assignment have to be recognised.\footnote{See also Hendrik Verhagen, Sanne van Dongen, \textit{Cross-Border Assignments under Rome I}, Journal of Private International Law 2010, pp. 17-18.}

Example. Assignor A firstly assigns its claim against his debtor to assignee B and secondly to assignee C. The first assignment is governed by English law, whereas the second assignment is governed by Italian law.

In such a case, the proprietary effects of the first assignment A-B would have to be determined by English law and those of the second assignment A-C by Italian law. In judging the proprietary effects of the second assignment from A to C, however, the earlier transfer of the claim from A to B should not be disregarded. As a result of the first transfer from A to B, A has lost his title to the claim subsequently assigned to C, so that C would only be able to acquire the claim if under the law applicable to the assignment from A to C (Italian law) protection is offered to C as a \textit{bona fide} assignee.\footnote{See also \textit{ibid.}, p. 18.}

This approach has been criticized in a recent article for being “too much tilted towards the Dutch/German approach (under which the first assignment prevails) (...)”, for it would “not pay sufficient regard to the English approach (under which the second assignee may gain priority if he is unaware of the first assignment and is the first to notify the debtor)”.\footnote{See Trevor Hartley, \textit{Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation}, International and Comparative Law Quarterly 2011, p. 51 (footnote 58).} It is submitted that this point of criticism cannot be justified. Whether the second assignment eventually prevails, will entirely depend on the extent to which the law governing that second assignment protects \textit{bona fide} assignees. If in our example the second assignment A-C is governed not by Italian but by English law and English law indeed offers protection to assignee C as long as he is unaware of the first assignment A-B and is the first to notify the debtor (e.g. when the first assignment A-B was of a undisclosed nature), then assignee C would indeed become entitled to the claim.

It has to be underlined that this is not in any way different from the approach that would be used in cases of multiple transfers of tangible property.\footnote{See also Hendrik Verhagen, Sanne van Dongen, \textit{Cross-Border Assignments under Rome I}, Journal of Private International Law 2010, p. 18.}

Example. A sells a painting to B and transfers title to the painting to B in England, while remaining in possession of the painting (a transfer \textit{constitutum possessorium}). A then subsequently takes the painting to Italy, where he sells and delivers it to C.

---

414 See also \textit{ibid.}, p. 18.
Consistent with the *lex situs* rule, the first transfer A-B has to be determined in accordance with English law and the second transfer A-C in accordance with Italian law. As a result of the first transfer, A will have lost his power to dispose of the painting. A subsequent transfer of A to C may nevertheless be effective, if according to Italian law C’s title as *bona fide* purchaser has precedence to that of the original owner B. Such a result will beyond doubt be recognised by the English courts under the *lex situs* rule.\footnote[417]{Cf. Lawrence Collins (red.), *Dicey, Morris and Collins on the Conflict of Laws*, 2006, No. 24-061 and 24-062. A classic example is Winkworth v. Christie Manson and Woods Ltd and Another [1980] 2 WLR 937.} It is submitted that the same approach be adopted in case of multiple (competing) assignments of the same claim.

### 4.2. Prohibition of Security Assignments

Article 3:84(3) Dutch Civil Code contains the so-called prohibition of *fiducia* (*fiduciaverbod*). A legal act which intends to transfer property for purposes of security or which does not have the purpose of vesting title in the acquirer may not result in a valid legal transfer of that property. As a result of this provision, an assignment by way of security stands a chance of being invalid. Claims that would in other jurisdictions be subject to a security assignment, will consequently have to be pledged if the transfer of the claims is governed by Dutch law. In some transactions, however, a right of pledge will not be considered an appropriate alternative. In this respect the State Committee referred to the following (summarized) example.\footnote[418]{See the Report of the State Committee, p. 48.}

Example. A Dutch airline company intends to bring an aircraft into use. With the aim of gaining tax advantages, the aircraft is sold and delivered by an aircraft constructor to a foreign investment company. The investment company finances the purchase partly from its own capital and partly from external funds, provided for by a Dutch bank under a loan agreement. The investment company leases the aircraft to the airline company and assigns its rights to receive the lease instalments to the bank, as security for the repayment of the loan. In addition, the airline company deposits with the bank an amount of money equal to the amount lent by the bank to the investment company.

Since in this example the bank is both debtor and creditor to both the investment company and the airline company, the bank will have the possibility of set-off. More specifically, in relation to the airline company the bank will be able to set off its rights to receive the lease instalments against its obligation to pay interest on the amount received on deposit. In relation to the investment company the bank will be able to set off its rights to receive interest under the loan agreement against its obligation to turn over the lease instalments. The possibility of set-off is, however, not available in the case where the bank has only been granted a right of pledge
over the lease instalments.\textsuperscript{419} The Dutch conflict rule allows the parties to such a transaction to make use of a security assignment instead of a right of pledge. For, it is the law applicable to the loan agreement that governs the proprietary effects of the assignment. If, for example, the loan agreement is governed by English law, it will be English law that determines whether a security assignment is valid and effective.

4.3. Transfer of Security Interests and Other Ancillary Rights

The assigned receivables may be secured by security interests, in which case the question arises as to whether the assignment results in the security interests being transferred as ancillary rights as well.

Example. As part of a securitisation transaction a Dutch originator (a bank) assigns its receivables arising from loan agreements secured by rights of mortgage to an English SPV

Which law determines whether in such an example the mortgages are transferred as ancillary rights? It is submitted that this issue is not governed by the law applicable to the assignment of the receivables. Instead it has to be dealt with in accordance with the law applicable to the ancillary security interest itself, e.g. the \textit{lex situs} of the immovables subjected to the right of mortgage.\textsuperscript{420} Similarly, if the ancillary right is not a right of mortgage over an immovable but a right of pledge over the receivable itself, it would be the law governing the right of pledge that determines whether the right of pledge passes to the assignee. In case the law governing such an ancillary right of pledge or mortgage is Dutch law, article 6:142 Dutch Civil Code would provide that the transfer of a receivable by way of assignment results in the assignee also obtaining all ancillary rights, including rights of pledge and mortgage.\textsuperscript{421}

4.4. The Assignability of a Claim

The law governing a receivable also determines its assignability, as is stated in article 14(2) Rome I and article 10(1) Conflicts Property Act. Assignability means the capability of a receivable to be the object of an assignment. Whether a claim may be assigned will under the law of the Netherlands have to be decided on the basis of article 3:83 Dutch Civil Code. Its first paragraph provides that ownership, limited rights and receivables are freely transferable, unless this is precluded by law

\begin{footnotesize}
\begin{enumerate}
\item See also the Report of the State Committee, p. 49; N.E.D. Faber, Verrekening (dissertation Nijmegen), Deventer, 2005, p. 27.
\item See article 2 Conflicts Property Act.
\item See also Henk Snijders, Eline Benoeming Rank-Berenschot, \textit{Goederenrecht (Studiereeks Burgerlijk Recht)}, 2007, p. 298; F.H.J. Mijnsen & P. de Haan e.a., \textit{Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. 3. Goederenrecht. Deel I. Algemeen goederenrecht}, 2006, no. 282.
\end{enumerate}
\end{footnotesize}
or by the nature of the right. A statutory provision preventing the assignment of a claim is for example to be found in article 7:633(1) Dutch Civil Code, limiting the assignability of wages below a certain threshold, the so-called “protected earnings level” (beslagvrije voet, see also article 475b et seq. Dutch Code of Civil Procedure). The assignability of a receivable may also be precluded due to its highly personal nature, as is the case with respect to pension and alimony claims.

According to article 3:83(2) Dutch Civil Code the assignability of a claim may additionally be excluded by way of an agreement to that effect between the assignor and the debtor. Here we see again the interaction between the assignment’s obligational and proprietary issues that has already been mentioned in paragraph 2.1 above. The law governing the receivable not only determines the question as to whether a non-assignability clause has been validly agreed between the assignor and the debtor, but also the question as to whether such a clause actually prevents the assignment of the receivable to the assignee. If the governing law is Dutch law, violation of a non-assignability clause not only results in the assignor being liable toward the debtor for breach of contract, but also in the invalidity of the assignment itself. Since under the law of the Netherlands in such cases there is hardly any protection available to bona fide assignees, a non-assignability clause has almost absolute effect.

4.5. Future Receivables

The assignment of future receivables involves the following three issues, which have to be dealt with separately: (i) whether a claim is considered to be future or an already existing claim; (ii) whether a future claim may be assigned in advance; and (iii) what requirements apply to such an assignment in advance. The first issue will obviously be determined by the law governing the claim. Which conflict rule applies to the second issue, however, is less self-evident. Although it is submitted that it is most appropriate to refer this issue to the conflict rule relating to the assignment’s proprietary effects (article 10(2) Conflicts Property Act), the Dutch Supreme Court decided otherwise. According to the Court this issue is governed

423 See also ibid., pp. 74-75.
425 A bona fide assignee may only be protected within the limits of article 3:36 Dutch Civil Code, applicable in case an assignee justifiably relied on statements or actions of the debtor that wrongly suggested the assignability of the claim.
by the proper law of the future claim, in other words the law governing the contract from which the claim will arise (article 14(2) Rome I and article 10(1) Conflicts Property Act). The third issue is, of course, governed by the law that is applicable to the proprietary effects of assignment.

Example. A Dutch lessor leases rolling stock to a Dutch lessee. The (operational) lease agreement is governed by Dutch law. All lease receivables arising under the lease agreement are sold and assigned to a German SPV, under a receivables purchase agreement governed by German law.

In such an example it will be for Dutch law to decide whether the lease receivables are considered to be existing or future receivables. According to Dutch Supreme Court case law, lease receivables have to be regarded as future receivables insofar as they correspond to future periods in time. Dutch law additionally governs the question as to whether future receivables may be assigned in advance. As a general rule, article 3:97 Dutch Civil Code provides that future assets may be delivered in advance. The manner in which such an assignment in advance has to be realised will on the other hand be determined by German law as the law applicable to the underlying agreement between the assignor and the assignee (the receivables purchase agreement).

Were this latter issue, e.g. the assignment of future claims in advance, to be governed by Dutch substantive law, the following should be noted. Dutch law only recognises an undisclosed assignment in advance of future claims that are directly acquired from a legal relationship that already exists at the time of the assignment. The availability of a disclosed assignment is, of course, also limited, but merely in a practical way, resulting from the requirement of notification of the assignment to the future debtor. A successful assignment in advance generally leads to the assignee becoming entitled to the claim as soon as it comes into existence. This result may however be precluded by insolvency proceedings opened in respect of the assignor (see further paragraph 6.2 below).

4.6. The Position of the Debtor

According to both article 10(3) Conflicts Property Act and article 14(2) Rome I the position of the debtor is established by the provisions of the proper law of the assigned claim. This law determines the conditions under which the assignment


427 Hoge Raad 30 January 1987, Nederlandse Jurisprudentie (NJ) 1987, no. 530 (Westland Utrecht/Emmerig q.q.).

428 See article 3:94(3) Dutch Civil Code. See also Henk Snijders, Eline Benoeming Rank-Berenschot, Goederenrecht (Studiereeks Burgerlijk Recht), 2007, p. 345; F.H.J. Mijnssen & P. de Haan e.a., Mr. C. Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht. 3. Goederenrecht. Deel I. Algemeen goederenrecht, 2006, no. 281f.
may be invoked against the debtor, as well as the question of whether performance by the debtor leads to a discharge of his obligations. If the assigned claim is governed by Dutch law, these questions will accordingly have to be answered on the basis of Dutch law, e.g. meaning that an assignment may only be invoked against the debtor after its notification and that in addition only after notification a debtor may discharge himself by making payments to the assignee (regardless of the debtor having factual knowledge of the assignment, see also paragraph 2.2).

An interesting related question is whether the debtor may continue to discharge himself by way of set-off against claims he has against the assignor. After a disclosed assignment, the debtor’s right of set-off is limited. He may set off his debt to the assignee against a claim he has against the assignor only if (i) both arise out of the same legal relationship or (ii) the debtor’s claim against the assignor became due and payable prior to notification of the assignment. For non-disclosed assignments this is different. Since a non-disclosed assignment does not prevent the debtor from obtaining discharge by making payments to the assignor, the debtor will equally be able to continue to set off his debt against a claim he has on the assignor, as long as he has not been notified of the assignment. The proper law of the assigned claim may not only decide whether the debtor may rely on set-off, but also the set-off itself. In case the assigned claim and the counter-claim of the debtor are governed by different laws, it will according to article 17 Rome I be the law applicable to the claim against which the right to set-off is asserted that determines whether set-off may be relied on. In case the debtor invokes the right to set-off, the applicable law will be the law governing the assigned claim.

5. THE ASSIGNMENT’S “OTHER THIRD-PARTY EFFECTS”

Under Dutch law, a distinction may not so much be drawn between the inter partes and erga omnes proprietary effects of an assignment (as has already been stated in paragraph 3.2 above), but instead between the assignment’s proprietary effects on the one hand and other third-party effects on the other. Such “other third-party effects” will include issues that do not belong to the assignment’s proprietary effects, but nevertheless are closely related to them. An important example under Dutch law is formed by the rules on recourse by creditors against assets owned by their debtor.

As a matter of Dutch law, where a creditor C obtains an attachment over a claim owed to his debtor A, this does not prevent a subsequent assignment of that claim to third party B. In other words, from a property law perspective the attached claim is still transferred from the patrimony of assignor A to that of assignee B. As a consequence of articles 475h(1) and 720 of the Dutch Code of Civil Procedure

---

429 See article 6:130(1) Dutch Civil Code.
430 As has been confirmed in Hoge Raad 20 February 2009, Nederlandse Jurisprudentie (NJ) 2009, no. 376 (Ontvanger/De Jong).
(Wetboek van Burgerlijke Rechtsvordering), however, the assignment cannot be invoked against the creditor who levied the attachment. In other words, the assignment from A to B, although intrinsically valid as a matter of property law, may still be ignored by creditor C. This is a legal fiction: although in reality a transfer of the claim from A to B has taken place, C can treat the claim as if it still belonged to A.\footnote{See also Hendrik Verhagen, Sanne van Dongen, \textit{Cross-Border Assignments under Rome I}, Journal of Private International Law 2010, p. 10.}

A similar effect takes place where an individual creditor is able to avoid an assignment as constituting a voidable preference (\textit{actio pauliana}, article 3:45 Dutch Civil Code). Where the creditor mentioned above, C, has not taken a prior attachment on the claim but is able instead to avoid the assignment from A to B on the basis of voidable preference, this would not unwind the transfer from A to B, because as a matter of property law the claim would still belong to the patrimony of B. However, C would be able to take recourse against this claim, as if the claim was still owned by his debtor A. These rules concerning attachments and voidable preferences, although directly affecting the legal consequences of an assignment, are clearly not within the scope of article 10(2) Conflicts Property Act. As a consequence, although a claim may have transferred under the (property) law applicable pursuant to article 10(2) Conflicts Property Act, the question as to whether certain creditors may ignore this transfer, because the claim has been attached or because the assignment constitutes a voidable preference, may be governed by a different law.\footnote{See also Hendrik Verhagen, Sanne van Dongen, \textit{Cross-Border Assignments under Rome I}, Journal of Private International Law 2010, p. 11.}

\section{6. ASSIGNMENT AND INSOLVENCY SITUATIONS}


The effectiveness of an assignment will of course be crucial in the event of insolvency proceedings opened in respect of the assignor. Therefore, in this paragraph 6.1 we will shortly consider some relevant rules relating to cross-border insolvency proceedings in general. In the following paragraph 6.2 we will examine certain rules of Dutch insolvency law in more detail.

On the basis of article 3(1) of the European Insolvency Regulation the courts of the EU Member State in which the assignor has its centre of main interests ("COMI") will have jurisdiction to open (main) insolvency proceedings in respect of the assignor. In case the assignor is a company or legal person, its COMI is - without proof to the contrary - deemed to be located at its place of incorporation. Article 4 European Insolvency Regulation subsequently provides that the \textit{lex concursus}
governing the insolvency proceedings will be the law of the EU Member State where
the proceedings are opened. However, the European Insolvency Regulation
provides several exceptions to this rule.

One of the most important exceptions is to be found in article 5 European
Insolvency Regulation. This provision implies that the opening of insolvency
proceedings shall not affect rights in rem on property that is located outside of the
EU Member State at the opening of the proceedings. Consequently, the opening of
insolvency proceedings has no implications for e.g. security assignments (as well as
charges) on claims that have to be located outside that EU Member State. What is
important here is the location of the claim, not the law applicable to the security
assignment’s proprietary effects. For the purposes of article 5 European Insolvency
Regulation, article 2(g) locates claims in the EU Member State in which the debtor
has its COMI (see also paragraph 6.2 below). 434

6.2. Dutch Insolvency Law

Assuming that the assignor’s COMI is in the Netherlands, it may be subject to Dutch
bankruptcy proceedings (faillissement), governed by Dutch law as lex concursus. In
such a situation, article 35 of the Dutch Bankruptcy Act (Faillissementsrecht) may
result in certain assignments not being effective as against the insolvent estate.
Firstly, article 35(1) Dutch Bankruptcy Act affects assignments that have not been
completed on the day of the opening of the proceedings. Whether or not an
assignment is completed, will have to be determined according to the law governing
the proprietary effects of that assignment, e.g. the proper law of the underlying
contract between the assignor and the assignee. This may very well be a different
law than that of the Netherlands. Secondly, the assignment of future claims may be
prevented by article 35(2) Dutch Bankruptcy Act. An assignment in advance may
not be invoked against the insolvent estate insofar as the assignment relates to
receivables that on the day of the opening of the proceedings are still deemed to be
future receivables. As explained in paragraph 4.5 above, this has to be determined
in accordance with the law governing the receivables to be assigned, which may
equally result in the applicability of another law than Dutch law.

Article 35(2) Dutch Bankruptcy Act raises an interesting question when looked at
from the perspective of Article 5 European Insolvency Regulation. The question
concerns the following example.

Example. A lessor, with its COMI in the Netherlands, has leased property situated in
Germany to a lessee with its COMI in Germany, pursuant to an (operational) lease
agreement governed by Dutch law. The lessor has sold the lease rentals to a Dutch
factoring company and assigned the (future) lease receivables in advance by way of

434 See further on article 5 European Insolvency Regulation Axel Flessner, Hendrik Verhagen,
Assignment in European Private International Law, 2006, pp. 73-74.
a disclosed assignment governed by Dutch law. During the term of the lease the lessor is declared bankrupt in the Netherlands. Pursuant to article 35(2) Dutch Bankruptcy Act the lease receivables accruing after the commencement of the insolvency proceedings would vest in the insolvent estate.

The question is whether article 5 European Insolvency Regulation provides protection against article 35(2) Dutch Bankruptcy Act, when the debtor of the assigned receivables has its COMI in another member state. It could be argued that it does not, since article 5 European Insolvency Regulation only protects rights \textit{in rem} existing at the time of opening of insolvency proceedings. In the example above, although the assignment has already taken place in advance, the assignee has not yet acquired title to the receivables, as they have not yet come into existence. We would argue, however, that where the law governing the assignment’s proprietary effects allows the assignment of future receivables, to the effect that once the receivables come into being they would (in the absence of insolvency) be automatically acquired by the assignee, the latter already has obtained a right \textit{in rem} deserving protection under article 5 European Insolvency Regulation.\textsuperscript{435} This interpretation brings the effects of an assignment of future receivables more in line with those of other jurisdictions, where receivables arising under contracts which have already come into existence before the commencement of insolvency proceedings can be subjected to a “bankruptcy-proof” assignment.\textsuperscript{436} Whether Dutch courts would be prepared to adopt this approach can, however, not be predicted.

Another - temporary - obstacle that may be relevant for the assignee under a security assignment (or the chargee under a charge), is a moratorium (\textit{afkoelingsperiode}), that may be granted by the bankruptcy judge on the basis of article 63a Dutch Bankruptcy Act. During such a moratorium, the assignee (or chargee) may not take recourse against the claim. Pursuant to article 5 European Insolvency Regulation, however, such a moratorium may only affect security rights on claims against debtors who have their centre of main interest in the Netherlands.

\textbf{7. CONCLUSION}

The general legal framework of assignment in the Netherlands, as provided in this report, is the result of a trend towards a more “consensualised” assignment, a trend which can also be found in (the substantive laws of) other European

\textsuperscript{435} For, one could say that the pledgee already has a right \textit{in rem} “\textit{in statu nascendi}” or a “property expectation” that should be treated in the same manner as a “fully grown” right \textit{in rem}.

jurisdictions.\textsuperscript{437} This development has shown itself both in substantive and in private international law. At the level of substantive law, with the undisclosed assignment it has become possible for the assignor and the assignee to agree upon when a claim transfers from the estate of the assignor to that of the assignee. The corresponding conflict rule allows the assignor and the assignee to choose the law applicable to the assignment’s proprietary effects. It is important to note that practice in the Netherlands during the fourteen years that have passed since the Hansa-judgment does not show an abuse of the freedom to choose the governing law. What it does show instead is the assignor and the assignee usually choosing a “related” law, such as the proper law of the assigned claim or the law of the residence of the assignor, varying their choice according to the need to efficiently structure each individual transaction. In - apparently very rare - situations in which party autonomy is abused, e.g. where a law has only been chosen in order to frustrate the rights of the assignor’s creditors, solutions are provided for by tools such as voidable preference (actio pauliana), tort, fraus legis or ordre public. It is therefore submitted that the conflicts rule applicable to the assignment’s proprietary aspects should be in line with this trend of consensualisation. This could easily be achieved by removing the current, unconvincing division between property aspects “inter partes” and “erga omnes”, e.g. by clarifying that the latter property aspects are also included in the wording “property aspects” of recital 38 of the preamble to Rome I and, as a result, in the term “relationship” in article 14(1) Rome I.

1. Substantive Law

Polish courts strictly apply the rule of *nemo plus iuris in alienum transferre potest quam ipse habet* in respect of assignment of claims. In general, no exemptions based on good faith are provided. Consequently, assignment of claims by an assignor that was not a lawful beneficiary of such a claim will not be effective (the assignor will be contractually liable to the assignee for damages on the grounds that he was not in a position to make an effective transfer). Polish law protects the rights of the debtor of an assigned claim. Lack of notice of assignment from an assignor does not render the assignment ineffective; however, it protects the debtor discharging its obligations to a former creditor. The legal beneficiary of an assigned claim (first assignee) has limited options when it comes to claiming against a debtor of an assigned claim acting in good faith. The legal beneficiary of the assigned claim (first assignee) might have a claim based on unjustified enrichment against a second assignee to whom a debtor discharged its obligations in respect of the assigned claim.

2. Conflict of Laws

Pursuant to the Supreme Court's decision of 19 December 2003, parties to an assignment agreement may not select a governing law in respect of the proprietary effect of assignment. Instead, the governing law of the underlying claim should apply. This rule was widely accepted by the Polish judiciary and academics. In addition, the newly adopted NPIL (the New Private International Law of 2011) provides that the law of the assigned claim governs the effectiveness of assignment against third parties (*erga omnes*). Although there are no clear rules that would differentiate between approaches as to the governing law of the proprietary effect of assignment depending on the nature of the assigned claims, a problem may arise if an assignment of future claims takes place. Such assignment will trigger the proprietary effect only upon the coming into existence of a future claim. As such, before the claim comes into force (with the accompanying selection of law governing such claim, if not already made), it may be difficult to apply the rule adopted in the NPIL to an assessment of the effectiveness of the proprietary effect of such assignment.

---

438 Tomek Jedwabny/ Andrzej Stosio, Clifford Chance LLP, Warsaw.
<table>
<thead>
<tr>
<th>Statutes</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Code of 23 April 1964, Journal of Laws of 1964, pos. 16, item 93, as amended</td>
<td>Article 169.1: If a person not authorised to dispose of a moveable transfers it and releases it to the acquirer, the latter shall acquire ownership upon obtaining the possession of the moveable unless he/she acts in bad faith.</td>
</tr>
<tr>
<td></td>
<td>Article 405: Whoever without legal grounds has gained a material benefit at the expense of another person shall be obliged to return that benefit in kind and, if that is impossible, to return its value.</td>
</tr>
<tr>
<td></td>
<td>Article 415: Whoever by his/her fault caused a damage to another person shall be obliged to redress it.</td>
</tr>
<tr>
<td></td>
<td>Article 452: If a performance was rendered to a person not entitled to accept it and the acceptance of the performance was not confirmed by the creditor, the debtor shall be released to the extent to which the creditor profited from the performance. The provision shall apply correspondingly where the performance was made to a creditor who was incapable of accepting it.</td>
</tr>
<tr>
<td></td>
<td>Article 467: Further to the situations specified in other provisions, the debtor may deposit the object of the performance with the court:</td>
</tr>
<tr>
<td></td>
<td>1) if, as a result of circumstances for which he is not responsible, he does not know who is the creditor or does not know the creditor’s place of residence or seat,</td>
</tr>
<tr>
<td></td>
<td>2) if the creditor does not have the full capacity for acts in law and does not have a representative authorised to receive the performance,</td>
</tr>
<tr>
<td></td>
<td>3) if there is a dispute as to who is the creditor,</td>
</tr>
</tbody>
</table>

439 Please note that the translation of the provisions of the Polish legislation set out in this table is a non-official translation.
4) if, as a result of other circumstances pertaining to the person of the creditor, the performance cannot be rendered.

Article 509.1:
The creditor may, without the debtor’s consent, transfer the receivable debt to a third party (assignment) unless that would be against a statutory law, a contractual stipulation, or the nature of the obligation.

Article 509.2:
Together with the receivable debt, the rights connected therewith shall pass to the acquirer, in particular, claims for the interest in arrears.

Article 510.1:
A contract of sale, exchange, donation or other contract obliging the creditor to transfer the receivable debt shall transfer the receivable debt to the acquirer unless there is a special provision to the contrary or the parties agreed otherwise.

Article 510.2:
If the conclusion of the contract of assignment takes place as a performance resulting from an earlier contract which obliged the creditor to transfer a receivable debt resulting from a legacy, from unjustified enrichment or from some other event, the validity of the contract of assignment shall depend on the existence of such an obligation.

Article 512:
Until the transferor informs the debtor about the assignment, the performance rendered to the previous creditor shall bind the acquirer unless the debtor knew about the transfer at the time of the performance. The provision shall apply correspondingly to other acts in law between the debtor and the previous creditor.

Article 513.1:
The debtor shall have the right to raise against the acquirers of the receivable debt all the defences which he/she had against the transferor at the time he/she learned about the assignment.
| Article 513.2: |
The debtor may set off from the transferred receivable debt the receivable debt he has against the transferor even if that receivable debt became due only after the receipt by the debtor of the notification of the assignment, This shall not, however, apply to the case where the receivable debt against the transferor became due later than the receivable debt which is the object of the assignment. |
| Article 515: |
If the debtor who received from the transferor a written notification about the assignment, rendered the performance to the acquirer of the receivable debt, the transferor may raise against the debtor the defence of nullity of the assignment or the defence resulting from legal grounds of that act only if at the time the performance was rendered these defences were known to the debtor. This provision shall apply correspondingly to other acts in law between the debtor and the acquirer of the receivable debt. |
| Article 516: |
The transferor of the receivable debt shall be liable to its acquirer for having the right to the receivable debt. He shall be liable for the solvency of the debtor at the time of the assignment only in so far as he assumed that liability. |

| Article 44.1: |
Exclusion or limitation of defences of a consumer in the case of an assignment of claims under a consumer credit agreement is ineffective. |

| Article 13: |
An agreement for the establishment of a financial collateral over dematerialised financial instruments, the rights resulting from such collateral, the priority of rights and the enforcement of such collateral is exclusively subject to the laws of the State in which the securities account is maintained, or another account in which financial instruments which are not securities are recorded, a deposit account or other register of securities, in which such collateral was recorded. Also the purchase in good faith of dematerialised financial instruments is governed by that law. |

**Article 70**: Provisions on the exemption from a bankruptcy estate do not apply to things, claims or other property rights transferred by a bankrupt entity to a creditor for security purposes. With respect to such items and to the claims secured in such a way, provisions concerning pledge and claims secured with a pledge apply, *mutatis mutandis*.

**Article 336.1**: Sums obtained from liquidation of things, receivable debts and rights encumbered with mortgage, pledge, registered pledge, treasury pledge or ship’s mortgage shall be allocated to satisfy the creditors whose receivable debts were secured on these things or rights, observing the provisions of this Act. Amounts remaining after satisfaction of these receivable debts shall be included in the funds of the bankruptcy estate.

**Article 336.2**: The provisions on satisfaction of receivable debts secured by pledge shall apply accordingly to satisfying receivable debts secured by transfer to the creditor of the right of ownership of a thing, receivable debt or another right.

### B) Conflict of Laws


**Article 24.1**: Ownership and other proprietary rights shall fall under the law of the State in which the object of such rights is located.

**Article 24.2**: Acquisition and loss of ownership, likewise acquisition, loss, and change of substance or priority of other proprietary rights, shall fall under the law of the State in which the object of the rights was located upon the occurrence of the event which resulted in the legal effects mentioned.

**Article 24.3**: The provisions of the preceding paragraphs shall accordingly apply to possession.

**Article 25.1**: Parties may subject their relationships, in relation to contractual obligations, to the law
selected by them provided that this law remains in connection with such obligation.


| Article 7: | Foreign law shall not apply where the application thereof would have effects contradictory to the fundamental principles of legal order of the Republic of Poland |
| Article 30.1: | Apart from the cases regulated in the regulation referred to in Art. 28, the choice of the law of a State which is not a Member State of the European Economic Area for an agreement which shows a direct relation to the territory of at least one Member State, may not lead to the deprivation of a consumer of protection granted to the consumer by the provisions of Polish law implementing the following directives: |
chapter 6, vol. 4, p. 321);  


Article 30.2:
If the governing law for an agreement covered by the scope of implementation of Directive 2008/122/EC of the European Parliament and of the Council dated 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (Official Journal of the EU L 33 of 03.02.2009, p. 10) is the law of a State which is not a Member State of the European Economic Area, then the consumer may not be deprived of the protection granted to the consumer by the provisions of Polish law implementing this directive:

1) if any of the properties is located in the territory of one of the Member States, or  

2) in the case of an agreement which is not directly connected with the property, if the undertaking conducts its business or professional activity in one of the Member States or otherwise directs such activity to one of the Member States, and the agreement is part of such activity.

Article 36:
The laws of the State to which the assigned receivable is subject, determines the effects of the assignment with respect to third parties.

Article 44:
The right resulting from the recording of a security in an account kept in a securities clearance system is governed by the laws of the State in which such account is maintained.

