Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission’s Proposal

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ABSTRACT
Both the 1980 Rome Convention and the Rome I Regulation on the law applicable to contractual obligations have not addressed the issue of the proprietary effects of assignments. Intense doctrinal debate, discussion of the issue in various appellate courts’ jurisprudence as well as (limited) empirical research are the basis for a current draft Regulation that proposes a two-tiered system of connecting factors (law of the assignor’s habitual residence, law of the assigned claim in specific cases). Subject to a few clarifications that are, in the author’s view, highly recommendable the instrument will deliver greatly enhanced legal certainty.

Key words
Assignment, conflict of laws, connecting factor, contractual obligations, EU Regulation, proprietary effects

1. INTRODUCTION
The 1980 Convention on the law applicable to contractual obligations (Rome Convention)1 contained rules governing the law applicable in cases involving voluntary assignments. Article 12 provided:

1. 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.

1. Consolidated version [1998] OJ C27/34. See the Report on the Convention by Professors Giuliani and Lagarde [1980] OJ C282/1.
2. The law governing the right to which the assignment relates 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 any question whether the debtor’s obligations have been discharged.

Governments and intergovernmental organisations with the remit of harmonising private law have always encountered the greatest difficulties when taking on matters involving more than a bilateral two-party transaction. The law of agency is the most prominent example. Article 12(1) Rome Convention covered explicitly only the ‘mutual obligation’ of assignor and assignee, ie contractual aspects. Whether Article 12 applied to proprietary aspects and, specifically, questions concerning the effects of an assignment vis-à-vis third parties, such as creditors or the insolvency administrator of the assignee, remained controversial. Different Member States adopted different solutions. The divide was not only between the (few) countries (such as Germany) whose substantive law provides for the so-called abstract (proprietary) effect of an assignment, ie the rule that the assignee acquires the right even if the underlying contract between assignor and assignee is null and void, and all others whose substantive law requires a valid causa for the title to pass. The divide was between legal systems according to which an assignment is characterised as merely contractual and others (such as German, Dutch and English law) distinguishing the agreement for transfer (a contractual matter) from the transfer itself (a matter of property law). That situation was utterly unsatisfactory.

2. ARTICLE 14 ROME I REGULATION – ONE STEP FORWARD

2.1 Shortcomings Addressed

The obvious change of the provision’s – now Article 14 – language was replacing the words ‘mutual obligations’ by a concept wider and capable of being construed as encompassing the proprietary aspects of an assignment. Article 14 reads:

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 assignor and assignee under this Regulation.

The Danish ‘forholdet’, the German ‘das Verhältnis’ and the Dutch ‘de betrekkingen’ reflect the legislator’s intention which Recital 38 spells out: ‘[t]he term “relationship” should make it clear that Article 14(1) also applies to the property aspects, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations.’ Article 14(2) is almost unchanged when compared to Article 12(2) of the Rome Convention except for the term ‘right’ which was replaced by ‘claim’. The
objective of having the law governing the assigned claim also govern 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 is clear and to be found in relevant provisions of substantive law on debtor protection. For the debtor is passive and he may not know of the assignment. So it is for the law to ensure that the change of creditors does not change the terms of the claim against the debtor.

Article 14(3) is the most visible change when compared to Article 12 of the Rome Convention. Yet it is also the least problematic and least controversial one. It reads:

3. The concept of assignment in the Article includes outright transfer of claims, transfers of claims by way of security and pledges or other security rights over claims.

Even prior to the conversion into a Regulation there had been wide agreement to this effect. The controversy which continued to determine the doctrinal debate was highlighted – and in all likelihood compounded – by Article 27(2) of the Regulation, which reads:

2. By 17 June 2010, the Commission shall submit […] a report on the question of the effectiveness of an assignment […] of a claim against third parties and the priority of the assigned […] claim over the 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.

