The law applicable to the proprietary effects of assignments of receivables: Introduction

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“It is no exaggeration to say that the area continues to be the most confused and confusing in the conflict of laws regimes of legal systems everywhere.” – Walsh

“The complexity of the rules concerning chattels, however, is surpassed by that concerning the rules relating to intangible moveable property.” – Carruthers

"The assignment of debts belongs to the most hazardous areas of private international law." – Struycken

The assignment of intangible things, such as debts, has long been one of the most intractable topics in the English conflict of laws. The writers on the subject are fundamentally divided and the little case law that exists is old, confused and inconclusive." - Moshinsky
“Assignment”?  

• While there may be disagreement on their content, there is a broad consensus that the same choice of law rules should apply to both the outright transfer and the grant of security in receivables (and generally in any other type of asset).

• Otherwise, priority competitions between outright transferees and secured creditors could be subject to different potentially conflicting laws.

• A unitary approach also avoids having to characterize whether a particular transaction is a sale or a secured transaction.
Choice of law issues

There is also a broad consensus that:

• Relations between the assignor and the assignee should be governed by the law of the contract between them;
• Relations between the assignee and the debtor on the receivable should be governed by the law governing the assigned claim (i.e., for contract-generated receivables, law designated by assignor and counterparty)

• Where controversy continues is with respect to the law applicable to the proprietary effects of assignments; 3 possible connecting factors are principally debated:
  • Law applicable to the assigned receivable
  • Law applicable to the contract of assignment
  • Law of the State in which the assignor/grantor is located
The UN Convention on the Assignment of Receivables in International Trade (2001)

Arts. 30 [&] 22: “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(h): “A person is located in the State in which it has its place of business. If the assignor . . . has a place of business in more than one State, the place of business is that place where the central administration of the assignor . . . is exercised. . . If a person does not have a place of business, reference is to be made to the habitual residence of that person.”

Art. 5(g): “Priority’ means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied.”

Art. 2(a): “Assignment’ means the transfer by agreement from one person (‘assignor’) to another person (‘assignee’) of all or part of or an undivided interest in the assignor’s contractual right to payment of a monetary sum (‘receivable’) from a third person (‘the debtor’). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer. (art. 2(a))
UNCITRAL Model Law on Secured Transactions

Art. 86: “...the law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located.”

Art. 90: For the purposes of the provisions of this chapter, the grantor is located:
(a) In the State in which it has its place of business;
(b) If the grantor has a place of business in more than one State, in the State in which the central administration of the grantor is exercised; and
(c) If the grantor does not have a place of business, in the State in which the grantor has his or her habitual residence.

Art. 91: “1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer:
(a) For creation issues, to the location at the time of the putative creation of the security right; and
(b) For third-party effectiveness and priority issues, to the location at the time when the issue arises.

2. If the right of a secured creditor in an encumbered asset is created and made effective against third parties and the rights of all competing claimants are established before a change in the location of the asset or the grantor, references in the provisions of this chapter to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change.”
7 Justifications for assignor location choice of law rule

• Objective connecting factor thereby preempting public policy/mandatory rule challenges and risk of manipulation (as compared to law applicable to the assignment contract or law applicable to the assigned receivable where secured creditor can directly or indirectly control applicable law)

• Facilitates the bulk assignment of receivables owing by multiple debtors in multiple locations by providing a single governing law (as compared to law applicable to assigned receivable)

• Ensures ex ante predictability of the applicable law where the assignment covers future receivables (as compared to law applicable to assigned receivable)

• Ensures transparency and efficiency for third parties (as compared to law applicable to assigned receivable or law applicable to assignment contract where third parties especially the assignor’s existing creditors may lack leverage over the assignor to gain easy access to the relevant contract)
7 Justifications for assignor location rule (cont’d)

• Avoids risk of unpredictability/arbitrariness in applicable law for priority competitions between competing assignees (as compared to law applicable to assignment contract and law applicable to assigned receivable)

• Where applicable law requires public registration for third party effectiveness/priority, enables third party effectiveness to be achieved by a single registration (as compared to law applicable to assigned receivable)

• Enhances likelihood that the law applicable to the assignor’s assets on insolvency is the same as the applicable law outside insolvency (“central administration of the assignor” = “centre of main interests”)

Exclusions from debtor location rule – Assignment Convention

Art. 2: “1. This Convention does not apply to assignments made:
(a) To an individual for his or her personal, family or household purposes;
(b) As part of the sale or change in the ownership or legal status of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:
(a) Transactions on a regulated exchange;
(b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;
(c) Foreign exchange transactions;
(d) Inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments;
(e) 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;
(f) Bank deposits;
(g) A letter of credit or independent guarantee.”
Exclusions from debtor location rule: Model Law

Art. 1

1. This Law applies to security rights in movable assets.

2. With the exception of articles 72-82, this Law applies to outright transfers of receivables by agreement.

3. Notwithstanding paragraph 1, this Law does not apply to security rights in:
   (a) The right to request payment under, or to receive the proceeds of, an independent guarantee or letter of credit;
   (b) Intellectual property in so far as this Law is inconsistent with [the law relating to intellectual property to be specified by the enacting State];
   (c) Intermediated securities; [or]
   (d) Payment rights arising under or from financial contracts governed by netting agreements, except a payment right arising upon the termination of all outstanding transactions . . .
Art. 2(dd): “‘Receivable’ means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security;”
Alternative choice of law rules for bank account receivables – Model Law art. 97

1. . . . the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the deposit-taking institution and the secured creditor, is

Option A

the law of the State in which the deposit-taking institution maintaining the account has its place of business.

2. If the deposit-taking institution has places of business in more than one State, the law applicable is the law of the State in which the office maintaining the account is located.

Option B

the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that the law of another State is applicable to all such issues, the law of that other State.

2. The law of the State determined pursuant to paragraph 1 applies only if the deposit-taking institution has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

3. If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to [the default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, to be inserted here by the enacting State].
EU law - Rome I Regulation

- Owing to absence of consensus on a single governing law solution, law applicable to proprietary effects of assignments not addressed when Rome Convention on the Law Applicable to Contractual Obligations 1980 was transposed into the Rome I Regulation.

- At request of EU, the British Institute of International and Comparative Law conducted a legal and empirical study, finding divisions in industry/national support for different solutions; these divisions reflected in three alternative rules each having something of a hybrid character.

- EU has launched a broad public consultation with the hope of arriving at a recommendation by end of 2017.
Panel Presentations

• Peter Winship, Southern Methodist University (US and Canadian law)
• Yuko Nishitani, Kyoto University Faculty of Law (Japanese law)
• Eva Lein, British Institute of International and Comparative Law (results of the legal/empirical research conducted by the Institute)
• Christian Heinze, University of Hanover (law applicable to proprietary effects of assignments of receivables in insolvency under EU and German law)
• Maria Vilar-Badia, European Commission (current status of EU reform consultations and plans)
Background reading

Roy GOODE, “The assignment of pure intangibles in the conflict of laws” [2015] LMCLQ 289


Trevor C. HARTLEY, “Choice of law regarding the voluntary assignment of contractual obligations under the Rome I regulation” (2011) 60 Int’l & Comp. L Q 60 29


And see British Institute of International and Comparative Law, 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 (2011) available at http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf