

ASSIGNMENT OF CONTRACTUAL CLAIMS UNDER THE ROME I REGULATION

CHOICE OF LAW FOR THIRD-
PARTY RIGHTS

The Rome I Regulation contains provisions on the relationship among the three primary parties –

creditor, debtor and assignee

– but does not cover third parties.

- In the previous negotiations, there was insufficient time to find an acceptable solution
- Now the matter is due for reconsideration

Part I

Substantive Law

Claim/obligation/debt

D (debtor)  C (creditor)

The claim may result from:

- Contract (Rome I)
- Tort (Rome II, Chapter II)
- Unjust enrichment (Rome II, Chapter II)
- Negotiorum gestio (Rome II, Chapter II)
- Culpa in contrahendo (Rome II, Chapter II)
- Other

Transfer of claim/debt

D (debtor)  C (creditor)

A (assignee) 

Analysis of assignment

- Only the claim is assigned
- A does not become a party to the contract
- But A has a relationship with D
- Transaction has a property aspect
- Akin to a sale of the claim by C to A

The concept of assignment includes:

- outright transfers of claims
- transfers of claims by way of security
- pledges or other security rights over claims

Rome I, Article 14(3)

Contract and property

In some legal systems, there is a clear distinction between:

- an agreement to assign (which gives rise only to contractual rights) and
- the assignment itself (which involves a transfer of property)

In other legal systems, this distinction may be less clear.

Property aspect

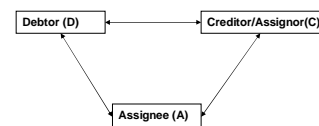
- If C becomes bankrupt, does claim fall into C's bankrupt estate, leaving A with only a contractual claim?
- If C assigns the same claim to two different assignees, A1 and A2, who gets it?

Part II

Choice of Law

Primary Parties

Relationships between primary parties



Debtor ↔ Creditor

- Relationship governed by the law applicable to the obligation in question
- If contractual, Rome I applies
- If non-contractual, Rome II

Creditor/assignor ↔ assignee

Article 14(1):

The relationship between assignor and assignee ... shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

Recital 38

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

The contract of assignment governs:

- The property aspects of an assignment (as between assignor and assignee)
- It does not govern "preliminary questions"

A preliminary question is –

- a question of law
- with its own choice-of-law rule
- which must be answered before the main question can be answered

Example

- Before you can decide whether the claim has been validly assigned, you must decide whether it exists
- This latter question is a question of law
- It has its own choice-of-law rule (the law of the obligation)
- It is not governed by the law that governs the contract of assignment

Assignee ↔ Debtor

Article 14(2):

The law governing the assigned or subrogated claim shall determine –

- its assignability,
- the relationship between the assignee and the debtor,
- the conditions under which the assignment or subrogation can be invoked against the debtor
- and whether the debtor's obligations have been discharged.

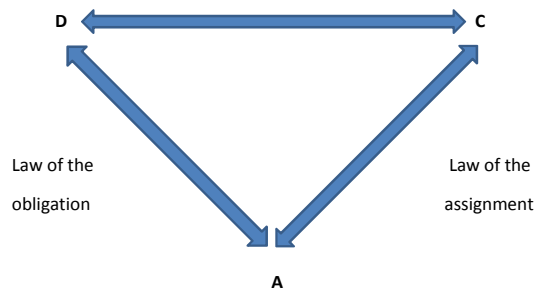
Applicable law

Debtor ↔ Creditor: **law of obligation**

Creditor ↔ Assignee: **law of assignment**

Assignee ↔ Debtor: **law of obligation**

Law of the obligation

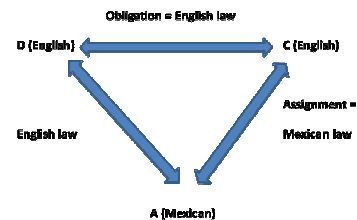


These rules do not apply to preliminary questions

- The validity of the assignment is governed by the law of the assignment even in proceedings between assignee and debtor
- The assignability of the claim is governed by the law of the obligation even in proceedings between assignor and assignee

