Business Law in Europe after Brexit. The Need for Legal Transnationalisation in the International Market Place and The Example of International Assignments (Draft April 15 2021)

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1. Introduction

After Brexit and with the legitimate aim to protect business coming from London, especially in commerce and finance, on the European Continent, it needs to be considered more fundamentally how this can be usefully and effectively done and whether there is the legal environment and means to make this happen. This affects more in particular the European Union (EU) although it may also hold a message for other jurisdictions. The civil law tradition, dominant on the European Continent, was never truly made for business while its codifications remained national, different also among the EU Member States, and were always 19th Century anthropomorphic, geared to natural persons in what we now call consumer law. This even remained true for newer codifications like the ones in The Netherlands in 1992. It was not different in Brazil in 2002, or in the recent Belgian proposals which still look for a unitary national approach basically the same for consumers and professional or business dealings unless some specific exceptions and clarifications are made for the latter and they are few. There is no true commercial and financial law or law concerning professionals except incidentally as *lex specialis* to these civil codes and their systems, sometimes still expressed

in commercial codes which are fragmentary. Even nationally, there is commonly no coherent law for business dealings and often not much understanding of its special interests, needs and requirements. This is no less so elsewhere, especially in Asia, like in China, South Korea, Japan, the Philippines, and Indonesia, that follow this civil law tradition. It is also the case in South America where therefore similar issues arise in business for its legal framework and protection. *A fortiori*, there is no concept of international business dealings either, which, under traditional private international law and its conflicts rules, are still covered by these local systems of law and broken up accordingly.

It may not be helped by civil law's intellectual and doctrinal bias that easily allows for a form of prejudice against commerce and finance. In this perception, contract law is still based on intent, readily considered flawed or missing, whilst default is excused for lack of blame, easily construed. There is much scope for interpretation and supplementation, maybe even derogation from the text, now mostly under good faith cover, again likely the same for consumer and professional dealings. The essence is that in such an approach the law takes it upon itself to redistribute risk. Perhaps worse, contracting is not merely limited by public policy but becomes a licensed activity per country. Party autonomy is under pressure and no longer an autonomous source of law.[1] It has even less meaning in property where it is hemmed in by the *numerus clausus* of proprietary rights whilst serious issues of recognition arise when these assets are in transformation or start moving cross-border. With the exception of corporate law, itself often abstractly studied without much context, commercial law is neglected as an academic subject. Bankruptcy law is rarely part of the curriculum either, but, without it, property law becomes unhinged especially in finance. When business law is taught, it is usually a practitioners' course without much academic and critical merit.

[1] G. DE ALMEIDA RIBEIRO, THE DECLINE OF PRIVATE 172 (Hart Publishing, 2019).

The common law of contract and movable property, on the other hand, derived from *commercial* law and practice and is more independent, even within the common law, more fact and need-based and practical. That gave it an advantage in business, helped by equity, much missed in civil law where in commerce and finance the greatest differences are: modern commercial and financial structures are likely to be equitable in a common law sense, so is corporation and bankruptcy law. The contract is here foremost a road map and risk management tool, a kind of instruction manual where one does not ask either what the writer might have intended. Texts when sufficiently clear are respected. If not, a reference to peer group understanding is made, defences and excuses are limited, and there must be an investment or beginning of performance or at least detrimental reliance before there is a cause of action.

In movable property, the foremost concern is here also with risk management. Professionally we may think of newer proprietary structures like conditional and temporary ownership rights or finance sales in repos and leases or receivable financing, of floating charges as other forms of asset backed funding, and of segregation of beneficial and economic interests and their legal protection in constructive trusts. In equity, there is an important degree of party autonomy in the creation of proprietary rights, not limited by a *numerus clausus*, cut off therefore not at the level of their creation but rather at the level of their operation against the unsuspecting public; only the professional insiders need to watch out for these interests, have an investigation duty, and are likely to be equipped to do so. There is for them a close connection with liquidity and transactional and payment finality concerning assets or classes of assets in transformation in production and distribution chains where the objective is adding value and arranging asset backed financing rather than consumption of individual products which makes the assets disappear when their legal status becomes irrelevant.

There is no greater value destruction than under the Christmas tree; common law is more concerned with how value is added and the presents get there, civil law with what is left. Again, that is consumer law and remains the civil law orientation at least in movable property where even the asset status of intangibles and their proprietary functioning are often still denied, very different in equity in common law countries where these assets are there to be traded or to be given as security or other forms of asset backed funding and are used in commerce and finance like any other. Equity supports here also better answers in respect of what assets legally are and it can cover intangibles, notably monetary claims and classes of them, even deal with future replacement assets like receivables, and with cocktails of goods, services, information, and technology in constant movement and transformation.

This law also has a broader international reach, at least in the English-speaking world, although it does not mean that it is more transnational in outlook and supporting of the unity of business transactions in a domestic and international setting, yet it is historically in its origin closer to the international market place, the English language being another facilitator. It is therefore often chosen by foreign parties even though it could never truly reach or cover proprietary structures and public policy or regulation issues in the international markets. It is a common mistake to think otherwise; these are not issues at the free disposition of the parties but are governed by the rules of that market itself, especially by international market practices, which English law may have no less difficulty to accept in its more modern emphasis on all law issuing from sovereigns, but, as it remains closer to them, it retains important guidance in the application of these rules. Significantly, the Uniform Commercial Code (UCC) in the US stressing a liberal interpretation and respect for custom and the law merchant in its Section 1-103 reflects here a more open and less nationalistic attitude, probably closer to the original common law.

Because of its history, civil law is more in particular held back in business; it is more scattered, in its modern versions strictly formalised in national system thinking without any clear concept of the professional contract and of movable property operating in professional dealings and it is devoid of much international resonance. It is not a family at all or if it still is, it is largely dysfunctional, there is communality only in the unresolved bottlenecks, especially in professional dealings. When formal attempts are made at some unification, like in the 1980 CISG Convention, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law (PECL), and the Draft Common Frame of Reference (DCFR) as an academic proposal for an EU codification, the result is seldom convincing whilst consumer concepts and principles of protection waft over into commerce and finance and are there rightly questioned. These formal unification attempts retain in particular a subjective notion of intent and breach, remain concerned about blame and risk redistribution, and may in their focus on individualised physical assets be seriously out of date. Business does not want its risk management arrangements challenged except in extreme cases. That is its notion of certainty. Intellectualisation of this nature is not sufficiently trusted; the CISG was rejected by the commercial practice which does not sufficiently recognised itself in it. The English never accepted it for these reasons. The DCFR did not convince either. An ill-fated and confused EU attempt at creating a Common European Sales Law (CESL) based on it was quietly withdrawn in 2014.[2]

Especially in EU countries or at the level of the EU at large (which only has limited competency in this area), the legal issues concerning the international flows in goods, services and money and the practices of the international market place and their dynamics are often little understood and the methodology hardly considered. In this environment, the question how unification can be better achieved and its method are largely ignored. To the extent

[2] JH DALHUISEN, *Some Realism about a Common European Sales Law*, 24 EUROPEAN BUS. L. REV. 299 (2013).

considered, it is still supposed to come top down in legal texts based on rationalisation and system thinking in the anthropomorphic manner. Bottom up legal transnationalisation is not considered as a concept or undercurrent. That may not be much different in common law countries like England, but, again, their laws have at least the advantage of being closer to international practices whilst systematic rationalisation up front remains suspect. Rather, acceptance of transnational law formation may still offend here the notion that all law must issue from a sovereign whilst it may also cut into the status of the domestic courts and their law clarifying authority, especially in appeals. In truth, the resistance against transnationalisation is often a self-serving paradigm, most everywhere meant to protect the financial interests of local practitioners; it was never so before 19th century nationalism or even now in public international law, or in the more functional American approaches, or perhaps in the proper interpretation of international commercial arrangements even under local laws.

Rather than transactional certainty, legal certainty of a nationalistic type remains then still the basic mantra even if in a faster moving world and market place it may become of such a low quality that it destroys everything. In this approach, traditional private international law, geared to the application of national laws only, still holds sway, even if these national laws were seldom made for international transactions and local insufficiencies thus spill over into the international sphere. There are other issues. The basic approach does not accept the unity of international transactions and still requires activities in the international flows to be cut up into domestic pieces in the hope that the local laws applicable to each of them – different for contractual, proprietary and enforcement aspects, add up to some sensible legal regime concerning the whole, which is unlikely. It cannot handle classes of assets situated in different countries either, nor their transfers in bulk. A choice of law of one country to cover all is often attempted to create greater unity, especially the laws of England or New York, but cannot reach regulatory and proprietary issues; they affect the public or third parties and are matters

not at the free disposition of the parties and are not subject to party autonomy or a parties' choice of law.

As there are for business hardly universal conflict rules either, forum shopping then becomes a favourite for litigation lawyers to make life more difficult for everyone, extract sharper settlements, and larger fees. It is the perverse but wholly predictable consequence of legal inefficiency. Again, there were always more fundamental problems with public policy and property law, clear in this private international law approach. Even before the globalisation of production and distribution chains, private international law proved to be particularly artificial in tripartite cross-border relationships (strictly speaking not to be confused with proprietary issues). That was so for agency, trusts, and the custodial holdings of investment securities, clear in The Hague Conventions of 1978, 1985, and 2002 aiming at more universal conflict rules concerning them. They did not convince either, and it is not different for international assignments, another major building block in international finance, and internationally an example of insufficient legal local support. As we shall see, the EU, although concerned, has not so far been able to deal with them convincingly in its (draft) Regulations either.