<table>
<thead>
<tr>
<th>C) TABLE OF CASE LAW⁴⁴⁰</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision</td>
<td>Reasoning</td>
</tr>
<tr>
<td>Judgement of the Appellate Court in Gdańsk of 14 April 1994, I ACr 178/94</td>
<td>A debtor is not obliged to pay to an assignee solely upon a notice of the assignment made by the assignee. The debtor should investigate who</td>
</tr>
</tbody>
</table>

⁴⁴⁰ Please note that the translation of the court decisions set out in this table is a non-official translation.
<table>
<thead>
<tr>
<th>Date and Court Reference</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judgement of the Supreme Court of 27 January 2000, II CKN 702/98</td>
<td>is the proper assignee and, if in doubt, he/she should make a payment to the court deposit to avoid any claim of paying to a person not authorised to accept such payment.</td>
</tr>
<tr>
<td>Judgement of the Supreme Court of 29 January 2002, V CKN 696/00</td>
<td>If a debtor that has been duly notified about an assignment by an assignor satisfies its debt to the assignee, his debt ceases to exist irrespective of whether the underlying assignment agreement was invalid or ineffective unless when satisfying the debt, he knew about the invalidity or ineffectiveness of the assignment agreement.</td>
</tr>
<tr>
<td>Judgement of the Supreme Court of 19 December 2003, III CK 80/02, OSNC 2005/1/17</td>
<td>In respect of the assignment of claims, there are no provisions that could substantiate any exemption from the rule that one may not validly transfer a right of a third person (nemo plus iuris in alienum transferre potest quam ipse habet).</td>
</tr>
<tr>
<td>Judgement of the Appellate Court in Poznan of 10 January 2006, I Aca 1063/05, OSA 2007/1/1</td>
<td>Parties to the assignment of a claim may not select the law governing the assignment of that claim (proprietary effect). The law governing the assigned claim shall govern such assignment.</td>
</tr>
<tr>
<td>Judgement of the Supreme Court of 9 August 2005, IV CK 157/05</td>
<td>Upon assignment of a future claim no transfer of such claim takes place, as the claim does not exist at that time. Such claim is only transferred to the assignee upon its coming into existence. As such the proprietary effect does not take place upon execution of the assignment agreement.</td>
</tr>
<tr>
<td>Judgement of the Supreme Court of 14 November 2008, V CSK 95/08</td>
<td>Assignment (proprietary effect) of a specific claim is always subject to the law governing that claim.</td>
</tr>
<tr>
<td>Judgement of the Supreme Court of 3 October 2007, IV CSK 160/07</td>
<td>An amendment agreement between a debtor and an assignor amending a contract which is a basis for the assigned claim without the consent of an assignee is effective against such assignee provided that the debtor, upon entering into such amendment agreement, has not been notified by the assignor of the assignment and otherwise has had no knowledge of that assignment.</td>
</tr>
<tr>
<td>Judgement of the Supreme Court of 16 April 2009, I CSK 487/08</td>
<td>As a result of an assignment, an assignor ceases to be a creditor of an assigned claim and he may not transfer that claim or otherwise influence its existence or scope. As an exemption, such actions of the assignor may be effective against an assignee, but only to the extent Article 512 of the Civil Code protects the good faith of a debtor.</td>
</tr>
<tr>
<td>Judgement of the Supreme Court of 16 April 2009, I CSK 487/08</td>
<td>Transfer of a claim which has not been precisely specified in the assignment agreement is effective if it is possible to determine such claim on the basis of the legal relationship on the basis of which such claim exists. Consequently,</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

Provisions of the Civil Code of 1964 ("Civil Code") regulate assignment of claims (wierzytelność) under Polish law. Pursuant to Article 509 § 1 of the Civil Code, a creditor (an assignor) may transfer claims to a third party (assignee) without the consent of the debtor of the assigned claims.

1.1. Contractual vs. Proprietary Effect of Assignment

Unless otherwise agreed by the parties or unless there is a provision of law stipulating otherwise, an assignment agreement has two legal effects, i.e. it provides for the obligation to assign an underlying claim (contractual effect) and it triggers the transfer of an underlying claim from the estate of the transferor (assignor) to the estate of the transferee (assignee) (proprietary effect).

A different approach has been presented by the Polish judiciary and law academics in respect of an assignment of future claims (conditional assignment). The future claims will be transferred to the estate of the assignee only upon their coming into existence. However, the obligation to assign will arise upon execution of an assignment agreement.

1.2. Assignability and Registration

Certain types of claims may not be assignable. Pursuant to Article 509 § 1 of the Civil Code, assignment of claims will not be permissible if it is contrary to the statutory provisions of law, a contractual stipulation or the nature of the obligation. In respect of a statutory ban, for example a pre-emption right, the right to

---

442 Pursuant to Article 510 § 1 of the Civil Code, a sale agreement, exchange agreement, donation agreement or any other agreement which includes an obligation to transfer a claim, transfers such claim to the estate of the transferee unless a specific provision of law provides otherwise or the parties have agreed otherwise. As such, depending on the underlying agreement, there may be other, different obligations set out in such agreement.
443 There have been many discussions among law academics as to whether the assignment of future claims is acceptable. The current view confirmed by the judiciary is that such assignment is acceptable; however, the future claim should be clearly described in the assignment agreement, i.e. there should not be any doubt as to whether this specific claim was subject to the assignment. See e.g. Adam.Olejniczak, Prawo Zobowiązań – Część Ogólna, 2009.
444 See e.g. Judgment of the Supreme Court of 9 August 2005, IV CK 157/05 or Judgment of the Supreme Court of 16 April 2009, I CSK 487/08.
repurchase or right to remuneration under a labour contract may not be assignable. The limitation regarding the nature of the obligation has been interpreted by Polish courts as precluding transfer of claims of a personal nature, e.g. alimony payments. Finally, parties to a contract may contractually limit the assignability of the underlying claims. Usually, such limitations stipulate that the consent of the debtor is required for the assignment to take effect.

Assignment of claims does not require any registration in a public register in order to be valid or effective.

1.3. Scope of Assignment

Pursuant to Article 509 § 1 of the Civil Code, all rights (prawa) connected with the assigned claims are simultaneously transferred to the assignee, in particular, claims for past due interest amounts.

1.4. Commercial Use of Assignment of Claims

Assignment is commonly used in Poland as a security interest. It is also used in factoring and forfeiting transactions. However, securitisation has never reached any meaningful size, mainly because Polish law does not allow for the transfer of a portfolio of claims (global assignment), i.e. the transfer of individual claims is required (a single document may, however, provide for the assignment of multiple claims which need to be separately and clearly identified.). One may also add to this list tax issues, problems with transferring security interest and data protection issues.

1.5. Notice to the Debtor

Assignment does not require a notice of assignment to be given to the debtor of the assigned claims in order to ensure the validity of the assignment. However, until the assignor notifies the debtor of the assignment, payment made by the debtor to the assignor will discharge the debtor from his obligations unless he knew about the assignment upon payment. This rule applies equally to various other actions between debtors and assignors, such as e.g. release from obligations, extension of payment date, contractual set-off, termination of the underlying agreement, novation or change of interest rate.446

Moreover, if the debtor is properly notified of the assignment by the assignor and if, following such notification, he discharges the obligations to the assignee, the assignor will not be able to claim against the debtor that the assignment was invalid.

---

445 It is possible to establish a registered pledge over claims. Such pledge needs to be registered with a public court register.
446 See e.g. Judgment of the Supreme Court of 3 October 2007, IV CSK 160/07 or Judgment of the Supreme Court of 14 November 2008, V CSK 95/08.
or otherwise ineffective. This will not apply if the debtor knew about the invalidity or ineffectiveness of the assignment.

### 1.6. Debtor's Defences

The debtor of an assigned claim may raise against the assignee all defences which he had against the assignor at the time he learned about the assignment. In particular, the debtor may set off the assigned claim against the claim he has against the assignor. However, such set-off will not be permitted if the claim against the assignor becomes due later than the assigned claim.

### 2. CHARACTERISATION AND SUBSTANTIVE LAW ISSUES

#### 2.1. Proprietary Effect of Assignment

As mentioned above, an assignment agreement has two legal effects. Pursuant to Article 510 § 1 of the Civil Code, an assignment agreement creates the obligation of the assignor to transfer the underlying claim to the assignee (*contractual effect*) and at the same time, it transfers such claim from the estate of the assignor to the estate of the assignee (*proprietary effect*). However, parties to an assignment agreement are free to exclude the automatic proprietary effect. If the exclusion is made, the occurrence of the proprietary effect may require a separate agreement to be entered into.

The proprietary effect will not occur if the assignor transfers a claim which does not belong to him. Polish law applies the rule of *nemo plus iuris in alienum transferre potest quam ipse habet* (one cannot transfer more rights than one possesses).

Consequently, it is not possible to effectively transfer a claim from the estate of the assignor to the estate of the assignee if the assignor does not have a valid legal title to such a claim.

A similar rule applies to the transfer of moveable property. However, pursuant to Article 169 § 1 of the Civil Code, there is an exception to that rule. Accordingly, if a person who is not the legal owner of a moveable property transfers such property and delivers it to the transferee, the transferee will acquire the ownership title to such property unless the transfer was not made in good faith, e.g. if he knew that the transferor was not the legal owner of the property in question.

However, this exemption does not apply *per analogiam* to the assignment of claims. This interpretation was repeated by the Supreme Court in its judgment of 29

---

447 See e.g. Judgement of the Supreme Court of 27 January 2000, II CKN 702/98.
449 Limited exemptions relate to inheritance law (Article 1028 of the Civil Code) or apparent legal action (Article 83 § 2 of the Civil Code).
January 2002.\textsuperscript{450} In the judgment, the Supreme Court rejected the previous interpretation adopted by the appellate court which had applied Article 169 § 1 of the Civil Code to the assignment of claims. Pursuant to the Supreme Court, it is not possible to apply \textit{per analogiam} to the assignment of claims the legal regime applicable to moveables. Consequently, an assignee who would like to benefit from the transfer of a claim from an assignor who does not have a valid title to such a claim will not acquire the claim.

In this context, it is worth mentioning that pursuant to Article 516 of the Civil Code, the assignor is responsible to the assignee for ensuring that the assigned claim belongs to the former. If the assignor fraudulently assigns a claim which does not belong to him, he will be liable for any damage incurred by the assignee. As mentioned above, the assignee will never acquire the claim.

\section*{2.2. Protection of Debtor}

As indicated above, Polish law incorporates into its legal order a general rule that a debtor's situation should not be worsened by an assignment of claims.

This rule may sometimes put a lawful creditor of a fraudulently assigned claim in a disadvantageous position. Pursuant to Article 515 of the Civil Code, if a debtor is notified by an assignor about an assignment and the debtor discharges his obligations to the assignee indicated by the assignor, such a debtor will be released from his obligation towards the assignor unless he knew or was aware of the fact that the assignment agreement was ineffective.\textsuperscript{451} But, if the debtor is in doubt as to the effectiveness of the underlying assignment or as to the identity of the person to whom the claim rightly belongs (e.g. if he received a notice only from the assignee and not the assignor), he should discharge his obligations in respect of the assigned claim into a court deposit.\textsuperscript{452} Pursuant to the judgment of the Appellate Court in Gdańsk of 14 April 1994,\textsuperscript{453} the debtor is not obliged to pay the assignee only on the basis of a notice received from the assignee. Instead, if he has doubts as to who the rightful creditor of the claim in question is, he should pay the obligations in respect of that claim into a court deposit. Otherwise, the debtor may run the risk of being in breach of Article 452 of the Civil Code, which stipulates that the obligations should be discharged to the rightful creditor.

Further, in the view of leading academics, the debtor should also be protected against multiple assignments. If an assignor fraudulently assigns the same claim to a number of persons, the claim will rightly belong to the first assignee (as the \textit{nemo plus iuris transferre potest quam ipse habet} rule would apply). However, if the

\textsuperscript{450} Judgment of the Supreme Court of 29 January 2002, V CKN 696/00.
\textsuperscript{451} See Judgment of the Supreme Court of 27 January 2000, II CKN 702/98.
\textsuperscript{452} See Article 467.1 and 467.3 of the Civil Code.
\textsuperscript{453} Judgment of the Appellate Court in Gdańsk of 14 April 1994, I ACr 178/94.
debtor was not aware of the first assignment and was informed by the assignor about the second assignment, he may discharge the obligations in respect of the assigned claim to the second assignee. Accordingly, the debtor will be discharged from his obligations. This approach is predominantly based on a per analogiam interpretation of Article 512 of the Civil Code, which allows the debtor to discharge his obligations in respect of an assigned claim to the former creditor before he is rightly notified by the assignor about the assignment.

2.3. Legal Means Available to the First Assignee

Taking into account that a debtor acting in good faith will be protected against any claims from the lawful beneficiary of an assigned claim (first assignee), the question arises as to what legal means are available to the first assignee.

The first assignee may have a claim for damages against the assignor based on the contractual liability for the non-performance or improper performance of an assignment agreement (e.g. because the assignor failed to notify the debtor about the first assignment). However, if the assignor goes bankrupt or is otherwise insolvent, it may not be possible for the first assignee to receive damages from him.

Polish law does not provide the first assignee with many options as to the available claims against the second assignee for repayment of proceeds received from a debtor of a fraudulently assigned claim. It appears that such claim could in certain situations be based on unjustified enrichment. Pursuant to Article 405 of the Civil Code, the first assignee might claim the proceeds paid by the debtor to the second assignee on the basis of the fact that the latter obtained those proceeds without a valid legal basis and to the detriment of the first assignee. In addition, one cannot exclude liability based on tort, although this would require willful misconduct on the part of the second assignee.

---


455 On the other hand, one may argue that the second assignee is not enriched if he paid a price to the assignor for the assigned claim (e.g. under an underlying sale contract). However, in such a case, the second assignee will have a claim against the assignor (or the bankruptcy estate) based on the warranty as to the legal defects under the sale contract and under Article 516 of the Civil Code.

456 Under the provisions regulating unjustified enrichment, the second assignee may always try to raise the defence that he has already spent the proceeds received from the debtor. In that case, the first assignee will need to prove either that the second assignee when spending the proceeds should have been aware that he may be required to return those proceeds or that the proceeds were not spent on consumption (i.e. not against any other assets which were transferred to the estate of the second assignee) but that they were used e.g. to purchase an asset (i.e. that the assignee remains unjustifiably enriched).

457 See Article 415 of the Civil Code.
2.4. Assignment in Bankruptcy

Bankruptcy is regulated by the Law on Bankruptcy and Recovery Proceedings of 2003 ("Bankruptcy law"). The law contains specific provisions on assignment of claims for security purposes.

Following a declaration of bankruptcy, a security assignment will be treated as a pledge for the purpose of liquidating the assets of the bankrupt entity. Such treatment will be irrespective of (i) whether an assigned claim was assigned unconditionally with the obligation to re-assign such a claim upon repayment of a secured claim or (ii) whether the assignment was to be effective only upon default. As such, in the case of bankruptcy with a liquidation option, i.e. bankruptcy proceedings leading to the liquidation of the bankrupt entity’s assets, the assigned claim will be enforced by a bankruptcy officer. Any proceeds received from such enforcement will be applied in the first place towards the secured claims (following enforcement costs).

Consequently, the proprietary effect of assignment of claims for security purposes (even if it was an unconditional assignment with the obligation to re-assign the assigned claim following repayment of the secured claim) will have a suspended proprietary effect in the case of the assignor’s bankruptcy. However, the assignee will have the right to be satisfied from the assigned claim in priority against other creditors of the bankrupt assignor.

3. CONFLICT OF LAWS ANALYSIS

Polish Private International Law of 1965 ("PIL") regulated the choice of law rules in Poland. Recently, the Polish parliament has adopted a New Private International Law of 2011 ("NPIL"). In addition, since accession to the European Union, Poland is obliged to implement and apply European legislation. As such, Rome I applies directly in Poland.

As mentioned above, an assignment agreement has two legal effects: (i) it provides for the obligation to assign the claim in question and (ii) it transfers this claim from the estate of the assignor to the estate of the assignee.

---

459 See Article 70 of the Bankruptcy Law.
460 See Articles 336.2 and 345 of the Bankruptcy Law.
3.1. Law Governing Proprietary Effects under PIL and NPIL

There were no specific provisions in PIL on the law governing the proprietary effect of the assignment of claims. PIL introduced only a proprietary status for immoveable and moveable property which was based on *lex situs*. In particular, transfer of title to a moveable was governed by law where the specific moveable was located when an event triggering such a transfer has occurred (e.g. execution of a sale contract).\(^{464}\) However, there was no commonly presented view among the academics or the judiciary which would allow application of this rule *per analogiam* to the assignment of claims.\(^{465}\)

Nevertheless, Polish courts have taken a stance on this issue. The Supreme Court in its judgment of 19 December 2003\(^{466}\) approved different approaches in respect of the law governing contractual obligations arising under an assignment agreement and the law governing the proprietary effect of such an assignment agreement.\(^{467}\)

In respect of the former (i.e. the contractual obligations under an assignment agreement), the Supreme Court's judgment enabled the parties to conclude an assignment agreement to elect the law which would govern their obligations under the assignment agreement. Accordingly, pursuant to Article 25.1 of PIL, parties to an agreement could choose the law governing their contractual relationship provided that there was a connection (*nexus*) between the chosen law and the agreement in question.

On the other hand, the Supreme Court ruled that the parties were not allowed to choose the law governing the proprietary effect of a specific assignment agreement. Instead, the Supreme Court indicated that the proprietary effect, i.e. whether an assigned claim was validly transferred from the estate of the assignor to the estate of the assignee should be governed by *lex causae*, i.e. by law governing the underlying claim.

Consequently, although not specifically stipulated by the PIL, this judgment of the Supreme Court\(^{468}\) set out an important rule concerning conflicts of law in respect of the proprietary effect of assignment of claims. This rule was later reaffirmed by a judgment of the Appellate Court in Poznan of 10 January 2006.\(^{469}\)

\(^{464}\) See Article 24.2 of the PIL.
\(^{466}\) Judgment of the Supreme Court of 19 December 2003, III CK 80/02, OSNC 2005/1/17.
\(^{467}\) This Judgment was issued before Poland's accession to the European Union, which took place on 1 May 2004.
\(^{468}\) Although formally, the courts of lower instances are not obliged to follow and are not bound by the rulings of the Supreme Court.
\(^{469}\) Judgment of the Appellate Court in Poznan of 10 January 2006, I ACa 1063/05, OSA 2007/1/1.
Although this position was commonly accepted, some views were presented pointing out the difficulties which could arise when applying this approach. In particular, it was considered that the following main problems could arise: (i) determination of the governing law when the underlying claim is governed by multiple laws, (ii) determination of the governing law in the case of assignment of future claims, (iii) determination of governing law when it comes to a global assignment (i.e. of multiple claims governed by different laws), (iv) difficulties in determination of the law governing the proprietary effect of assignment by a third party or (v) difficulties in determination of the law governing the proprietary effect of assignment by the assignee in the case of fraudulent behaviour of the assignor and the debtor.

In practical terms, determination of the law governing the proprietary effect of the assignment of future claims could create an imminent problem. As mentioned above, under Polish law, assignment of future claims will trigger the valid transfer of the future claim to the estate of the assignor solely upon its coming into existence. Consequently, if the law governing such a future claim is unknown, it is not possible to determine the law governing the proprietary effect of such assignment.

In addition, the question was raised as to whether the rule presented by the Supreme Court should have been applied when determining the priority of competing claims, e.g. in the case of multiple fraudulent assignments, i.e. when the assignor assigns the same claim more than once to different assignees. However, in order to preserve consistency, it appeared reasonable to apply in this respect the same law which governed the proprietary effect of assignment. A different approach could have a negative impact on the certainty of the law (which should be treated as one of the main goals of good legislation).

The recently adopted NPIL includes a reference to Rome I in respect of the choice of law for the assignment of claims. In addition, Article 36 of the NPIL stipulates that the law governing the assigned claim should govern the proprietary effect of

---

470 The proprietary effect of such assignment of future claims will take place only when the claims come into existence.


472 However, as mentioned in footnote 3 above, the future claims should be clearly identified in the assignment agreement in order to be assignable. One may, however, encounter a situation where different elements of the future claim, such as e.g. creditor, debtor and type of underlying agreement, have been clearly identified; however, the governing law of that underlying agreement has still not been decided upon.


474 The NPIL does not incorporate Rome I into the Polish legal order as Rome I applies directly in Poland (a direct effect of the EU regulations).
the assignment including, its effectiveness against third parties (\textit{erga omnes}). As such, the rule set out by the Supreme Court in 2003 has been incorporated into Polish legislation including, a clear reference to the third-party effect.

3.2. Law Governing Proprietary Effects under Rome I

As Rome I does not introduce specific rules governing the proprietary effect of assignment, the rule set out in the NPIL (in respect of the effectiveness of assignment against third parties) will be maintained in respect of assignments of claims falling within the scope of Rome I.

3.3. Mandatory Rules/Public Policy

The NPIL as well as Rome I contain provisions which enable Polish courts (assuming they are an appropriate forum for a dispute) to disregard foreign law if the application of such law would be manifestly incompatible with the public policy rules in Poland. Those provisions tend to be interpreted in a very narrow way.

As such, it would be relatively difficult to apply them to an assignment of claims. One may, however, not exclude the situation wherein those provisions may be invoked if the law determined under Rome I or the NPIL were manifestly disadvantageous to the debtor of an assigned claim. On the basis of the Civil Code, the academics have construed the paramount rule to provide that the situation of a debtor may not become worse as a result of assignment. In theory, this rule might be construed as a part of public policy in Poland. However, as Rome I and the NPIL refer to the law governing the assigned claim as the law governing the relationship between the assignee and the debtor and the conditions under which the assignment may be invoked against the debtor, in practice, it would be relatively difficult to apply this rule.

In respect of the mandatory rules of Polish law which need to be applied irrespective of the law chosen to govern a specific contract, in the context of assignment, it is worth mentioning the Law on Consumer Credit of 2001.

\footnote{Recital (38) of Rome I refers to the proprietary effect of assignment only as being between the assignor and the assignee.}

\footnote{See Article 7 of the NPIL, which refers to the main rules of the Polish legal order and Article 21 of Rome I.}


\footnote{However, as Rome I and the NPIL refer to the law governing the assigned claim as the law governing the relationship between the assignee and the debtor and the conditions under which the assignment may be invoked against the debtor, in practice, it would be relatively difficult to apply this rule, unless that law provides for a significant deterioration of the position of the debtor as a result of the assignment.}
("Consumer Credit Law"),\textsuperscript{479} which is due to be shortly replaced by the Law on Consumer Credit of 2011.\textsuperscript{480} It introduces regulations aimed at protecting consumers entering into consumer credit contracts. Under the Consumer Credit Law, no assignment, even if governed by foreign law, should have a negative impact on the scope of rights ascribed to a consumer under that law. Apart from the Consumer Credit Law, there are a number of other mandatory provisions of law which aim to protect consumers and which should be applied irrespective of the governing law of an underlying contract.\textsuperscript{481}

3.4. Particular Rules of Applicable Law for Certain Kinds of Transactions

The Law on Certain Financial Collateral of 2004\textsuperscript{482} ("FCL") implements the Financial Collateral Directive of 2002\textsuperscript{483} ("FCD") into Polish law. It contains a choice of law provision aimed at transposing Article 9 of the FCD into Polish law.\textsuperscript{484} However, Article 13 of the FCL as well as Article 9 of the FCD relate only to book-entry securities and not to assignment of claims (credit claims) as financial collateral.

In addition, Poland has not yet implemented the directive amending the FCD\textsuperscript{485} by the date this National report was drafted.

4. CONCLUSIONS

(A) Polish law differentiates between the contractual effect (obligation) and the proprietary effect of assignment of claims. The latter governs the transfer of an assigned claim from the estate of the assignor to the estate of the assignee (effective \textit{erga omnes}, i.e. against third parties);

(B) In general, an assignment agreement triggers both effects, i.e. the assignor enters into an obligation to assign a specific claim and he transfers the claim from the estate of the assignor to the estate of the assignee. In

\textsuperscript{480} Law on Consumer Credit of 12 May 2011, Journal of Laws of 2011, no. 126, pos. 715, as amended. It is scheduled to enter into force on 18 December 2011.
\textsuperscript{481} See e.g. Article 30 of the NPIL.
\textsuperscript{484} Article 31 and 44 of the NPIL also refer to the choice of law in respect of securities.
respect of an assignment of future claims, the proprietary effect will only occur upon the coming into existence of the assigned claim;

(C) Until recently, Polish law did not provide for any specific regulations on the choice of law in respect of the proprietary effect of assignment, in particular such regulations were neither provided in the PIL (Private International Law of 1965) nor in Rome I;

(D) Pursuant to the Supreme Court's decision of 19 December 2003, parties to an assignment agreement may not select a governing law in respect of the proprietary effect of assignment. Instead, the governing law of the underlying claim should apply;

(E) The above rule was widely accepted by the Polish judiciary and academics but its shortcomings were also recognised;

(F) The above rule (including its effectiveness against third parties (erga omnes)) was incorporated into the NPIL (New Private International Law) and it is now a part of Polish legislation;

(G) Although there are no clear rules which would differentiate between approaches as to the governing law of the proprietary effect of assignment depending on the nature of the assigned claims, a problem may arise if an assignment of future claims takes place. Such assignment will trigger the proprietary effect only upon the coming into existence of a future claim. As such, before the claim comes into force (with the accompanying selection of law governing such a claim, if not already made), it may be difficult to apply the rule adopted in the NPIL to an assessment of the effectiveness of the proprietary effect of such assignment;

(G) Public policy rule are strictly construed in Poland. However, one might not exclude the situation that the Polish courts may refuse to apply foreign law on the grounds of its material incompliance with the paramount rule that the situation of a debtor may not be made worse as a result of assignment. In addition, foreign law may not affect the rights of a consumer, in particular those ascribed to him under the Consumer Credit Law;

(H) Choice of law issues are treated separately in respect of the measures implementing the FID (Financial Collateral Directive). However, the relevant rules only apply to book-entry securities;

(I) Polish courts strictly apply the rule of nemo plus iuris in alienum transferre potest quam ipse habet in respect of the assignment of claims. In general, no exemptions based on good faith are provided. Consequently, the assignment of claims by an assignor who was not a lawful beneficiary of such
claim will not be effective (the assignor will be contractually liable to the assignee for damages on the grounds that he was not in a position to make an effective transfer);

(J) Polish law protects the rights of the debtor of an assigned claim. Lack of notice of assignment from an assignor does not render the assignment ineffective; however, it protects the debtor discharging his obligations to a former creditor;

(K) The legal beneficiary of an assigned claim (first assignee) has very limited options when it comes to claiming against a debtor of assigned claim acting in a good faith;

(L) The legal beneficiary of an assigned claim (first assignee) might have a claim based on unjustified enrichment against a second assignee to whom a debtor discharged his obligations in respect of the assigned claim;

(O) The proprietary effect of assignment for security purposes will be suspended if the assignor goes bankrupt. In such a case, the assigned claim will be enforced by a bankruptcy officer, and the proceeds received from such enforcement will be used in the first case to repay the secured claim of the assignee (after enforcement costs).
J. NATIONAL REPORT SPAIN

SUMMARY

With regard to assignments or pledges of claims, the legal situation in Spain is not absolutely clear. However, the dominant view among legal scholars, practitioners and judges can be summarized as follows.

1. Substantive Law

According to Spanish substantive law, assignments of claims are valid and effective vis-à-vis third parties by a mere contract entered into between the assignor and the assignee. The agreement has “proprietary effects”. Neither notice to the debtor nor any kind of registration is required. Naturally, the assignment may not be invoked against the debtor if it has not been notified. With regard to security interests, the Spanish Insolvency Act expressly requires that the pledge has been executed in a document with an authentic date in order to render it effective in an insolvency scenario of the pledgor.

2. Conflict of Laws

According to Spanish conflict-of-laws rules, the law applicable to the proprietary effects of an assignment or pledge of claims is the law governing the assigned/pledged claim.

Francisco Garcimartín Alférez, Universidad Autónoma, Madrid.
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spanish Civil Code</td>
<td>Article 1526: Assignment of a credit, right or action shall not be effective against third parties until the date on which it is to be considered certain in accordance with articles 1218 and 1227. If it should refer to immovable property, it shall be effective from the date of registration thereof in the Registry.</td>
</tr>
<tr>
<td></td>
<td>Article 1527: The debtor who, prior to becoming aware of the assignment, should pay the creditor, shall be released from the obligation.</td>
</tr>
<tr>
<td>Spanish Act on Chattel Mortgages and Pledges without transfer of Possession</td>
<td>Article 54 (3): Credit claims, included future credit claims, may also be subject to a pledge without transfer of possession. Their perfection will require a registration in the Registry of Chattels</td>
</tr>
<tr>
<td>Insolvency Act</td>
<td>Article 90 (1): Claims with special preference. Claims with special preference include:</td>
</tr>
<tr>
<td></td>
<td>6) Claims guaranteed by pledge constituted in a public document, on the pledged goods or rights that are in the possession of the creditor or a third party. In the case of pledged claims, it shall suffice for it to be recorded in a document with an authentic date to enjoy security over pledged claims</td>
</tr>
<tr>
<td>Spanish Civil Code</td>
<td>Article 10.1: Possession, ownership and other rights over immovable property and publicity thereof shall be governed by the law of the place where such property located. The same law shall apply to movable property.</td>
</tr>
<tr>
<td>Real Decreto-Ley 5/2005</td>
<td>Article 17.3:</td>
</tr>
</tbody>
</table>
If the subject matter of a collateral is a credit claim, the law applicable to the effectiveness vis-à-vis the debtor or vis-à-vis third parties will be the law governing the assigned or pledged claim.

C) TABLE OF CASE LAW

There is no relevant case-law dealing with the proprietary effects of assignment in cross-border relations.

1. SUBSTANTIVE LAW ISSUES

In the event that Spanish Law is applicable to the effectiveness against third parties of the assignment or pledge, its provisions are relatively simple:

Neither notice to the debtor nor any kind of registration is required. The mere agreement between the assignor and the assignee has “proprietary effects” (but see infra (iv) as regards form).

(ii) Obviously, the assignment may not be invoked against the debtor if it has not been notified. Thus, the debtor who, prior to becoming aware of the assignment, should pay the creditor, shall be released from the obligation (art. 1526 Civil Code). By the same token, if the assignment should take place without the debtor being aware of it, the latter may use as defence the set-off of credits which are in existence prior to such assignment, and subsequent credits until he became aware of it (art. 1198 III Civil Code).

(iii) For certain claims, a registration procedure is provided for by the Spanish Act on Chattel Mortgages and Pledges without transfer of Possession (Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento (art. 54.3)) but it is not compulsory, i.e. registration is optional. The pledge is valid and effective against third parties even if no registration has taken place. Priorities between a registered pledge and a non-registered pledge are not clear.487

(iv) The Spanish Insolvency Act requires that the pledge has been executed in a document with an authentic date –typically, a document sanctioned by a public notary or registered with a public authority– in order to render it effective in an insolvency scenario of the pledgor (art. 90.1 (6) Insolvency Act). Legal scholars understand that the same requirement must be fulfilled in non-insolvency situations. However, this is not considered as a mandatory rule. Thus, if the pledge is governed by a foreign law, this rule would not apply (furthermore, if the debitor cessus is located in another Member State, art. 5 of the Insolvency Regulation applies).

487 See, Angel Carrasco, Nuevos dilemas en el mercado de las garantías reales. Prendas registradas y prendas no registradas sobre derechos de crédito, Diario La Ley, 6867/2008, p. 1 et seq.
Additionally, special rules exist regarding the assignment of bulk and future receivables in the contexts of a factoring contract or a securitisation. The main purpose of those rules is to describe the nature and quality of the receivables that benefit from the special regime.

2. CONFLICT OF LAWS ANALYSIS

2.1. Introduction

In April 2011, the Spanish Law implemented a special rule regarding the law applicable to the effectiveness against third parties of an assignment or pledge of credit claims (“créditos”): "If the subject matter of a collateral is a credit claim, the law applicable to its effectiveness vis-à-vis the debtor or vis-à-vis third parties will be the law governing the assigned or pledged claim” (article 17.3 of the Real Decreto-Ley 5/2005). This rule has been included in the Spanish Act implementing the new Collateral Directive (Directive 2009/44/EC).

Until now, the Spanish legal system has not provided for any conflict-of-laws rule expressly covering the matter of effectiveness vis-à-vis third parties of an assignment or pledge of credits. Thus, in order to provide an accurate description of the legal situation in Spain, the situation existing before and after the relevant date should be examined.

2.2. Situation Before April 2011

For the purpose of this report, the concept of “effectiveness vis-à-vis third parties” basically refers to the requirements that must be met in order to transfer a credit claim from the patrimony of the assignor to the patrimony of the assignee. It encompasses issues such as the effectiveness: (i) against the general creditors of the assignor, (ii) against the assignor’s administrator in bankruptcy, and even (iii) against prior or subsequent assignees in cases of double assignments. The term “proprietary right” is used with the same meaning. The concept of credit rights or credit claims includes any personal claim or right to receive an amount of money which is not incorporated into a negotiable instrument or represented by book-entries.