2.2 Specifically Proprietary Effects

Faced with the Member States’ inability to agree explicitly on a clear connecting factor for third-party effects (either the law of the assigned claim or the habitual residence/place of business of the assignor), leading commentators had brought a strong case for developing a solution based on an autonomous and functional interpretation of Article 14 of the Regulation.3 The Supreme Courts of the Netherlands (Hoge Raad) and Germany (Bundesgerichtshof) as well as the English Court of Appeal had accepted this analysis already in relation to Article 12 of the Rome Convention.4 Others had forcefully taken the view that

3. Axel Flessner and Hendrik Verhagen, Assignment in European Private International Law (Sellier 2006) 10, 22; Axel Flessner, ‘Die internationale Forderungsabtretung nach der Rom I-Verordnung’ (2009) IPRax – Praxis des Internationalen Privat-und Verfahrensrechts 35; Francisco J Garcia Martín Allérez, ‘Assignment of Claims in the Rome I Regulation: Article 14’ in Franco Ferrari and Stefan Leible (eds), Rome I Regulation: The Law Applicable to Contractual Obligations in Europe (Sellier 2009) 217; HLE Verhagen and S van Dongen, ‘Grensoverschrijdende cessie in Rome I’ in FGB Graaf and WAK Rank (eds), Financiële sector en internationaal privaatrecht (NIBE-SVV 2011) 75.

4. For the Dutch Supreme Court, see HR 16 May 1997, basing its decision regarding third-party effects on Article 12(1) of the Rome Convention; see too case note by Ted M de Boer (1998) Nederlands Jurisprudentie 585 (Hansa Chemie). For the German Supreme Court, see BGH 8 December 1998 – XI ZR302/97, basing its judgment on Article 12(2) of the Rome Convention; see too case note by E-M Kieninger (1999) Juristenzeitung 404. For the English Court of Appeal, see Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] QB 825, 830 per Mance LJ (as he then was) also basing their opinion on Article 12(2) of the Rome Convention. For the most thorough discussion from an English point of view, see Trevor C Hartley, ‘Choice of Law Regarding...
neither the Convention nor the Rome I Regulation had addressed the issue. This discussion is now moot. *Bruxellae locuta causa finita* – but not quite, as we shall see.

### 3. THE COMMISSION’S PROPOSAL

#### 3.1 Uncertainties regarding Scope and Terminology

Conceptually, an assignment may have 'proprietary effects' in relation to five persons or categories of person. Assume Italian seller S assigns a claim for payment of the purchase price against German buyer B (the debtor) to the Luxembourg bank A. That assignment may – depending on the law applicable – have proprietary effects vis-à-vis the debtor (B), the assignee (A), creditors of the assignor (S), insolvency representatives of the assignee, and other assignees of the same claim (ie S’s claim against B).

Both the title of the EU Commission’s 12 March 2018 Draft Regulation and its Recital 4 indicate the legislator’s objectives emphasising the third-party effects. Recital 15 of the Draft Regulation states:

> 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) [all emphases by the author].

Conversely, Article 5(1)(a) refers to ‘the requirements to secure the effectiveness of the assignment against third parties *other than the debtor* [emphasis added]’. This is confirmed in the commentary on Article 5. More fundamentally, Article 1(1) refers to the ‘third-party effects of an assignment’, and Article 2(e) defines ‘third-party effects’ as 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.

The first question that arises when reading the Rome I Regulation and the Draft Regulation together is whether the draftsman envisaged to distinguish ‘property’ law aspects (as addressed in Recital 38) in the former from ‘proprietary’ or ‘third-party’ effects in the

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5. Stefan Leible and Matthias Lehmann, ‘Die Verordnung über das auf vertragliche Schuldverhältnisse anwendbare Recht’ (“Rom I”) (2008) *Recht der internationalen Wirtschaft* 528, 541; Peter Mankowski, ‘Die Rom-Verordnung – Änderungen im europäischen Recht der Schuldverträge’ (2008) *Internationales Handelsrecht* 133, 149; Harry C Sigman and Eva-Maria Kieninger, ‘The Law of Assignment of Receivables in Flux: Still Uncertain, Still Non-Uniform’ in Harry C Sigman and Eva-Maria Kieninger (eds), *Cross-Border Securities over Receivables* (Sellier 2009) 1, 46-50.

6. Proposal on the law applicable to the third-party effects of assignment of claims (COM (2018) 89 final).

7. Explanatory Memorandum to the Proposal (n 6) ‘Article 5: Scope of the applicable law’, 21.
latter. A second issue is that if the Draft Regulation were intended to be construed and applied as suggested by Recital 15 that would imply an amendment to Article 14(1) of the Rome I Regulation, as explained in that Regulation’s Recital 38, because the law applicable to the underlying contract and, beyond that, the entire ‘relationship’ between assignor and assignee (in the above example, in the absence of the parties’ choice of a different law eg the law of Luxembourg, Article 4(1)(b) or 4(2) Rome I Regulation) would be replaced by the law of the assignor’s habitual residence, that is, Italian law pursuant to Article 4(1) of the Draft Regulation. Thirdly, according to Article 14(2) Rome I, the law governing the contract between assignor and debtor (in the example, the parties may have chosen Swiss law, Article 3 Rome I) would govern, *inter alia*, ‘the relationship’ between the Luxembourg bank and the German debtor whilst Recital 15 suggests that Italian law would be applicable in this respect. Yet nowhere in the Draft Regulation does the legislator indicate its intention to amend Rome I.

Professor Andrew Dickinson has a point when he assumes that there are reasons to conclude that Recital 15 is an ‘act of exuberance on the draftman’s part’. Recital 15 apparently has been drafted, firstly, in acknowledgement of the fact that there are legal systems – such as Dutch and German law – according to which an assignment is of a double nature (contractual and property law). Secondly, the language reflects that, once the property-law based transfer (‘overgang’, ‘Übertragung’) has been effected by the ‘beschikkingshandel’ or ‘Verfügung’, (ie the ‘real agreement’, conceptually distinct from the contractual agreement between assignor and assignee), it has third-party effects vis-à-vis all parties involved (assignor, assignee, debtor) as well as in respect of third parties. Property aspects of an assignment between assignor and assignee cannot be separated from property aspects of an assignment towards third parties, such as creditors of the assignor and the assignee or, indeed, the debtor. This follows from the basic principle that, while obligations and contractual rights in particular are ‘relative’ (that is, they have effects between the parties only – *inter partes*), property rights are ‘absolute’ (that is, they have effects *erga omnes*). However, the draftsman of Recital 15 overlooked that the conceptual objective of proprietary effects *erga omnes* by definition cannot be achieved in light of the Draft Regulation’s primary connecting factor (assignor’s habitual residence) because the law governing proprietary effects of an assignment of claims as between assignor and assignee has already been determined in Article 14(1) Rome I Regulation according to which it is the same law that governs the contractual relationship between the parties to the assignment. The aspect that has the greatest importance in this relationship, namely who holds title in the claim and can therefore demand performance, falls within the scope of Article 14(1) Rome I Regulation. The scope of the Draft Regulation is indeed limited to the relationship of the assignor and the assignee to third parties, ie persons who are outsiders to the triangular constellation of an assignment.

8. Andrew Dickinson, ‘Tough Assignments: the European Commission’s Proposal on the Law Applicable to the Third-Party Effects of Assignments of Claims’ (2018) IPRax – Praxis des Internationalen Privat-und Verfahrensrechts 337, 340.

9. Flessner (n 3) 38; Verhagen and van Dongen (n 3) 82.
In summation and as regards the terminology, in this writer’s view the Commission’s opting for ‘third-party effects’ was appropriate.10 ‘Property-law effect’ or ‘proprietary effect’ would, in any conceivable Dutch or German version, be too wide and would necessarily evoke the *erga omnes* analysis, the inseparability of ‘dingliche Wirkungen’ and would, therefore, not be compatible with the choice made when Article 12(1) Rome Convention was amended to become Article 14(1) Rome I Regulation. Again, Professor Dickinson is correct in pointing out that the Commission ‘muddies the waters’ by treating ‘proprietary effects’ and ‘third-party effects’ as interchangeable expressions in Recital 11.11 Conversely, Article 2(e) is in line with the afore-mentioned conceptual analysis – or may be read as though it was. The German version of Recital 38 (’*die dinglichen Aspekte des Vertrags*) leaves no doubt that the legislator means exactly this.

3.2 The Primary Choice of Law Rule

3.2.1 The Options

Historically, and in the run-up to the Commission submitting its current proposal,12 four approaches to determining the most appropriate connecting factor had been competing: (i) the law of the domicile or the habitual residence of the debtor; (ii) the law governing the assigned claim; (iii) the law governing the contract between assignor and assignee; and (iv) the law of the assignor’s habitual residence.

