The EU conflict of laws rules on the law governing the effects of an assignment against third parties: some fundamental problems of the Proposal

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Abstract

The EU's Proposal for conflict of laws rules on the law governing the effects of an assignment against third parties aims to provide predictability for parties involved in an assignment. This contribution concludes that, unfortunately, the Proposal's suggested conflict of laws rule, based on which the law of the assignor's habitual residence governs the third-party effects, does not provide that predictability. It also concludes that there are some other fundamental problems with the Proposal and the assumptions underlying it. Most importantly, it questions whether the Proposal's suggestion that priority between competing assignments is determined by the assignment that is valid and effective first in time has a proper legal basis. It also analyses what law governs the effects of an assignment against third parties (other than the debtor of the assigned claim) and concludes that this is the law governing the assigned claim.

1. Introduction

The assignment of claims concerns the transfer by an assignor (i.e., the creditor of a right to claim a debt from a debtor) to an assignee. An assignment involves three parties: the assignor, the assignee and the debtor of a claim. Each of those parties is a third party to the relationship between the other two. This means that the debtor is the third party, seen from the relationship between the assignor and the assignee. It also means that the assignee is the third party to the relationship between the assignor and the debtor.

As an assignment involves three relationships (assignor-debtor, assignor-assignee and assignee-debtor), an assignment of a claim may be an international assignment if, for instance, the assignor and the assignee have their habitual residence in different countries, or if the debtor and the assignor have their habitual residence in different countries. The assignment may also be international, if the law governing the agreement between the assignor and the assignee is governed by a different law than the law governing the claim.

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International assignments of claims are transactions that are used, for instance, by companies to obtain liquidity and have access to credit, as in factoring and collateralization, and by banks and companies to optimize the use of their capital, as in securitization.[1]

As to the law governing an international assignment, within the EU, except Denmark, the Rome I Regulation[2] provides, in Article 14:

> '1. The relationship between assignor and assignee under a voluntary assignment […] 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 […] claim shall determine its assignability, 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.
> […].'[3]

It has been debated whether these conflict of laws rules also designate the law governing the effects of the assignment against third parties. The answer to that question is important for all parties involved in the assignment. If a party other than the assignee of a claim invokes that he has also been assigned the same claim, there is a priority conflict: a situation in which it would need to be determined who should prevail, the assignee or the other party. A priority conflict between the assignee of the claim and a third party can arise, for instance, in the following situation. If a claim has been assigned twice (accidentally or not) by the assignor to different assignees, both assignees could invoke to have been validly assigned the same claim. The law applicable to the effects of the assignment against third parties to the assignment will resolve the priority conflict between the two assignees of the same claim. A priority conflict may also arise if a claim has been assigned by the assignor to an assignee, and subsequently by that assignee to another assignee. This may lead to the assignor of the first assignment invoking the invalidity of the first assignment. If so, the question may be what law governs the effects of the invalidity of the first assignment on the subsequent assignment, as between the assignor and the subsequent assignee.[4]

Because of the debate about what law governs the third-party effects of an assignment, a Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (hereinafter: the 'Proposal') has been drafted.[5]

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1 Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, Brussels, 12 March 2018, COM(2018) 96 final, 2018/0044(COD) ('Proposal'), p. 2.

2 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, *OJ* 2008, L 177/6-16 ('Rome I Regulation').

3 For simplicity's sake, the reference to 'contractual subrogation of a claim' has been deleted. Also, Art. 14(3) Rome I Regulation has not been quoted. It provides: '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.'

4 See Proposal, p. 4.

5 See footnote 1.

In short, the Proposal provides, in Article 4(1), that the law of the country in which the assignor has his habitual residence at the material time governs the third-party effects of an assignment of claims. It also provides that if the assignor has changed his habitual residence between two assignments of the same claim to different assignees, the priority of the right of one assignee over the right of another assignee will be governed by the law of the habitual residence of the assignor at the time of the assignment which first became effective against third parties under the law designated as applicable pursuant to this first subparagraph.

However, according to Article 4(2) of the Proposal, the law applicable to the assigned claim governs the third-party effects of the assignment of cash credited to an account in a credit institution and claims arising from a financial instrument.