Transnationalisation and respect for the international order mean direct application of internationally accepted and practiced notions by local courts and enforcement agencies and affects not only operations in or from the EU but involves all legal systems and operations connected with the international market place. The proposed technique is borrowed from public international law, following the universalist approach of Grotius that before the 19th century applied to all law and its application on the European Continent.[3] For public international law, it is still embodied in Art. 38(1) of the Statute of the International Court of Justice, supplemented by the peremptory laws under Art. 53 of the Vienna Convention on the Law of Treaties. This proposed method restores the unity in international law formation and application. The sources are fundamental principle, customary law or industry practices, treaty

[3] JH DALHUISEN, 1 DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW CH. 1, S 1.2.7 AT 183 AND S 1.4.5 (7TH ED. 2019).

law, general principle, and party autonomy. It is submitted that for civil law to be internationally relevant and supporting of business, it should re-find this methodology at least in international business cases. It is also the simplest way forward in the EU. Rather than starting all over under harmonised local laws, which would be very difficult to agree and even more difficult to adapt and, also if unified, remain territorial, whilst EU might not even have that authority in the formulation of private law, it would be greatly more effective to accept the international legal order assuming that globalisation holds.

The truer challenge is then the formulation of international minimum standards to balance the international market place when coming demonstrably on shore in the EU or anywhere else. It concerns the balance between the international market place and public policy or order,[4] and may raise serious regulatory, environmental, public health, safety, bankruptcy, and taxation issues where short of international minimum standards treaty law or, in the EU, its Directives or Regulations might be more effective assuming it is achievable. A facility to ask preliminary opinions of an international commercial court may become an important and necessary additional facility.[5]

In this newer approach, concepts may still derive as general principle from domestic laws, in commerce and finance especially from the equity example in common law countries and in the US the approach in the UCC. They could also derive from UNCITRAL and UNIDROIT unification efforts. In the meantime, the transnational eurobond market and the transnational swap market imperceptibly became resp. the largest capital market and largest market of all, both legally mainly ignored because of the local perspective of most legal observers but they

[4] JH DALHUISEN, *Globalization and the Transnationalization of Commercial and Financial Law*, 67 RUTGERS U. L. REV. 19 (2015).

[5] JH DALHUISEN, *The Case for an International Commercial Court*, K-P Berger, FESTSCHRIFT NORBERT HORN, 893 (2006), see also SSRN Working Paper Series.

developed in their own transnational ways behind the ICMA and ISDA platforms. The international practice, not tied to national systems, was clearly able to take the legal risk and perhaps prefers obscurity to inappropriate and uninformed statist meddling.

Yet greater transparency may be desirable and legal scholarship can help in identifying market practices and formulating fundamental and general principle. At this stage, it is primarily a matter of providing guidance; more formal texts are often defective. Naturally, if all goes off the rails, public policy and international minimum standards might still correct but it is hardly in the interest of the international market place to let it come to this. Openness and recognition of its market practices are the more direct concern and also the truer answer for the EU unless public policy forbids it.

After Brexit, the EU is at the moment more directly challenged and it may be in a better position to lead this process, not prescriptively under its own rules, for which there may be no sufficient law making authority, but as a matter of acceptance of the international order. It is a matter of respecting the international community, international law, and the rule of law itself. The EU rightly reproaches the UK's attempts at violating international law, but its own record is not always unblemished either.

In professional business dealings, it means that contract law and party autonomy are indeed different and have greater independence as a source of law subject to their own checks and balances. The notion of intent is limited in professional dealings - it is conduct and detrimental reliance that matter - so are the defences and excuses. The contract is a road map and risk management tool. In movable property, business professionals also make their own arrangements in order to promote asset liquidity, risk management, and transaction and payment finality as long as the general public is protected. It means that the consumers buy free and clear of these charges and impositions and their payments are respected. *Bona fides* is assumed for them. Only professionals must be more careful and have search duties.

It is the context in which the law of assignment of portfolios of monetary claims also becomes truly relevant, individual assignments rarely are. In the US, Article 9 UCC understood this from the beginning even though one may question whether proper distinctions were made between secured transactions, finance sales, and full transfers of monetary claims like in securitisations; the original idea was to stop the wild growth in security and similar interests under state law. Key issues are the asset status of claims, monetary claims in particular, their separation from the relationships out of which they arise, the unity of portfolios of claims, their transferability in bulk covering also future receivables and proceeds as replacement assets, the formalities and proprietary rights that can be created in them, the protection of debtors, the rights of assignees, and the ranking between them, and the liquidity of these claims, their risk management, and the transactional and payment finality concerning them.

In international finance, the law of assignment concerns one of the most vital pieces of legal infrastructure to consider and needs proper legal support which cannot come from the common law alone, in the EU more urgently to be considered after Brexit. This article seeks to provide a clearer commercial perspective and attempts to identify the legal issues and needs, weave through the maze, and proposes a relatively simple way forward which, it is hoped, may find more universal application. That is (a) acceptance of a fundamental distinction between professional and consumer dealings, (b) recognition of the commercial and financial legal order in which professionals operate, (c) acknowledgement of the unity of international transactions in that order, (d) acceptance of the transnationalisation of the law in that order and the determination of its sources upon the analogy of public international law, (e) recognition by domestic courts of the law from these sources (and their hierarchy) as international law, (f) the approximation of the status of all monetary claims to that of promissory notes in the way these became negotiable instruments under the older law merchant, (g) the determination

of the impact of domestic public policy requirements to the extent international transactions of this nature still come demonstrably on shore, or otherwise of international minimum standards of market activity and behaviour, and (h) the effect to be honoured in international finance especially but not only in local bankruptcy courts.

2. The Asset Status of Claims and the Contractual and Proprietary Rights and Protections concerning Them.

The asset status of intangible assets, notably monetary claims has remained an issue in many legal systems connected with their intangible nature. It has a particular consequence in property law. Can claims be transferred, be given as security for debt, or be the subject of finance sales? This is relevant especially for whole portfolios of monetary claims when asset backed funding is the objective in floating charges or extended reservations of title, receivable financing or factoring, and securitisations. In Germany and countries following its lead, this asset status remains denied in principle. Claims and their operation are obligatory law issues even though it cannot be ignored that they can be assigned and also be given as security (Section 398 BGB), but this remains technically part of the law of obligations. It has the rather perverse advantage of allowing a measure of party autonomy in proprietary matters notwithstanding civil law orthodoxy, e.g choosing a foreign applicable law might be considered, which may be more difficult for chattels and requires then special structures.[6] It

[6] See JH DALHUISEN, 3 DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW CH. 1, S. 2.2.2 *(*7TH ED. 2019). For this development in German law at the time of the codification in 1900, see BERNHARD WINDSCHEID, THEODOR KIPP, 2 LEHRBUCH DES PANDEKTENRECHTS 331 (FRANKFURT AM MAIN, 1900).

may also mean that the need for individualisation and identification (*Bestimmtheitsprinzip*), mostly prevailing in property law and its protections, may be relaxed so that bulk assignments (*Globalzession* or *Globalabtretung*) become possible that might also cover future replacement assets (especially receivables) which is then in principle left to be determined in the contract but purportedly with third party or proprietary effect.

The Draft Common Frame of Reference (DCFR) as a prescriptive academic model for EU private law codification, uncritically follows German law but does not deny that the conditions for transfer of claims are the same as for other movable assets (Art. III-5:104). In fact, implicitly, German law accepts the asset status of claims and consequently requires for their transfer an *Einigung* or real agreement meaning a proprietary legal act of transfer, not different from chattels except that no delivery is required and the real agreement is deemed implicit in the assignment agreement itself, the obligatory and proprietary effects therefore being coterminous (unless the latter are postponed) and there are no additional formalities in terms of notification or documentation, which gives German law further flexibility, although the notions of possession and the protections flowing from it and the possibility of acquisitive prescription may remain in doubt.

The idea still is that proprietary rights proper and the notion of possession and holdership can only operate in physical assets, but in the law nothing is physical, there are only rights and obligations, early so stated by Hohfeld,[7] and it was always a misconception that there was something physical about proprietary rights. Nonetheless, in The Netherlands in its new Code the emphasis in property law is now also on physicality and intangible assets are excluded from the definition of assets and ownership notion are avoided. The reference is to disposition

[7] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913). This physical thinking also comes under severe strain in respect of cryptocurrencies and other crypto-assets, even though not truly 'claims' either.

rights instead, but it is truly only another term for ownership, whilst the notion of possession was retained and acquisitive prescription based on it remained notably possible (Article 3.99 CC), important especially when formalities of transfer are unintentionally not observed or prove defective whilst the transfer was implemented and payments to the assignee took place. Holdership is probably also implied, like ownership and possession in civil law important in the remedies which are otherwise in tort (cf. Article 3.125(3) Dutch CC). It might have been used under the old law *(cessie ter incasso*) to protect collections by the assignor for the assignee in the former's bankruptcy but may as such no longer be relevant. It is a great defect in new Dutch law even though it is often said that no fundamental changes were intended.