French courts and writers had traditionally favoured a solution according to which the debtor’s domicile was identified as the *situs* of the claim and the law of the debtor’s domicile governed the proprietary aspects of the assignment.13 Article 1690 Code Civil – the provision stating the requirements and formalities for third-party effects of an assignment – was framed, in a unilateralist manner, as belonging to French public policy (*d’ordre public*), ie mandatory at least in all cases in which the debtor’s domicile was in France. In other words, the rationale (debtor protection) was projected onto the trans-border scenario.14

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10. But see Dickinson (n 8) 341.
11. Dickinson (n 8) 341.
12. The previous one was based on the Commission’s Green Paper (n 2). For the legislative history, see Sigman and Kieninger (n 5) 50-53. When its original solution proved to be highly controversial with member States and industry a study was prepared by the British Institute of International and Comparative Law and submitted in December 2011. See Eva-Maria Kieninger, ’Das auf die Forderungsabtretung anzuwendende Recht im Licht der RIICL-Studie’ (2012) *IPRax – Praxis des Internationalen Privat- und Verfahrensrecht* 289.
13. Cour d’Appel de Paris, 11 January 1996, 1970 *Dalloz* 522-524; 27 September 1984, 1985 *Dalloz*, Informations Rapides 176, note Audit; Pierre Mayer and Vincent Heuzé, *Droit international privé* (11th edn, LGDJ 2014) 544. However, in the course of the consultation process regarding the Green Paper (n 2), Lagarde argued in favour of the assignor’s place of business: see Paul Largarde, ’Retour sur la loi applicable à l’opposabilité des transferts conventionnels de créances’ in Jean Bigot and others (eds), *Droits et actualité. Études offertes à Jacques Béguin* (Litéc 2005) 415. According to the Commission, this approach has been adopted, at least in French securitisation practice: see Explanatory Memorandum to the Proposal (n 7) 13.
14. For a critical assessment, see Marta Requejo Isidro, ‘Assignability/Assignment’ in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* vol I (Edward Elgar 2017) 141, 147.
German and Austrian law had adopted the rule according to which third-party effects of an assignment were governed by the law applicable to the assigned claim. The courts’ as well as the majority among commentators’ principal reason was their preference for a unitary connecting factor so as to ensure that all relevant aspects (in particular assignability and debtor protection) would be governed by the same substantive law.

Dutch law had opted for the extension of the law governing the contract between assignor and assignee so as to apply also to the property-law related aspects, in particular third-party effects of an assignment. Critics of this approach point to the problematic (as they see it) opening to party autonomy, ie the parties’ freedom to choose the applicable law. Interestingly, also the proponents of this solution focus on party autonomy, arguing that legal certainty is enhanced if the parties to the transaction can choose the governing law on the basis of their evaluation of risks flowing from Member States’ laws that lend themselves to being selected in light of the particular circumstances. Moreover, the constitutional freedoms guaranteed under the EU Treaty are cited in support of this rule.

Belgian and – already with an eye on the discussion that lead to the Draft Regulation – Norwegian law may be cited when looking for support of the Commission’s proposal, as it is now examined by the Parliament and the member States, ie to have third-party effects governed by the law of the assignor’s habitual residence.

Apart from these generalising approaches, Professor Garcimartín Alférez’ opinion deserves to be mentioned according to which differentiating the connecting factor in function of the specific type and purpose of an assignment will be beneficial.

3.2.2 The Assignor’s Habitual Residence

The Commission’s proposal – for which it has made a strong case shared by this writer – is a ‘mixed approach combining the law of the assignor’s habitual residence and the law of the assigned claim’. It combines the application of the law of the assignor’s habitual residence as a general rule (Article 4(1)) and the application of the law of the assigned claim to certain