Furthermore, based on Article 4(3) of the Proposal, the assignor and the assignee may choose the law applicable to the assigned claim as the law applicable to the third-party effects of an assignment of claims in view of a securitization. If so, that choice of law must be made expressly in the assignment contract or by a separate agreement. The chosen law governs the substantive and formal validity of the act whereby the choice of law was made.[6]

Next, Article 4(4) of the Proposal provides for a priority conflict between assignees of the same claim. It concerns a priority conflict where the third-party effects of one of the assignments are governed by the law of the country in which the assignor has his habitual residence. The third-party effects of other assignments are governed by the law of the assigned claim. In that situation, according to Article 4(4), the third-party effects are governed by the law applicable to the third-party effects of the assignment of the claim which first became effective against third parties under its applicable law.

According to Article 5 of the Proposal, the law applicable to the third-party effects of assignment of claims pursuant to this Regulation govern, in particular

> (a) the requirements to ensure the effectiveness of the assignment against third parties other than the debtor, such as registration or publication formalities;
> (b) the priority of the rights of the assignee over the rights of another assignee of the same claim;
> (c) the priority of the rights of the assignee over the rights of the assignor's creditors;
> (d) the priority of the rights of the assignee over the rights of the beneficiary of a transfer of contract in respect of the same claim; and
> (e) the priority of the rights of the assignee over the rights of the beneficiary of a novation of contract against the debtor in respect of the equivalent claim.

The Proposal is not very precise in its wording, and sometimes inconsistent.[7] To name but a few examples: Recital 15 mentions that the 'conflict of laws rules laid down in this Regulation should govern the proprietary effects of assignments of claims as between all parties involved in the assignment (that is, between the assignor and the assignee and between the assignee and the debtor) as well as in respect of third parties (for example, a creditor of the assignor)'. This would indicate that the law governing the third-party effects also governs the 'proprietary effects' of the assignment against the debtor. However, Article 2(e) of the Proposal provides that 'third-party

6 This seems a superfluous provision in light of Arts. 10 and 11 of the Rome I Regulation.

7 See also L.F.A. Welling-Steffens, 'Met een kluitje het riet ingestuurd? Onduidelijke taal in de voorgestelde verordening over het toepasselijke recht op de derdenwerking van cessie', *TvI* 2018/41.

effects means proprietary effects, that is, the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, creditors of the assignor and other third parties'. Similarly, Article 5 of the Proposal provides that the law governing the third-party effects governs 'the requirements to ensure the effectiveness of the assignment against third parties other than the debtor'. This would indicate that the Proposal does not designate the law governing the third-party effects or proprietary effects of the assignment against the debtor. As will be touched upon further below in this contribution, the Proposal also does not clearly distinguish between what the object of the assignment is. Is it a claim (defined in Article 2(d) by the Proposal as 'the right to claim a debt') or is the legal title to a claim (see Article 2(e) of the Proposal 'legal title over a claim assigned' and similar wording in Recitals 22 and 30). Also, the term 'third party' is not clear: is a third party the third party to a relationship of two or is it a party other than the three parties involved in an assignment? Furthermore, the Proposal uses the term 'at the material time',[8] but does not seem to explain what that means and how it should be determined. Finally, Article 5 of the Proposal is a bit odd, as Article 4 of the Proposal explicitly designates two different conflict of laws rules to determine the same issue of 'third-party effect', whereas Article 5 implies that the law thus designated *exclusively* governs the same third-party effect where it provides that it governs the priority of the assignment in relation to competing rights.

These preliminary remarks being made, this contribution will focus on a few of the more fundamental problems of the Proposal and the assumptions underlying it.

2. What law governs who has a claim?

One fundamental problem is that the Proposal, or the assumptions on which it is based, ignores the question what law determines who has a claim prior to or after an assignment of that claim. This is fundamental, because the assignment and, consequently, the law or laws governing the assignment are intended to change who has that claim and, consequently, the third-party effects thereof.

2.1 Law governing a claim

A claim's existence, the question who is creditor of a claim and who debtor of claim, is determined by law. What law applies in case of possibly conflicting laws is the applicable law according to which country has jurisdiction to decide upon that question. Within the EU, except Denmark, the Rome I and Rome II Regulations[9] determine what law or laws govern the claims arising from contractual and non-contractual obligations respectively.[10] The laws applicable

8 Art. 4(1) of the Proposal.

9 See n. 2 for the Rome I Regulation. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, *OJ* 2007, L 199/40-49 ('Rome II Regulation').