More than in Germany, but in the traditional civil law property mode concerning chattels, the emphasis continues to be here also on identification and individualisation even for claims, whilst additional formalities are imposed in terms of documentation, since 1992 also notification of the debtors, erroneously considered a form of publicity meant to track the delivery requirement for chattels. It made bulk assignments and the coverage of future replacement assets in production and distribution chains seriously problematic, less urgent perhaps in view of the atavistic elimination in the new Dutch Civil Code of the extended reservation of title and floating charges at the same time. Although a special regime was foreseen for security assignments with a non-public registration facility replacing the individual notification requirement, they were still handicapped by the individual documentation need although eased by the Supreme Court but not eliminated,[8] whilst conditional or finance sales in receivable financing and full transfers in securitisations still suffered from both the

[8] The Dutch Supreme Court now allows claims to be described in a general fashion ("all claims"), see HR Sept 20 2002, NJ 182 (2002), the coverage if necessary to be determined retroactively from the records of the debtor/pledgor; it may still raise issues of priority in security assignments of future claims, see DALHUISEN, *supra* note 6, at CH. 1, S. 1.2.1.

individualised notification and documentation requirements, the former (but not the latter) only lifted by statutory amendment in 2004 in favour of a registration requirement also.

The substantive difference is that in those assignments that require notification of the debtor as a constitutive requirement the first notifying but later assignee has the rights to the collections. It suggests a race between competing assignees especially relevant in security assignments. Individual notification was always the French approach, inherited from the *ius commune* (but abandoned in Germany) under Article 1690 (old) Cc, in finance amended since 1980,[9] and altogether abandoned in the amendments of the Cc in 2016, Articles 1321ff, cf

[9] See Law 81-1 of 2 January 1981, supplemented by Decree 81-862 of 9 September 1981, and modified by the Banking Law of 24 January 1984 (Arts 61ff), now codified in Arts L 313-23–L 313-35 CMF. It provides for an alternative way of assignment for professionals to facilitate modern financing structures involving portfolios of receivables: see also G Ripert and R Roblot (eds), 2 *Droit Commercial*, 16th edn (Paris, 2000), nos 2428ff, but still requires an official deed (*bordereau*) to incorporate the receivables, which may then be transferred to a credit institution providing advances on the basis of it. The necessity of notification to the debtors as a constitutive requirement of the transfer is abandoned for these types of assignment but not the requirement of identification in the bordereau, which remains restrictive and any further receivables need a new document and would appear not to allow for the inclusion of future receivables in the transfer. Belgium has more radically abandoned the notification requirement for assignments in Art 1690 of its own civil code in 1994, although not the documentation requirement.

It demonstrates the burdens that are still imposed on assignments in many countries of the civil law. A further French amendment of 1984 allowed the *bordereau* transfer technique also to be used by way of guarantee and without any determination and payment of a price. It may lead to a security in the guise of a fiduciary transfer, which had been favoured in France since the *Cour de Cassation* allowed it on 19 August 1849, D.1.273 (1849) but still required individual notification of each creditor for its validity, which may now be avoided by using the newer transfer technique if the transfer is to banks. It also made collection possible to reduce any advances given, which were in this manner amortised. This collection possibility had remained uncertain where receivables were merely pledged under Art 2073 CC.

Article 1321, but not the requirement of individualisation and a writing and assignments of rights remain part of the law of obligations. In a system that does not depend on notification, it the first assignee who has the rights. The new Dutch Code now practices a dual regime (as French law did also since 1980), which operates in a fashion in practice but it is no good model. This whole area of the law is often poorly conceived and its modern significance still not sufficiently understood.

It should be realised that common law struggled no less with the problems of physicality and individualisation as its movable property law was built around the notion of seisin or physical possession of individualised assets, but equity was able to overcome these impediments[10] and equitable assignments have become the norm, certainly for all uses of multiple claims as back-up in finance.[11] In equity, individualisation is not necessary, neither is notification and there are no specific documentation requirements. In their assignment agreement, parties have great freedom to define the type of assets that are to be transferred and the manner in which this is

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The French law of securitisation (*titrisation*) of 1988 (as amended), took a similar approach but also required a document still identifying the transferred claims, usually bank loans although it could cover classes of claims, see DALHUISEN, *supra* note 6, at CH. 1, S. 1.3.6. The introduction of the floating charge in France in 2005 and of the *fiducie* in 2007 followed by the *fiducie-sûreté* in 2009 lifted the restrictions on the transfer of future receivables in the context of these newer facilities. The implementation of the EU Collateral Directive did the same in the area in which it is operative.

[10] Even in England, intangible assets are not always considered purely personal (contractual, tort or restitution) rights. In *Fitzroy v Cave* [1905] 2 K.B. 364, 372, it was said that the courts of equity admitted that the assignee of a debt had title and the debt was considered a piece of property, an asset capable of being dealt with like any other; for English law see also Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 holding that 'a chose in action is property', and AG Guest, GUEST ON THE LAW OF ASSIGNMENT 4 (London, 2012).

[11] JH DALHUISEN, 2 DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW CH. 2, S. 1.5.3 (7TH ED. 2019).

done and the purpose that is to be served, see Section 5 below. This degree of party autonomy in the creation of proprietary rights is made possible by following the equitable principle that charges so created do not affect the general public when acquiring the underlying assets for value and there is a search duty only for the professional insiders amongst themselves. It follows that the collections belong to the first notifying assignee who collects in good faith, even though it may still be asked what the investigation duties of *professional* assignees and debtors are in this connection.[12]

This approach is further elaborated in the UCC in the US in section 2-210 UCC for the assignment of sales receivables and in section 9-406(d) UCC for assignments of all claims that may be transferred as security.[13] The UCC assumes that all assignments of multiple claims are for funding purposes (Sec. 9-109(d)(5) and (7) excluding therefore individual assignments and collection agreements) but has still difficulty distinguishing between the various types of assignments: full assignments, security assignments, assignments as conditional or finance sales, or those in securitisations, an original design flaw in the UCC that was hardly remedied in the revisions of 1999, although Section 9-109(a)(3) now makes some distinctions but these sales remain covered by Article 9 and its attachment and perfection provisions. As we shall see

[12] English case law at least protects the *bona fide* debtor who pays in good faith to a second assignee who gives notice first. That assignment is thereby perfected, *Dearle v Hall* (1828) 3 Russ. 1. It did not strictly mean that under English law the collecting assignee could also retain the earnings, even if he himself was unaware of the earlier assignment, although in modern case law that is now accepted *Rhodes v Allied Dunbar Pension Services Ltd* [1987] 1 WLR 1703. See in the US also section 342 of the Restatement (Second) of Contracts (1981).

[13] In the US the law of assignment developed on the basis of the equitable assignment and did not inherit the old common law impediments: see Walter W. Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 818 (1916). However, even in the US, the subject remained riddled with controversy, primarily centring on the question whether the assignor's right had been fully extinguished or whether the assignee had only an irrevocable power of attorney to collect, albeit in his own name and not affected by his death or bankruptcy.

in Section 5 below, it affects mainly the situation upon default and the right to collect (rather than organise an execution sale) and who is entitled to any over-value which are issues now left to (a degree of) party autonomy.

In the meantime, in the US, 'law and economics' has presented a more fundamental review and declares all structures with economic value legal assets, subject to proprietary legal principle.[14] This is important for intellectual and industrial proprietary rights but also for

[14] In modern US legal theory, inspired by the 'law and economics' school, more profound theories on the nature of proprietary rights developed especially in connection with intellectual property rights, see Brett M. Frischmann, Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007), based on some important earlier economic writings like the classic contributions of R.H. Coase, *The Problem of Social Costs*, 3 J.L. & ECON. 1, 2–6 (1960) and of Harold Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). It is also relevant for assignments.

See for more general recent observations on the evolution of modern property law, Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 JOURNAL OF LEGAL STUDIES 331 (2002).; Stuart Banner, *Transitions between Property Regimes*, 31 JOURNAL OF LEGAL STUDIES 359 (2002).; Saul Levmore, *Two Stories about the Evolution of Property Rights*, 31 JOURNAL OF LEGAL STUDIES 421 (2002).; Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).; and Brett. M Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005).

Demsetz defended the simple proposition, accepted here, that all that can be identified as having economic value creates and is object of property rights as fact and as an unavoidable social and economic phenomenon, as such to be protected, especially clear when these economic values increase as they tend to do in modern times in intellectual discoveries and their application, although it is also an issue in supply, production and distribution chains. It means that others are not to benefit freely, especially not from increased value, which itself can be seen as an externality that may be internalised in property rights, meaning exclusion and protection rights. In this view, this happens as a matter of efficient allocation if the benefits of internalisation as property rights exceed the benefits of keeping them externalised (free as social benefits). There may be strong reasons for internalising, although there may also be considerable advantages in keeping the benefits of innovation externalized, e.g. in intellectual property rights. Here a policy decision will ultimately be made.

claims, more especially when monetary. It is the approach supported and followed in this article. It means that although internally a claim is obligatory, either based on contract, tort, or unjust enrichment, externally it is like any other asset and deserves as such protection in a third party or proprietary manner if the user, income and enjoyment rights created therein are intended and expressed as property rights. As we shall see, the internal aspects are then likely to be increasingly deemphasised to promote the liquidity of these assets. In the following this will be considered an aspect of *abstraction*, considered inherent in all proprietary rights and their creation and transfers even if obligatory in origin. It separates the proprietary right from its origin and history.