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15. BGH 20 June 1990 – VIII ZR 158/89; (1991) IPRax – Praxis des Internationalen Privat- und Verfahrensrechts 248 (critical note by H Stoll advocating the law of the assignor’s place of business); D Martiny, ‘Forderungsabtretung’ in Christoph Reithmann and Dieter Martiny (eds), Internationales Vertragsrecht (8th edn, Otto Schmidt 2015) 3.289; Flessner (n 3). For Austria, see OGH 11 July 1990 – 1 Ob 648,649/90; (1992) IPRax – Praxis des Internationalen Privat- und Verfahrensrechts 47 (note W Posch 51).
16. HR 16 May 1997 (n 4); Verhagen and van Dongen (n 3) 95.
17. THD Struycken, ‘The Proprietary Effects of International Assignment of Debts and the Rome Convention’ (1998) Lloyd’s Maritime and Commercial Law Quarterly 345, 350-356; Eva-Maria Kieninger, ‘Das Statut der Forderungsabtretung im Verhältnis zu Dritten’ (1998) Rabels Zeitschrift für ausländisches und internationales Privatrecht 679, 693.
18. For Belgian law, see Article 87(3) Wetboek van internationaal privaatrecht; see also J Erauw and others (eds), Het Wetboek internationaal privaatrecht becommentariseerd – Le Code de droit international privé commenté (Internsentia 2006) 448, 453. According to the Commission’s Explanatory Memorandum (n 7), the same is true for Luxembourg and France, at least in securitisation practice. For Norway, see Høyesterett 28 June 2017 – Case HR-2017-1297-A, and (approving) Kåre Lillemholt, ‘Norwegian Supreme Court: The Law of the Assignor’s Home Country is Applicable to Third-Party Effects of Assignment of Claims’ (2018) IPRax – Praxis des Internationalen Privat- und Verfahrensrechts 539.
19. Garcimartín Alférez (n 3) 248.
20. Explanatory Memorandum (n 7) 14.
exceptions (Article 4(2), (3)). Apart from its own research as well as the study conducted by the British Institute of International and Comparative Law (BIICL) and presented in September 2016, the Commission was able to rely on writings by eminent scholars who had identified the following features as supporting the primary connecting factor of the assignor’s habitual residence or place of business:

- that it is the ‘natural environment’ of claims and the place where the assignor’s patrimonial situation (in particular, the appearance of solvency) is on display;
- it is the only law that is predictable and easily ascertained by any third party;
- it is the only practical solution in cases of bulk assignments and the only possible one for the assignment of future claims (both of crucial importance for the factoring industry);
- it is consistent with the Union acquis on insolvency, ie the Insolvency Regulation, as regards the connecting factor which designates the law applicable to insolvency proceedings, according to which the main insolvency proceeding must be opened in the member State where the debtor (here: the assignor) has its centre of main interests (COMI) whose courts will, in principle, apply their own law;
- it is – as also highlighted by Recital 22 of the Draft Regulation – consistent with the international solution enshrined in the 2001 UN Convention on the Assignment of Receivables in International Trade;
- even where, currently, the parties choose to apply the law of the assigned claim to the third-party effects of their assignment, they usually also look to the law of the assignor’s place of business to make sure that the acquisition of title on the part of the assignee is not prevented by overriding mandatory provisions of that law requiring some form of publicity, eg by registration.

While legal systems – both those based on codifications and those based on judge-made rules – traditionally designed rules on the assignment of claims to a large extent with an emphasis on debtor protection, in recent decades the assignment of claims has become

21. To name but a few particularly influential ones, see Kieninger (n 17); Struycken (n 17); Catherine Walsh, ‘Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade’ (2001-2002) 106 (1) Dickinson Law Review 159, 174; Lagarde (n 13); Sigman and Kieninger (n 5); Roy Goode ‘The Assignment of Pure Intangibles in the Conflict of Laws’ in Louise Gullifer and Stefan Vogenauser (eds), English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale (Hart 2014) 353, 375. In principle also, albeit subject to some reservations, see Hartley (n 4) 51.

22. Explanatory Memorandum (n 7) 15.

23. Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ 2015 L141/19. For an overview of its system, see Burkhard Hess and Georgia Koutsoukou ‘Internationales Insolvenzrecht’ in Herbert Kronke, Werner Melis and Hans Kuhn (eds), Handbuch Internationales Wirtschaftsrecht (2nd edn, Otto Schmidt 2017) Teil O, 1949-1989.