10 The Rome I Regulation entered into force on 17 December 2009 and almost entirely replaces the Rome Convention on the law applicable to contractual obligations, 19 June 1980, *OJ* 1980, L 266/1-19 ('Rome Convention') (see Art. 24 of the Rome I Regulation). The Rome II Regulation entered into force on 11 January 2009.

according to these Regulations determine whether a claim exists and hence who is creditor and who is debtor and the various ways of extinguishing obligations.[11]

This means that if according to the law determined by the Rome I or Rome II Regulations the claim has been extinguished, the creditor may have been the creditor, but no longer is. If it simply never came into existence, he never was the creditor. That law also determines whether the creditor is the creditor of a future claim or a conditional claim and when such claims become actual or unconditional. In other words, the law governing the claim determines whether there is a claim, who has it (the creditor), against whom the claim can be exercised or invoked (the debtor) and when and subject to what conditions that is the case.

2.2 Law governing the third-party effects of a claim

If you do not have a claim under the law governing the claim, it seems inconceivable that any law governing any attachment, garnishment, restraining order, injunction or similar measure that has been levied at your detriment or expense, or any law governing insolvency proceedings, bankruptcy proceedings or similar proceedings, could determine that you do have the same claim arising from the same obligation. Why this is inconceivable is illustrated by the following example: an attachment order is issued and executed to the benefit of X under the laws of jurisdiction A at the expense of X's debtor Y on Y's claim against Y's debtor Z. Z is domiciled in jurisdiction A. Let's assume that Z (or Y) invokes that Y's claim against Z is governed by the laws of jurisdiction C (or of any other jurisdiction) and that under that law, Y does not have a claim against Z, for instance, because Z has already paid the debt or has set it off against a claim Z has against Y, or because an obligation between Y and Z never existed. If Z's argument is successful, the attachment order will not cover Y's claim against Z.

Similarly, bankruptcy or insolvency laws aim to fixate the rights and liabilities of the insolvent debtor. In other words, the law applicable to insolvency proceedings only determines what rights that the insolvent debtor has fall in the insolvent debtor's bankruptcy estate and which ones do not. The insolvency law does not determine what claims the insolvent debtor already has.[12]

Let's assume that under the law governing a claim, you do not have a claim against a certain debtor. Could you still effectively and validly invoke against any party other than the debtor that you have that same claim against the same debtor? Clearly, the answer is 'no'.

Now imagine another situation: under the law governing a claim the creditor is entitled to receive something from a certain debtor based on a certain obligation. In that case, it is incon-

11 Art. 12 Rome I Regulation and Art. 15 Rome II Regulation.

12 It is conceivable that an applicable insolvency law would provide that Y would still have a claim against Z, because Z's payment of the debt would be considered void, voidable or unenforceable as it would be detrimental to the general body of creditors (Art. 7(2)(m) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, *OJ* 2015, L 141/19-72 ('Insolvency Regulation')). However, even in that case the law governing the claim would take precedence, if the law governing the claim is the law of an EU Member State and if under that law, Y and/or Z, depending against whom the voidness, voidability or unenforceability of the payment is invoked, can prove that under the law governing the claim, that payment cannot be challenged by any means.

ceivable that any other law could determine that any other party is entitled to receive the same from the same debtor based on the same obligation.

In other words, the law governing a claim not only determines what the creditor is entitled to receive from the debtor, but also to the exclusion of which other parties the creditor is entitled to receive the same from the debtor based on the same obligation. These other parties are all parties who are not party to the obligation as designated by its governing law, which exists between the creditor and the debtor. These other parties are, in other words, third parties.

Therefore, the law governing a claim determines who has a claim, who is creditor of that claim and who is debtor of that claim and against what third parties the creditor can invoke that he has that claim against the debtor and when. However, the principle that the law governing a claim also determines against which third parties the creditor can validly invoke that he has that claim, to the exclusion of those third parties (the third-party effect), has not been taken into account by the Proposal. This seems wrong, as will be further discussed in the next section.[13]

3. What law governs the validity of an assignment against third parties?

The next fundamental problem of the Proposal is that it assumes that the third parties against whom the validity of the assignment of a claim needs to take effect, are all the parties other than the three parties involved in the assignment, and that, consequently, this is an additional relationship that may require an additional governing law. In other words, it presumes that the debtor is a different third party than other third parties.[14] The Proposal does not in any way explain why it made that assumption, whereas this would seem to have been appropriate, for the reasons explained in this section 3.

As already touched upon in section 1, a third party is the party other than the two parties to a relationship. So, in an assignment, the third party will be the assignor from the perspective of the relationship between the assignee and debtor. From the perspective of the relationship between the assignor and assignee, the debtor will be the third party. And from the perspective of the relationship between the assignor and debtor, the assignee will be the third party.