The dominant view in Spain is that the effectiveness against third parties of an assignment or pledge of claims falls outside the scope of both the 1980 Rome

---

488 See, D.A. 3ª Ley 1/1999, de 5 de enero, reguladora de las entidades de capital-riesgo y de sus sociedades gestoras; Real Decreto 926/1998, de 14 de mayo, por el que se regulan los fondos de titulización de activos y las sociedades gestoras de fondos de titulización.
Convention and the Rome I Regulation. Consequently, such an issue is dealt with by the conflict of laws rules of each Member State.

However, before April 2011, the Spanish legal system did not provide for any conflict-of-laws rule expressly covering the effectiveness vis-à-vis third parties of an assignment or pledge of credits. Nor had such an issue been settled by the Spanish courts; in other words, there was no case-law.

Legal scholars’ opinions were divided as regards how best to fill this gap. From a lege lata perspective, three alternatives had been upheld: (i) The application of the law governing the assignment agreement; (ii) the application of the law governing the assigned claim; or (iii) the application of the law of the centre of main interests of the assigned debtor (= debitor debitoris).

2.2.1. Application of the Law Governing the Assignment Agreement

Some legal scholars argued that the solution most consistent with Spanish material-law rules on assignment was the application of the law governing the assignment agreement. Accordingly, such law would apply not only to the relationships between the assignor and the assignee –or the pledgor and the pledgee-, ex article 14 (1) Rome I Regulation, but also to the effectiveness of the assignment or pledge against third parties (i.e. the general creditors of the assignor or pledgor, the administrator in bankruptcy and the priority of claims), ex national conflict-of-laws rules. The argument was based on the fact that under Spanish material-law rules the assignment is valid and effective between the parties and against third parties pursuant to a mere assignment agreement: i.e. the agreement has proprietary law effects. No external elements (such as a notice to the debtor or a registration) are required. Thus, from a conflict-of-laws standpoint, it seems reasonable to argue that the effectiveness against third parties is subject to the law governing the assignment agreement.

2.2.2. Application of the Law Governing the Assigned Claim

Another group of legal scholars argued that the law governing the assigned claim should govern both its effectiveness against the debtor, ex article 14 (2) Rome I

---

490 Further analysis, with the relevant references, may be found at Alférez F. Garcimartin, Cervantes I. Heredia, loc.cit. See also, Marta Requejo, La cesión de créditos en el comercio internacional, 2002, p. 193-240. From a lege ferenda perspective, this author favours the application of the law of the assignor in line with the UNCITRAL Convention.
491 See, the reference at Alférez F. Garcimartin, Cervantes I. Heredia, loc.cit.
492 Neither the assignment, nor the pledge of a credit calls for any kind of notice to the debtor or registration in order to make it effective against third parties (infra).
Regulation, and its effectiveness against third parties, ex national conflict rules.\textsuperscript{493} Such a conclusion was based on dogmatic arguments, but it also has its practical grounds. \textit{Firstly}, credit claims are not in fact tangible assets, they only exist insofar as they have been created or recognised by a legal system. Therefore, it may be reasonable to apply the same legal system to the existence of a claim and to the constitution and transfer of proprietary rights over this claim. \textit{Secondly}, since from the point of view of the assignee or pledgee the effectiveness of the assignment \textit{vis-à-vis} the debtor is a key issue in many transactions, the fact that the same law applies to the effectiveness against third parties reduces transaction costs. Furthermore, such law would also govern the effectiveness of a non-assignability clause (\textit{pacto de non cedendo}) to the \textit{bona fide} assignee (i.e. such a solution avoids the characterisation problem as to whether this is a “proprietary effect” or not).

\subsection*{2.2.3. Application of the Law of the Centre of Main Interests of the Assigned Debtor}

Lastly, a third group defended the application of the law of the centre of main interest or the habitual residence of the assigned debtor.\textsuperscript{494} This understanding was grounded on two essential elements. On the one hand, the principle of \textit{lex rei sitae} enshrined in our Civil Code (art. 10.1 Civil Code): property rights over an asset are governed by the law of the country where the relevant asset is situated. This is the place where such rights may be enforced. The application of such principle to claims would mean that the country where the debtor is located would apply, since this is the place where the claim may be physically enforced. Additionally, article 2 (g) of the Insolvency Regulation: ‘\textit{the Member State in which assets are situated}’ \textit{shall mean}, in the case of... \textit{claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests}”.

The opinions of legal scholars described above do not differentiate depending on the nature of the claim, the assigned or pledge debtor or the beneficiary of the assignment or the pledge. Nor do they differentiate depending on whether there is an individual assignment or a global assignment. The same conflict-of-laws rule applies in all cases. Furthermore, none of them have raised any problem as regards the possible interference of any mandatory rules or the public policy clause in this area of the legal system.

In their daily practice, legal firms mostly abide by the second interpretation. However, in order to avoid legal risks, they tend to fulfil the requirements for the assignment or the pledge in accordance with all the possible laws involved (i.e. the


law of the assignment agreement, the law of the assigned claim and the law of the assigned debtor). This increases transaction costs but reduces legal risks.

One particular problem that arises from time to time in practice is the application of the preferential right recognised to the debtor of a litigious claim (a call option). According to article 1535 CC, "in the event of sale of a litigious credit, the debtor shall be entitled to extinguish the same by reimbursing the assignee of the price paid, any costs incurred and interest on the price from the date on which it was paid. A credit shall be deemed litigious from the time that a response to the claim relating thereto is filed. The debtor may exercise his right within nine days, counting from the assignee’s demand for payment". It is not clear whether this is (i) a material rule applicable only to those claims subject to Spanish law (ii) or, a procedural rule applicable to any claim irrespective of the law governing it.

2.3. Current Law

In April 2011, Spanish law implemented a special conflict-of-laws rule regarding the effectiveness against third parties of (i) an assignment or (ii) a pledge of claims. "If the subject matter of a collateral is a credit claim, the law applicable to the effectiveness vis-à-vis the debtor or vis-à-vis third parties will be the law governing the assigned or pledged claim" (article 17.3 Real Decreto-Ley 5/2005). The new rule points to the law governing the assigned/pledged claim, i.e. option (ii) described above.

This new rule has been included in the Spanish Act implementing the text of the new Collateral Directive.\(^\text{495}\) The main purpose of this new text is to extend the scope of application of the collateral Directive to certain credit claims. In this context, the Spanish legislator has deemed it necessary to eliminate the legal uncertainty surrounding cross-border aspects of an assignment or a pledge of claims and has decided to introduce that special conflict-of-laws rule.

Since this new rule has only recently been enacted there is currently no case-law regarding its interpretation or construction. However, legal scholars have regarded this rule as an interpretative rule, i.e. as a mere clarification of the applicable legal regime.\(^\text{496}\) Therefore, its application is not limited to the scope of the Collateral Directive. It applies to the effectiveness against third parties of an assignment or a pledge of any credit claim. For the same reason, even though the new rule only

---


\(^{496}\) Alférez F. Garcimartin, Cervantes I. Heredia, loc.cit., passim.
refers to assignments or pledges, it may also apply to any other proprietary rights created over a claim.

### 2.4. Conclusion and Personal View

Under current Spanish Law, the law applicable to the effectiveness against third parties of an assignment or a pledge of claim is the law governing such a claim. This solution has general application. There is no special conflict rule for global assignment or for the assignment of future claims.

My personal view with regard to the need for an article 14 (3) on the Rome I regulation can be summarized as follows: (i) There are convincing reasons for that rule. In particular, the need to eliminate any legal uncertainty that currently overshadows cross-border assignments or pledges of credit claims. (ii) The rule should be based either on the law governing the assigned/pledge claim (i.e. the solution followed by the Spanish legislator) or the law of the country where the Centre of Main Interest of the assignor/pledgor is located (i.e. the solution followed by UNCITRAL). For the reasons stated above, I tend to think that the former option is preferable.
K. NATIONAL REPORT SWEDEN

SUMMARY

1. Substantive Law

Under Swedish law a pledge or an assignment (or transfer as the case might be) is created by an agreement by the parties to that effect which agreement, based on the Swedish principle of freedom of contracts, can be governed by the law chosen by the parties (with some exceptions).

The agreement must be followed by a perfection element which in principle shall be either physical transfer of the pledged property, registration (for certain types of assets such as real estate, ships and aircraft) or notification to the holder of the asset if it is in the physical or deemed physical possession of a third party.

2. Conflict of Law

The law governing the perfection element is lex rei sitae (the law where the pledged/assigned/transferred property is located or deemed to be located).

Anne-Marie, Pouteaux Wistrand Advokatbyrå, Sweden.
1. INTRODUCTION

Under Swedish law it is a basic principle that parties to a contract are entitled to agree upon whatever rights and obligations they choose (including choice of law and jurisdiction (see Rome I Article 3)) with the general limitation that if they agree upon anything criminal or anything against public order such provisions will not be
upheld by the Swedish courts. Under the main rule stated above, parties to a contract cannot, however, validly agree upon anything which solely or primarily aims to have an effect upon the creditors of any of the parties. As a consequence the parties cannot for instance validly agree upon applicable law for bankruptcy proceedings or an execution (sw:utmätning). If a debtor is a Swedish entity, Swedish bankruptcy law will always apply (see section 4).

If the contract between the parties does not have a choice of law clause Swedish private international law will apply. The general principle is that the choice of law shall be determined in relation to the strength of different factors or the combination of such factors related to the subject matter such as i.e. the place of the conclusion of a contract or issue of a guarantee, the nationality of the parties, where an obligation shall be performed etc and the choice will be made (by the court) depending on which factor/s are determined to have the strongest connection to the subject matter.

Through the incorporation in 1998 into Swedish law of 80/934/EEC: Convention on the law applicable to contractual obligations in Rome on 19 June 1980, and in 2008 of regulation (EC) No 593/2008 of the European parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) the Swedish principles on choice of law matters regarding contractual matters have generally speaking been codified.

Thus the rules in Article 14 and 15 of Rome I are applicable according to Swedish law on matters related to contracts concluded after 17 December 2009. This means that the law of the underlying obligation first needs to be established after which the applicable law for the assignment or subrogation will follow the rules of Rome I referred to above.

2. ASSIGNMENTS

We have given the term assignment a wide interpretation to the effect of assignment meaning outright transfers or other transfers, assignments or transfers by way of security and pledges or other security rights.

3. SECURITY ARRANGEMENTS

3.1. Security Interest – Transfer of Title

Security arrangements are generally made under Swedish law either as a security interest (i.e., a pledge) or a transfer of title agreement. In order for a transfer of title (whether for security purposes or otherwise) or security interest to be properly created under Swedish law there need to be an agreement/contract between the parties (the contractual aspect) to that effect, followed by a perfection measure in order to protect the transfer or a security interest created in the transferred
property/collateral from the interests of the creditors of the transferor or pledgor (the proprietary aspect).

3.2. Security Interest

A security interest in (i.e., a pledge of) a chattel (we have used the term chattel as a translation of the Swedish law concept “handpanträtt”, see below) is created by way of agreement. Such agreement must include a provision showing the intention of the pledgor to pledge certain identified assets (collateral) as security for certain secured obligations. The requirement of identification means that the collateral must be sufficiently identified so that it can be separated from the pledgor’s other assets as well as from the pledgee’s other assets. If the pledge agreement provides for pledges of future assets, it is sufficient that these assets are identified in connection with the perfection of the pledge.

A security interest in a chattel (sw:handpanträtt) is perfected by depriving the pledgor of its right to dispose of and control the collateral. This is generally made in one of three ways; a) by physical transfer of the collateral from the pledgor to the pledgee or to a third party, b) by registration for certain types of property (such as i.e. land or ships), or c) in the case of the collateral being held by a third party at the time of perfection, by notification to the third party of the security interest in the assets it holds.

Since perfection of a security interest in a chattel entails depriving the pledgor of its right to dispose of and take control of the collateral, the pledgor must not have a general right to substitute or otherwise take any action in respect of the collateral in its own discretion. Such substitutions or other actions must generally be made only with the pledgee’s consent. If a Swedish court would find that the pledgor has too much control of the collateral, it will most likely find that the security interest in the collateral is unperfected and that the pledgee’s interest is not protected against the pledgor’s creditors. In this respect it should be noted that there are certain statements in the bill (sw:proposition, i.e. preparatory works) (Prop. 2004/2005:30) (the ”Bill”) implementing directive 2002/47/EC on financial collateral arrangements (the “Collateral Directive”) that support the view that a pledgor’s right to substitute a collateral might not endanger the perfection of the security interest created therein, at least not to the extent the value of the substitute collateral corresponds to or exceeds the value of the replaced collateral. However, due to the lack of case law, the exact boundary of when such rights of the pledgee would affect the perfection of a security interest is unclear under Swedish law. Directive 2009/44/EC has been implemented in Sweden effective as of 30 June 2011.

Under a security interest, the pledgor still maintains legal title to the collateral and, consequently, the pledgor’s title to it is protected against the pledgee’s creditors. The pledgee holds the collateral as security for a specified secured obligation and may enforce it in case of default. However, apart from re-pledging the collateral to
a third party for a secured obligation not greater than the original secured obligation and on terms not more onerous than those under the original pledge agreement, the pledgee may not itself use or dispose of the collateral in its own interest and discretion unless this has been agreed between the parties. If the pledgee is given the right to dispose of the collateral, the pledgor’s title to it will generally not be protected against the pledgee’s creditors and the arrangement will be considered to be a transfer of ownership rather than a security interest from a pure perfection perspective. As between the parties, the arrangement might still be considered to be a security interest.

3.3. Title Transfers

In case the parties agree on a security arrangement in the form of a title transfer, or if a security interest in a chattel is recharacterised as a transfer of title, the transferee will (based on the terms of the agreement and subject to perfection of the transfer) acquire full ownership to the assets and have an obligation to return/sell back the assets (or the equivalent thereof) to the transferor. Consequently, the transferor will lose its perfected title to the assets (i.e. the transferor’s title to it will not be protected against the transferee’s creditors) and, instead, the transferor will retain an unsecured claim against the transferee for the return of the assets.

As regarded perfection formalities there is no difference under Swedish law between a security interest and a title transfer. Just as for a security interest, a transfer of ownership is perfected by depriving the transferor of any rights to dispose of and control the transferred assets. As stated above perfection is typically obtained by transferring the asset to the transferee or, if the assets are located with a third party, by notifying that third party of the transfer.

Consequently, a recharacterisation of a security interest in a chattel as a transfer of ownership will result in the pledgor/transferor losing its perfected title to the collateral, but as there is no distinction under Swedish law between the requirements for perfection for both a pledgee/transferee will in any event retain an interest in it that is protected against the pledgor’s/transferor’s creditors.

4. VALIDITY OF SECURITY INTERESTS

4.1. Choice of Law

4.1.1. General

A Swedish court will characterise choice of law questions presented to it by application of lex fori, i.e. under the Swedish law. In essence, this characterisation will only relate to the character of the issue. The court could thus characterise the question before it as being a contractual issue (i.e., an issue between the parties to an agreement) or as an issue involving proprietary aspects (rights in rem, i.e., an
issue involving the protection of creditors, such as perfection issues) in order to determine which conflict of laws rule that should be applied.

4.1.1. Contractual aspect—between the parties

Under Swedish law, the law governing the contractual aspects of a security interest is the governing law of the relevant security agreement provided, that the choice of law would be valid under Swedish law (see above) and that the security interest created would be valid under the law of the document.

4.1.2. Proprietary aspect

A Swedish court would, in determining whether a security interest in chattels (which would include debt securities in bearer form) has been validly perfected, generally apply *lex rei sitae* (or *lex situs*), i.e. the law of the jurisdiction where the property in which the security interest is created is located (or deemed located).

There is an explicit rule in Chapter 5 Section 3 of the Financial Instruments Trading Act (*sw: Lag (1999:980) om handel med finansiella instrument*) regarding dematerialised or immobilised securities, pointing to the law of the jurisdiction where the register recording the holder’s/beneficiary’s interest in the securities is located. This provision incorporates the corresponding provision in the Finality of Payments Directive (98/26/EC) and reflects the equivalent rule in the Collateral Directive (implemented in Sweden pursuant to the enactment of the Bill).

4.1.2. Cash Collateral Held in an Account (in or Outside Sweden)

Under Swedish law, cash in a bank account is characterised as a non-negotiable claim against the bank holding the cash, i.e. a claim against the deposit holder to receive the balance of the account.

Under Swedish international private law it is not clear what law would govern the perfection of a security interest over such claim (the cash Collateral). The reason for the uncertainty is that it may be difficult to determine where the claim is located (or deemed located) and there is little case law of relevance. There are arguments that the claim is located or should be deemed to be located in the jurisdiction of the underlying agreement, in the jurisdiction of the transferor/pledgor or in the jurisdiction where the creditor (i.e. a bank) is located.

Subject to the aforementioned uncertainty under Swedish law, we think that the claim (the cash Collateral) should be deemed to be located at the place of incorporation of the bank holding the deposit.
4.1.3. Directly Held Bearer Debt Securities

The perfection of a security interest over directly held bearer debt securities is governed by the *lex rei sitae*, i.e. the law of the jurisdiction where the certificates representing the securities are physically located.

4.1.4. Directly Held Registered Debt Securities

Chapter 5 Section 3 of the Financial Instruments Trading Act governs Swedish private international law issues for perfection of a security interest over dematerialised and immobilised debt securities, stipulating that perfection of such securities is governed by the law of the jurisdiction where the register recording the owner’s interest in the securities is located.

It should be noted, however, that there is an ongoing debate in the legal doctrine regarding the scope of the application of the aforementioned rule. According to its statutory language, the provision is applicable only where the holder’s interest in the securities has been *registered according to law*. It is not clear how a Swedish court would interpret the phrase “according to law” and whether the scope of the provision is limited to registrations of interest in securities that are legally recorded (which in Sweden would mean a registration of the securities in accordance with the Financial Instruments Accounts Act (*sw:Kontoföringslagen (1998:1479)*)), or if a register kept merely for internal or accounting purposes will qualify.

Under the Financial Instruments Accounts Act, it is not possible to legally record directly held registered debt securities in Sweden. Assuming for the sake of argument that a register kept merely for internal purposes does not qualify for the application of Chapter 5 Section 3 of the Financial Instruments Trading Act, it is believed that in this case a Swedish court would most likely apply the *lex rei sitae* rule to perfection aspects, i.e. the law of the jurisdiction where the relevant assets are (deemed) located. Under Swedish law, directly held registered debt securities are characterised as non-negotiable claims, i.e. claims against the issuer, which, although it is not certain as a matter of Swedish law, likely are deemed located where the issuer of the securities is domiciled.

The conclusion of the above is that whether or not Chapter 5 Section 3 of the Financial Instruments Trading Act is applicable to the perfection aspects of directly held registered debt securities, based on authoritative statements in the legal doctrine and the Bill, we believe that the perfection of a security interest over such securities is governed by the law of the jurisdiction where the issuer (and its record) is (deemed) located, thus the place where the issuer of the securities is domiciled.
**4.1.5. Directly Held Dematerialised Debt Securities**

As stated above, under Chapter 5 Section 3 of the Financial Instruments Trading Act, the perfection of a security interest over directly held dematerialised debt securities is governed by the law of the jurisdiction where the register recording the owner’s interest in the securities is located.

Referring to the debate in the legal doctrine referred to above regarding the scope of the application of Chapter 5 Section 3 of the Financial Instruments Trading Act, it is not clear whether the provision is applicable only where the owner’s/beneficiary’s interest in the securities has been *legally registered* (which in Sweden would mean a registration of the securities and any interests therein in accordance with Financial Instruments Accounts Act (*sw:kontoföringslagen (1998:1479)*)), or if a recording of the same merely for internal or accounting purposes will qualify.

If a register kept merely for internal purposes would not qualify, the following can be said. Based on statements in the Bill and in the legal doctrine, it is believed that in this case a Swedish court would most likely apply the *lex rei sitae* rule to perfection aspects, i.e. the law of the jurisdiction where the relevant assets are (deemed) located. However, it is not clear under Swedish law what kind of asset the secured party’s recording of interest in the securities is. It has been suggested that a Swedish court would characterise the “registration” of the interest in the securities as a non-negotiable claim against the relevant intermediary or an interest in a pool of assets. Based on statements in the Bill we believe that the perfection of a security interest over such securities is governed by the law of the jurisdiction where the relevant (most immediate) Intermediary (and its record) is located.

**4.1.6. Indirectly Held Debt Securities**

Under Chapter 5 Section 3 of the Financial Instruments Trading Act, the perfection of a security interest over indirectly held debt securities is governed by the law of the jurisdiction where the register recording the holder’s/beneficiary’s interest in the securities is located. In this respect it makes no difference if the underlying immobilised securities are certificated or immobilised, or dematerialised. Indirectly held debt securities will often be part of an indirect holding system (which can encompass both immobilised bearer and dematerialised securities) where the “same” securities (or recordings of interests in the securities) are held by intermediaries or chains or tiers of holdings in the form of book entries with intermediaries at the various levels.

The aforementioned statutory rule in Chapter 5 Section 3 of the Financial Instruments Trading Act will apply also to securities held in such indirect holding system, thus stipulating that proprietary issues are governed by the law of the jurisdiction where the register of the most immediate intermediary is located, regardless of where the other intermediaries (and their records) in the “chain” are located.
The debate on the scope of the rule Chapter 5 Section 3 of the Financial Instruments Trading Act described under Directly held dematerialised debt securities above is equally relevant in relation to indirectly held securities.

4.1.7. Future Obligations

4.1.7.1. Security for Future Obligations

Under Swedish law it is possible to grant a security interest in favour of another party as security for future obligations and where the amount secured will fluctuate. It is also possible to extend such security interest to cover additional collateral.

Future obligations become secured obligations as and when they become current and, provided that they are obligations clearly contemplated by the terms of the relevant security document, without any further actions by the parties (see section 4.4).

4.1.7.2. Security Interest over Future Obligations

An agreement to create a security interest over future obligations is binding on both parties. The security interest would be valid in relation to future collateral but the security interest over future collateral located (or deemed located) in Sweden will not arise and be perfected until (i) the collateral is delivered and (ii) the relevant formalities required to perfect a security interest over the relevant type of collateral have been fulfilled (see below). The amount of collateral does not need to be fixed and it is permitted under Swedish law to hold excess collateral, subject to the agreement between the parties.

4.2. Perfection Measures

4.2.1. Cash

Under Swedish law cash held in an account is characterised as a non-negotiable claim on the bank providing the account. Transfer of the cash from a security collateral provider’s account into the account of a secured party would perfect the security interest in the cash, provided that the security collateral provider does not have access to the bank account or otherwise can control or dispose of the funds deposited into the bank account. The use of a custodian appointed by the secured party would not change the opinion expressed in the preceding paragraph.

Since cash collateral consists of fungible assets, it is important that the posted collateral is held in a segregated account. Otherwise it will not be possible to identify the posted collateral in the bankruptcy of the secured party, which could result in the security collateral provider losing its perfected title to the cash. However, if the recipient is a bank it is generally not practically possible for it to segregate funds held by itself. In that situation the bank holding the cash collateral
in an account in the bank itself could have a right of set-off which could work as “security”.

4.2.2. Directly Held Bearer Debt Securities
A security interest over directly held bearer debt securities is perfected by transferring the physical certificates representing the securities to the secured party or by notifying any third party that holds the securities (if applicable).

It should be noted that through an amendment in the Promissory Note Act (see section 7 on Securitisation) debt instruments sold by a bank, credit market undertaking or company authorised to operate a security business are protected from the creditors of the above mentioned entities although the debt instruments remains in the custody of the selling bank, credit market undertaking or company authorised to operate a security business.

4.2.3. Directly Held Registered Debt Securities
A security interest over directly held registered debt securities is perfected by notifying the issuer.

4.2.4. Directly Held Dematerialised Debt Securities
A security interest over dematerialised securities is perfected by notifying the holder of the register where the secured party’s interest in the securities is recorded and the subsequent recording of such interest. However, in case the recording of the secured party’s interest in the securities is a book entry or a similar recording for internal use rather than a legal recording under Swedish law (and Chapter 5 Section 3 of the Financial Instruments Trading Act is not applicable, see above), the security interest is perfected by notifying the issuer.

4.2.5. Indirectly Held debt Securities
A security interest over indirectly held debt securities is perfected by notifying the holder of the register where the secured party’s interest in the securities is recorded and the subsequent recording of such interest. However, in case the intermediary’s recording of the interest in the securities is a book entry or a similar recording for internal use rather than a legal recording under Swedish law (as may well be the case in an indirect holding system), by notifying the intermediary.

4.2.6. Other Measures – Actions
It is not necessary as a matter of formal validity that security agreements/documents be expressed to be governed by Swedish law or drafted in the Swedish language or for them to include any specific wording (as long as the intention to create a security interest is clear). In the case of a dispute involving the security documents brought before a Swedish court, the court may require such
documents to be translated into Swedish for the purposes of determining such dispute)

No actions other than those described above need to be taken in order to ensure that the security interest in the collateral continues and remains perfected. Please note that, in relation to future collateral any additional collateral located (or deemed located) in Sweden must be perfected by carrying out the respective actions described above, as applicable, every time additional or new collateral is delivered under the security documents.

4.2.7. Substitution of Collateral

As noted above the fundamental prerequisite for the perfection of a security interest in assets that are located (or deemed located) in Sweden is that the pledged assets may no longer be in the pledgor’s possession or under the pledgor’s control. If the security collateral provider has a right to substitute the collateral this could indicate that the security collateral provider still has a certain degree of control over the collateral, which could render the security interest unperfected (at least partially). In the Bill certain statements support the view that substitution of the collateral may not endanger the perfection of a security interest created therein, at least not as long as the value of the substitute collateral corresponds to or exceeds the value of the replaced collateral. However, it should be noted that due to the lack of case law the question is still unclear under Swedish law.

4.3. Enforcement of Security Outside Insolvency Proceedings

When enforcing a security interest created by security documents the party enforcing such security has a fiduciary duty to protect the interest of the party having provided the security. Such duty includes an obligation to notify such party of any sale of the collateral and to account for the proceeds of such sale, albeit that Swedish case law supports the view that such notification may not be required in relation to a sale of listed securities.

Section 37 of the Contracts Act ((sw:Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område)) prevents the enforcing party from forfeiting the security by taking over ownership of the collateral without accounting for the value thereof. It is generally believed that Section 37 of the Contracts Act requires that any excess proceeds a secured party holds after the secured obligations have been satisfied must be returned to the party providing the security.

The secured party is entitled to sell the collateral to any person but it may not, as noted above, forfeit the security by simply taking over ownership of the collateral without accounting for the value of the collateral that exceeds the underlying claim against the security collateral provider.
4.4. Enforcements of Security after the Commencement of an Insolvency Proceeding

In Sweden there are two different proceedings with respect to a company which has difficulties meeting its payment obligations. These are bankruptcy proceedings (sw: konkurs) pursuant to the Bankruptcy Act (sw:Konkurslagen (1987:672)) and company reorganisation (sw:företagsrekonstruktion) pursuant to the Company Reorganisation Act (sw:lagen (1996:764) om företagsrekonstruktion). In a bankruptcy, the company does not normally emerge as a going concern, while in a company reorganisation it does. It should be noted that a number of legal entities cannot be subject to company reorganisation. These are, inter alia; banks, saving banks, member banks, credit market companies, insurances companies, security companies, clearing organisations and entities in which the government, a municipality, a county council, a municipal association, a parish or a church organisation has a controlling influence.

The purpose of the bankruptcy procedure is the winding up of the affairs of the bankrupt entity such as a company, the dissolution of the company and the distribution of its assets (when converted into cash). The procedure commences with a petition from either the company itself or a creditor to the relevant district court. When the court declares the company bankrupt, it shall immediately (i) set a date for a meeting for administration of oaths (sw:edgångssammanträde), (ii) appoint one or more administrator(s) to handle the bankruptcy estate and (iii) summon the company, the administrator(s), the supervising authority and the creditor who made the petition (if applicable) to the meeting for administration of oaths. Distribution to the creditors shall take place as soon as all available property has been converted into cash. Distribution of the cash is made according to the priority given to each claim in accordance with the Priority Rights Act (sw:Förmånsrättslagen (1970:979)). There are three main groups of claims; (i) claims with special priority (e.g. secured claims) (such as security over cash and debt instruments), claims secured by mortgage and claims secured by seizure; (ii) claims with general priority (i.e. claims given priority because of public interest; e.g. taxes); and (iii) claims without priority. If any assets remain after claims with special priority have been satisfied, claims with general priority shall be satisfied out of the remaining assets. All non priority claims rank equal in priority (pari passu) and will be satisfied proportionally.

The purpose of a company reorganisation is to reorganise the company’s business and financial structure following an order by a court. In brief, the company reorganisation provides an extension of time (typically three months from the date of the order) for payments as regards the debt that already exists at the time of the court order) for payments as regards the dept that already exists at the time of the court order. During this time an appointed trustee investigates whether there exists a possibility for the debtor to reach a composition with its creditors. During the
process of a company reorganisation, no enforcement measures, except for enforcement of claims for which the creditor has a possessory pledge (which includes the security interest in collateral or a retention right, may be taken against the debtor, nor may attachment be ordered.

### 4.5. Priority Rights to Security

A security interest in different types of collateral will rank first in priority as regards proceeds from the realisation of such collateral. If such proceeds are not sufficient to satisfy the obligations, the remaining part of the secured party’s claim will be treated as a claim without priority. The order of priority is the same in both bankruptcy proceedings and company reorganisations.

The general rule contained in Chapter 8 Section 10 Paragraph 1 of the Bankruptcy Act is that a creditor that has a valid and perfected security interest in chattels (sw:handpanträtt) belonging to the bankrupt company, may itself sell the collateral on a public auction but not earlier than four weeks after the meeting for administration of oaths. Such creditor must also give the administrator the opportunity to redeem the collateral to the bankruptcy estate. The creditor will still have a first ranking priority in any proceeds from the collateral even though the administrator redeems it.

There is an explicit rule contained in Chapter 8 Section 10 Paragraph 2 of the Bankruptcy Act entitling a creditor that holds financial instruments (other than shares in the obligator’s subsidiaries to the extent those are not listed) whether or not those are listed for trade, or currency (cash) should be entitled to immediately sell the collateral, provided that the sale is carried out on commercially reasonable terms. The same applies to claims which are incurred by a credit institution (sw:kreditinstitut) or an equivalent foreign institution having granted a loan (through implementation of Directive 2009/44/EC into Swedish law as of 30 June 2011). Thus, in a bankruptcy proceeding the secured party will be entitled to sell collateral that falls within the provision referred to above immediately without being subject to any stay or freeze and without having to obtain the administrator’s consent or observing the administrator’s right to redeem the collateral.

In a company reorganisation, direct enforcement of a security interest in a chattel in accordance with the terms of the security agreement is possible.

### 4.6. Recovery (Claw-back) of Collateral

Pursuant to Chapter 4 Section 12 of the Bankruptcy Act, collateral can be recovered (clawed-back) if it has been granted within a suspect period of three months before the bankruptcy if such security interest was either (i) not agreed together with the agreement relating to the obligations secured, or (ii) not perfected without delay after the secured obligations were created. However, even if (i) or (ii) is applicable,
the collateral cannot be recovered if the granting of the security interests was considered to be “ordinary”.

5. TRANSFER OF TITLE ARRANGEMENTS

5.1. Characterisation

The characterisation of the interest created under a transfer of title arrangement under Swedish law is not certain. It can be argued that it should be characterized as either a security interest or an outright transfer of ownership. In jurisprudence it is looked upon as an outright transfer regarding protection for the holder of the collateral against claims from creditors of a transferor and forming part of the assets of the holder (thus in relation to third parties), while it is said that the rules generally applicable to pledge arrangements should govern the relationship between the parties.

Perfection requirements under Swedish law are identical for security interests and transfers of ownership. Thus for collateral located (or deemed located) in Sweden, a characterisation of a transfer to a security interest would not, in our view, have any adverse consequences on the validity or perfection of the transferred property.

Based on the above, and subject to the uncertainty under Swedish law on this issue, we think that transfer of title arrangements would be characterized as outright transfers or ownership. However, a characterisation would in our opinion not have any adverse consequences on the validity or perfection of credit support located (or deemed located) in Sweden.