24. As comprehensively assessed by Peter Mankowski, ‘Zessionsgrundstatut v. Recht des Zedentensitzes – Ergänzende Überlegungen zur Anknüpfung der Drittwirkungen von Zessionen’ (2012) IPRax – Praxis des Internationalen Privat- und Verfahrensrechts 298, 300; and see also Requejo Isidro (n 14) 151.
a tool for enhancing the easy flow of credit. This cannot be without consequences for the conflict of laws and, in particular, the choice of the most appropriate connecting factor(s).\textsuperscript{25} Since there are two main industries involved in providing credit based on large-scale assignment of claims – on the one hand the factoring industry and, on the other hand, the securitisation industry – both with their own distinct practices and needs,\textsuperscript{26} it was clear that the Commission had to formulate (at least) two choice-of-law rules. The principal rule (law of the assignor’s habitual residence) meets the needs and practices of factors who buy future claims (where the governing law is still unknown), who are the assignees of bulk assignments (where many claims may be governed by many different laws) and who, importantly, are not geared up to examine the underlying contracts and to determine the law governing each claim, which would entail substantial additional burden.

3.2.3 Exceptions: Law of the Assigned Claim

Conversely, securitisers driven by rating agencies requiring detailed information which is necessary to assess the rating of the bonds or notes to be issued, are routinely examining the underlying contracts, the applicable law and other relevant factors in the course of their due diligence. Accordingly, Article 4(3) provides for the possibility that the assignor and the assignee choose the law applicable to the third-party effects of an assignment of claims in view of a securitisation. That choice of law is to be made expressly.

A second exception is provided for in Article 4(2) of the Draft Regulation. According to this provision, the law applicable to the assigned claim also governs the third-party effects of the assignment of (a) cash credited to an account in a credit institution and (b) claims arising from a financial instrument. The former is appropriate if one assumes that the contract between account holder (e.g., a consumer or a small or medium-sized company) and its bank is governed either because chosen in the account contract pursuant to Article 3 Rome I Regulation or by the law of the country where the bank is located pursuant to Article 4(1)(b) Rome I Regulation. Both hypotheses make the applicable law readily ascertainable.

As regards the third-party effects of assignments of claims arising from financial instruments (as defined in Article 2(j) of the Draft Regulation), for example derivative contracts, the Explanatory Memorandum emphasises that subjecting them to the law of the assigned claim rather than the law of the assignor’s habitual residence ‘is essential to preserve the stability and smooth functioning of financial markets as well as the expectations of market participants’.\textsuperscript{27} This is conceptually correct, and the law applicable is either the law chosen by the parties to the contract or the law determined in accordance with non-discretionary rules applicable to the relevant financial market.

\textsuperscript{25} Requejo Isidro (n 14) 142.
\textsuperscript{26} Joanna Perkins, ‘A Question of Priorities: Choice of Law and Proprietary Aspects of the Assignment and Debts’ (2008) 2(3) Law & Financial Markets Review 238; Garcimartín Alférez (n 3) 248; Goode (n 21) 371.
\textsuperscript{27} Explanatory Memorandum (n 7) 19.
3.3 Competing Connecting Factors and ‘Super Conflict Rules’

3.3.1 Express Solutions

Article 4(1) subparagraph 2 of the Draft Convention provides a solution for the following variation of our example, as described supra section 3.1: Where the Italian creditor/assignor on 1 March assigns its claim against the German debtor to the Luxembourg Assignee I, thereafter moves its habitual residence to Switzerland and, on 1 April, assigns the claim to Assignee II, the priority conflict between A I and A II will be decided by the law (Italian or Swiss) at the time of the assignment (1 March or 1 April) which became first effective against third parties under the law designated as applicable pursuant to Article 4(1) subparagraph 1.

Article 4(4) of the Draft Regulation provides a solution for cases where the categories of claim differ and lead to a different connecting factor. Assume the Italian creditor’s claim for the purchase price against the German debtor, governed by Swiss law, on 1 March is assigned to Assignee I, a Luxembourg factor. On 1 April, the assignor assigns the same claim to Assignee II, an English securitiser, under a contract providing for the applicability of Swiss law pursuant to Article 4(4).