But even a right to income or a user right if only expressed and split-off contractually will be protected against all comers, although in that case only in tort, and is unlikely to be transferable without consent of the counterparty, e.g. contractual rights of way or user rights in equipment upon a sale of a business which do not commonly exist as servitudes in movable property in civil law (unlike income rights which may be split off as proprietary usufructs). Similar questions could be asked about finance sales, like repos and finance leases, where, however, conditional and temporary ownership for funding purposes in movable assets including monetary claims is increasingly recognised as part of property law.[15]

If one takes largely the perspective of the evolution of modern financial products, the argument (and therefore the notion of property) is, it is submitted, substantially cast in terms of liquidity, risk management, and transactional or payment finality, especially clear in asset-backed financing, resulting in a balance between preferred and common creditors and in the shifting and distribution of risk amongst different classes of professional investors through financial engineering, which may throw yet another light on what is or should be proprietary and how the relevant income, user and enjoyment rights are to be handled, either in an obligatory or proprietary manner..

[15] DALHUISEN, *supra* note 6, at CH. 1, S. 2.1.

Arguably, it was only because of the recognition of the asset status of claims that proprietary rights and their protections became possible in them and allowed their various types of transfer without consent of the debtor. It is submitted that another consequence is that all user income and enjoyment rights in assets of whatever nature tend towards proprietary expression and transfer together with these assets to support the latters' liquidity. To further this liquidity in the general public, *bona fide* acquisition or possession and an abstract system of title transfer may extinguish competing proprietary rights as we shall see (subject to stricter search duties for professionals), whilst the notion of privity neutralises contractual rights conceded by previous owners, although indeed if not elevated to proprietary rank it may leave the latter with the related duties which they may not be able to perform any longer after transfer of the property , thus inhibiting its transfers and liquidity.

3. The Separation Issue.

Even if the asset status of claims is accepted and the possibility of their transfer achieved, there remains a legitimate question in how far or to what extent claims can be separated to this effect from the rest of the agreement or other obligatory relationship out of which they arise and in how far these obligatory aspects retain importance and remain intact especially in respect of monetary claims against the new creditor or assignee, even if in principle accepting proprietary rights in them facilitates and encourages separation. The question is thus in how far the internal or obligatory aspects still determine or affect the external or proprietary ones and may then still limit their liquidity? This may be seen as an issue of *abstraction*, which, as already mentioned, presents itself throughout property law, see more in particular section 6 below. It seeks to separate the proprietary right from its origin and history and concerns

liquidity and impacts as such also on the assignability of claims, especially relevant when monetary.

The first rule is that only the *asset or active side* of a contractual arrangement may be freely assigned to third parties, therefore without the consent of the debtor so that only claims (and not obligations) may be separated from the relationship out of which they arise, in particular the payment rights, still provided in principle that

(a) no material extra burdens are created for the debtor and he is not substantially deprived of defences under the contract out of which the claims arose,

(b) the underlying contract is not fundamentally changed by the assignment, and

(c) the rights are assignable, which may be questionable in particular if they are highly personal or future or subject to contractual assignment restrictions.

It should be realised in this connection that assignments usually only concern a partial replacement of the creditor, limited to the claimant of the particular assigned claim or claims and that the assignor remains the contract party for all the rest. More importantly, this separation and transfer possibility leading to (partial) *creditor substitution* does *not* therefore normally apply to a transfer or delegation of contractual (or other) *duties*, leading to *debtor substitution*, or a transfer of the *liability or passive side* of the contract. It also means that entire agreements cannot normally be transferred or traded because they commonly also cover obligations, a situation often poorly understood by business people/non-lawyers, especially in the trading of financial derivatives for which special clearing facilities had to be devised.

The reason is obvious and a matter of *credit risk.* Except (mostly) in the case of personal services,[16] it is usually immaterial for a *debtor* whether he or she performs to an assignor or

[16] For personal services, creditor substitution may remain difficult as a personal service provider, like a servant, cannot normally be asked to provide his service to anyone whom the employer might identify except where that was part of the service contract or perhaps if the service can be defined as a true commodity. In French (Latin)

assignee, especially clear in the case of a payment provided always there is a proper release, but it is normally very relevant for a *creditor* who the person is who must perform and pay to him/her. Thus, for the creditor there is in the case of payment a *credit risk* to be considered or (often) a *quality risk* in the case of other duties owed him/her, which means that debtors cannot normally substitute themselves for others without the consent of the creditor. It could be an excessive burden and might indeed amount to a fundamental change of risk in the underlying agreement.

In respect of the transfer of claims or the asset side of a contract, the issues and protections raised under (a), (b) and (c) above are obvious transfer or assignment impediments derived from the underlying relationship. They are, however, increasingly *eroded,* especially when receivables are used and transferred as security for funding in professional dealings, precisely to facilitate the credit given to the debtor which must commonly be financed. Again, it is the issue of abstraction and the modern trend is to facilitate and promote the splitting-off and the assignability of the asset side, at least of monetary claims like receivables, and one may assume therefore that monetary claims are now ordinarily severable and assignable everywhere. To repeat, it may be seen as the consequence of them becoming proprietary rights, especially relevant when assigned as part of a whole portfolio of debt, although even for monetary claims it may still be asked how far this separation goes. Are extra burdens for the debtor still accepted as excuse against payment to the assignee or are the defences relaxed? May the debtor still be

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legal terminology, the contract is *intuitu personae*, which is an implied condition in many service contracts. This personal aspect applies then to debtor and creditor or to the active and passive side of the contract alike. Other claims are intrinsically highly personal and may remain unassignable also like those for alimony or child support. Life insurance policies, wages and pension payments may equally not be assignable because of their very nature. Social security benefits may also be in that category, as are more generally claims that are created with the person of the debtor in mind.

considered merely a third party to the assignment and retain his status and protections under the contract out of which the claim arises in respect of a new creditor/assignee?

In the US, Section 2-210 UCC is here of great significance.[17] It deals with the extra burdens, e.g. payment at the place of the assignee in another country, and requires them to be accepted if not material and there is increasingly a cooperation duty implied. Article 2 UCC does not distinguish here between burdens and defences.[18] An important aspect of the status of the debtor becomes thus when extra burdens result or which old defences are sufficiently material

[17] Section 2-210 UCC provides for a special regime for assignments of sales receivables (although Article 2 does not generally deal with the sale and transfer of claims but only of goods: see s 2-201 UCC). Except when the assignment materially changes the duties or materially increases the burdens or risks of the other party (the debtor), the assignment of claims from sales agreements is allowed and even promoted. The method of assignment of monetary claims is not covered by s 2-210 UCC but has its own regime under Article 9 UCC which assumes that bulk assignments of monetary claims are made for funding purposes and are considered security transfers (unless for collection alone).

There are differences in approach between s 2-210(2) and (3) and s 9-406(d) and (f) UCC, which go beyond the fact that in Article 2 the transfer of sales contracts' rights and duties is considered generally, while Article 9 UCC concerns the (security) assignment of monetary claims. Section 9-406 seems even less disposed to accept assignment restrictions on receivables when assigned for security purposes. The reason is that the debtor has the benefit of funding which itself must be funded, often by using the receivable as security.

In the US, the splitting out of a receivable and its separation from the context out of which it arose is less problematic under the UCC than under earlier common law, even if the assignment is only partial or limited for security or other purposes or merely conditional, see GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1077 (1965).

[18] Unlike the UCC in the US, modern Dutch law has notably not relented, see Art. 6:145 CC except for promissory notes, Art. 6:146, which shows that it remains reluctant to treat monetary claims similarly and is not aware of the challenges for purely monetary claims.

still to be raised effectively against a new assignee/creditor, cf. also Section 9-406 UCC that is even less sympathetic when these receivables are used as security for their funding.[19]

In sales, an important defence against payment is non-conform delivery. It assumes that at least as long as the quality of the delivered goods is not the agreed or commonly accepted standard, there is a right for the debtor not to pay or to set off repair costs or damages. Under applicable law in most countries, such defences against the assignor remain effective against the assignee [20] unless the contract out of which the assigned claims arise states otherwise, which is not common but not unlikely when security transfers were contemplated or necessary from the beginning.[21] As a consequence, the internal or obligatory relationship may continue to have a significant effect in assignments and, in the case of valid material defences, they may still be maintained against the assignee. Nevertheless, the space for the debtor, who benefits from credit, still to ignore the assignment in such cases upon proper notification and to refuse payment to the assignee, is becoming more limited. It is substituted by cooperation. Only the set-off right remains widely respected.[22]

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[19] Even in civil law the assignee is likely to receive some better treatment, at least against undisclosed and undiscoverable flaws in the assigned position, such as any undisclosed incompleteness in the documentation concerning an assigned claim if due to the debtor's oversight or to his lack of co-operation in not amending the contractual text properly when alterations were agreed. A provision to the effect existed in the German BGB of 1900 (section 405 BGB) and was also introduced in new Dutch law (Article 3:36 CC).