5.2. Recovery

Assets transferred under transfer of title arrangements could be recovered (clawed-back) either in accordance with the provision in the Bankruptcy Act regarding recovery of payments or the provision in the same act regarding recovery of security depending on the characterisation of such arrangements.

Transfer of assets/collateral could be regarded as payments for the purposes of the recovery provisions in the Bankruptcy Act, under which a payment of a debt can be recovered if it has taken place within a suspect period of three months before the bankruptcy and the payment was either (i) not made using normal means of payment, (ii) made in advance, or (iii) in an amount that has weakened the bankruptcy party’s economic position materially. However, even if (i), (ii) or (iii) is applicable, the payment cannot be recovered if the payment was considered to be “ordinary”.

498 “Normal means of payment” means a payment originally agreed between the parties in a transaction, or commonly used between the parties or in the trade in question.
5.3. Prohibition Against Collateral Forfeiture

We believe (although there is no case law on these matters) that the rules on forfeiture would equally apply to title of transfer arrangements for security purposes and that a Swedish court would consider Section 37 of the Contracts Act to be part of Swedish public policy and consequently apply it regardless of the contents of the laws governing the title of transfer arrangement (see above).

5.4. Valuation Percentage

Please note that valuation methods for conversion a physical delivery to cash must be “fair”. There are, however, no fixed rules on how this fairness should be obtained. In the end the courts would have to decide.

5.5. Substitution

We also believe that the reasoning in on substitution of collateral (see 4.7) would be applicable to title of transfer arrangements for security purposes.

5.6. Relationship Between the Parties

If the title of transfer arrangement would be characterised as security interests, the rules explained in the sections on duty of care and enforcement outside liquidation could, to the extent such rules are considered to be part of Swedish public policy, be applicable on the relationship between the parties.

6. SUBROGATION

The right of subrogation is recognised under Swedish law. The right is based on case law and legal doctrine.

There is a legal debate in Sweden on whether it is required to differ between recourse (sw:regress) and subrogation (sw:subrogation), where in the first case the right is thought upon as being “personal” and where in the other case the right is considered to be derived from the underlying obligation (the creditor’s claim) . As to the consequences of upholding the distinction between the two it can be said that “regress” follows from law, while a right of “subrogation” is deemed to be derived both from law and from the agreement with the main debtor to a guaranteed claim. The legal analysis on the effects of these rights are to a large extent the same under Swedish law. Certain aspects such as time bar issues might differ between the two concepts (which differences will not be commented in this report.

500 Gösta Walin, idem., p. 204.
Subrogation rights arise in cases of guarantees and third party posting of collateral (in both cases) for a main debtor’s \((\text{sw:huvudgäldenär})\) obligations for a main creditor’s \((\text{sw:huvudborgenär})\) debt.

A right of subrogation will only become effective if the guarantor or third party collateral provider has, in the case of the guarantor paid wholly or partly the debt of the main debtor, or in the case of a third party collateral provider such collateral having been used to satisfy (wholly or partly) the debt of the main debtor.

The person having a right of subrogation can transfer/assign that right to another party. The right of subrogation will form part of his bankruptcy estate and can be subject of execution \((\text{sw:utmätning})\) for his own debts.

A guarantor has a right of subrogation in relation to another co-guarantor/other co-guarantors for the same main debt. If one guarantor has satisfied a debt for which there are two guarantors the guarantor having paid can generally demand (as a right of subrogation) fifty percent from his co-guarantor.

The rules on priority between a guarantor and a third party having posted collateral for the same main debt can be subdivided in a) the right of the main creditor to claim under the guarantee and the posted collateral and b) the internal rights between the guarantor and the third party collateral provider.

It is generally believed that the obligations of the guarantor and the collateral provider towards the main creditor, would in dubio be joint (in the absence of an agreement on this matter and if they have been given/posted at the same time)

In the internal relationship between the guarantor and the third party collateral provider it has been argued that (in the absence of an agreement to the contrary) posted collateral shall be primary security to the effect of the third party collateral provider not having a right of subrogation on a guarantor, while a guarantor would have such a right against the third party collateral provider.\(^{501}\)

### 7. SECURITISATION

There is no special Swedish law governing securitisation arrangements. Through two special provisions (effective as of 1 June 2001) one in the Promissory Notes Act (Sw: Lag (1936:81) om skuldebrev) and one, now contained in the Banking and Financing Business Act (Sw:Lag (2004:297) om bank –och finansieringsrörelse), the possibility for securitisation arrangements were enhanced in Sweden. Prior to the these rules coming into force, it was economically unfavourable to set up these arrangements in Sweden since the purchase of negotiable debt instruments

---

constituted “financing business” and the entities doing so were required to follow capital adequacy requirements.

The amendment now contained in the Banking and Finance Business Act referred to above made an exemption from the licence requirement and consequently the capital adequacy rules for a “limited company or an economic association where: a) the operations consist of the occasional acquisition of claims; and b) funds from the operations are not regularly raised from the general public”.

The amendment to the Promissory Note Act states that if a bank, credit market undertaking or company authorised to operate a security business sells negotiable debt instruments such sale is perfected and thus protected from the creditors of the above mentioned entities although the debt instruments remains in the custody of the selling bank, credit market undertaking or company authorised to operate a security business. Please note that is an exemption from the general rules on perfection of negotiable debt instruments referred above.

Albeit these amendments to the law, securitisations using Swedish special purpose corporations or associations are, to the best of our knowledge, not frequently done. Prior to the enactment of the Covered Bond Act, mortgage backed securitisations were made in Sweden using single purpose companies incorporated in for instance Jersey.

It could be argued that covered bonds under the Covered Bond Act (see below) resembles securitisation arrangements in the situation where an entity having the issue of covered bonds as its sole activity (however in all material aspects only for mortgage backed securities).

8. COVERED BONDS

8.1. General

The Act on Säkerställda Obligationer (2003:1223) (the “Covered Bond Act”) came into force in Sweden on 1 July 2004 and was latest amended in 2010. This legislation enables Swedish banks and credit market companies to issue covered bonds coupled with a priority right over the cover pool of the issuer. The basic underlying rule for the covered bonds system is that assets forming part of a cover pool, at all times, must exceed the liabilities of the issuing institution including liabilities under derivatives contracts entered into by the issuing institution with a derivatives counterparty for the purpose of balancing the financial terms of the assets comprised in the cover pool.

The issuing institution shall keep a register over the covered bonds, the cover pool and if applicable any derivatives contracts.
8.2. Bankruptcy of the Issuing Institution

In the event of bankruptcy of the issuing institution, both the bond holders and to derivatives counterparties have a priority right in the Rights of Priority Act (1970:979), to the assets in the cover pool registered in the register. The bond holders and derivatives counterparties also have a right of priority to assets held by the issuing institution at the time of the bankruptcy provided such assets derive from the cover pool or derivatives contract and to money, which after the declaration of bankruptcy, has been paid to the issuing institution pursuant to the terms of agreements regarding the assets in the cover pool and which shall be registered in the register. It should be stressed that the priority right is derived from the entry of an asset or a derivatives contract in the register of the cover pool.

8.3. Priority Rights

In the case of a bankruptcy or insolvency of the issuing institution the bond holders and derivatives counterparties have priority rights to the registered assets of the cover pool and, if registered, also to derivatives contracts. The bond holders and derivatives counterparties have the right to payments, in accordance with the terms and conditions of the relevant agreement, from the assets comprised by the right of priority provided such assets meet the criteria in the Covered Bond Act. In a bankruptcy situation the priority rights would be upheld to the extent the assets of the cover pool suffice to meet the obligations of the bond holders and derivatives counterparties. A party not having recovered all of its claims against the cover pool is under general Swedish law allowed to file the remainder of its claim as a non-prioritised claim, non-preferential claim in the bankruptcy of the issuing institution.

8.4. Transfer of the Cover Pool in Case of Insolvency

The cover pool is not a legal entity and as such cannot be put into bankruptcy. The bankruptcy situation which can become relevant is the bankruptcy of the issuing institution.

Should the bankruptcy receiver during his administration find that the cover pool will not suffice the cover pool shall be handled according to general Swedish principles in bankruptcy. Then the continuous payments will cease and the cover pool will no longer be kept separate and will instead be part of the bankruptcy estate and will be wound up by the receiver. Bond holders and derivative counterparties who have already received payment according to the terms of their respective agreements will have no obligation to repay any amounts to the estate.

In this situation the cover pool will be a part of the bankruptcy estate of the issuing institution. In such a case priority rights would be upheld to the extent the assets of the cover pool suffice to meet the obligations of the bond holders and derivatives counterparties.
A party not having recovered all of its claims against the cover pool is under general Swedish law allowed to file the remainder of its claim as a non-preferential claim in the bankruptcy of the issuing institution.

There is no obligation under Swedish law for the issuing institution to transfer the cover pool to a third party in the event of insolvency/bankruptcy of the issuing institution.
L. NATIONAL REPORT ENGLAND

SUMMARY

1. Substantive Law

According to English substantive law, an assignment (whether legal or equitable) is generally effective in relation to third parties without further requirement. However, priorities between competing assignments are determined by whoever of the competing assignees gives notice to the debtor first, subject to whether or not a subsequent assignee had actual or constructive knowledge of a prior assignment (the rule in Dearle v Hall). Further, in so far as a registration requirement exists (eg in the case of an assignment by a UK company of book debts by way of a charge or mortgage) such registration is required to make the assignment effective in relation to the company's liquidator or other (secured) creditors.

2. Conflict of Laws

English choice of law rules relating to assignments are not easy to determine due to a lack of (modern) case law and diverging views often influenced by practical considerations.

There was a strong tendency following the decision in Raiffeisen to characterise the efficacy of an assignment vis-à-vis third parties as being contractual in nature and therewith falling within Article 12(2) Rome Convention. This approach has been called into question by Articles 14 and 27 Rome I.

Although the traditional English approach is to apply the lex situs rule to proprietary issues, this rule has been strongly eroded with respect to intangibles. Although there is little agreement on the subject, there appears to be a prevailing view which applies different choice of law rules to different proprietary issues. For example, there is a strong view which applies the law of the underlying debt to the question which of a number of competing assignments takes priority, whereas the lex situs is preferred in relation to the question whether an attachment may trump an (otherwise effective) assignment. The effect of an assignment in the insolvency of the assignor is likely to be determined by Article 14(1) Rome I and the lex concursus.

Although it is acknowledged that more complex assignments of bulk debt may raise their own problems, there is a strong view that no special rules should apply, and that the law governing the assigned debts is an appropriate law to govern the question of priority and perfection.

502 Prepared by Herbert Smith LLP (Pamela Kiesselbach, Dorothy Livingston, Adam Johnson).
<table>
<thead>
<tr>
<th>Statute</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law of Property Act 1925</td>
<td><strong>s136 - Legal assignments of things in action:</strong></td>
</tr>
<tr>
<td></td>
<td>(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—</td>
</tr>
<tr>
<td></td>
<td>(a) the legal right to such debt or thing in action;</td>
</tr>
<tr>
<td></td>
<td>(b) all legal and other remedies for the same; and</td>
</tr>
<tr>
<td></td>
<td>(c) the power to give a good discharge for the same without the concurrence of the assignor:</td>
</tr>
<tr>
<td></td>
<td>Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—</td>
</tr>
<tr>
<td></td>
<td>(a) that the assignment is disputed by the assignor or any person claiming under him; or</td>
</tr>
<tr>
<td></td>
<td>(b) of any other opposing or conflicting claims to such debt or thing in action;</td>
</tr>
<tr>
<td></td>
<td>he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act, 1925.</td>
</tr>
<tr>
<td></td>
<td>[...]</td>
</tr>
<tr>
<td>Companies Act 2006</td>
<td><strong>s860 - Charges created by a company:</strong></td>
</tr>
<tr>
<td></td>
<td>A company that creates a charge to which this section applies must deliver the prescribed particulars of the charge, together with the instrument (if any) by which the charge is created or evidenced, to the registrar for registration before the end of the period allowed for registration.</td>
</tr>
<tr>
<td></td>
<td>[...]</td>
</tr>
<tr>
<td></td>
<td>This section applies to the following charges—</td>
</tr>
<tr>
<td></td>
<td>(a) a charge on land or any interest in land, other than a charge for any rent or other periodical sum issuing out of land,</td>
</tr>
<tr>
<td></td>
<td>(b) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale,</td>
</tr>
<tr>
<td></td>
<td>(c) a charge for the purposes of securing any issue of debentures,</td>
</tr>
<tr>
<td></td>
<td>(d) a charge on uncalled share capital of the company,</td>
</tr>
</tbody>
</table>
(e) a charge on calls made but not paid,
(f) a charge on book debts of the company,
(g) a floating charge on the company's property or undertaking,
(h) a charge on a ship or aircraft, or any share in a ship,
(i) a charge on goodwill or on any intellectual property.

s874 - Consequence of failure to register charges created by a company:

(1) If a company creates a charge to which section 860 applies, the charge is void (so far as any security on the company's property or undertaking is conferred by it) against—

(a) a liquidator of the company,
(b) an administrator of the company, and
(c) a creditor of the company,

unless that section is complied with.

[...]

Financial Collateral Arrangements (No 2) Regulations 2003

Reg. 4.4 - Certain legislation requiring formalities not to apply to financial collateral arrangements:

[...]

(4) [Sections 860 (charges created by a company) and 874 (consequence of failure to register charges created by a company) of the Companies Act 2006]¹ shall not apply [(if they would otherwise do so)]² in relation to a security financial collateral arrangement or any charge created or otherwise arising under a security financial collateral arrangement [ or, in Scotland, to (sic) relation to any charge created or arising under a financial collateral arrangement]

[...]

Insolvency Act 1986

s238 - Transactions at an undervalue (England and Wales):

(1) This section applies in the case of a company where—

(a) the company enters administration, or
(b) the company goes into liquidation;

and “the office-holder” means the administrator or the liquidator, as the case may be.

(2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make
such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and

(b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

s239 - Preferences (England and Wales):

(1) This section applies as does section 238.

(2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

(4) For the purposes of this section and section 241, a company gives a preference to a person if—

(a) that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities, and

(b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

(5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).

(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).

(7) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.
### TABLE OF CASE LAW

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Case Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dearle v Hall [1828] 3 Russ 1</td>
<td>Where there are two competing assignments, the question which assignment takes priority is determined by which assignee gives notice first to the debtor, provided that where the later assignee gives notice first, he has no knowledge of the earlier assignment.</td>
</tr>
<tr>
<td>Le Feuvre v Sullivan [1855] 10 Moo.P.C.1</td>
<td>Applying English law (as either the lex situs or the law governing the assigned insurance policy), the question whether a later assignment of an insurance policy (governed by English law and payable in England) took priority over an earlier pledge depended upon whether the later assignee had taken the assignment for valuable consideration and without notice of the earlier pledge.</td>
</tr>
<tr>
<td>Re Queensland Mercantile and Agency Co [1891] 1 Ch 536 Ch D</td>
<td>Where uncalled share capital payable by Scottish shareholders of an Australian company is first assigned by the company and later attached through the Scottish courts, Scottish law determines that the later attachment takes priority, as equivalent to an assignment with notice, over the earlier assignment which was not notified to the shareholders.</td>
</tr>
<tr>
<td>Re Maudslay, Sons &amp; Field [1900] 1 Ch.</td>
<td>A debt owed by a French firm must be treated as situated in France and subject to French law which did not recognise a prior assignment of the debt under English law (eg for lack of a formal notice required under French law); and consequently a later attachment of the debt through the French courts which alone was recognised by French law prevailed over the English assignee's claims.</td>
</tr>
<tr>
<td>Kelly v Sellwyn [1905] 2 Ch 117 Ch D</td>
<td>In the case of competing assignments of an English testamentary trust, the question of priority was to be determined in accordance with English law as the trust fund was an English one, set up by the testator with English law in mind as the law of the court that would administer the fund.</td>
</tr>
<tr>
<td>Re City Life Assurance Co Ltd [1926] Ch 191</td>
<td>Notice to the debtor is not required to make an assignment complete as between the assignee and the assignor or the assignor's trustee in bankruptcy.</td>
</tr>
</tbody>
</table>
Avoidance rules contained in English insolvency law will be applied to a foreign transaction provided the party against whom avoidance is sought is sufficiently connected with England for it to be just and proper to make an order avoiding the transaction. One of the factors to be taken into account will be whether under any relevant foreign law the party acquired a title free of any claims even if the insolvent had been adjudged bankrupt or wound up locally.

The question whether an earlier assignment was effective in relation to a third party seeking a subsequent attachment of the assigned debt was contractual in nature and was therefore governed by Article 12(2) Rome Convention. The relevant issue was what steps, by way of notice or otherwise, were required to be taken to make an assignment effective without differentiating between effectiveness as between assignee, assignor and debtor on the one hand and in relation to third parties on the other hand.

The first part of this study (Part 1) will look at the conditions under English law under which an assignment can be invoked against third parties other than the debtor, third parties being contractual or tortious creditors of the assignor, competing assignees, an assignor’s administrator in insolvency and “anybody else who relies on the presence of wealth”; in short the aspects which are generally referred to as “proprietary effects or aspects” of an assignment. The second part of the study (Part 2) will then turn to the English conflict of law rules which apply to various proprietary issues.
1. SUBSTANTIVE LAW ISSUES

English law distinguishes between contractual and proprietary aspects of an assignment. It is generally accepted that an assignment involves a transfer of property in the assigned debt (also called a “chose in action”).

Further, English law distinguishes between a legal and an equitable assignment. E.g. English courts may recognise an equitable assignment where not all elements of a legal assignment (see below) are fulfilled or where there is an agreement to legally assign a chose in action. Both assignments are considered to transfer ownership, i.e., either legal or equitable (or beneficial) ownership in the assigned debt, and may be effective vis-à-vis third parties. The nature of the assignment as being either legal or equitable will generally make little difference to the efficacy of the assignment in relation to third parties.

A legal assignment of a debt requires the assignment to be (a) in writing, (b) for the whole debt, (c) absolute (i.e., not by way of security) and (d) to be notified to the debtor (s 136 Law of Property Act 1925). The notice to the debtor needs to be in writing. However, no further formal requirements attach to the notice and the notice may be by way of a written demand sent by the assignee to the debtor or may be contained in the document which constitutes the assignment itself.

Only in the case of a legal assignment may the assignee sue the debtor directly for payment of the debt as if he were the original creditor. Where one of the requirements under s 136 is missing the assignment may take effect in equity and the assignee needs to join the assignor if he wishes to pursue the debtor (i.e., the assignment does not take full “legal” effect). Put differently: in the case of an equitable assignment the legal title remains with the assignor and the assignee only acquires equitable (or beneficial ownership). E.g. in the case where the debtor is not notified the assignor will collect in the debt and hold the proceeds on behalf of the assignee. Also, the debtor can only discharge the debt by paying to the assignor.

503 Cf Fitzroy v Cave [1905] 2KB 364 (CA): “Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods” (at 373). Also: Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1WLR 896 at 915; Generally with many case references: Greg Tolhurst, The assignment of contractual rights, 2006, 3.19 to 3.27; Mark Moshinsky, The Assignment of Debts in the Conflicts of Law, LQR 1992, 591 at 593.


505 Chitty on Contracts, 19-016.

506 There are differing views as to whether the requirement to join the assignor in the case of an equitable assignment is a matter of procedure or substance. For procedure: Tolhurst, 3.26 and 4.08; Moshinsky, 591 at 619. For substance: Dicey, Morris & Collins, The Conflict of Laws, 2nd Volume, 14th Edition, 7-012 (with reference to authorities cited by either of the views expressed); Cheshire, North & Fawcett, Private International Law, 14th Edition, p. 1235.
Although relevant case law is not always entirely clear on the issue, the modern view appears to be that notice (to the debtor) is not required to make an (equitable) assignment effective against third parties. Eg an equitable assignment may be considered to be “absolute and complete” and remove a debt from an (insolvent) assignor’s assets despite the lack of notice (to the debtor). As indicated above the lack of notice will mean that the assignment can only be equitable and not legal in nature, and that the debtor may continue to discharge his debt by making payment to the assignor. But this does not mean that the assignment is not effective vis-à-vis third parties. In other words, notification is not required to “perfect” an assignment.

The question whether a subsequent assignee or chargee needs to acknowledge the (beneficial) rights of a previous assignee or chargee (who has not given notice to the debtor) will depend largely upon whether the subsequent assignee or chargee had (actual or constructive) knowledge of the previous assignment/charge. Such knowledge can either be brought about by way of registration (where available), and registration will "perfect" the right vis-à-vis the world (insofar as the relevant third party could be reasonably expected to search the register), or by notice to or knowledge by particular third parties (however this may be brought about). In other words: where an assignee takes an assignment of a debt without actual or constructive knowledge of a pre-existing equitable assignment, the subsequent assignment will prevail provided the subsequent assignee gives notice to the debtor first.

It follows therefore that notice to the debtor will impact upon the question which of a number of competing assignees has priority in relation to the assigned debt. Ie whichever assignee gives notice to the debtor first will rank first and trump any other (prior or subsequent) assignee who has not yet given notice or gives notice subsequently provided that the assignee giving notice first did not know of the prior assignment at the time he took assignment of the debt. Notice as a priority rule is therefore only of relevance where there is no registration requirement (see

---

507 Re City Life Assurance Co Ltd [1926] Ch 191; Tolhurst, 4.15 with reference to further case law; A different view is taken by Moshinsky, 591 at 616, 617 who considers notice to the debtor and/or registration to be required to “perfect” the assignment and to make the assignment binding upon third parties, and in particular upon subsequent assignees.

508 Tolhurst, 4.19; see however: Roy Goode, Commercial Law, 4th Edition, 2009, p. 695 who refers to notice to the debtor as a "special mode of perfection" – the terminology is not used consistently.


510 Goode, Commercial Law, op.cit., p. 690.

511 Known as the rule in Dearle v Hall (1828) 3 Russ 1, at 22, 24, 38; see Goode, Commercial Law, op.cit., p. 695 on the rule and for criticism of the rule; see also Chitty on Contracts, 19-068.
below) and potential subsequent assignees or chargees have no (constructive) knowledge of previous assignments/charges.

Consequently, the notice requirement has a dual purpose, ie to protect the debtor as he may discharge the debt by paying to whichever assignee notifies him first and as one factor which will determine which of a number of competing assignees has priority.

Where companies resident in England assign (both future and existing) debts as security by way of a charge or mortgage (actual or constructive) knowledge of third parties may be achieved by registering the charge/mortgage with the Registrar of Companies in accordance with s 860(1) Companies Act 2006. Registration of a charge/mortgage over (future and existing) book debts will also ensure that the charge/mortgage is effective vis-à-vis the company’s other (secured) creditors and/or liquidator in the case of insolvency (s 874(1) Companies Act 2006). In other words, in the absence of registration the charge/mortgage (ie assignment by way of security) will not be effective in relation to the company’s "creditors" (ie any subsequent chargee or creditor seeking an attachment order\(^{512}\)) or in the company’s insolvency, regardless of whether notice of the assignment was given to the debtor and regardless of whether any subsequent chargee happened to have actual notice of the previous (unregistered) charge.\(^{513}\)

This registration requirement applies (in relation to English companies) regardless of where the debts are situated, ie will also apply to debts due from debtors outside the UK. It is, however, noteworthy in this context that an outright assignment of debts (ie not by way of security, eg in the context of non-recourse factoring) is not subject to a registration requirement. Nor is the assignment or charge of investment securities or other financial collateral subject to the registration requirement under s 860 Companies Act 2006, other than in the case of a floating charge (s 860(7)(g)). However, as soon as the floating charge crystallises and becomes perfected by possession or control, the registration requirement ceases to apply.\(^{514}\)

These same registration requirements apply to overseas companies where the overseas company has a UK establishment which it has registered in accordance with the Overseas Companies Regulations 2009 (SI 2009/1801) and the charge relates to property (ie debts) situated in the UK. The relevant rules (which are identical to the rules applicable to UK companies) can be found in the Overseas Companies Acts 2006.

\(^{512}\) See Goode, Commercial Law, op.cit., p. 710 on the correct reading of "creditor": "This limitation on the meaning of "creditor" is consistent with the continued enforceability of the charge against the company, which would be meaningless if the charge were open to attack by any "creditor" prior to the company’s insolvency.

\(^{513}\) Goode, Commercial Law, op.cit., p. 711.

\(^{514}\) Reg. 4(4) Financial Collateral Arrangements (No 2) Regulations 2003; see below under section 5 for further detail.
Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI 2009/1917). However, it should be noted that the UK government is currently planning to abolish this registration requirement in relation to overseas companies with effect from 1 October 2011.

English law also recognises the assignment (absolutely or by way of charge) of future debts, although such an assignment will not be fully "perfected" before the debt has come into existence. Such an assignment is seen as an agreement to assign, and upon the debt coming into existence the assignment will automatically take effect and the assignee will obtain an immediate (proprietary) interest in the debt. 515 The assignor never takes full beneficial interest of the debt (not even for a "split second") as the assignment binds the debt itself as soon as it comes into existence; 516 this can be relevant on the insolvency of the assignor when determining whether a (future) debt falls within the insolvent's estate.

Although considered to be an "agreement to assign", the assignment of a future debt is generally seen to create a "higher" interest in the future debt (prior to the debt coming into existence) than a mere contractual interest. 517 In other words, the assignee will be considered as a "secured creditor" with quasi-proprietary rights to the as yet non-existent debt.

As already indicated above a differentiation is made in English law between the outright transfer of a debt and the transfer of a debt by way of security either by way of a mortgage (which provides for an absolute transfer coupled with a right of redemption) or a charge (which is considered to be an incomplete “equitable” assignment only). It is questionable how far these distinctions impact upon the question which choice of law rule should apply to (the proprietary aspects of) assignments. It is suggested in legal writing that none of the distinctions between outright assignments and assignments by way of security either by way of a mortgage or by way of a charge should lead to different choice of law rules. 518

2. CONFLICT OF LAWS ANALYSIS

This part of the study will look at the current English choice of law rules which govern "proprietary effects or aspects" of an assignment with specific focus on certain financial transactions which involve assignments (eg securitisations and

515 Tolhurst, 4.30 et seq with reference to Palette Shoes Pty Ltd v Krohn (1937) 58 CLR 1; Chitty on Contracts, 19-032.
516 Tolhurst, 4.32 with reference to Re Lind [1915] 2 Ch 345 at 360.
517 Re Lind [1915] 2 Ch 345 at 357,358, 365 and 373, 374; critical but acknowledging that this is settled law: Tolhurst, 4.33.
factoring). The study will approach this question in the following stages, i.e. by asking

- which aspects are considered to be “proprietary” under English law, i.e. arguably outside the scope of the current Article 14 and consequently subject to English common law conflict of law rules; and

- what are the English common law rules in relation to the “proprietary” scenarios identified?

There is considerable uncertainty in English law as to both the delineation between proprietary and contractual aspects of an assignment and the common law choice of law rules which apply to assignments in situations not covered by Article 14. This uncertainty is partly due to the paucity of English case law in this area and partly to differing views expressed in English literature. There is a single leading decision of the Court of Appeal in Raiffeisen Zentralbank Oesterreich AG v Five Star Trading LLC [2001] QB 825 which is dealt with in detail below under para 2.1.4. and a second Court of Appeal decision in Macmillan Inc v Bishopsgate Investment Trust Plc (No 3) [1996] 1WLR 387 (CA) which considered the choice of law rules in relation to the transfer of shares (which fall outside the scope of this report as transfers of shares are generally considered to fall outside the scope of Article 14). These appear to be the only cases which have dealt with choice of law rules and assignments since the Rome Convention came into force. Older case law is either inconclusive (as it gives insufficient reasons for the application of one law over another519) or not clear enough520 to allow for the formulation of authoritative choice of law rules. It is therefore uncertain and open to speculation what common law rules English courts are likely to apply to different aspects of an assignment and whether rules should differ depending upon the subject matter and context of the assignment.521

2.1. The “Proprietary” Aspects of an Assignment

Whether or not a question arising in relation to an assignment is proprietary in nature and falls outside the current scope of Article 14 raises problems of characterisation or classification. The following sets out the English law view as to which aspects are or are not covered by Article 14 and are proprietary aspects governed by English common law conflict of law rules. There are a number of questions which arise in relation to an assignment which may be considered to be

519 Le Feuvre v Sullivan (1855) 10 Moo.P.C.1.
520 Eg Re Queensland Mercantile and Agency Co [1891] 1 Ch 536 Ch D, affirmed [1892] 1 Ch. 219 CA; Kelly v Selliwn [1905] 2 Ch 117 Ch D.
521 See Janeen Carruthers, The Transfer of Property in the Conflict of Laws, 2005, 6.17 and the reference in FN 24 to an unattributed remark made at the beginning of the last century: "There are various views as to what law governs the voluntary assignment of a Chose in Action ... The cases on the subject are singularly inconclusive".
“proprietary” in nature (and as mentioned above views often diverge on the subject).

2.1.1. Assignment of a Contractual Debt

The initial question raised by English law is whether and to what extent assignments of intangibles raise proprietary issues at all. Eg where the underlying debt is contractual in nature, it is argued that the question who is entitled to pursue the debtor (both vis-à-vis the debtor and any competing third parties) “is a matter for the law which governs all the other aspects of the contract which created the obligation which the debtor owes”, ie is fundamentally contractual rather than proprietary in nature and is therefore governed by the law under which the assigned debt was created or otherwise arises. This would leave little scope for proprietary aspects.

2.1.2. Transfer of the Debt out of the Assignor’s Property

However, it is generally accepted that the English domestic law on assignment differentiates between the contract of assignment and the transfer of the debt in accordance with the underlying contract of assignment; ie the difference between the assignor merely promising to assign the debt and actually effecting the assignment (although a promise to assign may already encompass an equitable assignment). It is argued that one “proprietary” question is whether the debt has been validly transferred out of the assignor’s property. Post Rome I this question would now appear to be governed as between the assignor and the assignee by Article 14(1) Rome 1 (as clarified by Recital 38), ie by the law governing the assignment.

Pre Rome I, views were expressed in English legal literature that the question whether a debt has been transferred out of the assignor’s property was not covered by Article 12(1) Rome Convention, but should be governed either by the law of the lex situs of the debt as the traditional rule or by the law of the assignor’s place of business (in particular in the case of bulk transfers) as the place where registration requirements are likely to arise. The main argument advanced against the application of Article 12(1) was that proprietary issues should not be subject to

---

523 Dicey, Morris & Collins, op.cit., 24-062.
524 Cf Brandt’s Sons & Co v Dunlop Rubber Co [1905] AC 454; Re McArdle [1951] Ch 669 CA.
525 Cf Fitzroy v Cave [1905] 2KB 364 (CA): “Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods” (at 373).
526 This is the conclusion drawn by Trevor Hartley, Choice of Law regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation, ICLQ [2011], pp. 29, 40.
party autonomy as this would otherwise allow parties to escape legal requirements that existed for the protection of other creditors. It is doubtful that this view can be upheld in light of the revised wording in Article 14(1) and the clarification in Recital 38 that “Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee ...”.

However, this is not uncontroversial and there are suggestions that there is no difference between Article 12 Rome Convention and Article 14 Rome I in this respect and that neither cover the proprietary effects of an assignment as between assignor and assignee, except to the extent to which the assignment affects the debtor. It is unclear how this suggestion can be squared with Recital 38 and it is suggested that the better view is that Article 14(1) covers the question of proprietary transfer out of the assignor's property.

2.1.3. Insolvency – Liquidator/Creditors Competing with Assignee

In the case of the insolvency of the assignor, there will be a question whether or not a debt has been validly transferred out of the assignor’s estate, ie whether the transfer is valid as between the assignee and the liquidator and/or the creditors of the assignor. It has been suggested that a differentiation needs to be made between the case where the liquidator is simply “stepping into the shoes” of the assignor, ie is not asserting any greater rights than those to which the assignor was entitled (in which case the same rule applies as set out above under 2.1.2), or whether the liquidator is claiming greater rights, eg is claiming that he can override transactions carried out by the assignor (which is a question not currently covered by Article 14 Rome I). The reliance upon preference rules and rules relating to transactions at an undervalue will fall within the second category.