The Proposal aims to determine the law governing the validity and effect of the assignment against the parties who are a third party from the perspective of the relationship between the assignor and the (prospective) assignee or another party that is interested in acquiring the claim.[15]

Article 14(1) of the Rome I Regulation determines what law governs the relations between assignor and assignee of an assignment of any claim, whether the claim is contractual or not, or whether the claim is 'international' or not. However, the law applicable pursuant to Article 14(1) Rome I Regulation does not govern the effects of the assignment in relation to the debtor of the assigned claim. This means that, even though the material scope of the Rome I Regula-

13 The Proposal does not refer to it in any way.

14 See for instance Art. 5 under (a) of the Proposal, although this seems to be at odds with Recital 15 (the Proposal should govern 'the proprietary effects of assignments of claims as between all parties involved in the assignment (that is, between the assignor and the assignee and between the assignee and the debtor) as well as in respect of third parties (for example, a creditor of the assignor)').

15 See Art. 2(e) of the Proposal and Recitals 12, 15 and 20.

tion is limited to the law governing contractual obligations,[16] it also includes a conflict of laws rule for aspects which are not necessarily of a contractual nature.[17]

As follows from Article 14 Rome I Regulation, at most two different laws can apply: the law governing the contract between the assignor and the assignee governs the relations between the assignor and the assignee (Article 14(1)) whereas the validity and effect of the assignment against the debtor are governed by the law governing the claim (Article 14(2)).

As to Article 14(2) of the Rome I Regulation, the assignability and the question whether payment discharges the debtor are all matters concerning the validity and effect of the assignment against the debtor. The non-assignability of a claim determines whether and, if so, to what extent an assignment of that claim can validly and effectively be invoked against the debtor. Similarly, the question whether payment discharges the debtor is determined by the validity and effect of the assignment against the debtor. This means, for instance, that in the event of a third-party attachment that is levied at the expense of the assignor under the debtor, the debtor will and may only rely on the law governing the claim to determine whether and, if so, when the conditions for the valid assignment of the claim to an assignee have been complied with.

In this respect, it is noted that Article 14(2) Rome I Regulation is the successor of Article 12(2) of the Rome Convention. The Report on the Convention on the law applicable to contractual obligations by M. Giuliano and P. Lagarde[18] explains as to the wording of Article 12:

> '1. The subject of Article 12 is the voluntary assignment of rights. Article 12 (1) provides 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. Interpretation of this provision gives rise to no difficulty. It is obvious that according to this paragraph the relationship between the assignor and assignee of a right is governed by the law applicable to the agreement to assign. Although the purpose and meaning of the provision leave hardly any room for doubt, one wonders why the Group did not draft it more simply and probably more elegantly. For example, why not say that the assignment of a right by agreement shall be governed in relations between assignor and assignee by the law applicable to that agreement. 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). The present wording was in fact finally adopted precisely to avoid a form which might lead to the idea that the law applicable to the agreement for assignment in a legal system in which it is understood as "Kausalgeschaft" [this would be the case under German law, CAdeV] also determines the conditions of validity of the assignment with respect to the debtor.

16 Art. 1(1) Rome I Regulation.

17 There are many other problems. One is the wrong assumption of the Proposal that Art. 14 of the Rome I Regulation only designates the conflict of laws rules on the assignment of contractual claims (see Proposal, p. 5), whereas Art. 14 Rome I Regulation clearly governs the assignment, and the contractual subrogation, of *any* claim. It is only if such claim is a contractual claim to which more than one law could apply, that the Rome I Regulation also designates which law governs the claim.

18 M. Giuliano and P. Lagarde, 'Report on the Convention on the law applicable to contractual obligations', *OJ* 1980, C 282/1-50.

> 2. *On the contrary* [emphasis added, CAdeV], under the terms of Article 12 (2) it is the law governing the right to which the assignment relates which 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.'

To understand this better: under German law, if an assignor and an assignee enter into an agreement pursuant to which the assignor obliges to sell and assign to the assignee a claim against payment by the assignee of a purchase price, that agreement is considered a *Kausalgeschäft*. The act whereby the claim is then assigned (*Forderungsabtretung*) is considered a *Verfügungsgeschäft*. Under German law, a *Verfügungsgeschäft* is a proprietary act which determines the validity and effect of a transfer of an asset against third parties. In case of *Forderungsabtretung*, the third parties include the debtor of the claim to the assignment, even though if the debtor does not know of the *Forderungsabtretung*, payment to the assignor discharges him from his obligation.