[20] It includes the benefit of the *exceptio non adimpleti contractus*. This is established in France through case law, see Cour de Cass, 29 June 1881, D.1.33 (1882) and in Germany through ss 404 and 407 BGB, again allowing all defences accruing to the debtor until the latter becomes aware of the assignment; see also s 9-404 UCC in the US for security assignments. See in England, *Ord v White*, 3 Beav 357 (1884).

[21] In the US, s 9-403 UCC especially upholds these contractual waivers for security transfers of claims.

[22] Defences are in so far different from extra burdens in that they commonly derive from the nature of the claim or from the relationship with the assignor, also the *set-off rights* the extra burdens from the assignment itself. The

Section 2-210 UCC also ignores contractual assignment restrictions, repeated and reinforced for security assignments in Section 9-406 UCC.[23] That is also increasingly the attitude

retention of the latter upon an assignment against the assignee is more in particular important and commonly accepted: see for Germany, s 406 BGB, which allows the set-off in respect of all claims which the debtor acquires against the assignor even after the assignment but before the debtor becomes aware of it. That is also the system of s 9-404 UCC in the US for security assignments. In the Netherlands under its new system requiring notification for the validity of the transfer, all counterclaims arising until the notification can be offset.

In England, the set-off right is at least good for claims arising out of the same contract whether they arise before or after the debtor has notice of the assignment: see *Graham v Johnson* (1869) L. R. 8 Eq. 36. Other claims may be set off only if they arose before notice was given: see *Stephens v Venables* (1862) 30 Beav 625.

[23] In the US, s 2-210(4) UCC presumes that a non-assignability clause only concerns the delegation of duties and not the assignment of rights except where the circumstances indicate otherwise. A right to damages for breach of the whole sales agreement or a right arising out of the assignor's due performance of his entire obligation under a sale of goods agreement is always assignable despite agreement otherwise (s 2-210(2) UCC old). Section 9-406 (d) UCC is even more liberal when receivables are assigned for security purposes.

In England, an *assignment prohibition* in respect of the 'contract' as a whole is still upheld and considered to affect the obligations as well as the rights, not only in respect of future performance under it, but also in respect of payments and accrued rights of action thereunder, *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd and Ors; St Martin's Property Corporation Ltd and Anor v Sir Robert McAlpine & Sons Ltd* [1993] 2 All ER 417. In fact, it was held that *liquidity* was *not* the issue and that there was no need for a market in choses in action. This may be considered a remarkable and wholly out-of-date finding. The Court of Appeal (per Kerr J) had allowed a split and ignored the prohibition in respect of payments and rights of action. That seems to be greatly more sensible and more reflective of modern needs and perceptions.

The English Business Contract Terms (Assignment of Receivables) Regulation 2017 now also take a different view. See for more recent case law also *Don King Productions v Warren* [1999] 2 All ER 218 (CA) under which it was held that at least in an equitable assignment there could still be a declaration of trust in favour of the assignee regardless of the assignment prohibition. It begged the question whether the assignee had a search duty. In Canada the position is taken that the assignment is not invalid in the case of an assignment restriction but the assignee can still not directly claim from the account debtor: see *Rodaro v Royal Bank of Canada* [2000] [QL] OJ 272.

elsewhere. Contractual assignment restrictions were commonly meant to avoid any argument about extra burdens, defences, and connected duties upon an assignment, but their validity and effect present increasingly further issues[24] and are no longer favoured, again it is a question of proprietary status, abstraction, and liquidity. German law in section 399 BGB and Dutch law, even in its new Article 3.83(2) CC, still support the older attitude[25] and contractual limitations on the assignment in these countries commonly still have *in rem* or third party effect and

[24] It may be useful to underline in this connection that contractual restrictions on the transfer of *chattels* are normally considered not to have *in rem* or third party effect and cannot be opposed to buyers who did not know of them; even if they did it might still be an issue since asset liquidity may be considered a matter of public order at least for physical assets and there is in any event no investigation duty; in ordinary buyers good faith is assumed. Different treatment in this regard in the case of intangible claims, which remains common, may still be considered the consequence of them not being considered assets proper. It may also be connected with civil law not according *bona fide* purchaser protection to transferees of intangible claims, which may be considered a related issue.

In France, however, covenants that restrict the resale of chattels are still upheld in principle, see Cour de Cass, 20 April 1858, D.1.154 (1858) where there is accordingly a need for *bona fides* in the transferee to retrieve the situation in respect of chattels. But it still requires that the original seller, buyer or a third party has a justified interest and the restriction is limited in time, see Cour de Cass 24 January 1899, D.1.535 (1900); 23 March 1903, D.1.337 (1903); and 18 March 1903, D.1.126 (1905). The defendant need *not* have knowledge of the original covenant before acquiring the asset, but in the case of chattels *bona fides* means that a subsequent transferee is considered full owner and need not return them. In this respect s 137 BGB in Germany and Art 3.83(3) of the new Dutch CC are also clear.

[25] Confirmed in The Netherlands by HR, 17 January 2003, NJ 281 (2004), although somewhat weakened in HR March 21 2014, NJ 167 (2015). Under Dutch law, the contractual assignment restriction is not considered to go to the issue of the disposition right of the assignor as it may be for chattels, but is simply considered a condition of the claim itself and therefore obligatory but parties could still indicate that they meant the restriction to be proprietary which they commonly started to do.

Draft legislation now aims at making restrictions to the pledging of receivables ineffective in financial transactions (amendment Art. 3:83 (2) CC).

assignees cannot even invoke their *bona fides* in order for the assignment to be valid thus not even in situations in which the assignee could not have been aware of the restriction.[26] Yet one sees generally pressure for change, increasingly reflected in more up to date statutory law also in these countries. In 1998, German law started to relent and now denies proprietary effect to assignment restriction clauses between merchants, importantly still excepting consumer debtors and bank loans.[27]

Assignment is about the transfer of rights as we have seen, not duties, but importantly, Section 2-210 UCC also deals with the delegation of duties which under this section (in the context of the sale of goods only) does no longer need the consent of the counterparty either except where there is a substantial interest in the performance by the original promisor. The trade-off is that the debtor/transferor is not released without the consent of the creditor under

[26] Unless misled because the restriction was, for example, not contained in the documentation on which the assignee relied, see n 19 above.

[27] Sec. 354a HGB. The general rule remains nevertheless that the restriction is effective and may be either inherent in the nature of the claim or be negotiated (s 399 BGB). An example of the former is a claim of a company against its unpaid-up shareholders. In that case, it was the abstract nature of a transfer of title in German which did not allow the debtor to go behind the assignment and he may upon notification no longer be allowed to pay the assignor: see RGH, 23 September 1921, RGHZ 102, 385. The third-party impact of the implied restriction is thus lost upon assignment. As it was never meant to protect the debtor in the first place, it could in any event hardly be invoked by him. In the case of a contractual restriction, the debtor could traditionally ignore the assignment as the restriction is believed a debtor's right, not inherent in the claim but rather an integral part of it: see BGH, 14 October 1963, BGHZ 40, 156 (1963).

It is even said that in such cases the assignment is ineffective *per se* so that the assignee has nothing at all but one might also argue that the breach only gives the debtor a defence, which he may be able to maintain against the assignee. As a consequence, this limitation is then likely to work against third parties, therefore *in rem but only when invoked*. It is nevertheless exceptional that a mere contractual term can have such an effect against third parties and derives from the German ambivalence on the subject of the asset status of claims?

the underlying agreement and remains a guarantor although the transferor may insist that the transferee (the new debtor) performs first (unless otherwise agreed). It is another important departure, likely to be followed transnationally, as it allows each party in principle to transfer *its entire position* at least under a (commodities) sales agreement, therefore the whole contract, and is as such a significant pointer to a new trend. New French law (Arts 1216ff Cc) follows but still puts emphasis on consent. Without it, it provides that both old and new contract parties are jointly and severally liable for performance of the contract (Arts. 1216-1 Cc).

An important related issue is the status of *connected* rights and obligations and whether especially the latter transfer automatically with the claim. It is truly also a separation and liquidity issue. In bilateral contracts more generally, as in sales and exchanges, rights are often balanced by contractual obligations or duties, resulting in an interwoven contractual relationship in which these rights and benefits may not stand sufficiently alone to be assigned separately or the duties to be ignored. It often concerns a *package* and this may also affect the issue and extent of separation and therefore the scope and impact of an assignment, again especially relevant for monetary claims, receivables in sales (assuming whole contractual positions cannot yet be transferred). As for *closely connected rights*, e.g. a supporting security interest or guarantee, [28] they could be independently transferred together with the claim and it

[28] Closely connected rights (such as security interests) may transfer more easily as an integral part of the claim. See for the accessory nature of the security interests more particularly, DALHUISEN, *supra* note 6, at CH. 1, N 23. The issue of accessory right and its meaning has received attention in civil law scholarship in Germany, Switzerland, The Netherlands, Belgium, and France, but is less of a feature of common law scholarship, see for Germany Wolfgang Mincke, *Die Akzessorietaet des Pfandrechts* (1987), Ekkehard Eberhard, *Die Forderungsgebundenheit der Sicherungsrechte* (1993), Christoph Schmidt, *Die sogenante Akzessorietaet der Burgschaft* (2001), and Susanne Heinemeyer, *Der Grundsatz der Akzessorietaet bei Kreditsicherungsrechte* (2017); for Switzerland Christian Schoebi, *Die Akzessorietaet der Nebenrechte von Forderungen* (1990); for the Netherlands T.E. Booms, *Aanvulling van Subjective Rechten* (2019); for Belgium, Koen Swinnen,

may not be a big issue, although the question still arises who is entitled to exercise them, e.g. in the case of a claim supported by a security interest, assignor or assignee or perhaps both?