2.1.4. Attachments - Execution Creditors Competing with an Assignee or with one Another

Creditors of the assignor may attempt to attach a debt either under English law (eg third party debt orders formerly known as garnishee orders) or foreign law attachment rules and a question may arise whether the assignor’s execution creditors or whether a previous (or subsequent) assignee has a better right to the debt, ie whether the transfer of the debt under the assignment is valid as against the execution creditor as third party.

This is the scenario which arose under the leading English case in this area (Raiffeisen Zentralbank Oesterreich AG v Five Star Trading LLC [2001] EWCA Civ 528 Goode, Commercial Law, op.cit., p. 1240.

529 Hartley, op. cit., pp. 29, 38; the same differentiation seems to be made by Bridge, op. cit., pp. 688; see also Richard Plender, Michael Wilderspin, The European Private International Law of Obligations, 3rd Edition, 2009, 13-038 who also suggest that the first scenario (“stepping into the shoes”) might have been covered by Article 12(1) Rome Convention.
68) which was decided under Article 12 of the Rome Convention. In that case the owner of a ship (Five Star) obtained a loan from a bank (Raiffeisen Zentralbank (RZB)) which was secured eg by an assignment of Five Star’s interest in an insurance policy with French insurers concerning the ship. Both the insurance policy and the assignment were governed by English law. The insurers were notified of the assignment and the method of notification was compliant with English but not French law. The ship was involved in a collision resulting in claims being brought by cargo owners against Five Star in Malaysia. The cargo owners sought and obtained a provisional attachment order in the French courts of the insurance proceeds “owed to the debtor” (ie Five Star) out of which they were hoping to satisfy any judgment obtained against Five Star. RZB brought proceedings in England against Five Star and the insurers (to which the cargo owners were joined) seeking a declaration that it (rather than the cargo owners or Five Star) was entitled to the proceeds of the insurance as the policy had been validly assigned to RZB prior to the attachment order. The cargo owners took the view that the question who had “title” to the policy was proprietary in nature and was therefore (in accordance with English common law) subject to the lex situs (law of the place where the property is situated), ie French law which required a more formal notice to allow for the assignment to take effect vis-à-vis third parties.

The Court of Appeal took the view that the question at the heart of the dispute was who was entitled to claim against the insurers, the assignor or the assignee, and that this question was contractual rather than proprietary in nature and was therefore governed by Article 12(2) of the Rome Convention. The characterisation of the issue as being one relating to “title” was considered by the court to be “artificial”. The court pointed out that it was “not necessarily appropriate to attempt an analogy between physical assets and intangible rights” resulting in the application of the lex situs rule. The question was one of the validity of the assignment, ie of which steps needed to be taken to validly assign a debt and this question fell squarely within Article 12(2) Rome Convention. The court did not differentiate between validity of the assignment as between assignee, assignor and debtor on the one hand and in relation to third parties on the other hand; the debt was either validly assigned, ie owned by the assignee or not.

However, the court did identify a potential second issue, ie whether an assignment valid under the relevant law governing the debt might be overridden by a subsequent involuntary assignment in the form of a (French) attachment. The question that this issue raises is what law should decide whether the attachment overrides the (otherwise effective) assignment. Although this issue did not have to be decided by the court as it was not raised by the parties, the court indicated obiter that this issue might be “proprietary” in nature and might be governed by

---

530 Presumably because under French law the attachment could only take effect in relation to a debt that was still owed to Five Star and did not override an assignment valid under the law governing the debt.
the lex situs rule in accordance with English common law although the court also indicated that this may lead to problematic results. Another suggestion is that in this case the application of the law of the debt may lead to the fairest outcome, ensuring that the assignee is not deprived of his right and the debtor does not have to pay twice.\footnote{Hartley, \textit{op. cit.}, pp. 29,47.}

There is also a question whether the line drawn by the court in Raiffeisen between contractual and proprietary issues still holds in light of the “new” Article 14 and the clarification in Article 27 that certain “proprietary” issues are not covered. Regrettably, there is no more recent case law which has re-assessed the matter, which has resulted in uncertainty as to what the English law position is likely to be in relation to the delineation between proprietary and contractual effects and, indeed, the choice of law rules applicable to the issues raised by a competition between an assignee and an execution creditor.\footnote{For a proprietary characterisation: Bridge, \textit{op.cit.}, p. 688; Hartley, \textit{op. cit.}, pp. 29, 47 (in line with \textit{Raiffeisen} only in relation to the second issue as identified in the case).}

A similar question of priority may arise where there are competing attachment orders aimed at the same debt made by courts in different countries.

\textbf{2.1.5. Competing Assignments}

Where a debt is assigned twice, the question is which assignment takes priority. This question only arises where both assignments are effective in accordance with the law(s) governing the respective assignments as stipulated by Article 14(1) and/or any national choice of law rules in relation to matters falling outside the scope of Rome I (eg capacity of natural persons). Where one of the "competing" assignments is void due to eg non-compliance with formal requirements or lack of capacity under the law applicable to it, the competing assignee can simply rely upon the failure of the other assignment and his assignment will prevail as a matter of default.\footnote{See for example \textit{Republica de Guatemala v Nunez} [1927]1 KB 669 where a subsequent assignment trumped a previous assignment as the previous assignment was considered invalid under the applicable law of the assignment which did not allow assignments to minors.}

Where there are two effective and therefore competing assignments the priority question is governed in relation to the debtor by Article 14(2) Rome I (ie who has the better claim against the debtor when pursuing the debtor), and in relation to the assignor by Article 14(1) Rome I (ie who has lost out and may bring a claim for breach of contract). However, the priority question as between the competing assignees would fall outside Article 14 Rome I.\footnote{Hartley, \textit{op. cit.}, pp. 29, 50; Bridge, \textit{op. cit.}, p. 688; see also Marcus Smith, \textit{The Law of Assignment}, [2007], 22.59.} Such a question may arise for example where a subsequent assignee raises the argument that he has obtained a
better title to the debt as he did not have knowledge of the first assignee's rights and the assignment to him has been fully "perfected" in accordance with the applicable national law. It is suggested that this and similar questions of priority could arise where both assignees pursue the debtor or request the assignor to pursue the debtor on their behalf and the debtor/assignor interpleads or where one assignee pursues the other assignee after payment has been made. It is further suggested that the most sensible law to govern the relationship between competing assignees is the law of the assigned debt as this is the common factor between the assignees.\textsuperscript{535}

A similar “proprietary” question arises in the case of a competition between an assignee and a party claiming the proceeds for the sale of goods supplied by him under an extended retention of title agreement.\textsuperscript{536}

2.2. "General" English Choice of Law Rules Relating to the Proprietary Aspects of an Assignment

The general English common law rule is that proprietary matters are governed by the lex situs.\textsuperscript{537} This rule was developed in relation to tangibles and it is argued in legal writings that, as a starting point even if this leads to unsatisfactory results, the same rule should apply to intangibles.\textsuperscript{538} However, there is also a strong view that this rule has been eroded in relation to intangibles, mainly in favour of the law governing the assigned debt.\textsuperscript{539}

2.2.1. The English "Lex Situs" Rule

A debt is generally considered to be located at the residence of the debtor as the place where it can be enforced.\textsuperscript{540} Where the debtor is a company, "residence" in this context must be equated with residence for the purpose of jurisdiction.\textsuperscript{541} Except where the Brussels Regulation (No 44/2001) on jurisdiction and the

\textsuperscript{535} Hartley, \textit{op. cit.}, pp. 29, 50.
\textsuperscript{536} Cf Goode, \textit{Commercial Law, op. cit.}, p. 1242; Moshinsky, \textit{op. cit.}, 591 at 612.
\textsuperscript{537} \textit{Glencore International AG v Metro Trading Inc} [2001] 1 Lloyd’s Rep. 284.
\textsuperscript{538} Cf Dicey, Morris & Collins, \textit{op.cit.}, 24-053; Cheshire, North & Fawcett, \textit{op.cit.}, p. 1226; Joanna Perkins, \textit{A Question of Priorities: Choice of Law and Proprietary Aspects of the Assignment of Debts}, LFMR 2008, pp. 238, 239; Goode, \textit{Commercial Law, op.cit.}, p. 1240 (although suggesting that a different rule should apply to bulk assignments of future and existing debts under factoring and invoice discounting arrangements).
\textsuperscript{539} Cf Philip Wood, \textit{Conflict of Laws and International Finance}, 2007, 14-085; see also for a strong preference for this rule: Cheshire, North & Fawcett, \textit{op.cit.}, p. 1228; Plender, Wilderspin, \textit{op. cit.}, 13-043; see also Carruthers, \textit{op.cit.}, 6.24 et seq. and 6.62 who is particularly critical of the lex situs rule.
\textsuperscript{540} \textit{New York Life Insurance Co v Public Trustee} [1924] 2 Ch 101 at 119 (CA); see also Cheshire, North & Fawcett, 1226 with multiple references to English case law; Dicey, Morris & Collins, 22-026; Wood, \textit{op.cit.}, 14-085.
recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation) applies, this means that the situs of a debt is wherever the company carries on business. But English courts also have jurisdiction over a company incorporated in England (regardless of whether it carries on business in England) which means that the situs may also be at the place of the company's incorporation.\(^{542}\)

Where the Brussels Regulation applies, a company's "domicile" is where it has its statutory seat, or its central administration or its principle place of business (Article 60(1) Brussels Regulation). In the UK, a company is domiciled for Brussels Regulation purposes where it has its seat; and it is deemed to have its seat both where it is incorporated and where it has its central management and control (Article 60(2) Brussels Regulation). However, where a company carries on business in another Member State (ie would be considered "resident" but not "domiciled" there) and the debt is payable in that Member State, the debt would be considered situated there in light of that Member State's jurisdiction under Article 5(1) Brussels Regulation.\(^{543}\)

It is also generally acknowledged\(^{544}\) that the determination of a situs in the case of debts is often not as straightforward as in the case of tangibles which have an obvious physical location. Ie only an artificial situs or quasi-situs can often be attributed to a debt and there will be cases where it will be difficult to identify a situs, eg where the debtor has more than one residence or the debt is payable or enforceable in a place other than the debtor's place of residence.\(^{545}\) Broadly, the rules in this case appear to be that where a debtor has more than one residence and the debt is stipulated to be payable at one of those places, that will be the situs of the debt.\(^{546}\) Where there is no such stipulation the debt will be situated at that place of residence where the debt is payable in the normal course of business.\(^{547}\)

A different situs applies to bearer securities which are considered to be located where the bearer certificate itself is found\(^{548}\) and to letters of credit where the paying bank’s obligation is considered to be located where it is payable against documents\(^{549}\); whereas dematerialised or immobilised book-entry investments are

\(^{543}\) Dicey, Morris & Collins, 22-032.
\(^{544}\) See for example Wood, op.cit., 14-034; Dicey, Morris & Collins, 22-025.
\(^{545}\) Cheshire, North & Fawcett, 1226.
\(^{546}\) New York Life Insurance Co v Public Trustee [1924] 2 Ch 101 (CA).
\(^{548}\) A.-G. v Bouwens (1838) 4 M&W 171.
considered to be located for the purposes of perfection and priority in the jurisdiction where the destination account is located.\textsuperscript{550}

As mentioned above, although the lex situs rule is the general English conflict of law rule which determines proprietary issues this rule is not necessarily considered appropriate/applicable in relation to (all) proprietary issues arising in relation to choses in action. The following seeks to determine which English choice of law rules apply in relation to the proprietary issues identified above.

\textbf{2.2.2. Insolvency – Liquidator/Creditors Competing with Assignee}

Insolvencies commenced under the Insolvency Act 1986 are governed by English law, including English choice of law rules. This is subject to the EU Regulation on insolvency proceedings (No 1346/2000) (Insolvency Regulation) which contains certain jurisdiction and choice of law rules for insolvency proceedings commenced in an EU Member State (excluding Denmark) in relation to an insolvent debtor which has its centre of main interests (COMI) in an EU Member State (excluding Denmark).

In general and in accordance with the "principle of universalism" which underpins English insolvency law, insolvency proceedings commenced in England will encompass all of the insolvent debtor's assets and affect all creditors, wherever located. This principle is also applied by the Insolvency Regulation.

\textbf{2.2.2.1. English Conflict of Law Rules}

The general English conflict of law rule relating to proprietary rights in an insolvency is that the lex situs determines whether an asset has been properly charged or transferred out of the insolvent debtor's property (or if the liquidator has a perfected title to an asset). Eg where a debt has been properly attached under the rules of its lex situs this will take effect in the insolvency.\textsuperscript{551} However, it is suggested that this rule has been displaced (in relation to voluntary assignments) by Article 14(1) Rome I (and Recital 38) which provides that the proprietary effect of an assignment as between the assignor (and by extension his liquidator) and the assignee is to be determined by the law governing the assignment (and not the lex situs) (see above).

The second question identified above is whether the insolvency may render an (otherwise effective) assignment or charge void or voidable (eg under rules relating to preferences or transactions at an undervalue). The general English rule is that this question is in principle governed by the law of the insolvency proceedings (the lex concursus), ie by ss 238 and 239 Insolvency Act 1986. However, English courts,

\textsuperscript{550} Wood, \textit{op.cit.}, 14-094; see also Dicey, Morris & Collins, \textit{op.cit.}, 22-043.

\textsuperscript{551} This was the case in \textit{Galbraith v Grimshaw} [1910] AC 508 which related to a Scottish insolvency and the attachment of a debt situated in England.
when deciding whether to apply avoidance rules in relation to a foreign transaction will take into account whether the party against whom the avoidance is being sought is "sufficiently connected" with England for it to be just and proper to make an order avoiding the transaction.\textsuperscript{552} Whether such a connection exists will be assessed taking into account all circumstances, including whether under any relevant foreign law the party acquired a title free of any claims even if the company had been wound up under that foreign law.\textsuperscript{553} Consequently, in relation to voluntary assignments this question should be governed by Article 14(1) Rome I, ie the law governing the assignment.

\textbf{2.2.2.2. The EU Insolvency Regulation}

English conflict of law rules are displaced in an EU context by the Insolvency Regulation (in so far as the Insolvency Regulation applies). The Insolvency Regulation applies to insolvency proceedings commenced in an EU Member State (excluding Denmark) in relation to an insolvent debtor which has its centre of main interests (COMI) in the EU (excluding Denmark). The Insolvency Regulation does not apply to the insolvency of certain banks, insurers or mutual funds in relation to which there are corresponding directives.

\textbf{2.2.2.2.1. Article 5(1) – Third Parties' Rights In Rem Generally Protected}

The general conflict of law rule in Article 4 Insolvency Regulation provides that "the law applicable to insolvency proceedings and their effects" shall be the law of the state of the opening proceedings (ie the lex concursus). However, there are a number of exceptions to the general rule, including relating to the effect of insolvency proceedings on third parties' rights in rem in respect of "tangible and intangible, moveable and immoveable assets" situated in another EU Member State (Article 5 Insolvency Regulation).

Where the asset (eg debt) is situated outside the EU, the general rules of the lex concursus will apply (in accordance with Article 4) without the restrictions provided for in Article 5; ie in the case of English law, the rules set out above under para 3.2.(a) in relation to the "second question".

It is noteworthy in this context that the situs of a debt is determined under the Insolvency Regulation as being at the centre of main interest of the debtor (Article 2(g)) and that there is a rebuttable assumption that the COMI is at the place of the debtor's registered office (Article 3(1)). This is in turn subject to Recital 13 which states that the COMI should correspond to the "place where the debtor conducts the administration of his interests on a regular basis". This can lead to curious

\textsuperscript{552} Dicey, Morris & Collins, \textit{op.cit.}, 30-087; \textit{Re Paramount Airways Ltd (No 2)} [1993] Ch 223, 239-240 (CA); see also \textit{Banco Nacional de Cuba v Cosmos Trading Corp} [2000] 1 BCLC 813, 819-820 (CA).

\textsuperscript{553} \textit{Re Paramount Airways Ltd (No 2)} [1993] Ch 223 (CA).
results. By way of example, this would mean that where a debt is owed by a French branch of a Japanese bank, for the purposes of the Insolvency Regulation, the debt would be considered to be located in Japan and the effect of any EU located insolvency on the debt would be determined by the lex concursus without regard to Article 5 of the Insolvency Regulation. The relevant time for identifying the situs of the debt is the time of the opening of the insolvency proceedings (Article 5(1)).

Where the debt is situated in the EU, Article 5 Insolvency Regulation restricts the application of the relevant national rules of the lex concursus and provides that rights in rem shall not be affected by the opening of insolvency proceedings. This rule applies inter alia to proprietary rights created by the assigning or charging of debts. Article 5 also specifically covers floating charges (rights in rem in relation to "collections of indefinite assets as a whole which change from time to time").

Recital 25 of the Insolvency Regulation provides that whether or not such a right in rem exists will "normally" be determined by the lex situs of the asset in question. However, it is suggested that this assumption is trumped by Article 14(1) Rome I (as interpreted in light of Recital 38) Rome I which provides that the proprietary effect of a voluntary assignment as between the assignor (and by extension his liquidator) and the assignee is to be determined by the law governing the assignment (and not the lex situs).

However, if one follows the (minority) view that proprietary issues as between the assignor and assignee continue to fall outside Article 14(1) (see above), the Recital 25 preference for the lex situs rule is likely to apply coupled with the rules placing the situs of a debt at the third party debtor's COMI (Articles 2(g) and 3(1)) at the time of the opening of the insolvency proceedings. This would mean that the question whether and to what extent a party has rights in rem in relation to the insolvent's debts may be decided differently depending upon whether the insolvency is located in Europe (and falls under the Insolvency Regulation) or not. If one followed the (minority) view and were to apply the lex situs rule both in the context of non-European insolvencies (see above) and European Insolvencies, different laws could apply due to the different manner in which the situs of the debt is determined under English law compared to the Insolvency Regulation. The lex situs under English law (see above) would point towards the place where the debtor carries out its business, in particular if the debt is payable there (ie in the above example of the Japanese bank, France as the location of the branch which owes the debt) whereas the Insolvency Regulation points to the place of the third debtor's registered office (Japan in the example). This peculiar result is avoided by applying Article 14(1) Rome I to the issue regardless of where the insolvency takes place.

2.2.2.2. Article 5(4) – continued application of avoidance rules?

If one does come to the conclusion that a right in rem has been created under the applicable law, Article 5 does not preclude the application of the opening court's
bankruptcy rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors (Articles 5(4) and 4(2)(m)). This means that rules relating to the setting aside of an (otherwise effective) assignment as a preference or a transaction at an undervalue may still trump an assignment or charge. This qualification itself is however subject to Article 13 which bars interference pursuant to the opening court’s bankruptcy laws where the law governing the act (ie the assignment or charge) "does not allow any means of challenging the act in the relevant case", eg where the law governing the assignment would not consider the assignment to be a voidable preference or transaction at an undervalue. Which law governs the assignment is determined by the conflict of law rules of the lex concursus (which include, in the case of EU Member States Rome I).554

2.2.3. Attachments - Execution Creditors Competing with an Assignee or with one Another

One needs to look for the choice of law rule which was considered applicable prior to the Rome Convention and Raiffeisen, as post Raiffeisen it was arguable that Article 12(2) applied to the question whether and to what extent an assignment was effective in relation to a creditor seeking an attachment; an assumption which has become questionable in light of Articles 14 and 27 Rome I.

However, case law is sparse and older legal writings identifying common law rules do not have much to go on when determining which rule applies. The prevailing view appears to be that the lex situs of the debt determines whether an attachment is to be given priority over an earlier or later assignment.555 Reliance for this rule is placed upon Queensland Mercantile556 which related to the assignment and subsequent arrest of uncalled share capital owed by Scottish shareholders of a Queensland company. The competition arose between an assignment without notice having been given to the debtor shareholders and an arrest obtained from the Scottish courts (which was treated as an assignment with notice). Although the judgment is not entirely clear the decision appears to favour the lex situs of the debt, ie Scottish law, as determinative of the priority issue. Scottish law considered an assignment with notice (to the debtor), although made later, to take priority over an (earlier) assignment without notice (to the debtor). The law of the assignor’s domicile was expressly rejected as not being determinative of the issue.

---

554 Dicey, Morris & Collins, op.cit., 30-222.
555 Dicey & Morris, 11th Edition, Rule 124; Cheshire, North & Fawcett, op.cit., p. 1240 reiterates this view as being current; see however Wood, op.cit., 14-088 who interprets old common law rules as preferring the law of the assigned/attached debt; see also Carruthers, op.cit., 6.63 et seq. who suggests that the "proper law of the right" applies, "that is, in most cases, the law of the situs, being the place where the debt is enforceable."
556 Re Queensland Mercantile and Agency Co [1891] 1 Ch 536 Ch D, affirmed [1892] 1 Ch. 219 CA.
This rule seems to be in line with other old cases.\textsuperscript{557} Eg in Maudsley there was a competition between an English charge taken over the assets of an English company which included a French debt, and a subsequent French attachment order in relation to the French debt (ie a case very similar to the Raiffeisen case). The court referred to the lex situs rule and held that French law determined whether the charge or the attachment prevailed, and as French law required formal notification of the charge (which had not happened), the attachment prevailed in accordance with French law. However, query whether this case would have been decided differently today, as the question was strictly speaking not a question of priority but as to whether French law recognised the prior charge, which is, presumably, a question which now falls within Article 14(1) Rome I. Ie if the debt was validly charged and therefore transferred out of the chargor's assets, it was no longer available to be attached or the attachment would at least be subject to the charge; unless of course French law allowed the attachment to trump an (otherwise effective) charge (or assignment).

\textbf{2.2.4. Competing Assignments}

The same problem arises as with attachments: post the Rome Convention and Raiffeisen the predominant view appears to have been that the question of priority between competing assignments was pretty comprehensively covered by Article 12(2), at least where the assigned debt was contractual in nature.\textsuperscript{558} Again, one needs to start by looking to the rules that were considered to apply pre Rome Convention. When looking at older legal writings (pre-dating the Rome Convention and Raiffeisen) which set out the English (common law) conflict of law rules in relation to assignments, the prevailing view appears to have been that the question of priority was governed by the law applicable to the assigned debt;\textsuperscript{559} ie came to the same conclusion as under Raiffeisen, albeit applying an English common law rule. These older views claimed that this rule was in line with the relevant older case law referred to above under para 2; however falling short of saying that this case law was entirely clear and authoritative. Two of the cases referred to dealt with the question of priority in the case of competing assignments.

Le Feuvre, a decision of the Privy Council relating to competing assignments of an English insurance policy, is inconclusive as the application of English law could have been chosen either as the lex situs or the law applicable to the assigned debt and the decision did not make it entirely clear which rule was used to come to the result

\textsuperscript{557} \textit{Re Maudslay, Sons & Field} [1900] 1 Ch. 602 at 609; See also \textit{Rossano v Manufacturers Life Insurance Co} [1963] 2 QB 352; \textit{Power Curber v National Bank of Kuwait} [1981] 1 WLR 1233.

\textsuperscript{558} Dicey, Morris & Collins, \textit{op.cit.}, 24-058, 24-062 and 24-064.

\textsuperscript{559} Dicey & Morris, 11\textsuperscript{th} Edition, Rule 123; Cheshire & North, 11\textsuperscript{th} Edition, 541 – 549.
that English law applied to the question of priority. The assignor in that case was resident in Jersey. Kelly v Selwyn considered competing assignments of an English testamentary trust, the first assignment executed in New York and the second executed in England by an assignor domiciled in New York. Although the first assignment was considered to be valid under New York law, the issue of priority was considered to be governed by English law since the trust fund was an English one, set up by a testator with English law in mind as the law of the court that would administer the fund. Again there is no clear indication which choice of law rule was applied to arrive at this result, and the court may have applied English law either as the lex forum, or the lex situs or the law applicable to the trust, all of which coincided.

Modern literature (insofar as reliance is not placed on the characterisation of the issue as contractual in accordance with Raiffeisen) appears to be split on the issue. One view suggests that the lex situs rule should apply to this issue as the country of the debtor’s residence was the more likely place where third parties would make enquiries and searches as to any notice of a prior assignment. This view could arguably place equal reliance upon the cases referred to above in light of the fact that the courts in both cases could have arrived at their decision either based upon the law applicable to the debt or the lex situs. Another view favours the law applicable to the assigned/attached debt as this gives "the same answer for all parties and is the law to which parties would naturally look". However, there is also a suggestion that where the same assignor has assigned the same debt twice and both assignments are governed by the same law, that law may also apply to determine the priority between the competing assignees. Finally, in the case of assignments of bulk debt (see below) there is a suggestion that the law of the assignor’s place of business should apply as this is the place where any registration requirements will need to be complied with.

2.3. The Application of the Choice of Law Rules to More Complex Transactions

2.3.1. The Assignment of a Bundle of Debts, Including Future Debts

Assignments of bundles of (existing and future) debts have become increasingly important in the financial services industry, eg in the context of transactions such as securitisations and factoring or invoice discounting agreements. The same issues
arise in the case of security assignments of a bundle of existing and future debts (eg book debts) eg by creating a floating charge.

The non-proprietary aspects of such assignments are covered by Article 14(1) and (2) Rome I, eg the assignability of each individual debt will be governed by the law of the relevant debt. As there is no English case law in relation to bulk assignments which suggests that a different or special choice of law rule applies to the proprietary aspects of the bulk assignment (falling outside Article 14), the starting point remains that the “general” rules as set out above under section 3 apply.

There are suggestions that these rules lead to unworkable results as their application would mean that the question whether the assignee obtains good title to the individual debts vis-à-vis third parties would be governed by potentially multiple laws either based on the laws governing the individual underlying debts or the lex situs of the debts. Although it is appreciated in English legal writing that this may be “impracticable”, there is no clear indication which rule should apply in place of the general rule.

One suggestion is to look for a single law “with which the bundle of rights is most closely connected” and to use this law to determine the validity and (proprietary) effect of the assignment. Another view is that the law of the assignor’s habitual residence or place of business should apply. One of the main reasons given for the latter rule is that the assignor’s place of business is likely to be the place where any registration requirements will apply. However, under English law at least, registration requirements only apply in relation to security assignments and no registration is required in the case of outright assignments (eg in the case of factoring or securitisations). Also, the securitisation industry has indicated its opposition to a choice of law rule favouring the assignor’s place of business as being neither certain nor cost-effective, and has voiced a preference for the rule which applies the law of the underlying debts.

In the absence of English case law on the matter, it is unclear whether English courts are likely to apply the “general” common law rules or another rule. It is noteworthy in this context that Mance LJ highlighted in Raiffeisen the flexible approach that English courts should take when determining which choice of law rule should govern particular (novel) issues, ie that “the overall aim is to identify the most appropriate law to govern a particular issue” even if this meant formulating new rules.

---

565 Dicey, Morris & Collins, 24-068.
566 Dicey, Morris & Collins, 24-068.
567 Moshinsky, op. cit., 591 at 624.
568 See Perkins, op. cit., 238 at 242.
569 Ibid, at para 27.
2.3.2. The Assignment of Intermediated (Book-Entry) Securities or Investments

Complexities also arise where securities or other investments are held through one or more intermediaries and are held and dealt within centralised holding systems such as those operated by Euroclear and Clearstream. Transfers of such investments are paperless and are carried out by means of electronic debit and/or credit book-entries to securities accounts. Such transactions may often involve different tiers of intermediaries and accounts located in different jurisdictions resulting in complex questions of choice of law.

Unlike in the case of a "simple" transfer of shares or other securities there is no direct relationship between the issuer and the investor, and the transfer will not be evidenced by an entry in the issuer's register or by the physical possession of a certificate.

The English conflict of law rules relating to indirect holding systems and the questions arising in relation to the nature of the rights of various parties (eg account holders, different tier intermediaries and third parties) to the securities have been described as being largely undeveloped. There seems to be agreement that the lex situs rule applies to these (proprietary) questions, but the difficulty has been to determine the situs of the securities. Although not entirely clear, the traditional approach appears to have been to "look through" the tiers of intermediaries to the law of the place of incorporation of the issuer, or the place of the issuer's register or the location of the actual underlying securities certificates.

This has been acknowledged as being unsatisfactory and as leading to a "distortion" of the lex situs rule, and the more modern approach suggests that one should look to the law of the place where the destination account is located, rather than to the law of the place where the issuer is situated or where any global bearer bond is being held, when determining the perfection and priority of assignments. This is known as the "place of the relevant intermediary approach" (PRIMA). PRIMA selects the law of the location of the intermediary on whose books the interest in dispute is credited as the applicable law for determining proprietary issues.

The same PRIMA approach is taken by the two EU Directives which provide for special choice of law rules in this area, ie Directives 98/26/EC (Article 9(2)) and 2002 /47/EC (Article 9). These Directives have been implemented into English law.

---

570 Goode, Commercial Law, op.cit., p. 1242.
572 Wood, op.cit., 14-094.
by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 and 
the Financial Collateral Arrangements (No 2) Regulations 2003 respectively. In so 
far as these Regulations apply (mainly in relation to the rights of holders of 
collateral security) the choice of law rules contained in those Regulations provide 
that the (proprietary) rights of persons and the relationship of any competing rights 
to the securities are determined either by the law of the EEA State where the 
register, account, or centralised deposit system is located (ie in the case of 
securities provided as collateral security) or by the law of the country where the 
relevant account is maintained (ie in the case of “book entry securities collateral”).

Although a similar approach is also taken by the Hague Convention on Intermediary 
Securities 2002 (not in force and unlikely to come into force any time soon), the 
Hague Convention's primary rule is to provide for the ability of parties to choose a 
governing law for the account which may be different from the lex situs (Article 4 of 
the Convention). The choice of law may be expressly agreed in the account 
agreement between the account holder and its immediate intermediary, however, 
subject to the proviso that the law chosen will only apply if the relevant 
intermediary has, at the time of the agreement, a qualifying office in the state of 
the chosen law. Only in the absence of such a party choice does Article 5 of the 
Convention apply the PRIMA rule, ie the law of the state where the office of the 
intermediary is located through which the account agreement was entered into 
(Article 5(1)), or the law of the state under which the relevant intermediary is 
incorporated or otherwise organised (Article 5(2)), or the law of the state in which 
the relevant intermediary has its principle place of business (Article 5(3)).

An alternative approach that is being suggested is to apply the “law of the 
system”.

The law of the system is already relevant under Article 9 Insolvency 
Regulation as the law which determines the effect of an insolvency on the rights 
and obligations of parties to a payment or settlement system or to a financial 
market. A similar insolvency rule is contained in Article 8 in the 1998 Directive.

2.4. English Mandatory Rules and/or Public Policy

The requirement mentioned above under section 1 to register mortgages and/or 
charges over book debts (ie a company's receivables) in accordance with s 860(1) 
Companies Act 2006 is likely to be applied by English courts as a mandatory rule of 
the forum regardless of which law otherwise governs the (proprietary) aspects of 
the assignment. Ie English companies incorporated in England need to register a 
security assignment of their receivables regardless where situated and overseas 
companies who have a registered UK establishment need to register a security

574 Ooi, ibid, p. 231; in fact the suggestion appears to be to apply this choice of law rule to most 
issues arising out of a dispute over intermediated securities held in a particular system, including the 
manner in which they are assignable. 
575 Moshinsky, op. cit., 591 at 618.
assignment of any receivables situated in England, failing which the security assignment will be ineffective in an insolvency of the assignor and/or in relation to other creditors of the assignor. NB however, that pursuant to Reg. 4(4) Financial Collateral Arrangements (No 2) Regulations 2003, registration may not be required as a prerequisite to perfect a security interest in financial collateral already perfected by possession or control.\textsuperscript{576}

There are a number of English public policy rules which restrict the assignability of a debt. Eg it has been held to be against public policy for a person to assign income and property to an assignee as security for a debt where the effect would be to create a relationship of serfdom between assignor and assignee.\textsuperscript{577} In addition there are a number of statutory provisions which limit or prohibit assignment on grounds of public policy.\textsuperscript{578} However, it is likely that these laws and rules already coincide with the law applicable to the debt and are not applicable simply as the law of the forum via Article 21 Rome I.