This should be borne into mind when interpreting Article 12 of the Rome Convention and, consequently, Article 14(2) of the Rome I Regulation. If under the law governing the agreement between assignor and assignee, the relations between assignor and assignee are of a proprietary nature, the scope of that law does not govern the proprietary aspects of the assignment in relation to the debtor. It is the law governing the claim that governs the effects of the assignment against the debtor. In other words, the effect of the assignment against the debtor, i.e., the third party seen from the perspective of the assignor and assignee, is governed by the law governing the claim.

The fact that the drafters of the Rome I Regulation considered, in Recital 38, that '[i]n 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 […]' does not change that, for the following reasons. Clearly, Article 14(1) of the Rome I Regulation only makes it explicit that the law governing the contractual obligations between assignor and assignee also governs, as between assignor and assignee, the property aspects of an assignment but only if under the law governing the contractual obligations those property aspects are also governed by it. In other words, the scope of the law designated by Article 14(1) is limited to the relations between assignor and assignee. Consequently, it does not govern the property aspects of the assignment against the debtor, nor any other aspect of the assignment.[19]

The Proposal now seems to imply that, to the extent that the validity of the assignment against the debtor concerns property or proprietary aspects, these aspects could be governed by a law other than the law governing the assigned claim.[20] This would mean that certain aspects of the validity of the assignment against the debtor would be governed by a law other than the

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19 It would be illogical to conclude that, as Recital 38 of the Rome Regulation considers that the property effects of an assignment as between assignor and assignee are also governed by the law governing their contractual relationship, this law would also govern the validity of that assignment against a third party (regardless of whether there would be any distinction between property and proprietary, as some authors suggest there might be (see A. Dickinson, 'Tough Assignments: the European Commission's Proposal on the Law Applicable to the Third Party Effects of Assignments of Claims', *IPRax* 2018, pp. 341-345)).

20 Proposal, Recital 15: 'The conflict of laws rules laid down in this Regulation should govern the proprietary effects of assignments of claims as between all parties involved in the assignment (that is, between the as-

law governing the claim. The consequence would be that the debtor of the claim, to determine his position as regards the validity of the assignment to the extent that these would be considered 'proprietary' or 'property' aspects of the validity of the assignment, would have to take into account any possibly applicable law. Clearly, that cannot be the intended effect of the Proposal.

In light of the above, it would seem logical to conclude that if the law governing the validity and effects of the assignment, from the perspective of the relationship between the prospective assignee and the assignor, against one third party (the debtor) is the law governing the claim, that law also governs the validity of the assignment against all other third parties from the perspective of the relationship between the prospective assignee and the assignor.

The European Court of Justice has an excellent opportunity to decide that the law governing the claim also governs the validity of the assignment against third parties other than the debtor, based on a recent request for a preliminary ruling submitted by the Oberlandesgericht Saarbrücken by decision of 8 August 2018 before the Court of Justice.[21] In light thereof, it seems noteworthy that the drafters of the European Community's Draft Convention on the Law applicable to Contractual and Non-contractual Obligations, which may be considered the draft for the Rome Convention on the law applicable to contractual obligations, the Rome I Regulation's predecessor, as regards the topic of the law applicable proposed the following rule in Article 16: 'Obligations between the assignor and the assignee of a claim shall be governed by the law applicable under articles 2 to 8. The law governing the original claim shall determine its assignability and relationship between the assignee and the debtor, as well as the conditions under which the assignment may be invoked against the debtor and third parties'[22] even though the phrase 'and third parties' did not make it into the final text of Article 12 of the Rome Convention.

If the European Court of Justice rules that the law governing the claim also governs the validity of the assignment against third parties, the Proposal will be redundant.

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signor and the assignee and between the assignee and the debtor) as well as in respect of third parties (for example, a creditor of the assignor).'

21 Saarlandisches Oberlandesgericht, Decision of 8 August 2018, 4 U 109/7 (*BGL BNP Paribas S.A.* v. *TB A.G.*). See for an online version in German https://dejure.irg/gerichte. In short, the Oberlandesgericht has asked the Court of Justice to render a preliminary ruling on the following questions (informal English translation by CAdeV):

1. Is Article 14 Rome I Regulation applicable to the third-party effects of multiple assignments [of the same claim, by the same assignor, CAdeV]?
2. To the extent that the answer to the first question is 'yes': which law governs the third-party effects in that case?
3. To the extent that the answer to the first question is 'no': does the provision apply by way of analogy?
4. To the extent that the answer to the third question is 'yes': which law governs the third-party effects in that case?

22 See O. Lando, 'The EC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, Introduction and Contractual Obligations', *RabelsZ* 1974, p. 38, p. 47. Arts. 2 to 8 of the Draft Convention are similar to Arts. 3 to 5 and 8 to 11 of the Rome I Regulation as regards the law applicable to contractual obligations.