Closely connected obligations create much greater problems for the debtor especially in respect of any discharge of the assignor. They may represent a precondition for the enjoyment of the right itself, like a duty to make an advance payment before a right may be enjoyed.[29] Faithful implementation of these connected duties may be wanting and the question then becomes whether the assignor is released, much the same problem as when an entire agreement is to be transferred and he may remain a guarantor. A better-known instance may be the duty to arbitrate in the case of a dispute between debtor and assignee. In the case of an assignment of a right to the delivery of goods, there may be timely and conform delivery requirements, insurance and transportation duties and very likely also the duty to pay on the appointed day.[30] In terms of a discharge of the debtor upon his payment to the assignee, this duty also passes in

Accessessoriteit in het vermogensrecht (2014); for France Marion Cottet, *Essay critique sur la theorie de accessoire en droit prive* (2013). It may be noted that the more vexed question of the accessory status of duties remains largely ignored.

[29] Thus the rights to mineral extraction subject to payments of royalties have been found assignable without consent while imposing the payment duty in respect of royalties on the assignee: see the English line of cases on the subject starting with *Aspden v Seddon* (1876) 1 Ex D 496, see further also *Tito v Waddell* [1977] Ch 106, 302. Again, it raises the issue whether the assignor is fully discharged in the process and it is likely that the debtor retains residual recourse against the original creditor unless explicitly released.

[30] It may be noted in this connection that the Eurobond practice expanded the realm of closely connected duties considerably and commonly incorporates a whole legal framework in the bond that is meant to transfers with it, but, importantly, it is limited to what is provided in the note itself and is written on it. The law made applicable by the parties, usually that of England or New York, does not support this – it is against the notion of negotiable instruments, which are supposed to express in the simplest way the asset side of a monetary claim - but international market practice accepts it, an example of a situation where the choice of the applicable law is irrelevant in the proprietary status as its effects are not at the free disposition of the parties.

first instance to the latter but the assignor may not be released here either and must at least recognise the payment and accept that it is valid when made to the assignee.

4. Transfer of Monetary Claims.

According to Roman jurist Gaius,[31] the transfer of assets requires power, cause, and formalities and it remains important guidance. Power means here sufficient disposition rights in the assets, normally ownership rights although more limited proprietary rights like usufructs may also be transferred and security rights ordinarily transfer with the claims they secure. Cause normally means a contractual obligation entered into to initiate the transfer. Formalities in respect of chattels mean in countries like Germany and The Netherlands delivery of possession or control. In the case of assignments, it may mean notification to the debtor as we have seen. There may also be documentation requirements. In the US, Section 9-203 UCC expresses these conditions for security interests in movable property. As already noted, in most legal systems traditionally there was also an identification requirement and the assets had to be capable of being set aside in order to be the object of proprietary rights, to be protected by proprietary actions, superseded in equity in common law countries where the contractual description takes over, in the US now reflected in Section 9-203(3)(A) UCC.[32]

[31] Institutes 2.20

[32] Even in civil law, purely contractual rights which could cover classes of assets are also protected against interference and infringement by third parties although then only in their operation between the parties to the contract. They are protected in tort, see Section 2 above, which in common law is the normal recourse in all cases unless there are special statutory provisions.

This is the general picture which raises the question what the position is when any of these requirements fail and the consequences, especially if discovered only after payment to an assignee has already been made. In civil law, the lack of disposition rights on the part of the transferor is for chattels commonly remedied by *bona fide* acquisition in the transferee, which is assumed. The idea is that those who voluntarily entrusted their assets to a fraudulent transferor (excluding theft) must bear the risk. Appearance of ownership in the transferor protects in such cases the transferee and depends on outward signs, hence traditionally the limitation of this protection to physical movable assets, not therefore to claims. In common law, the same idea applies by statute but is limited to the sale of goods, therefore also movable physical assets.[33] However, where the more modern consideration is asset liquidity, the concept may apply to all assets, including claims.[34] Again the equitable assignment shows here a way forward and allows the *bona* fide collecting assignee to retain the collections as we have seen, although under the UCC the reach of Section 9-203 UCC insisting on the disposition right is for intangible assets less than clear whilst filing may cut through this also, at least in matters of ranking, and may suggest a more stringent investigation duty for professional assignees even though filing itself guarantees nothing and is only warning.

The lack of a cause, normally a contractual obligation to transfer, and the failure of it becoming clear only after transfer and collection, e.g. because there was no sufficient intent, is cured in countries like Germany by the abstract system of title transfer and is a further expression of the abstraction principle in property law. Again, history becomes irrelevant once the transfer is completed. It splits the proprietary aspects from the contractual ones and assumes

[33] DALHUISEN, *supra* note 11, at CH. 2, S.1.4.

[34] Interestingly, the Draft Common Frame of Reference (DCFR) in Art. III-5:120(1) protects the *bona fide* first notifying assignee. In civil law, it would be an important exception to the *nemo dat* rule then also accepted for intangibles, but the DCFR forgets to state that this should be so only upon collection.

to this effect a second real agreement of transfer, which, except in the case of fraud, is not undermined by the status and continued existence of the original agreement. Other countries like The Netherlands still maintain a causal system allowing failure of the contract to undermine the transfer leading to an automatic retransfer of the asset unless the period for acquisitive prescription has run.[35]

A similar approach may be assumed in the various countries for the transfer of intangible movable assets like claims. It required in The Netherlands a special statutory provision to protect the *bona fide* payee against failure of the assignment agreement for whatever reason (Art. 6.34 CC). At least in England, in the case of an assignment, the abstract system is adhered to,[36] but the situation may still be less clear in the US where it is often connected with the discussion about voidable title, commonly reduced to a *bona fide* purchaser rather than abstraction issue at least for chattels, cf. Section 2-403 (1) UCC.

As to formalities, they centre on delivery for chattels and on notification for receivables; there may also be documentation requirements as we have seen. Here there is no particular remedial action, acquisitive prescription in civil law and statutes of limitations in common law being the answer when the time element is likely to remain an important impediment to asset liquidity.

It may be helpful in this connection to repeat the distinction between contractual and proprietary issues and also consider the matter of enforcement. It was already pointed out in the previous Section that at least in civil law there are different protections. Claims expressed

[35] DALHUISEN, *supra* note 11, at CH. 2, S.1.4.6.

[36] At least in n England, failure of the assignment agreement itself does not affect the transfer once perfected, at least not upon collection, meaning that the proprietary effect of the assignment is not dependent upon the continued existence of a prior valid contract to assign unless the assignee was in the plot, which in civil law terms suggests the abstract system of title transfer, see *Republica de Guatemala v Nunez* [1927] 1 KB 669, 697.

in terms of proprietary rights benefit from proprietary protection, those that remain merely contractual are protected against infringement by third parties in tort. Contractually one can cover many aspects of assignments and also transcend the identification requirement, e.g. transfer assets in bulk covering also future claims, but the key is that as long as there is no proprietary expression or recognition of such arrangements, there is no third party effect, especially relevant for security interests and their ranking, and for finance sales, even though there may still be protection in tort against involuntary alienation, e.g. where a third party starts to collect. However, it will not disregard or cure defects in the proprietary transfer and the identification requirement, where maintained, is not superseded either. Here again the equitable assignment allows for greater flexibility and will admit proprietary effect if only against professional insiders, see more specifically Section 7 below.

Yet substantial confusion may continue to exist where intangible claims are still deemed merely obligatory, even though their assignability cannot be denied, and the proper distinctions are not made. What is protected and how? In private international law there are related problems as the domestic laws deemed applicable may be quite different in the contractual, proprietary and enforcement aspects, as we shall see in Section 10 below, whilst the characterisations in this connection may remain quite obscure or overlap. Particularly it must be considered what third party rights and duties mean in this connection or any reference to them, to be distinguished from the tri-partite nature of assignments which is more often a contractual issue although there may be proprietary consequences which come on top. In a 2018 draft Regulation on the Law Applicable to the Third Party Effect of Assignment of Claims, the EU attempted to define the third party issues but proved barely successful and the project was suspended, see also Section 10 below.

Enforcement necessarily concentrates on the debtor who must pay and his obligations and proper release in this connection. Here again the applicable law has to be determined and often

translates in concern for the defences of the debtor and his protections. The problem is that upon bulk assignments, where made possible, enforcement remains an individualised activity and takes place in respect of identified debtors only. That is not different in the case of bulk transfers of chattels, the special issue for intangible assets like monetary claims being in the execution sale versus collection controversy and the entitlement to any overvalue in the collections, see the next Section.

5. The Types of Interests Created.

At least in civil law, there are a limited number of proprietary rights that can be created. That is the *numerus clausus*. User, income and enjoyment rights need to be expressed in the proper form to qualify and then acquire third party status, meaning that they can be defended against all the world. It follows that they remain intact upon a disposition of the underlying assets and transfer with them and that older rights prevail over junior ones. It also follows that merely contractual user, income and enjoyment rights to assets do not transfer with them but frustrate their free transfer as the original party having parted with the assets can no longer perform whilst the transferee can ignore them as he is not a party. Only when these rights become proprietary is the situation different. From this perspective it was already argued in Section 2 above that all user, income and enjoyment rights in underlying assets tend towards proprietary status as this promotes their liquidity which, it was submitted results from their asset status followed by the abstraction principle.