Example 1: assignee sues creditor in an English court

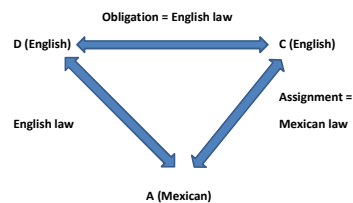
- Debtor and creditor (assignor) are English
- The obligation is governed by English law
- Assignee is Mexican
- Assignment is governed by Mexican law
- The question whether the obligation is assignable is governed by English law, even in proceedings between assignor and assignee



A (assignee) sues C (assignor): the question whether the obligation is assignable is governed by English law, not by Mexican law

Example 2: assignee sues debtor in an English court

- Debtor argues that assignment was invalid; so he does not have to pay assignee
- Validity of assignment is governed by the law of the assignment (Mexican law), even as between assignee and debtor



A (assignee) sues D (debtor); the question whether the assignment is valid is governed by Mexican law, not by English law

Part III

The new provision

Rome I, Article 27(2)

By 17 June 2010, the Commission shall submit ... a report on ... the effectiveness of an assignment ... of a claim against third parties and the priority of the assigned ... claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation ...

Issues to be covered

1. Effectiveness of an assignment ... against third parties
2. The priority of the assigned ... claim over a right of another person

1. Effectiveness of assignment against third parties

This means whether ownership of the claim (as a property right) has been transferred from creditor (assignor) to assignee in so far as the rights of third parties are concerned.

Justification?

Why have one rule to decide the validity of the assignment –

- as between assignor and assignee and
- another to decide its validity as regards a third party?

Protect rights of creditors?

Who is a “third party” for this purpose?

Someone who –

- Is not a primary party (D, C or A) and
- asserts a property right in the claim
- that depends on the validity of the assignment.

Should it cover not-for-value claimants?

- Heir of assignor or assignee?
- Donee of assignor or assignee?
- Spouse of assignor or assignee?

If it covers only claimants for value

- Creditors of assignor
- Creditors of assignee
- Other assignees (for value) of assignor
- Assignees (for value) of assignee

Creditors of assignor

Example –

- Assignor becomes insolvent: does claim fall into insolvent estate, so the assignee is simply another creditor?
- Or does claim belong to assignee so he gets paid in full?

If assignor is bankrupt

- Although the insolvency administrator is said to step into the shoes of the bankrupt, he must count as a “third party” because he is acting on behalf of the creditors.
- So claims to the obligation by the insolvent estate count as claims by a third party.

If the assignor is bankrupt

1. Assume that D pays assignee

- Insolvent estate sues assignee for the money
- the new rule applies

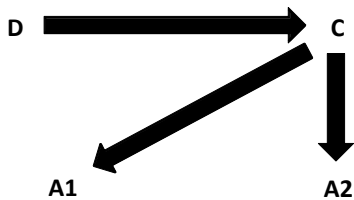
2. Assume that D pays money into court (interpleads)

- Assignee and insolvent estate both claim it
- the new rule applies

EU Insolvency Regulation

- The governing law is the law of the Member State within which insolvency proceedings are opened, usually the country in which the insolvent has the centre of his main interests
- This decides what assets fall into the estate
- But it does not cover preliminary questions like the validity of an assignment; so it is not relevant to our problem

2. Priorities



What is covered?

- If either A1 or A2 sues C, law of the assignment applies
- If either A1 or A2 sues D, law of obligation applies
- The new provision will apply only where A1 sues A2

Substantive law

- **German law:** the rights of the first assignee prevail
- **English law:** the rights of the second assignee prevail if he was in good faith and he notified the debtor before the first assignee (rule in *Dearle v. Hall* [1828] 3 Russ 1)

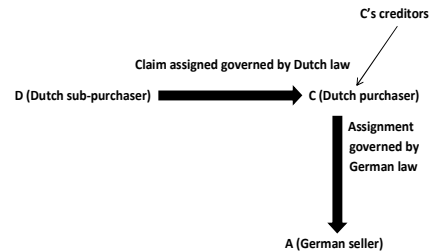
Examples

(based on decided cases)

Example 1

- A (German) sells goods to C (Dutch) on credit terms.
- C intends to resell them in the Netherlands.
- As security, C assigns to A his (future) claim for the price from the sub-purchasers, when he resells.
- The assignment is governed by German law.
- It is valid under German law but not under Dutch law.
- C resells the goods to D under Dutch law.
- C becomes insolvent before payment is due.
- Does D's obligation to pay fall into the insolvent estate?