4. Proposal

4.1 Does the Proposal also designate the law governing the validity of the assignment against the debtor of the claim in his capacity as a third party?

Under the assumption that the European Court of Justice will not quickly render a decision on this issue, the question is whether the Proposal also designates the law governing the validity of the assignment against the debtor of the claim in his capacity as a third party.

The Proposal states that it does not affect the scope and effect of the provisions of the Rome I Regulation nor of the Rome II Regulation.[23] This means that the law governing the claim determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor, whether the debtor's obligations have been discharged or any other effect of the assignment against the debtor.

This raises the question, for the reasons explained in section 3, whether the law that according to the Proposal governs the validity of the assignment against third parties (Article 4(1) of the Proposal) also governs the validity of the assignment against the debtor in his capacity as a third party, so as a creditor of, for instance, the assignor or the assignee. As a debtor, he can and should undeniably ignore this law, as payment to a party who under the law governing his claim is not entitled to such payment does not discharge him. However, to what extent should or could he do so in his capacity as a creditor of the assignor or the assignee, for instance?

If the person who is the debtor of the claim, is also creditor of the assignor, there may be a question of set-off. If different laws govern the claims involved in the possible set-off, the question may be what law governs the set-off. Pursuant to Article 17 of the Rome I Regulation, unless otherwise agreed, the law governing a claim of which a party invoking a set-off is the debtor, governs the set-off.[24] In case of an assignment of the claim, the question whether the debtor can still set off his debt (under the assigned claim) with his claim as creditor of the assignor would be determined by the law governing the assigned claim, and not by any other law. The same goes in case the debtor invokes the set-off of the assigned claim with his claim against the assignor, against the assignee. It also applies in case the debtor is also creditor of the assignee. In that case, the question whether the debtor can invoke set-off of the assigned claim with his claim against the assignee is governed by the law governing the assigned claim. This is in line with the rationale behind Article 14(2) of the Rome I Regulation, i.e., that the effects of the assignment against the debtor, including the effects on the debtor's ability to discharge his debt through set-off, are governed by the law governing the assigned claim. However, it also means that the validity of the assignment against the person who is the debtor of the claim in his capacity as a creditor of the assignor or of the assignee, at least as concerns the question of

23 See Art. 10 of the Proposal ('Relationship with other provisions of Union law'): 'This Regulation shall not prejudice the application of provisions of Union law which, in relation to particular matters, lay down conflict of laws rules relating to the third-party effects of assignments of claims.'

24 Art. 17 Rome I Regulation: 'Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.' See also Art. 9 Insolvency Regulation (Recast): '1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.'

set-off of that creditor's claim with the assigned claim, is also governed by the law governing the claim. In other words, the law governing the claim not only governs the validity of the assignment against the debtor in his capacity as debtor, but also in his capacity as a creditor of the assignor or of creditor of the assignee.

Based on the above, logic would dictate that the law governing the assigned claim would govern the validity of an assignment against any third party, including the debtor in his capacity as third party other than a debtor. This also ensures that, in case of a conflict between two assignees of the same claim, one law governs the validity of the assignment and the priority.

4.2 Analysis of the Proposal's proposed rule that certain aspects of the validity of certain assignments against (certain) third parties are governed by the law of the assignor's habitual residence

Despite the logical conclusion that the law governing a claim governs the validity and effect of an assignment against any third party, common sense did not seem to have prevailed. As follows from Article 4(1), the European legislator proposes that the law of the assignor's habitual residence governs certain aspects of the validity of certain assignments against (certain) third parties.[25]

One of the obvious and negative consequences of this rule is that, in combination with Article 14 of the Rome I Regulation, three different laws may govern certain validity and certain effects of certain assignments. Certainly, this will not add to the predictability for prospective assignees that the Proposal seeks to give, contrary to what it aims to provide.[26] This alone would, in the author's view, already be a reason to reject the Proposal in its current form.[27]

Another consequence is that any prospective creditor that needs to assess what claims his debtor has (which seems a logical part of any solvency or liquidity assessment test) will have to consider not only the law governing such claim in order to assess whether that claim has been assigned or not, but also the law of that debtor's habitual residence. This boils down to the fundamental problem as already identified, i.e., that the Proposal does not consider what law governs a claim and what law governs the question of the third-party effect of having a claim. Whereas the existing Rome I and Rome I Regulations imply that the law governing a claim determines who is creditor of a claim, also against third parties, the Proposal implies, in Article 2(e), that what is assigned is the legal title over a claim and that the applicable law may be the law of the assignor's habitual residence (see Article 4(1) of the Proposal). This means that, on the one hand, the law governing the claim determines who is creditor of the claim, against third parties, while, on the other hand, the Proposal provides that the law of the assignor's habitual