Where an assignment is champertous or involves unlawful maintenance this may also render the assignment ineffective under English public policy.\textsuperscript{579}

2.5. Renvoi

It is uncertain whether and to what extent renvoi may apply under the English common law rules. Where Article 14 Rome I applies, Article 20 expressly defines the applicable "law" as excluding the chosen law's conflict of law rules. However, where English common law choice of law rules apply, the reference to the law of another country may include a reference to the law which would be applied by a judge sitting in the place indicated. Unfortunately, the question remains unresolved as the point was abandoned on appeal in Macmillan Inc v Bishopsgate Investment Trust Plc (No 3).\textsuperscript{580}


If it was decided that a common conflict of law rule was required in relation to proprietary issues, the preferable rule would be to apply the law governing the assigned or subrogated claim. This would avoid the difficulties of characterizing an issue as falling either within or outside of Article 14(2). Also, this would result in enhanced certainty (as the law of the underlying claim remains constant) and

\textsuperscript{576} Goode, \textit{Commercial Law, op.cit.}, p. 690.
\textsuperscript{577} Tolhurst, 6.58 with reference to \textit{Horwood v Millar's Timber & Trading Co Ltd} [1917] 1 KB 305.
\textsuperscript{578} Eg Army Act 1955 (UK) s203(1); Social Security Administration Act 1992 (UK) s187; Pensions Act 1995 (UK).
\textsuperscript{579} See Tolhurst, \textit{op.cit.}, 6.59 et seq, \textit{Chitty on Contracts, op.cit.}, 19-049 et seq.
\textsuperscript{580} [1996] 1 WLR 387 (CA), at 405; the court at first instance held that renvoi did apply; \textit{Dicey, Morris & Collins}, 24-073.
ensure that party autonomy is given utmost effect (as the law governing the claim will often be chosen by the parties). Further, the application of the same law to both Article 14(2) questions and the effect of the assignment in relation to third parties will reduce due diligence costs, as potential assignees will not need to investigate different laws in relation to the same claims.

The introduction of special rules in relation to special types of transactions (eg involving assignment of bulk debt) is not advisable as this is likely to result in more uncertainty and characterisation issues. However, the transfer of intermediated securities should be/remain excluded from the scope of Article 14, as these are subject to special rules.

If a rule relating to proprietary issues is inserted into Article 14, some clarification as to which proprietary issues (if any) fall within Article 14(1) and which fall within Articles 14(2) and (3) would be helpful. Also, it would be beneficial to align the conflict of law rules in Article 14 and the Insolvency Regulation (Article 5 as clarified in Recital 25) to ensure that the same rule applies under both regimes to the question whether a "proprietary" right has been created in relation to a claim which will be respected in the insolvency of the assignor (ie either the rule in Article 14(1) which is the preferable rule or the lex situs rule advocated by Recital 25).
M. THIRD STATES’ SOLUTIONS (AUSTRALIA, CANADA, JAPAN, RUSSIAN FEDERATION, SWITZERLAND, USA)

A brief comparative analysis of five jurisdictions is presented hereunder, with particular consideration of the Russian Federation, the United States, Canada, Australia and Japan. It was suggested by the Expert Group that an overview of the solutions in some non-EU Member States would be helpful for making the policy decision on the law applicable to the third-party effects of the assignment.

1. AUSTRALIA

There remains considerable uncertainty as to the law applicable to the effects of assignments of intangible property, in general, under Australian common law private international law principles. There is support in older case law for the application of the *lex loci actus* (and, now perhaps, in light of modern developments, the law applicable to the debt assigned) to questions of validity both between assignor and assignee and as against third parties (although the *lex situs*, referring normally to the debtor’s residence) may remain influential.

The existing authority also favours application of the law applicable to the debt assigned to questions of priorities.

With the entry into force of the Personal Property Security Act 2009, specific rules now determine the law applicable to security interests over personal property. In relation to security interests attaching to intangible property, section 239 provides that the law applicable to the validity of a security interest and issues concerning perfection and effects of perfection and non-perfection (understood to include issues of priority) will be the law of the jurisdiction in which the grantor is located at the time when a security interest attaches. Section 240 contains the same

---

581 Martin Davies, Andrew S. Bell, Paul Brereton, *Nygh’s Conflict of Laws in Australia*, 2010, paras. 33.55-33.65. As appears from this discussion, there are few, modern Australian authorities, and 19th Century English decisions continue to exert a significant influence.
583 See, e.g., Anning v Anning (1907) 4 CLR 1049.
584 Davies, Bell, Brereton, *Nygh’s Conflict of Laws in Australia*, 2010, paras. 33.72-33.77 referring to Lefevre v Sullivan (1855) 10 Moo PC 1 (Jersey); Kelly v Selwyn [1905] 2 Ch 117; Australian Mutual Provident Society v Gregory (1908) 5 CLR 615 (in the last two cases, English and Australian respectively, there was a coincidence between the proper law of the trust fund, to which the reasoning points as the law applicable to questions of authorities, and the lex situs of the fund under common law principles – in the view of the editors of Nygh (paras. 33.75 and 33.77) application of the lex situs of the debt cannot be rejected out of hand, even if it is currently unsupported by authority).
585 Being the place of incorporation of a corporation, and the principal place of residence of an individual (s. 235(3), (5)).
586 As to the time of attachment, fixed by reference to s. 19(2).
solution for interests in financial property,\textsuperscript{587} and property constituting a right evidenced by a letter of credit, subject to certain exceptions.\textsuperscript{588}

Further, the Act also provides for a statutory rule, where the governing law does not provide for a public registration or notice (i.e. for the determination of whether there is a perfected interest in the property); this rule allows for perfection by registration under the Act (and thus the protection afforded against third parties therein).\textsuperscript{589}

\textbf{2. CANADA}

Canadian conflict rules concerning assignment are generally common law rules. Issues arising concerning the assignment of a chose in possession (i.e. tangible, physical property), will be governed by the \textit{lex situs} of the chose,\textsuperscript{590} that is, the law of the place where the goods are actually located at the time of litigation.\textsuperscript{591} Issues arising in relation to the assignment of negotiable instruments and documents of title, e.g. bills of lading, will be dealt with by the law of the jurisdiction in which the assignment takes place, understood as the \textit{lex situs} of the instrument or document.\textsuperscript{592}

The determination of the law applicable with regards to assignments of bare choses in action, e.g. debts, is more complex. The conflict rule seems to provide that the applicable law will be the “proper law” of the chose in action.\textsuperscript{593} Questions of priority will therefore be governed by the law of the underlying claim.\textsuperscript{594}

The Canadian provinces have enacted Personal Property Security Acts, with the exception of Quebec; for example, reference can be made to the Personal Property Security Act of Ontario (1990). In relation to interests in collateral, the conflict rule

\begin{footnotesize}
\begin{itemize}
\item i.e. (a) chattel paper, (b) currency, (c) a document of title, (d) an investment instrument, or (e) a negotiable instrument (s. 10).
\item e.g. under s. 240(3), the law of Australia will apply if the property over which the interest is granted is located in Australia and the party with the secured interest has possession and control over the property, in such a way as would allow him to perfect under the Act. Section 235 provides for a limited party autonomy, in favour of the law of Australia, where the grantor is an Australian entity at the time that security attaches.
\item Section 77 is relevant where the conflict rules in sections 238 \textit{et seq.} point to the application of a law other than that of Australia as governing issues relating to perfection (including priorities), and that applicable law does not provide for public registration of interests. The section allows for perfection by registration under the Act (which will give the interest priority before Australian courts).
\item \textit{Inglis v Usherwood} (1801) 1 East 515.
\item \textit{Maden & Maden v Long} [1983] 1 WWR 649 (BCSC).
\item Idem, para.339; Alcock v Smith [1892] 1 Ch 238, 255.
\item \textit{Lefeuvre v Sullivan} (1855) 10 Moo PC 1 (Jersey); \textit{Kelly v Selwyn} [1905] 2 Ch 117; \textit{Australian Mutual Provident Society v Gregory} (1908) 5 CLR 615 (English and Australian cases, respectively); J.G. Castel, \textit{op. cit.}, para.340.
\end{itemize}
\end{footnotesize}
in section 5 provides that the validity, perfection and effect or perfection or non-perfection of a security interest in goods, and a possessory security interest in an instrument, a negotiable document of title, money and chattel paper, is to be governed by the law of the jurisdiction in which the collateral is situated at the time the security interest attaches. Section 7(1), provides that the priority (along with the validity, perfection and effect of perfection or non-perfection) of a security interest in an intangible or a good normally used in more than one jurisdiction, or of a non-possessory security interest in an instrument, a negotiable document of title, money and chattel paper, shall be governed by the law of the jurisdiction in which the assignor is located at the time the security interest attaches. A similar rule favouring the law of the location of the assignor is adopted in Quebec.

3. JAPAN


Following the reform, the priority between competing assignees is governed by the law applicable to the claim assignment (Art. 23 of the Act of 2006). Under the previous regime, Art. 12 of the *Horei* subjected the effect of the assignment of a right with respect to a third party to the law of the place of the debtor’s domicile. During the drafting of the new rule some academics supported the law of assignor’s location as it could facilitate the bulk assignment of rights, including rights held against debtors domiciled in different countries, as well as the assignment of future rights. However, this argument did not prevail. It was considered that the law governing the priority issues should follow the law that is applicable to the the underlying claim assigned.

4. RUSSIAN FEDERATION

The relevant statute is the Civil Code of the Russian Federation, Chapter 68. Article 1216 regulates the private international law aspects of the assignment. It follows very closely the pattern of the Rome Convention and contains no explicit rules on third-party effects of the assignment. Nor does the doctrine deal with the issue explicitly.

---

Despite this uncertainty as to the law applicable to the issue of third-party effects of the assignment, it is likely that the Russian courts or doctrine will advocate the application of the law of the debt assigned.

An authoritative author states that all issues related to the assignment are governed by the law of the debt assigned, with the only exception being the relationship between the assignor and assignee.\footnote{Aleksandr Sergeev (eds.), Commentary to the Civil Code of the Russian Federation, 2005 (in Russian).} In light of this statement and assuming that Russian courts or doctrine acknowledges the existence of third-party effects of assignment, it can be argued that the issue of third-party effects would be governed by the law of the assigned debt.

The conclusion is, however, not without difficulty, for a solid reason. The qualification of third-party effects of the assignment as proprietary may render the lex rei sitae rule applicable to the issue (Art. 1205 of the Civil Code).

5. SWITZERLAND


According to this provision, a voluntary assignment is governed by the law chosen by the parties. In absence of such choice, the transfer of a claim by voluntary assignment is governed by the law applicable to the claim assigned.\footnote{See also the decisions of the Swiss Federal Court BGE 121 III 437 and BGE 130 III 417.} However, it has to be noted that Art. 145(4) subjects those questions which only concern the relationship between the assignor and the assignee to the law which is applicable to the legal relationship on which the assignment is based.

The provision furthermore contains a debtor protection exception: a choice of the applicable law by assignor and assignee is considered ineffective as against the debtor if the latter has not consented to it (Art. 145(1) subpara. 2 IPRG). As a
consequence, the law of the underlying debt applies, as if no choice had been made. This solution follows a similar approach to Art. 14 (2) Rome I Regulation. If the debtor has not consented to the choice of law made between assignor and assignee, the law applicable to the underlying debt assigned applies regardless of whether the chosen law would have been more protective for the debtor. Furthermore, in the case of an assignment of claims of an employee, a choice of law is only possible if it would also be permitted for the contract of employment itself.

It has to be noted, that the party autonomy based art. 145 Swiss IPRG construes a very liberal system in which the protection of third parties is not an issue that the legislator deemed necessary to be dealt with. There is a minority opinion arguing that Art. 105 (1) IPRG should apply in analogy in cases of cross-border assignment in order to protect third parties. This opinion is repelled on the basis of several arguments, including the scope and suitability of Art. 105 (1) IPRG as a third party protection rule in assignment cases and the lack of legitimate expectations of third parties in the case of assignment of claims: unlike the situs of movables or immovables, the applicable law cannot be determined by third parties with certainty from the outset. Also, the wording of Art. 145 IPRG shows, that the legislator clearly intends to limit any protection to the debtor. This means that a choice of law between assignor and assignee is valid as regards third parties whether or not they know of it or consented to it.

In cases of assignment of future claims, Swiss doctrine refers to the law applicable to the claim as and when it comes into existence.

6. UNITED STATES

In the United States, most assignments of the right to receive money are governed by Article 9 of the Uniform Commercial Code. This is because, with a small number of specified exceptions, Article 9 governs not only security interests in all types of tangible and intangible personal property but also sales of most payment rights. Thus, the only assignments of payment rights that are not governed by Article 9 are (i) assignments that are neither sales nor assignments for security and (ii) those that fit into one of the specified exceptions. (As a matter of internal nomenclature, Article 9 refers to the rights of a buyer of a payment right as a “security interest” and, for purposes of determining the applicable law [as well as for most substantive issues], applies the same rules to sales of payment rights as...
to security interests that secure obligations.) Thus, with only a small number of exceptions, the rules that determine the law applicable to third party effects of assignment are found in Article 9 of the Uniform Commercial Code.

Like much of the U.S. law of secured transactions, the rules that determine the applicable law depend, in part, on the category of collateral involved. Most payment rights fit into one of four collateral categories – “accounts,” “payment intangibles,” “promissory notes,” and “chattel paper.”

Under Article 9, the determination of the law applicable to the third party effects of assignment is bifurcated, with separate determination of the law that governs perfection of a security interest (i.e., what steps must be taken in order for the interest to prevail against a lien creditor and other competing claimants) and the law that determines priority of that security interest as against competing claimants. For all four categories of payment rights, perfection of a non-possessory security interest (including the right of a buyer of the payment right) is governed by the law of the jurisdiction in which the “debtor” (here, the assignor of the payment right) is located. (If the secured party [i.e., the assignee of the payment right] takes possession of a promissory note or chattel paper, perfection is governed by the law of the jurisdiction in which the promissory note or chattel paper is located.) The location of the assignor (as “debtor”) is determined by intricate rules in UCC § 9-307. Subject to quite a few complicating exceptions, an individual is located at the individual’s principal residence and an assignor that is an organization is located at its place of business (or chief executive office, if it has more than one place of business). A major exception applies in the case of domestic corporations and similar entities, which are located in the state of incorporation or similar constitutive action.

The law that determines priority of a security interest in a payment right as against competing claimants, however, depends on the nature of the payment right. In the case of accounts and payment intangibles, priority (like perfection) is governed by the law of the state in which the “debtor” (again, the assignor) is located. In the case of promissory notes and chattel paper, however, priority is governed by the law of the state in which the promissory note or chattel paper is located.

---

608 The following transactions with respect to payment rights are excluded from the scope of UCC Article 9: (i) an assignment of a claim for wages or other employee compensation, (ii) the sale of payment rights as part of a sale of the business out of which they arose, (iii) an assignment of payment rights for the purpose of collection only (e.g., a sale of record, but not beneficial, ownership to a collection agency to enable it to bring a collection action in its own name), (iv) an assignment of payment rights under a contract to an assignee that is also obligated to perform under the contract, (v) an assignment of a single payment right in full or partial satisfaction of pre-existing indebtedness, (vi) an assignment of a claim under a policy of insurance, (vii) an assignment of a right represented by a judgment, and (viii) an assignment of a claim arising in tort, other than a “commercial tort claim.”
Also, one issue outside the scope of the Article 9 rules that arises with some frequency is the law applicable to restrictions on assignment. While Article 9 does not address this issue directly, the Official Comments to the Article suggest that the law governing the contract that is the subject of the assignment would be the law applied to this issue.

For issues falling outside the scope of UCC, the Restatement 2nd of Conflict of Laws (1971) can be a good guidance (§§208 – 211). §208 provides that the assignability of a debt is determined by the local law of the state which has the most significant relationship to the contract and the parties, with respect to the issue of assignability. The state whose local law governs the issue of assignability will usually, but need not necessarily, also be the state whose local law would be applied to determine other issues relating to the contract. General conflict of laws principles should be applied to determine that law (§6 of the Restatement 2nd of Conflict of Laws).

§209 of the Restatement 2nd states that the validity of an assignment and the rights created thereby, as between the assignor and the assignee, are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the assignment and the parties. The effect of assignment on the obligor, in particular the discharge of his/her duties, is governed by §210.609

§211 of the Restatement 2nd is the most relevant provision: it governs the problem of successive assignments. Questions of priority as between two or more assignees are determined by the law governing the assignments under the rule of § 209 (see above), if the assignments are governed either by the same law or by different laws having the same rule of priority. In other situations, i.e. when there is a true conflict of laws, questions of priority are determined by the law governing the assignability of the right (see § 208), or, in the case of accounts receivable of a business enterprise, by the local law of the state where the books evidencing the accounts are kept. The latter conflict rule is drafted to determine the applicable law for an assignment transferring multiple debts.

The question of priority as between the assignee and the assignor’s creditors or the assignor’s trustee in bankruptcy is more uncertain. When the garnishment (attachment) proceeding is brought in the state whose local law governs the assignment under the rule of §209, the local law of this state will determine questions of priority as between the assignee and the garnishing creditor of the

609 “Payment or other performance of a contractual right not embodied in a document, to the assignor or assignee, following its assignment, will discharge the obligor, if this payment or other performance would have such effect under (a) the law selected by application of the rule of § 208, or (b) the law selected by application of the rule of § 209 as against the assignor and the assignee, if the right is assignable under the law selected by application of the rule of § 208.”
assignor. It is uncertain what law governs the question of priority as between the assignee and a garnishing creditor of the assignor in situations where the state whose local law governs the assignment (see §209) has a different rule on the subject than the state in which the garnishment action is brought. The question of priority should be determined in such instances by the law governing the assignability of the contractual right, or, in the case of accounts receivable in a business enterprise, by the local law of the state where the books evidencing the accounts are kept.
PART 5: DEVELOPING THE RULES ON ASSIGNMENT IN THE ROME I REGULATION

Part 5 analyses the need for a new rule addressing third-party aspects of assignment and priority issues (under 1.), the scope and interaction of the existing rules in Art. 14 and a potential new rule (under 2.) as well as the possible legislative solutions (under 3.). Recommendations and drafting proposals, with commentary, have been included under 4 and 5.

1. NEED FOR A NEW RULE IN ART. 14 ROME I REGULATION

Having regard to the legal study and the stakeholders’ comments, as well as the opinions of the expert group members and commentators, the need for a new rule in the Rome I Regulation on “property aspects”/third-party effects of assignment has been largely confirmed. The vast majority of respondents to the questionnaire (80 %) support introducing a new rule,\(^6^{10}\) with a minority of respondents and experts proposing to keep the status quo.

Some objections have been made against the introduction of a new rule:

(1) **Limited case law:** It can be argued that the absence of a significant body of case law demonstrates that the status quo is not problematic in practice, and that the legal difficulties are overstated. However, in the present context, limited case law does not appear to be a reliable indicator on whether parties undertaking cross-border transactions involving assignments encounter problems in practice. Many practical difficulties with the current regime have indeed been identified by stakeholders,\(^6^{11}\) commentators and members of the expert group. The value of intra-EU trade involving the assignment of claims\(^6^{12}\) suggests that this part of the Member States’ economies is too great to overlook these difficulties.

(2) **Limited response to the questionnaire:** Limited answers to the empirical study might suggest that the issue of third-party effects of assignment does not cause many difficulties in practice. The BIICL questionnaire has reached thousands of stakeholders, but only 36 have responded. However, there may be other reasons to explain the limited response. In particular, the financial sector has been faced with a gamut of new regulation, at Member State and EU level, and this may be an example of “regulatory fatigue”. In any event, the responses received suggest that action to fill a gap in the Rome I Regulation is desirable.

\(^{611}\) See Part 2: Statistical Analysis, 2.1.3., pp. 48 – 55.
\(^{612}\) See Part 2: Statistical Analysis, 2.2., pp. 74 – 82.
**(3) Status quo adequate:** In addition, it has been alleged that there is no urgent need for a change of the Rome I Regulation.

**(a) Art. 14(1) resolves difficulties:** Two members of the expert group and several commentators\(^{613}\) expressed the opinion that Art. 14 (1) Rome I Regulation can be understood as addressing, *de lege lata*, also the effects of assignment in relation to third parties. That view, however, is very difficult to reconcile with the text and legislative history of the Regulation.\(^{614}\) In any event, as the view is controversial among commentators and not widely shared by the expert group and the stakeholders, a clarification of the position remains highly desirable.

**(b) No rule better than a bad rule:** It has also been argued that the preservation of the status quo should be favoured rather than an arbitrary rule pointing to a jurisdiction which is fairly unrelated to the case. However, the preservation of the status quo is clearly not an option for the vast majority of stakeholders and experts. Indeed, some stakeholders expressed the view that any rule is better than no rule at all – i.e. legal certainty is a commodity to be valued in itself. Although that view seems questionable, the object of this Study and any legislative process that will follow it must be to produce a rule which operates satisfactorily and resolves most, if not all, of the problems that have arisen in practice.

**(c) No pressing need for intervention:** Finally, it has also been suggested that the issue of third-party effects of assignment could be dealt with in the general revision report on Rome I which is due in 2013, instead of hastening towards a solution. The present lack of practice and case law under Art. 14 and the still diverging views on the subject suggest that the issue would be better addressed in 2 or 3 years’ time. However, Art. 27 (2) Rome I Regulation requires the Commission to consider whether action is needed at an earlier stage, and the issue appears to be capable of being addressed on its own merits, without a significant revision of other elements of the Regulation.

Overall, the prevailing view appears to be that there is a strong need for a clarification of third-party effects of cross-border assignment. Clarification of the interaction of a provision on third-party effects with the Insolvency Regulation 1346/2000/EC and in financial collateral cases where priority issues are crucial is also highly desirable.

At the same time, it must be acknowledged that a consensus might well be difficult to achieve due to a diversity of views among stakeholders (in particular, between

---


\(^{614}\) See Part 4: Legal Analysis, 2.2.1., pp. 150-152.
participants in the factoring and invoice discounting industry, on the one side, and the banking sector, on the other), Member States, commentators and members of the expert group. Such differences are inevitable given the range of practical, economic and legal perspectives from which different observers of the process approach the issues, and the (apparent) impossibility of drafting a rule which will satisfy all.

One commentator concludes that.\textsuperscript{615}

“It is very likely that there is no unique and perfect solution to the issue of the effectiveness against third parties of an assignment. A rule functions well for certain types of cases and/or circumstances, whereas another rule functions well for other cases and/or circumstances. And, even if we accept this, the problem is whether the legislator would be able to identify with precision each of them. What seems to be indisputable is the need of legal certainty, i.e. the need of a new rule even if it is the ‘second best’”.

The authors of this Study agree with that diagnosis. It is necessary to develop, in collaboration with stakeholders and other interested parties, a rule which is the best rule for the EU and its Member States, even if it is not perfect or will not meet universal approval.\textsuperscript{616}

2. SCOPE, UNCERTAINTIES AND INTERACTION OF THE EXISTING RULES IN ART. 14 AND A POTENTIAL NEW RULE

2.1. GENERAL LIMITATIONS OF THE REGULATION’S SCOPE IMPACTING ON ART. 14 ROME I REGULATION

Some of the general limitations of Art. 1 (2) Rome I Regulation are pertinent to Art. 14, such as Art. 1 (2) (d)\textsuperscript{617} relating to negotiable instruments and Art. 1 (2) (f) as far as company shares are at issue.\textsuperscript{618} It is unclear whether or not Art. 1 (2) (d) covers intermediated securities. It is also unclear in light of Art. 1 (2) (f), whether or not a transfer of shares is excluded from the scope of the Rome I Regulation. Insofar as this issue is considered to involve an assignment, the scope of the


\textsuperscript{616} A case, perhaps, of: “Le mieux est l’ennemi du bien”.

\textsuperscript{617} Art. 1 (2) (d): “obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character.”

\textsuperscript{618} Art. 1 (2) (f): “questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body.”
2.2. COVERAGE OF ART. 14 (1) AND 14 (2) ROME I REGULATION

Art. 14 (1) and (2) Rome I Regulation already cover a variety of issues in the area of cross-border assignment, but not necessarily in a convincing way, although Art. 14 sought to clarify and improve the former Art. 12 Rome Convention. The whole of the relationship between assignor and assignee arising directly from the assignment is now expressly subject to Art. 14 (1), independent of whether the issue in question arising out of this relationship can be aptly characterised as one of obligation or property (see also the wording of Recital 38). This clarifies the present limits of the autonomy of the parties to an assignment under the Regulation.

Similarly, the whole of the relationship between debtor and assignee, and other aspects affecting the debtor, are covered by Art. 14(2). That rule ensures the protection of the debtor, so that any prejudice resulting from the assignment can only be imposed upon the debtor by reference to the law which applies to his relationship with the assignor (which will, in many cases, be the law chosen by debtor and assignor under Art. 3).

In order to provide a basis for the discussion of the formulation of a new rule, the experts addressed the issues that are covered by the existing Art. 14 (1) or Art. 14(2), with a view to identifying the elements for possible inclusion within the scope of a new rule and to clarifying whether the current architecture of Art. 14 can be built upon. The outcome of that discussion is summarised below (see 2.2.1. and 2.2.2.), although some borderline issues remain which arguably need clarification (see 2.2.3.).

2.2.1. Limitation of Art. 14 Rome I Regulation to Voluntary Assignments

Art. 14 clearly refers to voluntary assignment and contractual subrogation only and does not apply to involuntary "assignments" such as the attachment or expropriation of a claim. This limitation in the scope of the current Art. 14 does not, however, preclude the possibility that a potential new rule may address the question of which law regulates the competition between a transfer of a claim by voluntary assignment with an involuntary transfer, e.g. by means of an attachment.

2.2.2. Issues Subject to Art 14 (1) Rome I Regulation (Law that Applies to the Contract Between Assignor and Assignee)

The current version of Art. 14(1) of the Rome I Regulation reads as follows:
“The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.”

The scope of Art. 14(1) of the Rome I Regulation is elucidated by Recital 38.619

An analysis of these provisions indicates that the law that applies to the contract between assignor and assignee governs all aspects of the relationship between the assignor and the assignee which are directly relevant to the assignment, including, for example:

a. “Property aspects” of an assignment as between the assignor and the assignee (Recital (38); in the German text “dingliche Aspekte des Vertrags zwischen Zedent und Zessionar”, in the French text “aspects de droit réel d’une cession de créance entre cédant et cessionnaire”). Recital (38) refers to the position in a minority of Member State legal orders where property aspects of an assignment are dealt with separately from the obligational aspects. The provision is unfortunate as it suggests a difference in meaning between “property aspects” as between the parties to an assignment and in relation to third parties, which does not correspond to the in rem/ erga omnes effect of property law.620

b. The contractual and other consequences, as between assignor and assignee, of a failure to assign or to perfect the assignment. Insofar as the contractual aspects of the relationship between assignor and assignee are concerned, Art. 14(1) may be seen as adding nothing to the preceding provisions in the Regulation (especially Arts. 3–8) which fix the law applicable to that contract. Accordingly, Art. 14(1) could be restricted to the “property” questions, and further consideration should be given as to whether it continues to be appropriate to distinguish between the position as between assignor and assignee (currently within Art. 14(1), as emphasised by Recital (38)) and the position vis-à-vis third parties. Also, the term “relationship” is unclear and its use could be reconsidered.

2.2.3. Issues Subject to Art. 14 (2) Rome I Regulation (Law Governing the Assigned Claim)

The current version of Art. 14(2) of the Rome I Regulation reads as follows:

“The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked

619 See Part 4: Legal Analysis, 2.2.2., p. 153.
620 A distinction between the property aspects as between the parties to the assignment and the property aspects as to third parties is indeed alien to some legal systems, e.g. in German legal doctrine: once the proprietary “part” of the assignment is completed, it is effective erga omnes.
against the debtor and whether the debtor's obligations have been discharged.”

It seems uncontroversial that the law governing the assigned claim applies to the following issues:

1. assignability, including (at a minimum) the effect of a restriction on assignment in the contract between assignor and debtor,\(^{621}\)

2. the following aspects of the relationship between the assignee and the debtor arising from the assignment:
   
a) whether the debtor can rely, as against the assignee, on the defences that the debtor had against the assignor, and

b) whether the debtor can rely on any additional defences against the assignee (e.g. set-off with a claim the debtor has against the assignor),

3. the conditions under which the assignment can be invoked against the debtor, including (in particular) any requirement for notice to the debtor, the form of that notice and whether the bringing of legal proceedings constitutes due notice,

4. whether the debtor's obligations have been discharged, including whether payment or other performance by the debtor to the assignor/assignee after the assignment results in an effective discharge of the debtor’s obligation (and whether the assignor/assignee has authority to give a good receipt).

**2.2.4. Borderline Issues (Uncertain Whether Covered by Art. 14(1) or Art. 14(2) Rome I Regulation or Outside Current Scope)**

For other issues, there is disagreement among the members of the expert group (and other commentators) as to which paragraph of Art. 14 (if any) applies. In particular, the following issues have been highlighted by the expert group:

1. The question of whether the assignee is entitled to bring a direct claim against the debtor, i.e. the question of the assignee’s right to claim performance from the debtor and to sue him on the claim. Experts expressed varied opinions as to the possible application of Art. 14(1), as a direct consequence of the transfer of the claim to the assignee), Art. 14(2) or a new rule. The dominant view of the expert group favoured the application of Art. 14(2), as the comprehensive wording of Art. 14 (2) (“relationship between the assignee and the debtor”) suggests to cover this issue. Another view, however, suggested that the application of Art. 14 (2) to this issue would render Art. 14 (1) almost meaningless, and it would add another split to the effect of the assignment, this time not only between the assignee and third

\(^{621}\) See Part 5, 2.2.4., pp. 379 - 380 below for discussion of examples.
parties but also between the assignee and the debtor. As the law determined under Art. 14 (1) accepts the assignee as the new holder of the claim, it would appear that it must also accept him as the new creditor of the debtor with the concomitant right to claim performance and to sue. Only the debtor’s protection against unwelcome consequences of this change of creditor would therefore be guaranteed by the special rule in Art. 14 (2) as this provision covers all the issues between him and the assignee (and the assignor as his former creditor).\(^{622}\) Given the potential importance of this issue for the debtor and concerns expressed that a new rule favouring any law other than that governing the underlying claim would undermine the debtor’s protection from vexatious claims (for example, by “vulture funds”) it is important that this aspect be clarified as part of the overall package supporting the adoption of any new rule.

2. The question whether the assignee must join the assignor in bringing a claim against the debtor (application of Art. 14(1) or Art. 14(2) of the Rome Regulation or of the lex fori of the court seised of the action, taking into consideration the procedural aspect of this issue). Similar issues arise as under point 1 above, and the solution should be the same, as the joinder of the assignor relates to both to the debtor’s original relationship with the assignor and the debtor’s new relationship with the assignee and the “conditions under which the assignment can be invoked against the debtor”. The concept of “procedure” should be given a very restrictive interpretation for the purposes of the regulation.

3. Identification of the law applicable to a claim commenced by the assignee against the assignor to recover the proceeds or value of the claim, where the debtor has discharged his duties to the assignor (or vice versa): the majority view was that Art. 14(1) covered this issue but it is arguable that Art. 10 Rome II Regulation could apply instead.\(^{623}\) However, the issue is better addressed in Art. 14 Rome I Regulation, especially in light of competing assignees claiming to recover proceeds. A recital is needed to clarify this issue.

4. The question of whether the transaction is an assignment (and has “property effects”), or whether it only creates contractual relations between the assignor and the assignee. Some experts favoured the application of Art. 14(1) to this question whereas others considered that it fell outside the existing rules.