In both cases the Draft Regulation favours the assignee who, under the law applicable to that assignment, first secures the effectiveness of the assignment to it. In this writer’s submission, it is the Commission’s intention to state that a claim is either effective against all third parties or it is not yet effective against any third party. However, Professor Dickinson’s view that the language based on this assumption is ambiguous and that it would be beneficial for the ‘super conflict rules’ to refer specifically to ‘existing or future assignees of the same claim’ rather than merely to ‘third parties’ clearly has merit, and this ought to be clarified.28 Likewise, a clarification to the effect that this ‘super conflict rule’ also applies to the priority conflicts envisaged in Article 5(c)-(e) should be considered.

3.3.2 Implied Solutions to Obvious Questions?

Reading the text of the Commission’s proposal as well as the Explanatory Memorandum one may wonder how to interpret the absence of any specific reference to, let alone guidance for, the solution of potential priority conflicts in cases like the following.

The Italian creditor/assignor assigns the claim against the German debtor to Assignee I, its Luxembourg bank or factor. Subsequently, A I assigns it to Assignee II in the Netherlands. A more complex scenario, introduced to the discussion by Professor Trevor Hartley29 and projected onto our standard example supra section 3.1 raises another issue: The creditor/assignor in Italy assigns the claim against the German debtor for the purchase price, arisen under a contract governed by Swiss law, to Assignee I, its Luxembourg bank or factor. Subsequently, the Italian creditor assigns it a second time to another bank in the Netherlands, Assignee II, who, in turn, assigns it to a financial institution in England, Assignee III. Who has priority, Assignee I or Assignee III? Professor Hartley points out the advantages of applying the (Swiss) law of the obligation because it is readily ascertainable

28. Dickinson (n 8) 343.
29. Hartley (n 4) 55.
by any third party to whom the claim might be assigned by the creditor or the creditor’s assignee or subsequent assignees. Conversely, if the habitual residence of the assignor were to be chosen as the relevant connecting factor, should one look to Italy, the creditor’s (and original assignor’s) habitual residence or to that of Assignee II, the Netherlands? Based on this premise, it is obvious that both (potentially) governing laws would pose problems of practicality and fairness: Assignee III has no reason to be concerned with Italian law. In the same vein, Assignee I’s rights should not depend on the law of Assignee II’s habitual residence, ie Dutch law. In response, Professor Goode suggested (and Professor Hartley reportedly agreed) that the better approach was to start with the ‘last event’ rule by which it is the law of the last dealing or event which determines whether (a purchaser or) an assignee has acquired an overriding title.30 This would, obviously, not be the case if the nemo dat rule applied.31 A court seised of the matter of a priority conflict would first examine the position according to the law applicable to the assignment by Assignee II to Assignee III. Only if this does not give Assignee III an overriding title would it be necessary for the court to resort to the law applicable previously, ie Italian law, to determine the title of Assignee I. This analysis, while not addressing the issue as to whether applying the law of the assigned claim is preferable, is correct. Moreover, it would appear to be premised on the assumption that all legal systems have adopted the ‘nemo dat rule’ and that no legal system acknowledges the good-faith acquisition of a title to a claim by way of assignment from a ‘non-owner’. The Draft Regulation too seems to be premised on this assumption when defining, in Article 2(a), an assignor – and that must mean anyone purporting to transfer title in a claim – as a person who transfers ‘his right’ to a claim to another person. In our example, only the Italian creditor and original assignor assigned ‘his right’. All further transactions failed because the right now vested in Assignee I.

The present writer fully subscribes to the view according to which any conceivable conflict of connecting factors in situations involving a chain of assignments should, and could, be dispelled by another round of careful examination of examples such as the ones discussed above.32 This could include – if felt necessary – a thorough comparative analysis of the substantive law regarding the assignment of claims.

4. CONCLUSION

Progress has been made, albeit taking a detour that has led the Commission back to its principal connecting factor proposed in 2005. Limited empirical studies and extensive additional doctrinal debate have laid the foundation for a sound solution that takes into consideration the needs and practices of the relevant industries. It is noteworthy that the Norwegian Høyesterett anticipated and approved, in principle, that solution. Once the clarifications discussed will have been implemented – be it in an EU instrument, be it in domestic legislation – the conflict of laws edifice will have been stabilised both as regards the floor designated ‘contractual obligations’ and the floor ‘property’.

30. Goode (n 21) 376.
31. Nemo dat quod non habet or, more correctly, nemo plus iuris transferre potest quam ipse habet.
32. Dickinson (n 8) 345.