25 See also Art. 5 under (a) of the Proposal, pursuant to which the law that the Proposal designates as the law applicable to the third-party effects of assignment of claims, governs 'the requirements to ensure the effectiveness of the assignment against third parties other than the debtor'. See also Art. 2(e) ("'third-party effects" means proprietary effects, that is, the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, *creditors of the assignor and other third parties* [emphasis added, CAdeV]').

26 See Proposal, p. 6: 'First, the legal certainty brought by the uniform rules will enable assignees to comply with the requirements of only one national law to ensure the acquisition of legal title over the assigned claims.'

27 See also Welling-Steffens 2018, p. 264 (*supra* n. 7).

residence determines who has legal title over that claim, against third parties. If these laws are different, which is not unlikely, the result may be that one person is creditor of a claim (under the law governing the claim), whereas another person has legal title over the same claim (pursuant to Article 4(1) of the Proposal). This means that, even under the Proposal, the proposed conflict of laws rule that designates the law governing who has legal title to a claim would derive from and be dependent on the law governing the claim for its possible applicability. That does not seem to create the desired predictability either.

4.3 Analysis of the Proposal's priority conflicts rules

Furthermore, the Proposed rule will obviously create situations in which conflicts between two assignees of the same claim are not governed by one law.

This may occur in the case of a successive assignment of the same claim, from one assignor to an assignee, who subsequently assigns the same claim to another assignee, whereby under the law of the first assignor's habitual residence the assignment is not valid against third parties, whereas under the law of the second assignor's habitual residence the second assignment is valid against third parties.[28] Again, this will not add to the predictability as desired.

However, an even more fundamental problem lies in the Proposal's suggestion how to deal with a priority conflict.

In that respect, first Article 4(1) of the Proposal provides that if the assignor has changed his habitual residence between two assignments of the same claim to different assignees, the priority of the right of one assignee over the right of another assignee will be governed by the law of the habitual residence of the assignor at the time of the assignment which first became effective against third parties.

Secondly, Article 4(4) of the Proposal provides for a rule for a priority conflict between assignees of the same claim. It concerns a priority conflict where the third-party effects of one of the assignments are governed by the law of the country in which the assignor has his habitual residence. The third-party effects of other assignments are governed by the law of the assigned claim.[29] In that situation, according to Article 4(4) of the Proposal, the third-party effects are

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28 See also Dickinson 2018, p. 337 (*supra* n. 19). Under Dutch substantive law, the following scenario is possible, for instance. A agrees to assign and subsequently assigns a claim to B. B subsequently assigns the same claim, but then to C. Next, A avoids the contract based on which A assigned the claim to B. As a result, the assignment from A to B was not valid against C due to lack of a valid title (Art. 3:84 of the Dutch Civil Code). However, if C was not aware and should not have been aware of the fact that B could not dispose of the claim due to this lack of title, C is protected against the fact that B could not dispose of the claim. Consequently, the assignment of B to C remains valid, also against third parties (Art. 3:88 Dutch Civil Code).

29 See Art. 4(4) of the Proposal. Under the Proposal, the law governing the assigned claim could govern the third-party effects of an assignment if the assignor and the assignee of an assignment have agreed so *in view of a securitization*. For obvious reasons, the assignor and assignee cannot choose the law that governs the validity and effect of the assignment against third parties. As an example why this is obvious: if under the law governing a claim, assignment of the claim is not possible (this is different from a claim being non-assignable, as that concerns the claim not being assignable, rather than that assignment of a claim is simply not possible), it would seem an abuse of law if the assignor and the assignee can by choosing a law to govern the assignment, still assign a claim which cannot be assigned. In light thereof, it is inconceivable how in Dutch legal practice such a choice is condoned, even if that choice does not seem to have been abused (see

governed by the law applicable to the third-party effects of the assignment of the claim which first became effective against third parties under its applicable law.

This means that the question of how a priority conflict between competing assignments is solved is settled (i) by hypothetically applying the two laws that would govern the third-party effect of the assignment and (ii) by determining which assignment would have been effective against third parties first in time. The law that 'wins' is supposed to then govern the priority conflict, according to Article 4(1) and Article 4(4) respectively of the Proposal.