5. The effect of restrictions on assignment on its effectiveness as between assignor and assignee, and against the debtor. The minority opinion considers that only those types of (contractual and extra-contractual) restrictions which tend to protect the debtor are within the scope of Art. 14(2), whereas those aimed at the

\(^{622}\) See Martiny, Münchener Kommentar, Rom I-VO Art. 14 nr. 20, 22, 27; Einsele, RabelsZ 2010, 96; Flessner, IPRax 2009, 37-39; Bauer, in the Calliess commentary, Art. 14 nr. 23, 24; Palandt/Thorn, Rom I Art. 14 nr. 3, 4.

\(^{623}\) See, further, Part 4: Legal Analysis, 3.3.3., pp. 162–163.
protection of the assignor (or which are not aimed at protecting the debtor) are
covered by Art. 14(1). On this view, for example, the ability of an employee to
assign his salary (or a consumer his right to contractual performance) would fall to
be determined by reference to the law applicable under Art. 14(1) and not the law
applicable under Art. 14(2), as the debtor (the employer) could be argued to have
no interest as to which law applies to this question. According to the majority
opinion, all aspects of contractual and legal restrictions are governed by Art. 14(2),
with the following consequence: The most appropriate law, for instance, with regard
to rules intended to protect an employee is the law governing the employment
relationship as laid down by Article 8 of the Rome I Regulation. Article 14(2)
supports this policy whereas Article 14(1) does not, since this latter provision leads
to the law governing the assignment. The assignee could then force the employee
(assignor) to agree to a choice-of-law clause (possibly coupled with a choice-of-
court clause) leading to the application of a legal system under which the
assignment would be valid thereby thwarting the policy of protecting the employee
laid down by the law governing the employment relationship. A similar analysis
applies with regard to rules intended to protect consumers.

6. The applicability of Art. 14(2) to claims under contracts not yet in existence, for
which the law applicable to the claim cannot be identified at the date of
assignment. It is submitted that a person’s ability to assign future claims should be
treated as falling outside the concept of “assignability” in Art. 14(2), and should
instead be determined by reference to Art. 14(1) (if only the relationship between
assignor and assignee is in issue) or a new rule (if any third-party relationship is
involved).624

7. The question of whether the assignment is effective vis-à-vis successors in title
and other representatives of the assignor and assignee, including heirs, personal
and insolvency representatives, i.e. whether such persons fall to be treated as
indissociable from the “assignor” or “assignee” for the purposes of Art. 14(1) or as
“third parties”. The treatment of insolvency representatives and whether the
effectiveness of the assignment against them falls within or outside Art. 14(1) was
the subject of lengthy discussion, and a difference of opinion between the experts.
Given the importance of this issue, clarification on this issue as well as on the
interaction between the Insolvency Regulation and the Rome I Regulation appears
necessary.

8. The effectiveness of an assignment to the debtor and in particular the ability of
the debtor to take an assignment, charge or pledge of its own debt by way of
security. As a matter of first impression, this should not be treated as a question of
“assignability” within Art. 14(2), but instead as a matter falling within Art. 14(1) (if

624 F.J. Garcimartin, op. cit., p. 231.
only the relationship between assignor and assignee is in issue) or a new rule (if any third-party relationship is involved).

2.3. INTERACTION WITH THE INSOLVENCY REGULATION

Currently, the relationship between the Insolvency Regulation, the Rome I Regulation and other rules of private international law of the Member States concerning the third-party effects of assignments is far from clear. That lack of clarity is a considerable source of uncertainty both in practice and in legal discourse, and this was evidenced in the discussions of the expert group.

Open questions include the following:

1. Whether, insofar as the Rome I Regulation is potentially relevant, the insolvency representative of an insolvent assignor (or assignee) should be treated as an “assignor” or “assignee” for the purposes of Art. 14(1) of the Regulation, or whether he constitutes a third party whose relationships with the assignee (or, as the case may be, assignor) currently fall outside the scope of the Regulation and could be addressed by a new rule.

2. Whether Art. 4(2)(b) of the Insolvency Regulation (“the law of the State of the opening of proceedings […] shall determine in particular: […] (b) the assets which form part of the estate […]”) has the potential of being applied to the property aspects of the assignment, i.e. whether the Insolvency Regulation requires application of the lex concursus to assignments of claims in cases in which the assignor become insolvent.\(^\text{625}\) This was controversially discussed by the expert group. According to several experts, Article 4(2)(b) clearly only covers issues such as whether property owned by the insolvent at the time of the insolvency falls into the estate, but not the question whether title to a particular item of property was validly transferred to him. This must be decided by the law appropriate to decide that question, e.g. in the case of tangible movables, by the lex situs at the time of the purported transfer. This seems the correct solution, but the Insolvency Regulation is widely drafted and, unfortunately, is not clear on this point.

3. Whether Art. 5 of the Insolvency Regulation, when it applies, contains an implied choice of law rule favouring the law of the place where the asset is situated (i.e., in case of claims, the law of the COMI of the debtor of the claim, see Art. 2 (g)). This question should be given a negative answer\(^\text{626}\) but doubts remain.

In view of the fact that the effects of a future insolvency (in particular of the assignor) appear to be a very significant factor in the minds of the parties to cross-

---

\(^{625}\) See Part 4: Legal Analysis, 3.3.2., pp. 160 – 162.

\(^{626}\) See Part 4: Legal Analysis, 3.3.2., pp. 160 – 162.
border transactions involving assignments,\textsuperscript{627} it seems desirable that the impact of the Insolvency Regulation on conflict of laws rules on assignment in Art. 14 Rome I Regulation should be clarified.

Similar issues arise in relation to the special regimes laid down for credit institutions and insurance companies in their respective Insolvency Directives\textsuperscript{628} and to any other insolvency regimes which may fall outside the Insolvency Regulation.

Nevertheless, with the exception of point 1 above concerning the question whether an insolvency representative of the assignor or assignee is to be treated as indistinct from the insolvent party for the purposes of applying Art. 14, the need for this clarification would appear to be more appropriately addressed in the context of the first review of the Insolvency Regulation itself, with respect to which the Commission is required to produce a report in 2012 (Insolvency Regulation, Art. 46).

\subsection*{2.4. INTERACTION WITH THE ROME II REGULATION}

The possible interaction with the Rome II Regulation, in particular, Art. 10 has been considered above.\textsuperscript{629} Some clarification of this relationship seems desirable, as it is to date uncertain whether the Rome II Regulation or Art. 14 Rome I Regulation apply to claims to recover proceeds or the value of the claim. It can be argued that after payment there is no debt, therefore the Rome II Regulation applies and not Rome I. However, the question who has the best right to the proceeds should follow the question of who had the best right to collect the debt and this issue seems better solved in the Rome I Regulation than in Rome II.

\subsection*{2.5. SCOPE OF A NEW RULE CONCERNING “THIRD-PARTY” ASPECTS}

Taking account of the preceding discussions there remain a number of issues that would potentially be within the scope of a new rule addressing third-party aspects of an assignment (i.e. relationships other than as between debtor and assignor, assignor and assignee, or debtor and assignee).

\subsubsection*{2.5.1. Art. 27(2) Rome I Regulation}

\textsuperscript{627} Thus, approximately one third of all stakeholders have mentioned the importance of taking into account insolvency scenarios, either in relation to them carrying out due diligence or in the context of the drafting of a new conflict of laws rule in Art. 14.

\textsuperscript{628} Directive 2001/24/EC on the reorganisation and winding-up of credit institutions and Directive 2001/17/EC on the reorganisation and winding up of insurance undertakings.

\textsuperscript{629} See Part 4: Legal Analysis, 3.3.3., pp. 162-163.
Art. 27 (2) lists the issues that need to be addressed in the revision of Art. 14 Rome I Regulation:

1. The effectiveness of an assignment or a subrogation of a claim against “third parties” (in the French text “opposabilité aux tiers”; in the German text “ob die Übertragung einer Forderung Dritten entgegengehalten werden kann”). The expert group agreed that the term “third parties” covered as a minimum the assignor's unsecured creditors (including judgment creditors whether or not they have obtained an attachment by way of execution) and other persons dealing with the assignor (including competing assignees). It should also extend to creditors of the assignee. The status of insolvency representatives needs to be clarified, i.e. whether or not they should be classified as “third parties”.

2. As stated above, it seems preferable not to distinguish between the effectiveness of an assignment or a subrogation of a claim between the parties and as against third parties, as this separation is artificial and does not fit well with the erga omnes effect of property law (see also below, 2.7.2).

2. The priority of the rights of the assignee over the rights of another person (including, at a minimum, prior and subsequent assignees and judgment creditors), i.e. in particular whether the assignee can assert an entitlement over a claim against a prior or subsequent assignee or other transferee of a right in the same claim).

2.5.2. Additional Questions Raised by the Study

1. In light of the difficulties surrounding the applications of Recital (38) and the current Art. 14 (1) and (2), it needs to be questioned whether any change of the Rome I Regulation with a view to include third-party effects of assignment should not lead to a single rule covering all “property aspects” or “third-party effects, i.e. all questions - both between assignor and assignee (currently dealt with in Art. 14 (1), see also Recital 38), and against third parties; this question has been raised and will be further addressed below (see below).

2. The question of whether the transaction is an assignment, or only creates a contractual relationship between the assignor and the assignee, provided that this question is considered not to be covered by Art. 14 (1). It may be debated whether this aspect should be clarified.

---

630 However, it has to be noted that the formulation of Art. 27 (2) is unfortunate as it refers to a report “on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person.”, not “on the law applicable to the question of the effectiveness [...]”, although it is clear from Art. 27 (2) second sentence and the legislative history of Art. 14 that the applicable law issue is addressed here.

631 See Part 4: Legal Analysis, 3.3.2., pp. 160-162.

632 See Part 5, 2.2.4., p. 379.
3. Questions concerning the assignee’s standing to sue the debtor and the requirement to join the assignor to legal proceedings. For the reasons already given, these aspects should be clarified.

3. POSSIBLE SOLUTIONS

In light of the existing body of expert opinions and comments, the Member States’ approaches and the stakeholders’ views, a variety of solutions for a rule on third-party effects of assignment were considered in the course of this Study.

3.1. NON-VIABLE OPTIONS

Of the possible solutions, the following were not widely supported by responding stakeholders and experts and have been rejected for this reason:

1. Law of the Debtor’s Location (Lex Situs of the Debt). Only 3% of the responding stakeholders (i.e. one respondent) have supported this law and it did not attract any support amongst the experts. This solution is adopted in 3 Member States of the European Union. It is supported by a minority of scholars arguing that the courts of the debtor’s location would be the best suited to decide on the questions of the enforcement of the claim assigned. However, this “power theory” was criticised as jurisdiction may be based on grounds other than residence, and orders of enforcement are often directed towards the assets of the debtor which can be located in different countries, rather than the person of the debtor.

2. Law of the place of assignment. This law can easily provoke uncertainty, may not be transparent and is unsuited for modern forms of transactions, particularly those concluded by electronic methods. No responding stakeholders or experts favoured this law.

3. Law of the forum. This solution did not receive support from stakeholders or experts as a great number of reasons severely undermined the viability of this law. In particular, the fact that the lex fori encourages forum shopping, reduces legal certainty and might have no connection to the underlying transaction are the most prominent reasons.

This leaves, broadly, three possible connecting factors which require closer examination. First, the law applicable to the contract between assignor and

---

633 See Part 5, 2.2.4., pp. 378-379.
assignee. Second, the law applicable to the claim assigned. Third, the law applicable to the assignor’s location/habitual residence.

3.2. SOLUTION 1: LAW APPLICABLE TO THE CONTRACT BETWEEN ASSIGNOR AND ASSIGNEE

This solution, or a variant of it, is favoured by three out of 11 experts, some commentators and by 11% of the responding stakeholders. This connecting factor is adopted by one of the examined EU Member States (The Netherlands, see Summary of national reports and Dutch national report). The solution is also suggested by the Dutch, German and Belgian rapporteur. One out of six surveyed Third States (Switzerland) has adopted this solution.

3.2.1. Advantages

Those supporting this solution point to the following advantages:

1. **Flexibility**: This solution enables party autonomy, as assignor and assignee can, subject to the restrictions elsewhere within the body of the Rome I Regulation, freely choose the law applicable to their contract. As a consequence, it assures a parallelism between the law applicable to the contractual aspects and the property aspects of an assignment. In particular (when taken together with Art. 14(2)), this solution would permit the parties to designate, as the law applicable to all aspects of the assignment, the law of the underlying debt assigned, as a result of which one single law would apply under Art. 14. If complete freedom is permitted, the parties may also choose a law which permits the type of security interest which they wish

---

to create, or which facilitates their transaction in another way, or seek to ensure consistency with the law(s) that would apply in the event of the assignor’s insolvency.

2. **Practical experience:** This solution has been implemented in the Netherlands and is reported to work well there: parties in practice do not appear to abuse their freedom (e.g. by choosing a particular law in order to defraud the assignor’s creditors) and typically choose a law to govern the assignment which is connected to the assignment (mainly the law of the assignor’s habitual residence or the law of the underlying debt assigned),

3. **Avoiding or reducing the need for specific sectoral rules:** Specific sectoral rules do not fit well into the system of EU Private International Law and may lead to difficult classification issues to delimit the sectoral rules in question from each other and from the general rule. By adopting a solution based on the contract between assignor and assignee, such problems can be avoided as each business sector could mould their own contract clauses pointing to the law considered to be most well-suited for the sector’s needs. For example, those undertaking factoring activities could provide in factoring contracts for the application of the law of the assignor’s location, the solution which seems to be most favoured in this industry.

4. **Synergy, reduction of applicable laws and of complexity:** If this solution were adopted, the number of applicable laws to the issues dealt with under Art. 14 Rome I Regulation would be reduced to the law of the contract between assignor and assignee for all property aspects of assignment other than those issues involving the position of the debtor. This could lead to a simplified Art. 14(1) covering all non-debtor aspects of assignment. Art. 14(2) would remain unchanged. It would also reduce due diligence costs. The criticised distinction between “property aspects” as between the parties and against third parties would become obsolete, and the unclear first sentence of Recital 38 could be removed.

5. **Future claims:** The solution could increase legal certainty in the practically important areas of assignment of future claims and global assignments.

6. **Existing case law:** It has been reported that Art. 14(1), if extended to "property aspects"/"third-party effects" of assignment, could have reasonably resolved the cases that have to date, been decided by Member State courts relating to such matters, although these (as noted) are relatively few in number.\(^{637}\)

3.2.2. Disadvantages

---

Those opposing this solution point to the following disadvantages:

1. **Prejudice to third parties:** Third parties can be prejudiced by the application of a law over which they have no control, and which may not be foreseeable to them. There is also a risk that party autonomy may be abused where third parties are involved if the law chosen by assignor and assignee offers little or no protection to them. The risk of abuse could, however, be controlled (if not eliminated) and foreseeability to third parties increased by restricting the laws which the assignor and assignee could choose so as to bind third parties (for example, allowing only a choice of the law of the assigned claim or the law of the assignor’s location), or by separating the issue of multiple assignments/priority. Furthermore, the argument that Article 14(1) Rome I Regulation lacks legal certainty when creditors of the assignor are involved can be invalidated with a counter-argument: if a debtor (here the assignor) acts within a European market, there is no legitimate expectation that this debtor is only bound by the rules of the State of his habitual residence.

2. **Avoiding publicity:** The assignor and assignee could seek to avoid a filing requirement by opting for a law prescribing no such requirement. Although filing requirements may remain relevant, for example, as overriding mandatory provisions of the forum’s law or in an insolvency situation, their effectiveness in ensuring the publicity of security and other interests over claims may be reduced.

### 3.2.3. Debated Arguments

1. **The principle of party autonomy:** It has been suggested that party autonomy is in line with the trend of EU legislation in other commercially relevant EU private international law instruments, and the Rome I Regulation in particular. It may, however, be noted that both the Rome I Regulation (Art. 3(2)) and the Rome II Regulation (Art. 14(1)) contain provisions which emphasize that a contracting party’s power to exercise its autonomy to choose the law applicable should not prejudice the rights of third parties. Furthermore, party autonomy is not generally allowed by the Member States’ systems of private international law insofar as transfers of immovable and movable property are concerned – here, the *lex situs* predominates.  

   “Party autonomy” cannot, therefore, be considered to be a “general principle” of EU private international law insofar as non-parties are concerned. On the other hand, the assignment of claims cannot be fully equated with the transfer of tangible property, as it is one of the characteristics of the assignment of contractual rights that it concerns “the enforcement of a right that is created by a contract and is contractual in nature.”

---


pointed out that the right in question is created by a contract between debtor and assignor and not by a contract between assignor and assignee, so the case for upholding the autonomy of assignor and assignee is not significantly advanced by this argument.

2. Certainty as to the law applicable: Optimal certainty (at least insofar as assignor and assignee are concerned) is achieved as to the law applicable where the connecting factor points to the law applicable to the contract between assignor and assignee, and that contract contains an express choice of law provision. However, two difficulties may be identified, as follows:

(a) It can be argued that the contractual and “property” aspects of the assignment should be separated and that the law applicable to the contractual relationship between assignor and assignee should not automatically extend to matters which are properly regarded as extra-contractual (including third-party effects); instead, a specific extension of that choice (such as that required for non-contractual obligations in Art. 14(1) of the Rome II Regulation) could be required. Alternatively, a new rule could make clear that the choice of different laws to govern contractual and “property” aspects is allowed.

(b) In absence of an express choice of law by the assignor and assignee, it may be questioned whether the “default” rules in Art. 4 of the Rome I Regulation provide an adequate solution to the problem under discussion, considering the resulting uncertainty as to the applicable law for third parties and the assignee. This problem could be addressed by limiting this solution to cases of an express choice by assignor and assignee (whether of the law to govern their contractual relationship or, more specifically, of the law to govern “property aspects” – see (a) above) and imposing a different solution in other cases. Alternatively, but less satisfactorily given the existence of the “escape clause” in Art. 4(3) and the possibility that an assignment may not be the central feature of a contract, a specific default rule for contracts of assignment (favouring, e.g., the law of the assignor’s location) could be introduced into Art. 4(1).

3. Conflict of connecting factors: This solution can provoke conflicting solutions in the case of competing assignments governed by different laws (or competition between an assignment and another type of right) and difficulties in solving priority issues, especially from the viewpoint of a collateral taker. Most obviously, it is unclear how a conflict between the (different) laws applicable to two competing assignments should be resolved. It would be inappropriate to subject cases of competing assignees to different laws some of which would recognise an assignee’s title while others would not. It must be acknowledged, though, that such a conflict

---

is also possible with the other solutions discussed below, although the connecting factors deployed in such cases seem more stable.

Supporters of this approach have suggested that this conflict can be resolved by analysing the effects of each transaction in sequence, according to its own applicable law, arguing that this solution works perfectly well in the case of movable property. The analysis would follow the property law principle of *prior tempore, potior iure*, of ‘first in time, first in right and rank’, which is qualified only by rules on good faith acquisition by transactions that may follow. Each transaction is assessed, but the preceding transaction has prepared the ground for the next one, and this next one, by its governing law, may override the effects of the preceding one.

It would seem preferable though to adopt a single connecting factor, if possible, to address the issue.

4. Unsuitability for financial claims: It has been suggested that the solution does not work well for some types of claims, such as claims over bank accounts and claims deriving from financial contracts and instruments.\textsuperscript{641} The reasons for such objections are, however, unclear (on the assumption that the relationship with the debtor would be governed in its entirety by the law applicable under Art. 14(2) and, therefore, the risk of prejudice to banks and financial institutions who are debtors would seem to be excluded).

\textsuperscript{641} e.g. F.J. Garcimartin, *op. cit.*, p. 238.
3.3. SOLUTION 2: LAW APPLICABLE TO THE ASSIGNED CLAIM

This solution as a general rule is favoured by some experts and commentators and 30% of the responding respondents to the BIICL questionnaire. It has to be noted that the participating association stakeholders (from England and Germany) representing the legal profession (14,000 and 68,000 lawyers respectively) favour this solution. The connecting factor is adopted in six EU Member States (Luxemburg, Poland, Spain, Italy, United Kingdom, Germany) and by four out of six examined Third States (Australia, Canada, Japan and the Russian Federation). It has also been favoured by the national rapporteurs from the Czech Republic, England, Spain and, in combination with certain sector-specific rules, by the Finnish rapporteur.

3.3.1. Advantages

Those supporting this solution point to the following advantages:

1. **Consistency of connecting factor**: There is a lower risk of a conflict between connecting factors in the case of competition between assignees or other rightholders, as the law underlying the claim is rarely changed. Further, the solution would be suitable for successive assignments, as the law applicable to the transfer between assignor and first assignee and between first assignee and subsequent assignee would normally be the same. It must, however, be noted that Art. 3(2) of the Rome I Regulation specifically contemplates a change in the law applicable to a contract, and the significance of this provision will be further discussed below.

2. **Synergy and cost effectiveness**: This solution corresponds to Art. 14(2). If adopted, it would avoid problems of classification as between “debtor” issues and “third-party” issues (for example, as to whether the assignee’s right to bring a claim against the debtor falls within a new Art. 14(3) or not). Indeed, if the contractual aspects of the relationship between assignor and assignee were removed from the scope of Art. 14(1) (as covered by Arts. 3 ff Rome I Regulation), and a decision was taken that all “property aspects” should be governed by a single law, and that any sector specific rules should be excluded, Art. 14 could even be reduced to a single rule. This would also reduce legal costs, because assignees

---

would be able to conduct due diligence by reference to a single law. (This last point, however, excludes the possibility that a different law – that of the prospective forum of insolvency proceedings (often, the assignor’s COMI) – may exert a significant influence, and must therefore also be investigated).

3. **Suitability for financial claims:** It has been said that this solution is particularly suitable for some types of claims, in particular bank accounts and claims arising from financial contracts and instruments. In particular, it would be convenient for a bank to be able to determine whether it may effectively take a pledge, charge or security assignment over all bank accounts held with it by reference to the (common) law governing those accounts rather than the (different) laws of their customer’s locations.\(^{643}\) In general, however, the concerns of banks and financial institutions that their position as debtors may be prejudiced by an assignment (e.g. to a “vulture fund”) may be allayed by emphasizing the broad nature of the words “the relationship between the assignee and the debtor” in Art. 14(2).

### 3.3.2. Disadvantages

Those opposing this solution point to the following disadvantages:

1. **Unsuitability for “future claims”:** The solution does not work for claims arising under contracts that have not been concluded, and have no determinable applicable law. This point seems uncontroversial. Given the practical importance of the assignment of future claims or blanket assignments, the disadvantages of this solution are significant and a specific rule would be necessary to address these unsolved issues. A means of addressing this point would be to provide that in the case of future claims, the relevant date for determining the law in relation to each assigned debt is when that debt comes into existence. The law of the underlying debt could, however, be applied to another category of “future claims”, i.e. claims which have yet to arise under existing contracts. This last category could, therefore, be brought within a general rule adopting this solution.

2. **Complexity and inefficiency for bulk assignments:** This solution would complicate bulk assignments, particularly where claims assigned are not specifically identified in the assignment, as many different laws would come into play. As a result, adoption of this solution may lead to reduced transaction volumes of bulk assignments. This point is strongest in financial services transactions – in particular those in the factoring and invoice discounting sector – where (as a matter of normal practice) the assignee does not undertake due diligence with regard to questions concerning its relationship with the debtor. It has to be noted, however, that Art. 14(2) Rome I Regulation also subjects “assignability” to the law of the underlying debt assigned and that some investigation might be needed in any event. In other

---

\(^{643}\) F.J. Garcimartin, *op. cit.*, p. 244.
sectors – including some parts of the securitisation sector – due diligence does extend to the debtor relationship and, as a result, the application of this solution may, in practice, be viable. In addition, contractual representations and covenants may be used to limit factoring to debts governed by particular laws or created by parties operating in certain jurisdictions (where e.g. the default rule in Article 4(1)(a) would help and/or using certain contract terms including a choice of law). In addition it is noted that in international factoring it is commonplace to work with a network of factors in different jurisdictions, so that perfection/enforcement against the debtor where necessary is dealt with in the debtor's jurisdiction. That jurisdiction is also likely to be the forum where a third party (such as a creditor of the assignee) is trying to get payment of the debt.

3. Uncertainty: Despite the default rules in the Rome I Regulation, the law applicable to the underlying claim may not always be easy to identify where there is no express choice of the applicable law in the contract between the debtor and assignor, and it may not be possible for the assignee to identify this with certainty in advance of the assignment (e.g. where there is a confidentiality provision).

Also, many cross-border transactions producing assignable claims will be governed by internationally unified law, such as the Vienna Convention on the International Sales of Goods (CISG), or, in Europe, by an optional contract code, which is currently under consideration. These instruments do not have provisions on the assignment of claims, and this solution would force parties and courts to investigate the national law subsidiarily applicable. This would create additional costs of due diligence.

3.3.3. Debated Arguments

1. Theoretical underpinnings: It could be argued that the assigned claim owes its existence to the law which governs it and, as it is the subject matter of the assignment, its sphere of application should not be restricted to matters arising between the debtor (on the one hand) and the assignor or assignee (on the other) – without the claim, there would be no assignment. Against this, it may be argued that the debtor is in no way concerned with questions arising as between the assignee (on the one hand) and the assignor (on the other). Overall, these arguments do not significantly advance the debate.

2. Prejudice to third parties: Parties to the assigned claim can choose the law applicable to it, and could change the applicable law. As a result of this, third parties would be subject to a choice of the contracting parties, over which they have no control. However, in considering this argument, it may be noted that Art. 3(2) of the Rome I Regulation provides that “any change in the law to be applied that is made after the conclusion of the contract shall not ... adversely affect the rights of third parties”. This may be argued to protect an assignor or other
rightholder who acquires a right before the change in applicable law, and must be taken into account in the drafting of any new rule.

3. Conflict of connecting factors: As noted above, the law applicable to the assigned claim (although arguably more stable than the other solutions) can change over time and this presents the difficult question as to which law should apply to determine disputes between competing parties who have acquired a claim either side of a change in the law which applies to it. Here, Art. 3(2) of the Rome I Regulation may be thought to be highly relevant, in that it may enable the first rightholder to argue that it should be in no worse a position, in terms of its priority, as if the same law had governed throughout. A satisfactory solution needs to be found to this problem, taking account of Art. 3(2).
3.4. SOLUTION 3: LAW OF THE ASSIGNOR’S LOCATION (HABITUAL RESIDENCE)

This solution is favoured by the representative of the factoring industry on the expert group, some commentators\(^\text{644}\) and by 44% of the stakeholders, including a significant proportion of respondents from the factoring industry (75%). This connecting factor is adopted in one EU Member State (Belgium) and one third State (USA). It has also been suggested by the French and Italian rapporteur of this study. The solution corresponds to Art. 22 of the UN Receivables Convention and it was originally favoured by the European Commission in the Rome I Proposal, but was deleted in the course of the legislative process resulting in the adoption of the Rome I Regulation.\(^\text{645}\) One of the reasons for deleting this rule is that it was perceived as inappropriate by other significant industry sectors. Only one respondent in the securitisation sector opted for this rule, and the City of London Law Society, whose 14,000 members advise on nearly all English law securitisations, as well as the German Bar Association (68,000 members) did not favour this solution.

3.4.1. Advantages

Those supporting this solution point to the following advantages:

1. **Single connecting factor:** The solution normally points to a single, objectively ascertainable connecting factor, which promotes certainty among secured and

---


\(^{645}\) See Part 4: Legal Analysis, 2.2.1., p. 152.
unsecured creditors. In the case of competing assignees, assignees and creditors seeking to attach the debt or conflicts between the assignee and the assignor’s insolvency administrator, the law of the habitual residence of the assignor would provide a suitable and predictable solution in determining who has the best title to the assigned debt.

2. **Suitability:** The solution is particularly suitable for bulk assignments and assignments of receivables under contracts not yet in existence.

3. **Synergies with the Insolvency Regulation:** The solution might, in many cases, coincide with the most likely venue for (and the insolvency law applicable to) insolvency proceedings in relation to the assignor, including under the Insolvency Regulation (where the assignor has its COMI in the EU).

   Although the Insolvency Regulation’s impact on rights arising under assignments is attenuated by the protection afforded to certain rights *in rem* by Art. 5, adopting this solution within the EU could avoid some of the difficult issues raised by the application of Art. 5, as the same law would ultimately apply to the effectiveness of an assignment in the insolvency whether Art. 5 was invoked or not, assuming that the Insolvency Regulation contains choice of law rules. On the other hand, although the COMI can be equivalent to the assignor’s location, this will not always be the case as can be seen in the situation where a change in the assignor’s location occurs after he assigned the claim but before his COMI is determined under Art. 4 of the Insolvency Regulation. Also, in many cases, the assignor might be a credit institution, an insurance company or an investment undertaking to which the Insolvency Regulation does not apply but which is subject to sectoral directives. In these cases, the connecting factor is also not exactly the COMI.

4. **International recognition:** The same approach is followed by the UN Receivables Convention (Art. 22). A parallel solution to this Convention would lead to a single “international” solution for the applicable law to third-party effects of assignment and might encourage further ratifications of this Convention. The obvious strength of the argument that harmony between the Rome I Regulation and the UN Receivables Convention is desirable is, however, undermined by the limitations in the types of transactions to which that Convention applies (see its Art. 4), by the inapplicability of the conflict-of-laws rule when substantive rules of the Convention are applicable to the particular issue (see, e.g., Art. 9(1) on the

---

646 The UNCITRAL Model Law on Cross-border Insolvency (1997) also adopts the concept of the “COMI” (Art. 2(b), 17(2)(a)), although views differ as to definition of COMI in that instrument.

647 See Part 4: Legal Analysis, 3.3.2., pp. 160-162.

648 This assumes that the assignor’s insolvency representative falls to be treated as a “third party” for these purposes, see pp. 140 – 142 above.

649 See p. 141 below suggesting the contrary.

validity of assignments breaching contractual anti-assignment clauses), and (more particularly) by the fact that it is not yet in force and has, to date, only been ratified by 1 State.

5. Suitability for factoring transactions: The law of the assignor’s location is supported by the factoring and invoice discounting sectors. Factoring companies deal quite often with bulk assignments, where each debt assigned can be governed by different laws, and the economic and practical aspects of these transactions are not compatible with an individual investigation of the laws applicable to the underlying claims, especially in cases of small value receivables created by SMEs, where due diligence of every underlying contract would be impractical. The law of the assigned claim, therefore, seems to be strongly opposed by the factoring and invoice discounting sectors, at least as a general solution.

6. Suitability to resolve conflicts between competing rightholders: It has been reported and illustrated that this solution would lead to satisfying solutions in cases of conflicts between competing assignees or an assignee and another rightholder as it reduces the number of potentially applicable laws to the priority issue. While the law of the underlying claim would lead to arbitrary results, the question who has the best title to the claim could be reasonably solved on the basis of the law of the assignor’s habitual residence. This does not affect and needs to be separated from the question of whom the debtor has to pay and which defenses he has (Art. 14(2) Rome I Regulation).

3.4.2. Disadvantages

Those opposing this solution point to the following disadvantages:

1. Problems with connecting factor: A reference in a new rule, without further clarification, to “habitual residence” would entail the application of Art. 19 of the Rome I Regulation, which defines “habitual residence” generally as (see Art. 19 (1)) the place of central administration for corporate and unincorporated bodies and the place of business for natural persons acting in the course of their business. Art. 19(2) provides, however, that where the contract is concluded in the course of the operations of, or is to be performed by, a branch, agency or other establishment, the place of the branch etc. is to be the place of habitual residence.

This definition creates three problems. Firstly, determination of the assignor’s “habitual residence” may be the subject of factual uncertainty, for example, in the case of offshore companies, international joint ventures, SPVs or companies with more than one headquarters, or where more than one branch etc. is involved in the conclusion or performance of a contract. Particular problems may be caused by Art.