This may be considered a social good and economic necessity at least in respect of commoditised products including the use of receivables and transfer of loans in finance. In real property, common law developed the covenants that go with the land for similar reasons. One

sees that for economic and risk management concerns, the *numerus clausus* is then under pressure even in civil law and at least conditional or temporary ownership rights have increasingly crept up on it. Reservation of title was the more traditional example and started to operate as a proprietary payment protection devise in sales. In Germany, the non-possessory charge in movable assets or *Sicherungsuebereignung* was another.[37] It is the area of the modern finance sale, operative more in particular in repos and finance leases, and it also plays a role in recourse receivable financing, although in many countries there may remain important identification issues and also issues of delivery or notification and documentation in respect of bulk assignment of monetary claims as we have seen, especially affecting the inclusion of future replacement assets in production and distribution chains.

It was already said that common law had similar constraints for chattels expressed in the law of bailment but equity broadened this approach and allowed a substantial measure of party autonomy to enter.[38] This also allowed the extension to monetary claims whilst the identification requirement and the formalities of notice and documentation were allowed to be taken care of in the assignment agreement which could also define the interest. Although there may still be argument how far this goes,[39] the result is that in equity there is no *numerus clausus*

[37] DALHUISEN, *supra* note 6, at. CH. 1, S 1.4.2.

[38] DALHUISEN, *supra* note 6, at CH. 1, s 1.5.2.

[39] See for the risk of an unbridled creation of equitable proprietary rights, *Keppell v Bailey* [1834] 39 ER 1042, 1049, in which the Chancery Court famously held that 'incidents of a novel kind cannot be devised and attached to property at the fancy and caprice of any owner'. In *Hill v Tupper* [1863] 2 H & C 121, it was further said that 'A new species of incorporeal heriditament cannot be created at the will and pleasure of an individual owner of an estate and he must be content to take the sort of estate and the right to dispose of it as he finds the law settled by decisions, or controlled by act of parliament'.

In *Taddy & Co v Sterious & Co*, [1904] 1 Ch 354, retail price maintenance restrictions were not accepted either, there probably arose here a public policy element rather than a private law protection issue against unknown

proper. Risk management is here a more vital issue. The trade-off was, as noted, that these equitable proprietary rights do not work against all third parties but only against certain classes of them, notably professional insiders who have a search duty, but not against the general public which may ignore them when buying the underlying assets for value in the ordinary course of business. As already noted also, these equitable proprietary rights are not then cut of at their formation but only at their operation. *Bona fides* might not even be required, everybody knows that all inventory in a shop is likely to be given to a bank in one form or another to obtain working capital, only other banks and main suppliers need worry. They are the professional

interests, which in equity are in any event cut down at the level of the *bona fide* purchaser for value which may be assumed to exist in the public at large and there is no search duty. It only applies to professionals and is for them a matter of risk distribution amongst themselves.

It shows increasing ossification of the law of equity, but it did not prevent the floating charge from developing in case law later: DALHUISEN, *supra* note 6, at CH. 1, s 1.5.2. Perhaps contractual arrangements rather than unilateral action make a difference.

In the US, where there appears to be even greater flexibility, statutory law has helped especially in respect of floating charges (Article 9 UCC). There are nevertheless also limits, especially in testamentary grants and grants of servitudes, see *Johnson v Whiton* 34 N.E. 542 (Mass. 1893) and *Werner v Graham* 183 P. 945, 947 (Cal. 1919). There is also a traditional resistance in the US to recognition of equitable servitudes or use restrictions on assets, at least in chattels, see for a rare discussion, Zechariah Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928) and *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956).

See more recently in a modern context Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008)., dealing with the myriad restrictions on how electronic programs can be downloaded and used leading in the US to so-called click-wrap licenses, which may still be considered merely contractual but concern also the so-called 'free software' and 'free culture' and tend towards affecting remote users and therefore start running with the burdened assets, automatically binding current possessors.

insiders with a search duty. In assignments, *bona fides* may only then allow them to keep the collections.

It gives the common law greater flexibility and important tools of risk management in line with its commercial tradition in contract and movable property law. Floating charges are one result, finance sales another. Bulk assignments covering also future substitute assets become possible. Statutory law, like Article 9 UCC in the US, may elaborate and clarify even if it continues to have difficulty with finance sales and securitisations and may also have recharacterisation issues.[40] For claims as underlying assets, Article 9 created a special regime, as we have seen in Section 2, without much distinction either. It may be considered a birth defect in Article 9, meant to curtail the earlier wild growth in security and similar interests under state law,[41] but it created problems, not in the least for repos and finance leases. For the assignment of portfolios of monetary claims, the situation also remains confused especially for receivable financing and securitisations, which still must take the form laid down for security interests.[42]

The reason is that Article 9 UCC continues to adhere to a *unitary functional approach* to all movable asset transfers with a funding aspect and introduces a *recharacterization risk* in the sense that they may all be converted into and treated as secured transactions. For monetary claims more in particular, this goes in particular into the issue of an execution sale upon an event of default or the right to collect instead, and to the entitlement to overvalue. At least in securitisations of bank loans, this is now left to party autonomy,[43] but is remains a serious issue,

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[40] See for the difference between security interests and finance sales, DALHUISEN, *supra* note 6, at CH. 1, s 2.1.

[41] See also text following n 11 above and DALHUISEN, *supra* note 6, at CH. 1, s 2.1.3.

[42] DALHUISEN, *supra* note 6, at CH. 1, S 1.6.2.

[43] In the rewrite of 1999, sales and security interest were better distinguished and Sec. 9-318 tried to bring some greater clarity by making clear that a sale means that no legal or equitable interest is maintained but it does not

say when this is so, in other words ‘when is a sale a sale?’, relevant especially in securitisations. A conditional sale may not qualify, but at least in a full sale of monetary claims, the enforcement regime is relaxed and parties may choose for collection rather than an execution sale and also may make special arrangements concerning overvalue, Secs 9-607/8, but the rights and their status are still affected by the attachment and filing requirements and the *bona fide* collection is qualified thereby even though filing guarantees nothing in terms of title and is mere warning.

[44] , although the financial practice has largely learnt to live with , but further clarification may be needed.[45]

[44] The guaranteeing of a certain income level by the seller independent from the yield of the underlying financial assets constituting the income stream must be considered a serious danger to securitisation and may convert the sale of the investment stream to the SPV into a secured loan. This is different from guaranteeing the existence of the income stream itself, see the early case of *Home Bond Co. v McChesney,* 239 U.S. 568 (1916). Others refer to an economic return, which may have to be measured, however, in similar terms: see Peter V. Pantaleo, Herbert S. Edelman, *et al*., *Rethinking the Role of Recourse in the Sale of Financial Assets*, 52 THE BUS. LAWYER 159 (1996).

A similar danger may exist in factoring and securitisations if under the arrangement any overvalue beyond a certain agreed amount of collections must be returned, especially when that amount is the sale price plus an agreed interest rate on it: see *In re Grand Union Co.,* 219 F. 353 (1914), but the return of uncollectable receivables at their face value was not sufficient to convert the sale into a secured loan: *Chase & Baker Co v National Trust & Credit Co.,* 215 F. 633 (1914). This is still good law after the emergence of the UCC and shows that not all forms of factoring are secured transactions. Modern case law suggests that the level of risk that remains with the seller is the determining factor and not so much the guaranteeing of a certain collection plus interest, see *Major's Furniture Mart Inc. v Castle Credit Corp.,* 602 F.2d 538 (1979) but it leads to unnecessary uncertainty and has rightly been criticised: see Pantaleo *et al,* above, where courts require that the risk of loss of the asset must be with the buyer, as in In *re Executive Growth Investments, Inc.,* 40 B.R. 417 (1984).

In a bankruptcy of the seller, the buyer (SPV) may then find that it is only a secured creditor whose collection rights may be stayed under s 362 of the US Bankruptcy Code while the seller may retain any current collections under s 363 and the security may even be diluted under s 364 (in the latter two cases always subject to adequate protection of the buyer, however). This is always assuming that the buyer has properly filed the interest. Without it he may have at best a position just above the unsecured creditors but below all others as his interest is attached but not perfected: see s 9-322(a)(3) UCC.

[45] Doubts remained in view of *LTV Steel Co., Inc v U.S.*, 215 F.3d 1275 (2000), a bankruptcy case in which it was argued that the transfer of assets to an SPV was not a true sale and that the collections by the (now bankrupt) originator were its cash collateral which, pending a resolution of the sales issue, could be used during the bankruptcy if adequate protection was given. A settlement followed so that the basic issue was not determined.

Thus, although Article 9 UCC notably focussed on floating charges, even though it only uses the term in the Comment, it also covered the reservation of title and finance sales but converts them into a secured transaction whilst abandoning their nature as a conditional sale. It meant that an execution sale became necessary upon default in payments with the return of overvalue rather than repossession and appropriation of the asset, which remains the more common answer elsewhere. Similarly, in receivable financing any receivables remaining after a certain amount is collected should automatically retransfer to the assignor, as may be any extra collections, when the true question is their status in a bankruptcy of the factor, who may alternatively take the full credit risk while retaining any overvalue and the exact terms may be left to party autonomy. Again, it may be asked to what extent Article 9, which also purports to cover factoring, supports this.