The reason that this is a fundamental problem is that this rule is not a conflict of laws rule, nor a 'super conflict rule',[30] nor a general European private law principle, but rather a substantive rule of law. A conflict of laws rule designates the law applicable to a legal question in a situation where two or more laws may be applicable. After designation of the applicable law, that law answers the question or matter to which two or more laws seemed to apply.

In that respect, please do not be fooled by the wording of Articles 4(1) and 4(4) of the Proposal: what these provisions effectively say is that priority between competing assignments is determined by the question which assignment is valid first. This also follows from the result of the application of the proposed rule: instead of designating the governing law which then substantially solves the problem (it determines which of the assignments has priority), the proposed rule determines that the assignment that is valid first (under its applicable law) is the assignment that has priority (under its applicable law). In that sense, the conflict of laws rules do not solve a conflict of laws, but a conflict between competing assignments.

Although there may be a lot of pragmatic or political arguments in favor of introducing a substantive rule of law to address these and other issues (and the same probably goes for many other issues that result from conflicting laws), the reason why this question is of a fundamental nature is that it is unclear what legal basis this proposed rule has.

According to the European Commission, the legal basis for the Proposal is Article 81 Treaty on the Functioning of the European Union (TFEU) and Protocols 21 and 22 of the Lisbon Treaty. Article 81 provides that the Union 'shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases'. That cooperation may include 'the adoption of measures for the approximation of the laws and regulations of the Member States'. To that end, 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring […] (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; […]'.

The incompatibility that the proposed rules of Articles 4(1) and 4(4) aim to solve, however, is not an incompatibility of conflict of laws rules applicable in the Member States, but an incompatibility of a conflict of laws rule proposed by the EU itself. Article 81 TFEU does not provide a legal basis to adopt such a rule, and probably no other provisions of the TFEU do

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Welling-Steffens 2018, p. 264 (*supra* n. 7)). Obviously, if there is no evidence of any abuse, that does not mean that any lack of abuse is caused by the fact that the assignor and assignee can choose the law governing the third-party effect. In any case, as pursuant to Art. 4(3) of the Proposal, the choice of law is limited to the law governing the claim, effectively that law determines the validity of the assignment against third parties, which makes it a moot argument.

30 See for instance, Dickinson 2018, p. 337 (*supra* n. 19).

either. If the Proposal had wished to solve the incompatibility of the conflict of laws rules as to the validity of the assignment against third parties, it should have proposed one harmonized conflict of laws rule and, in that case, one that does not lead to priority issues.

What the Proposal essentially seeks to establish is the introduction of a conflict of laws rule (the law of the assignor's habitual residence rule) to create certainty for certain assignees of (bulk) assignments. That aspired certainty is that instead of having to determine what law governs a claim to determine the validity of an assignment of that claim, only the law of the assignor's habitual residence, which allegedly seems easier to establish (ignoring that the more fundamental question is whether the assignor is indeed the creditor) needs to be considered for certain assignments of certain claims. The reason for seeking to ignore that law is that determining the law governing a claim may be difficult or even impossible, making it more unpredictable and hence costlier for prospective assignees to purchase and acquire a claim internationally.

However, it does not take (see sections 2 and 3) much to conclude that essentially this is a false sense of security. In that respect, the Proposal does nothing more than enable prospective assignees to purchase 'hot air'. A prospective assignee can never be assigned more than that unpredictability, as follows from the principle of *nemo plus iuris ad alium transferre potest, quam ipse haberet.* By introducing a conflict of laws rule that seeks to circumvent the law governing the claim, as it may be difficult or simply impossible to know that law and, hence, the validity of its assignment, the Proposal would violate that principle.

5. Conclusion

Certainly, a harmonized EU conflict of laws rule on the law governing the third-party effects of assignments will solve the problem that currently in certain jurisdictions different conflict of laws rules apply. However, as follows from the analysis of certain fundamental problems underlying the Proposal, it does not contain a uniform harmonized conflict of laws rule, let alone that the rules that it does contain solve the problems for which the Proposal seeks to find a solution. It does not create predictability for prospective assignees of claims about the validity of an assignment against third parties. Instead, it would violate the principle of *nemo plus iuris ad alium transferre potest, quam ipse haberet*, to the extent that it does not adhere to the conflict of laws rule that the law governing the claim governs the validity and effects of the assignment against third parties.

As this contribution has sought to explain, the EU could suffice by adding to Article 14(2) of the Rome I Regulation after the word 'debtor' 'and any other third party', to clarify that the law governing the claim governs the effect of the assignments against all third parties to the assignment between assignor and assignee.