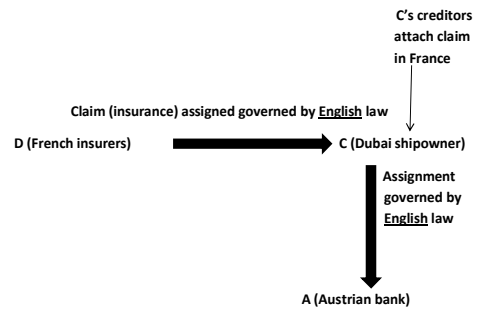
Assignment is valid under German law; invalid under Dutch law



Example 2

- C (a shipowner) is habitually resident in Dubai
- He insures his ship with D, who is French
- The policy is governed by English law
- He assigns his claim under the insurance to A, who is Austrian
- The assignment is governed by English law
- The ship sinks in a collision
- X, C's creditor, attaches the insurance claim in France
- Who has priority – A or X?

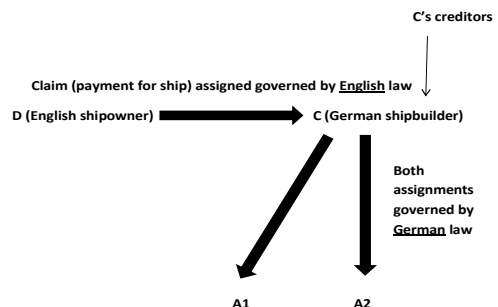
Priority between A and C's attaching creditors



Example 3

- C (German) is a shipbuilder
- He contracts with D (English) to build a ship
- The contract is governed by English law
- Payment is by instalments
- He assigns all future payments first to A1 and then to A2
- Both assignments are governed by German law
- C becomes insolvent
- Under German law, A1 gets priority; under English law, A2 gets priority

Under German law, A1 gets priority; under English law, A2 gets priority



Part IV

Possible solutions

Proposals

1. Law of habitual residence of assignor

Habitual residence of a company

Rome I, Article 19:

1. For the purposes of this Regulation, the habitual residence of companies ... shall be the place of central administration...
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

The proposal

For this purpose the habitual residence of a company should be determined solely by

- Article 19(1) and
- not by Article 19(2).

Law of habitual residence of assignor

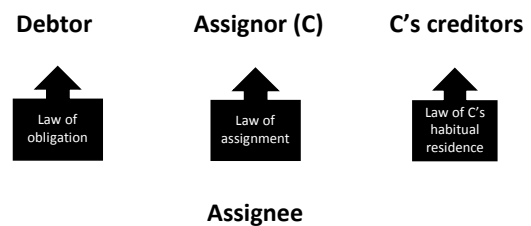
Advantages –

- Factoring (bulk assignments)
- Assignment of obligations that do not yet exist
- 2001 UN Convention on Assignment of Receivables in International Trade

Disadvantages –

- Introduces new connecting factor
- Assignor might change his residence between first and second assignment (priorities)
- Joint assignors

Increased transaction-costs if three laws are applicable



Proposals

2. The law of the obligation

Law of the obligation

Advantages –

- Does not introduce a new connecting factor
- Joint assignors

Disadvantages –

- Factoring (bulk assignments of multiple claims)
- Assignment of obligations that do not yet exist

Proposals

3. The law of the assignment

Law of the assignment

Advantages –

- Does not introduce a new connecting factor
- Joint assignors
- Factoring (multiple claims assigned)
- Assignment of obligations that do not yet exist

Disadvantages –

- Applicable law might be chosen to put third parties at a disadvantage
- Competing assignments governed by different laws (but...)

Proposals

4. Compromise proposal

Compromise proposal

Law of the assignment, provided –

- It is expressly chosen, and
- It is either the law of the obligation, or
- It is the law of the assignor's habitual residence

But ...

If the above conditions are not fulfilled –

- apply the law of the obligation,

except for obligations that do not yet exist –

- apply the law of the assignor's habitual residence

Citations

Rome I Regulation

- Regulation (EC) No 593/2008, OJ 2008 L177/6

Rome II Regulation

- Regulation (EC) No 864/2007, OJ 2007 L199/40

Insolvency Regulation

- Regulation 1346/2000, OJ 2000, L160/1

BIICL Report

http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf

Raiffeisen Zentralbank v. Five Star [2001] EWCA Civ 68; [2001] QB 825; [2001] 2 WLR 1344; [2001] 3 All ER 257