651 No definition is adopted for natural persons acting otherwise than in the course of business (i.e. consumers and, probably, employees).
19(2), when the same claim is assigned by two different branches of the assignor located in different countries. Secondly, Art. 19(2), in particular, departs from the definition of “location” under Art. 5(h) UNCITRAL Convention, and even Art. 19(1), standing alone, may be argued not to be in precise alignment. To fully align with the UN Receivables Convention, a new rule in the Rome I Regulation would need to refer to the "location" of the assignor as understood in Art. 5(h) of the Convention. This would lead to the introduction of a new notion into Rome I and provoke new incoherencies. Alternatively, Art. 19(2) would need to be excluded from being applied in this case. Thirdly, the potential synergies with the Insolvency Regulation (and other insolvency regimes) described above may be lost if the connecting factor points otherwise than to the assignor’s COMI under the latter Regulation.

2. Increased transaction costs, complexity: This solution, unless accompanied by changes to Art. 14(1) and Recital (38), would carry forward the current separation between “property aspects” of assignment between the assignor and assignee and against third parties, which seems artificial and unnecessarily complex, and, in addition, this solution would introduce a third applicable law into Art. 14, as a result of which transaction costs could increase. Applying one law to obligatory and property aspects of assignments between assignor and assignee, one law - to property aspects of assignments against third parties and another law - to issues concerning the debtor’s protection should be avoided. As noted above, the law which would apply to the assignor’s insolvency (under the Insolvency Regulation, that of the assignor’s COMI) is likely to be a law that the assignee would wish to investigate in any event. This is only possible if the assignor’s location in the moment of the assignment and the COMI coincide, which will not necessarily always be the case. Also, the increase in the costs of enforcement would be greater wherever a third party wished to enforce its rights directly against the debtor and would involve the debtor in the cost and delay associated with the potential identification and application of a law wholly unassociated with the underlying debt or the forum.

3. Conflict of connecting factors: The location of the assignor leads to many potentially applicable laws in the case of joint assignors (e.g. where a claim is owned by two parties jointly) and chains of assignments where the same claim is assigned several times by assignors located in different Member States, creating a need to resolve this conflict of connecting factors. This issue could be addressed in the rule itself or in a recital and potentially solved by reference to either a center of gravity or solved by means of the closest connection principle. Another alternative would be to subject the question of the multiplicity of assignors to party autonomy. Any abuses of such party autonomy could be dealt post facto by court intervention.

652 See Part 4: Legal Analysis, 3.3.2., pp. 160-162.
A conflict of connecting factors may also arise in the event that the assignor’s location changes in between the times at which assignments were made (or other competing rights acquired). This may be particularly problematic in the case of special purpose vehicles (SPVs) or offshore companies, whose place of central administration may be capable of being changed within a short period. A satisfactory solution would need to be found to these problems.

4. Problems in practice: It has been reported that this solution has led to unsatisfactory solutions in practice in Member States where it has been adopted, in particular in Belgium and Luxemburg.

5. Unsuitability for financial claims: This point has already been discussed in relation to other solutions. It does not appear to be a compelling reason in itself for rejecting this solution. It is notable, however, that the UN Convention explicitly excludes financial claims from its scope (Art. 4(2)). To a certain extent, this might be taken to suggest that the Convention itself considers that the law of the assignor’s location is not adequate for these types of claims.

6. Inflexibility: In addition, this rule, if foreseen without any choice of law option, would limit assignor and his potential assignees to an assignment under the rules of the assignor’s home state. The latter would not be able to offer assignments under other conditions and prospective assignees would prefer transactions with assignors from other jurisdictions offering more suitable conditions. This would entail a “territorial segmentation” of the European assignment of the claims market, legally imposed by the EU itself. This thwarts the idea of an European internal market and potentially also leads to a discrimination of market actors according to their location and the third-party regime applicable there. It seems doubtful whether these effects would be compatible with the Treaty of the European Union.

3.5. A COMBINATION OF SOLUTIONS

3.5.1. Limited Party Autonomy

The potential disadvantages of allowing assignor and assignee to choose the law applicable to the third-party effects of assignment have already been considered (see 3.2 above). It has, however, been suggested that the concerns expressed by some as to the potential for prejudice to third parties, and indeed abuse, if this solution were to be adopted, could be allayed by restricting the choice available to the assignor and assignee. In this way, the assignor and assignee would enjoy some flexibility in structuring their transaction, but third parties would be protected by the restrictions on autonomy, providing them with greater foreseeability as to the laws which might affect their position. Further restrictions could be imposed, for

---

example, by requiring an express choice of law to govern “property aspects” (including relationships with third parties) or by applying a different solution to resolve priorities between competing assignees or other rightholders.

Alternatively, the second and third general solutions discussed above could be combined, for example by applying the law of the assigned claim to assignments of bank accounts and other financial instruments and contracts, and the law of the assignor’s location in other cases, or by applying the law of the assignor’s location to factoring and invoice discounting transactions and the law of the assigned claim in other cases. However, this would lead to sectoral solutions and definitional uncertainty and the majority of stakeholders expressed a clear preference for a single rule without sector-specific exceptions.

3.5.2. Sector-Specific Solutions

3.5.2.1. Factoring

A sector-specific rule for factoring and invoice discounting (favouring the law of the assignor’s location654) would undoubtedly be well received by participants in those sectors, if the general rule adopted would require them to investigate which law applies to each claim assigned. However, such a step would have its own disadvantages:

1. **Problems of definition and classification**: In providing an exceptional rule, difficulties would immediately arise in deciding whether a definition of “factoring” (or “invoice discounting”) would be necessary or desirable. Whatever solution is adopted, there would likely be classification problems at the borderline.

2. **General approach of Rome I Regulation**: Rome I tends to avoid sectoral solutions, with the exception of the specific provisions which seek to protect weaker parties (consumers, employees). Therefore, it might appear anomalous if the Rome I Regulation were to include a specific provision to address the particular concerns of one sector. Also, if a sector-specific solution would be chosen for factoring, other sectors might then follow and point to solutions more advantageous to them, which would lead to an undesirable piecemeal approach.

3. **Support for general solution**: Only 3% of the stakeholders (i.e. one company) support a sector-specific solution, the overwhelming majority of them advocate a single rule for all sectors.

4. **Conflict of connecting factors**: If a sector-specific solution were to be adopted for factoring, there would remain the possibility of a conflict of connecting factors in

654 See Part 5, 3.4., p. 394.
circumstances where only one of two competing assignments was occasioned by a factoring transaction.

### 3.5.2.2. Securitisation

In the course of the study, no claim has been made for specific rules for the securitisation sector. Representative of the securitisation sector expressed different views. The City of London Law Society whose members advise on most securitisations under English law and one stakeholder responding for the securitisation sector prefer the law applicable to the underlying debt, while one other securitisation respondent preferred the law of the assignor’s habitual residence. The representative of the securisation industry on the expert group did also not oppose to the law applicable to the contract between assignor and assignee.

### 3.5.2.3. Financial Markets and Derivatives/Collateralised Transactions

Representatives of these two sectors tend to favoured the law of the underlying debt (for the reasons set out at above).

### 3.5.2.4. Other Sectors

No suggestions were received from stakeholders belonging to the construction and insurance sectors. Nor did labour or consumer credit organizations respond to the questionnaire. For the time being, therefore, no case has been made for exceptions which are specific to these sectors.

As to consumer assignments there is room for ambiguity in the wording of Art. 14(1) as to the protection of weaker parties, i.e. it is not entirely clear whether “the law that applies to the contract between assignor and assignee under this Regulation” includes mandatory rules protecting consumers and employees referred to in Art. 6, 8 of the Regulation. To avoid any risk of an inconsistent interpretation, it is advised to clarify whether the law mentioned in Art. 14(1) includes the protection afforded to consumers and employees under those provisions by specified non-derogable rules. If that point is clear, no specific provision for consumer assignments would appear to be necessary.

---

656 See Part 5, 3.3.1., p. 391.
3.6. EU SUBSTANTIVE RULES GOVERNING THE THIRD-PARTY EFFECTS OF ASSIGNMENTS

In light of the variety of potential solutions presented above and the insight that there is no perfect or ideal solution, the question may be raised of whether the problems addressed in this study could not be more satisfactorily addressed by an EU wide harmonization of regimes governing priority and other third-party issues or by the creation of a parallel EU priority regime for cross-border claims (for example an EU register of security interests over receivables or a harmonised requirement of notification). Registration requirements are not uncommon in the Member States, see e.g. the recently introduced German Art. 22 Kreditwesengesetz (KWG). However, there is apparently no current demand for such initiative among the stakeholders. Moreover, it would be costly and complex and the treaty basis for such initiative would need to be tested. Further deliberations on this issue are outside the scope of this study.

Alternatively, it could be envisaged to introduce a substantive rule into the private international law rules so as to resolve conflicts of connecting factors in a way that better balances the interests of competing right holders. For example, if the proposal adopted by the Commission were to favour determining the law applicable to questions of priority between two competing assignments by reference to a connecting factor which fell to be determined at the time of the later of the two assignments, the first assignee would carry the risk that a change in the connecting factor (and the applicable law) after the date of his own assignment would adversely affect his position. Although that solution can be justified, a more “equitable” solution might be achieved by a “super conflict” rule enabling the first assignee to follow a particular procedure (e.g. the giving of a written notice to the debtor) in order to fix the applicable law once and for all by reference to the circumstances prevailing at the date of the first assignment. A practical demonstration of this solution is evidenced in the scenario where the harmonised EU rule points to the law of the assignor’s habitual residence, and the assignor is habitually resident in State A at the time of Assignment 1 but has moved to State B by the time of Assignment 2, fixing the connecting factor at the date of the later of the two assignments would mean that the law of State B would ordinarily apply to determine questions of priority between Assignee 1 and Assignee 2. A “super conflict” rule might, however, enable Assignee 1 to fix the application of the law of State A to all priority issues affecting him by giving written notice in a prescribed form to the debtor, thereby giving preference to the first Assignee to deliver a compliant notice. In order to keep the drafting proposals prepared for this Study as straightforward as possible no “super conflict” rule has been included within them. Indeed, an obvious disadvantage of proposals of this kind is that they would complicate an already complex area of law. Nevertheless, such hybrid solutions, combining substantive and private international law elements may merit further consideration.
4. RECOMMENDATIONS

The Study has clearly demonstrated **the need for Art. 14 to contain a clear solution concerning the effects of assignments on third parties** and the relationships which arise from assignments other than those between the debtor, assignor and assignee.\(^{657}\)

At the same time, the concept of Art. 14, the content and place of a new rule and the merits of particular solutions have been fiercely debated.\(^{658}\) It may readily be accepted that **no general solution is perfect.**

Account should be taken of the need to **define the scope of the new rule (and its relationship to the existing Art. 14(1) and (2)) with sufficient precision**, while at the same time not omitting any important issues.

It is suggested that the inclusion of third-party effects of assignment into the Rome I Regulation leads to a solution where **all property aspects of assignment are governed by one rule** (subject to the limitations for the protection for the debtor within Art 14 (2)) and that the current structure of (Art. 14 and Recital 38) is revisited. Although the study focuses on the effects of an assignment against third parties and the priority of an assigned claim over the right of another person, the option of a **single rule covering all “property” aspects without distinguishing between whether they arise in the relationship between assignor and assignee or against third parties needs to be considered in this study**, since it presents significant advantages. Only one law would then be applicable to the “property” aspects of an assignment and the number of potentially applicable laws in assignments could be reduced from the outset. Moreover, the current artificial distinction between property aspects, as between assignor and assignee and against third parties (see Recital 38 and Article 27 (2)), could be removed.

It is recommended to clarify that **contractual aspects of the assignment are covered by Art. 3 ff Rome I Regulation directly**, while Art. 14 only addresses the assignment itself, i.e. its legal effects.

It is proposed to aim at finding a **solution which reduces complexity. The number of applicable laws under Art. 14** should be reduced and the wording of an amended Art. 14 should be clear and precise.

The possibility of sector specific rules should be considered but **a moderate use, if at all, is recommended, as they add complexity and encourage characterisation problems.** The more complicated that a proposed new rule is (e.g. if it includes a combination of the suggested general solutions and/or sectoral

\(^{657}\) See Part 5, 1., pp. 373-375.

\(^{658}\) See Part 5, 2., 3., pp. 375-401.
specific rules), the more likely it seems to be a cause of legal uncertainty and satellite litigation.

It is necessary to balance the interests of all parties involved in an assignment (i.e. the assignor and assignee, the debtor and third parties). Additionally, it needs to be ensured that a new rule does not hinder EU trade, but supports it.

It is important to address the key disadvantages of particular solutions, and in particular the problems caused by a change in the connecting factor over time or in multiple party transactions.

It is also desirable that some unclear issues (of the newly formulated Art. 14 to other EU instruments, in particular the Rome II Regulation) are clarified in a Recital.
5. DRAFTING PROPOSALS

The British Institute has formulated alternative drafting proposals which present the conflict of laws solutions that have been favoured by a significant number of stakeholders and/or experts and can reasonably be considered as an option for legislation. The proposals are accompanied by a suggestion for amendments of Recital 38, for the insertion of new Recitals and for a change of Art. 1 (2) Rome I Regulation where clarification is deemed to be necessary. Each proposal has been complemented with detailed comments.

Proposal A is based on a restricted application of the law applicable to the contract between assignor and assignee. The law applicable to the contract between assignor and assignee could lead to a straightforward general solution, insofar as it allows for flexibility and subjects property aspects of assignment as between assignor and assignee and against third parties to a single rule, leading to one applicable law for all property aspects of assignment (anchored in Art. 14 (1) Rome I Regulation). This would also entail the abrogation of Recital 38 in its current form, and could resolve the present complexities. However, to prevent the risk of prejudice to third parties, it is suggested to restrict the party autonomy of assignor and assignee.

Of the other two general solutions proposed (i.e. the law of the assigned claim and the law of the assignor’s location), the level of support from stakeholders and experts is such that these solutions also merit further consideration.

Proposal B follows the approach of applying the law governing the assigned claim thereby reducing the number of applicable laws.

Proposal C is based on the application of the law of the assignor’s habitual residence.

In both Proposals an optional sectoral exception (in the first case for factoring, in the second for assignment of claims under financial contracts) has been added, with the above mentioned precautions.

---

659 See Part 5, 5.2., pp. 406 et seq.
660 See part 5, 5.3., pp. 411 et seq.
661 See Part 5, 5.4., pp. 414 et seq.
5.1. CURRENT TEXT OF THE ROME I REGULATION (FOR COMPARISON)

Recital (38)

In the context of a voluntary assignment, the term “relationship” should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term “relationship” should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor’s obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Article 27

[...]

2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.
5.2. PROPOSAL A – RESTRICTED APPLICATION OF THE LAW APPLICABLE TO THE CONTRACT BETWEEN ASSIGNOR AND ASSIGNEE

Recital 38 (new)

Article 14 contains rules determining the law applicable to the legal effects of a voluntary assignment or contractual subrogation of a claim, including the relationships between the assignee and the debtor and between the assignee and other persons. The law applicable to the contractual obligations of the assignor and assignee must be determined separately according to Articles 3 ff of this Regulation.

New Recitals

The law applicable under Article 14(1) or Art 14(2) shall include any provisions of the law designated which must be given effect under Article 6(2) or Article 8 (1) for the protection of a consumer or employee.

The law applicable under Article 14(2) applies to all aspects which directly affect the debtor, including the question of whether the assignee has standing to bring legal proceedings against the debtor and whether the assignor must be joined as a party to such legal proceedings.

Article 14 shall also apply to any action to recover the proceeds of a claim, or their value, on the basis of unjust enrichment or otherwise. To this extent, Regulation (EC) No. 1864/2007 on the law applicable to non-contractual obligations (Rome II) shall not apply.

Art. 14(1)(c) shall not apply to future claims under existing contracts, as the law applicable to such claims should be capable of being determined at the date of the assignment.

Comment

The new Recital (38) is intended to replace the existing Recital (38) and to remove the current, complicated and arbitrary distinction between the “property” aspects of an assignment between assignor and assignee and as against other persons. Instead, a distinction is drawn between the contractual obligations between assignor and assignee (which are determined outside Art. 14 by the law applicable to the contract between them) and the legal effects of an assignment, i.e. all other direct consequences of an assignment (which are determined by reference to the rules in Art. 14 (i.e. principally, by reference to the law applicable under Art. 14(1) with the exception of the matters set out in Art. 14(2)). By adopting this approach, it is hoped that problems of characterization will be reduced.

As to the additional new Recitals, the first is intended to maintain the protection afforded to consumers and employees under Arts. 6(2) and 8(1), and to avoid a restrictive interpretation of the words “the law that applies to the contract” or “the law governing the ... claim” as limited to the law chosen by the parties to the relevant consumer or employment contract.
The second new Recital seeks to emphasize that Article 14(2) must be given a broad interpretation so as to ensure that all issues which have a direct bearing upon the debtor are regulated by the law applicable to the claim assigned, in accordance with the debtor’s legitimate expectations. The specific reference to the assignee’s standing to bring legal proceedings against the debtor and the requirement to join the assignor are intended to address concerns raised by representatives of the financial sector during the Study. They felt that these issues could be argued to fall within the scope of any new rule governing the “third-party” effects of assignment and enable parties acquiring debt (including “vulture funds”) to place commercial pressure on debtors to settle by bringing or threatening proceedings directly, even if this would not be permitted under the law applicable to the underlying claim assigned. The clarification avoids this interpretation and ensures that the debtor is able to rely on the law which applies to his own obligation to strike out or oppose any such claim.

The third new Recital seeks to determine the relationship with the Rome II Regulation and to ensure that a single law applies to questions of competing rights and claims to proceeds. For the sake of legal certainty, Art. 14 Rome I Regulation should cover the entire field, including monetary claims between assignee and a third party. It cannot at present be said that the Rome II Regulation provides a satisfactory solution to the broader issues described in this Study (see above Part. 4, 3.3.3.). The “country in which the enrichment took place” (Art. 10(3)) may be thought to favour either the place where the debtor actually paid the defendant or the place where payment was contractually due. Neither place corresponds to any of the solutions which have generally been considered as suitable for determining the third-party effects of assignment.

The fourth new Recital aims at clarifying the case of an assignment of future claims. Only claims under contracts not yet in existence would be covered by Art. 14(c) (“law of the assignor’s habitual residence”) but not future claims under existing contracts.

**Art. 1(2) amended**

The following shall be excluded from the scope of this Regulation:

...  

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, the issue and transfer of shares, and the personal liability of officers and members as such for the obligations of the company or body;

(k) assignments by operation of law, except insofar as Article 14 determines the priority between a voluntary assignment or contractual subrogation and a competing right arising by operation of law, and assignments or other transfers of judgment debts or intellectual property rights.

**Comment**

These amendments to Art. 1(2) are intended, for the avoidance of doubt, to exclude from the category of “claim” in Art. 14 shares, judgment debts and intellectual property rights, which
fall outside the Rome I Regulation and raise particular problems in private international law. The new sub-Article also confirms that (subject to one exception) Article 14 is limited to voluntary assignments and does not determine the validity or effectiveness of assignments by operation of law (including, for example, expropriation of claims, transfers of claims on a company reorganisation and assignments by way of execution of a judgment). The one important exception proposed below is that Art. 14 should regulate questions of priority between voluntary assignments, on the one hand, and transfers by operation of law (including by way of execution) on the other. This pre-supposes, for the priority issue to arise, that the assignment by operation of law is recognised as being valid under the private international law rules of the Member State seised of the dispute.

**Article 14 - amended**

**Voluntary assignment and contractual subrogation**

1. Without prejudice to paragraph 2, in the case of a voluntary assignment or contractual subrogation of a claim against another person (the debtor), the law applicable to the assignment or subrogation shall be:

   (a) the law that applies to the contract between the assignor and assignee under this Regulation, provided that law has been chosen by the parties in accordance with Article 3 of this Regulation and is either:

   - the law governing the assigned or subrogated claim at the date of the assignment; or

   - the law of the country in which the assignor has his habitual residence at the date of the assignment;

   or, failing that,

   (b) the law governing the assigned or subrogated claim at the date of the assignment.

   (c) If the law governing the assigned or subrogated claim cannot be determined at the date of the assignment, the law of the country in which the assignor has his habitual residence at the date of the assignment shall apply.

   Article 19(2) and (3) shall not apply in determining the place of the assignor’s habitual residence for the purposes of this paragraph.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor’s obligations have been discharged.
3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Comment

It seems preferable to create a single rule for all property aspects of assignment. It does not seem sensible to keep the current artificial distinction between property effects of an assignment between assignor and assignee and third parties. In addition, a single rule for all property aspects of assignment would render the drafting of Art. 14 clearer and reduce the potential for characterisation difficulties.

Moreover, Art. 14 should clearly deal with property aspects only as the contractual aspects of an assignment are covered by Art. 3 ff Rome I Regulation. This has to be made clear in a (new) Recital 38 (see above). The current version of Art. 14 (1) seems awkward insofar as it (also) covers the law applicable to the mutual contractual obligations between the assignor and assignee which should already be covered by Art. 3 ff directly, while the issue of property aspects as between assignor and assignee and its separation from property aspects as against third parties is clearly not well solved at the moment.

Some countries follow a party autonomy based approach which is reported to work well (see the Netherlands and, as a Third State example, Switzerland) and allows the parties to adopt a flexible approach which might better suit their needs regarding their particular transaction. Given the potential negative consequences of full party autonomy for third parties, this proposal suggests an approach based on limited party autonomy. Limited party autonomy would still enable different business sectors to some extent to mould the contractual rules which best suit their particular needs without creating a disproportionate disadvantage for third parties. The suggested Art. 14(1)(a) of this proposal therefore allows for a limited choice of law as regards property aspects of an assignment (while allowing a free choice of law for the contractual aspects under Art 3 ff Rome I Regulation). The new provision would enable the parties to apply a single law to the contract between assignor and assignee and to all property aspects of the transaction if this law is one of those mentioned in Art. 14 (1)(a). In case no choice is made or a third law is chosen by assignor and assignee, the effectiveness of the assignment will be governed by the law applicable to the assigned or subrogated claim (Art. 14 (1) (b), i.e. the same solution applies than in Art. 14 (2) (while Arts. 3 ff Rome I apply to the contract between assignor and assignee). It is therefore possible that the law applicable to the contract between assignor and assignee does not coincide with the law applicable to the property aspects of the assignment, but assignor and assignee are free to align the law applicable to the contract between them and to the effects of assignment by choosing it accordingly. Moreover, even in the case in which the default rule of Art. 14 (1)(b) applies, only two laws would need to be looked at: the law applicable to the contract between assignor and assignee and the law of the claim assigned (see 14 (1)(b) and 14(2)). The former Art. 14 (2) protecting the debtor remaining unchanged, the number of applicable laws to an assignment under this proposal would therefore be either limited to two or, by choosing the law applicable to the underlying claim, the assignor and assignee could produce a situation where a single law applies to all aspects of the assignment, including the protection of the debtor.

As to priority issues between competing assignees, this conflict can be resolved by analysing the effects of each transaction in sequence, according to its own applicable law. The analysis would follow the property law principle of prior tempore, potior iure, of 'first in time, first in right and rank', which is qualified only by rules on good faith acquisition of the following transactions. Each transaction is assessed with the preceding transaction preparing the ground...
for the following, and the following, by its governing law, may override the effects of the preceding transaction.

As the law of habitual residence of the assignor is one potentially applicable law under Proposal A, the question can arise in cases of plurality of assignors which assignor’s residence should prevail. This could be addressed in a recital or in the rule itself and be potentially solved by reference to either a center of gravity or via the closest connection principle. An alternative would be to leave the question of the multiplicity of assignors to party autonomy. Any abuses of such party autonomy could be dealt with post facto by court intervention. Considering this, the drafting proposals do not address the problem of multiple assignors explicitly.

**Article 27(2)**

[Deleted]

**Comment**

Following completion of the Commission’s review, Article 27(2) would no longer be relevant and could be deleted.
5.3. PROPOSAL B – LAW GOVERNING ASSIGNED CLAIM [WITH OPTIONAL FACTORING EXCEPTION]

[New text of Recital (38), other new Recitals, amendment of Article 1(2)(f) and new Article 1(2)(k) in substantially the same terms\(^{662}\) as Proposal A. Article 27(2) deleted. See Proposal A above, with Comments]

Article 14 (amended)

Voluntary assignment and contractual subrogation

1. In the case of a voluntary assignment or contractual subrogation of a claim against another person (the debtor), the law governing the assigned or subrogated claim at the relevant date shall also govern the assignment or subrogation.

2. In the case of an assignment of a claim arising under a contract not in existence at the date of the assignment [or an assignment by way of factoring]:

(a) the law governing the assigned or subrogated claim at the relevant date (or, if later, when the contract comes into existence) shall determine the assignability of the claim, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged; and

(b) the assignment or subrogation shall otherwise be governed by the law of the country in which the assignor has his habitual residence at the relevant date. Articles 19 (2) and (3) shall not apply in determining the place of the assignor’s habitual residence for the purposes of this article.

3. If the issue is one of priority between two or more competing assignments or other rights to the same claim, the relevant date is the date of the last assignment or other event giving rise to a competing right. If the issue is whether the debtor's obligations have been discharged, the relevant date is the date of performance of the debtor's obligation in question. For all other issues, the relevant date is the date of the assignment in question.

4. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

\(^{662}\) The numbering of the provisions referred to in the recitals and in Article 1(2)(k) may, depending on the final form of Article 14, need to be changed.
Comment

The proposed Article 14(1) adopts the law governing the assigned claim as the law generally applicable to all matters other than the position of the debtor, and the contractual obligations of assignor and assignee (see comment to the new Recital (38) in Proposal A above).

In general, the law applicable must be determined at the date of the assignment, see Art. 14(3). Two qualifications to this are proposed.

Firstly, if the question is one of discharge of the debtor’s obligations, the relevant date should be the contractual date of performance of the obligation of the debtor which is in question, as determined under the governing law. This protects the debtor’s legitimate expectations.

Secondly, if the question which arises is one of priority between two or more assignments, or between an assignment and another competing right, it must be acknowledged that the connecting factor (here, the law applicable to the claim assigned) may change over time.

The proposal seeks to resolve possible conflicts between different laws regulating questions of priority by fixing the connecting factor, in general, at the date of the last assignment or other event giving rise to a competing right (the “relevant date”). As a result, an assignee may, at the date of assignment, determine the law applicable to questions of priority of his right over pre-existing rights (including earlier assignments), but must take the risk that his entitlement may be overridden under a different law by another person’s right, if the law applicable to the underlying claim changes following the assignment. Here, however, the “change of connecting factor” risk is something which the assignee may be able to control through his relationship with the debtor.

The proposed Article 14(2) contains two limited exceptions to the general rule in Article 14(1). First, for assignments of claims under a contract not yet in existence. Secondly, for assignments by way of factoring. The first exception arises out of necessity because the law applicable to such claims cannot, at the date of the assignment, be determined. The second exception reflects the strong views of stakeholders and representatives of the factoring industry during the Study as to the need for certainty in relation to assignments of trade and other receivables for which the law applicable to underlying claims may be unclear or when it would be inefficient or impracticable (for reasons of cost) to determine and investigate that law. However, the drafters of the study have some doubts about the necessity of the factoring exception. Providing for an exception for a particular business sector may incite other sectors, concerned with problems arising during the course of their business, to express their preference in favour of an exception for their respective sectors. Also, the multiplicity of laws applicable to an assignment frequently referred to by the factoring sector in this debate may arise in other sectors as well. Any special rules require careful justification.

Under these exceptions, all matters other than the position of the debtor, and the contractual obligations of assignor and assignee (see comment to the new Recital (38) in Proposal A above) will not be governed by the law applicable to the claim assigned but instead by the law of the country of the assignor’s habitual residence as determined in Art. 19 (1) Rome I Regulation. The application of Art. 19 (2) and (3) shall be excluded to render the solution

---

663 The Article applies to “future claims” only in these circumstances, and not to claims yet to arise under an existing contract.
more consistent with Article 5(h) of the UN Receivables Convention\textsuperscript{664} (see also Articles 22 and 30 of the UN Receivables Convention).

Sub-paragraph (a) of Art. 14(2) emphasises that all matters affecting the debtor will continue to be determined using the law governing the assigned claim, irrespective of the factoring exception.

In sub-paragraph (b) of Art. 14(2), the same solution to the problem of the changing connecting factor over time is proposed compared to Art. 14 (1) (see Art. 14 (3) for definitions): that the law applicable should be determined, generally, at the date of the last assignment or event creating right. Here, the assignee could seek to control future changes in the assignor’s location by a contractual covenant in the contract between assignor and assignee. A failure by the assignor to observe such provision would not, however, prejudice a later assignee or rightholder who would take priority in accordance with the law of the debtor’s location at the time of the acquisition of his right.

If the specific exception for factoring transactions were to be adopted, it seems doubtful whether the term “factoring” could (or should) be comprehensively defined in the text of the Regulation, due to difficulties in providing a comprehensive description of the relevant features of a “factoring” transaction, as distinct from other types of transaction (e.g. securitisation) to which the general rule in Article 14(3) would apply. Some further guidance could, however, be given in a Recital.

\textsuperscript{664} A Recital could clarify this intention.
5.4. PROPOSAL C - LAW OF THE ASSIGNOR’S LOCATION [WITH OPTIONAL EXCEPTION FOR ASSIGNMENTS OF CLAIMS UNDER FINANCIAL CONTRACTS]

[Amendments to Recital (38), new recitals, amendment to Article 1(2)(f) and new Article 1(2)(k) in substantially the same terms\textsuperscript{665} as Proposal A. Article 27(2) deleted. See Proposal A above, with Comments]

Article 14 (amended)

Voluntary assignment and contractual subrogation

1. Subject to Article 14(3), in the case of a voluntary assignment or contractual subrogation of a claim against another person (the debtor):

(a) the law governing the assigned or subrogated claim at the relevant date (or, if later, when the contract comes into existence) shall determine the assignability of the claim, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor’s obligations have been discharged; and

(b) the assignment or subrogation shall otherwise be governed by the law of the country in which the assignor has his habitual residence at the relevant date. Arts. 19 (2) and (3) shall not apply in determining the place of the assignor’s habitual residence for the purposes of this article.

2. In the case of an assignment of a claim [under an existing contract concluded within the type of system falling within the scope of Article 4(1)(h) or within a multilateral system for the settlement of payments or other transactions between banks and financial institutions or a claim under a financial instrument], the law governing the assigned or subrogated claim at the relevant date shall also govern the assignment or subrogation.

3. If the issue is one of priority between two or more competing assignments or other rights to the same claim, the relevant date is the date of the last assignment or other event giving rise to a competing right. If the issue is whether the debtor's obligations have been discharged, the relevant date is the date of performance of the debtor’s obligation in question. For all other issues, the relevant date shall be the date of the assignment in question.

\textsuperscript{665}The numbering of the provisions referred to in the recitals and in Article 1(2)(k) may, depending on the final form of Article 14, need to be changed.
4. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Comment

Under the proposed Art. 14(1), the law of the assignor’s habitual residence would govern all matters other than the position of the debtor, and the contractual obligations of assignor and assignee (see comment to the new Recital (38) in Proposal A above).

These provisions follow the structure and language of the exceptional rules of Proposal B (above, with Comments).

Art. 14(1) is subject only to the limited exception in the proposed Article 14(3), if that exception is accepted. The proposed Art. 14(3) contains a possible exception to the general rule for a limited group of financial contracts. The rationale for this exception, which follows Art. 14(1) of Proposal B (see above, with Comments) in applying the law of the assigned or subrogated claim to relationships between the assignee and persons other than the assignor or debtor, is the need to apply a single law to relationships of these kinds. It reflects, therefore, the reasoning underlying the exclusion of some contracts within multilateral systems and financial instruments from the consumer contract provisions in Art. 6 of the Rome I Regulation. Again, for the reasons stated in relation to the preceding Proposal, some caution is needed with providing for exceptions from the general application of the law of assignor’s habitual residence.

It can be seen that Proposal B (in which the general rule favours the law of the assigned claim and the exception favours the law of the assignor’s location) is effectively a mirror image of Proposal C (in which the general rule favours the law of the assignor’s location and the exception favours the law of the assigned claim). Both rules would be more straightforward if the general rule only were adopted.

---

666 Rome I Regulation, Art. 6(4)(d)-(e).