6. The Unity of Portfolios of Monetary Claims and the Transfer of Classes of Assets. The Status of Future Claims

It is submitted that the unity of portfolios of claims regardless of the location of the debtors must increasingly be respected as a practical requirement and economic need in international commerce and finance. It concerns first the possibility of bulk transfers, the idea that a whole

In 2002, a legislative proposal to amend the federal Bankruptcy Code (the Employee Abuse Prevention Act) was even introduced in Congress (the Durbin-Delahunt initiative) ostensibly to protect retirees and employees while seeking in s 102 of the proposal to re-characterise as a secured loan *any sale* (with or without securitisation) of assets including those to SPVs if its material characteristics were substantially similar to the characteristics of a secured loan. No criteria were given. It was eventually withdrawn, see also Steven L. Harris and Charles W. Mooney, *The Unfortunate Life and Merciful Death of the Avoidance Powers under Section 103 of the Durbin-Delahunt Bill: What Were They Thinking?*, *25* CARDOZO L. REV. 1829 (2005), and DALHUISEN, *supra* note 6, atCH. 1, S 2.5.7.

portfolio of assets, in particular receivables or bank loans, can be transferred in one single legal act, thus breaking fundamentally with the idea of individualisation of assets in property law and introducing the notion of *classes of assets*, dependent only on an adequate description in the assignment agreement. This also affects the possibility of the inclusion of classes of future claims, especially future receivables deriving from present sales. The situation is acute particularly in floating charges, in receivable financing, and in securitisations, conceivably further complicated in assignments with debtors in many countries, see the next Section.

For reasons of efficiency and clarity, the more particular question is then whether it may be possible to find and promote *one* single legal regime or *unitary* approach under one law that would cover the transfer of each claim in the same manner. Putatively, the effect would be the same at the place of each debtor in enforcement wherever located, which would become a question of uniform recognition (or adaptation). The proposition in this article is that such unity can only come from accepting and finding broad acceptance of the abstraction principle in respect of the asset status and separation issue and in the assignment itself and in the payment notices given thereunder, supported by the *bona fides* principle, treating all monetary claims in international funding operations and their transfer increasingly like *promissory notes*. It implies a substantial degree of party autonomy in the description of the assets covered and in the type of interests transferred, see the next Sections.

More in particular for the assignment and liquidity of *future* claims, notably a portfolio of receivables resulting from sales in production and distribution chains, the issue of inherent or statutory lack of assignability arises where English (in equity) and German law seem to be more liberal and French and even new Dutch law more restrictive.[46] In fact, it could be argued that all debt is no more than the sale of a future cashflow but in law future claims are commonly

[46] DALHUISEN, *supra* note 11, at CH. 2, S.1.5.6.

defined as those not yet existing because no debtor can as yet be identified. Claims that do already exist but have a later maturity date are not then future. That is relevant especially in the case of an assignment of bank loans, which may include future principal and interest payments but their inclusion in an assignment should not then be a problem. These claims exist, although payable in the future. A receivable, on the other hand, may be a future claim in respect of payment for goods not yet sold when the debtor (the future buyer) is unlikely to be known.

The question of transferability of future assets is one of policy, in particular when receivables are replacement assets upon a sale of goods under an extended reservation of title or in a floating charge. At least the origin of such claims are known, although not yet the debtor and barriers remain then individualisation, documentation, and notification or registration requirements where existing. They are obviously more difficult to meet if the debtor is in the future and not yet identified. The issue in terms of identification might still be, however, solved with reference to the origin of the claim rather than the existence of the debtor. They are replacement assets that are traceable. In practice, it raises more in particular the possibility of their inclusion in bulk assignments but also goes into the ranking in the case of security assignments. Can there be a ranking before the individual debtor is known or can be identified? Is the crucial date in such cases the one of the assignment or of the emergence of the debtor or any other moment? Again, leaving it to contractual description may be the better answer and is the equity approach extending to after acquired property, at least if a replacement asset.

The situation in the US is not the same everywhere, and in some States the policy of the courts appears more restrictive than in others, probably on the view that no one should commit too far out and mortgage the future or defeat the reasonable expectations for recovery of future creditors. However, the UCC under its Article 9, adopted in all States, follows for asset backed funding the equity approach unreservedly and accepts for security assignments any description of the collateral, whether or not it is specific, as long as it reasonably identifies what it

describes: section 9-108 UCC. This may include after acquired property regardless of the need expressed in section 9-203 UCC to show at least some control.

The ethos of the Code (section 9-204 UCC) is that for security transfers all future assets (after acquired property except consumer goods) can be given for all future debt subject to a form of publication (in the case of claims if they account for a substantial part of the assignor's portfolio) through the filing of a finance statement and one may therefore assume a liberal interpretation of any requirement of 'existence' of the claims. As regards notification, which is not a constitutive requirement under the UCC, it must reasonably identify the rights assigned in order for the debtor to make a liberating payment pursuant to it, section 9-406 UCC, again without saying what this identification requires.

7. The Issues of Abstraction and Bona Fides

In Sections 2 and 4 above, reference was already made to the *abstraction principle* in connection with a) the separation of the internal and external aspects of monetary claims, and b) the continued validity of transfers of claims upon collection even after the assignment agreement itself proved defective. It was considered the consequence of the proprietary status of claims as assets that their history in the law of obligations is increasingly ignored but the principle extends to other aspects of the assignment as well. It may give the assignee better rights than the assignor whilst weakening the defences of the debtor under the original contract out of which the claims arose and creating a cooperation duty. It was also shown that even assignment restrictions in the contract may no longer affect assignees.

It means that debtors must increasingly sort out any complications with the assignor under the original contractual arrangements or the internal side of the claim whilst respecting the assignment and the transfer or the proprietary or external effect; it was already said that the

tendency is for the *internal* relationship to have less and less effect on the *external* relationship, the latter being abstracted from the former; it is thus not merely a question of good faith of the assignee although it may be reinforced thereby. It means that the assignee might be in a better position than the assignor vis a vis the debtor. Again, this may be explained by the latter needing credit for which he/she may have to make the necessary concessions.

In Section 2, it was also shown that the debtor may still be threatened by connected duties that may transfer with the claims and discharge the assignor. On the other hand, the notification requesting the debtor to pay the assignee may give the former better protection in the payment circuit and substantially discharge him/her from investigation duties, whilst assignors and assignees must give a release. Here good faith may also play a role but it is likely that any notification that is on its face properly made protects a debtor and there is no investigation duty, e.g into the possibility that there may have been an earlier assignment or that the assignment is not valid.

That may also be seen as another aspect of *abstraction* principle, here with regard to the notification, and is in accordance with the passive nature of the debtor's position and absence of a need for consent. Although it is clear that debtor may be faced with the proprietary pretences of others, even of the assignor invoking an invalid assignment, and with the question how far he/she may ignore these, English law, as we have seen, in equity has traditionally resolved this issue by considering an assignment completed or perfected upon notification to and payment by a *bona fide* debtor.[47] It may still introduce uncertainty for the latter, resulting in non-payment pending clarification, which modern Dutch law would appear to allow, Article 6.37 CC, but it would seem that this can only be so if the debtor has a legitimate interest e.g when te assignor openly contests the assignment.

[47] This is the famous rule in *Dearle v Hall*, (1828) 3 Russ 1, see n 12 above. It could be criticised on the grounds that it undermines the equity assignment approach, which in principle does not rely on notification.

Whom the debtor should pay may therefore still present a dilemma as it depends in first instance still on the debtor's knowledge and on his investigation, although it also suggests some duty especially if notification is supported by the assignor. The applicable law should resolve this issue and now commonly reduces the uncertainties by limiting any duty of the debtor to investigate [48] allowing a liberating payment to the first notifying assignee who collects,[49]

[48] In theory there are various possibilities. It is clear that as long as there is no notification, the debtor must still pay the assignor and be released or liberated, most likely even if he knows of an assignment. Upon notification, he may probably expect a release in the way directed even if he knows of another assignment, although, again, his *bona fides* might then be an issue especially if notification is not a validity issue. In such cases the first notifying assignee might not be the rightful assignee, although, again, the debtor could hardly accept an investigation duty and should be able safely to pay and obtain a release. If in the meantime he received several notifications he should still be protected if he paid the first one if valid on its face and would not have any investigation duty into the better right, but his good faith could still be questioned if he had subjective knowledge of an earlier assignment or of the possible invalidity of the present one and made a payment to a first notifying assignee. Clarity is here needed.

If on the other hand notification is a prerequisite for the *validity* of the assignment, and an assignee tries to collect, the debtor should know that the first notification transfers the claim and he must therefore pay the first notifying assignee. If before he makes payment, he receives several notifications claiming assignments by the original creditor/assignor, he still has a duty to pay the first notifying assignee and his *bona fides* is irrelevant if he pays another thinking that the latter has a better right (e.g because his assignment contract was earlier) and he will not be protected, although it leaves open the question of knowledge of a possibly invalid assignment. One might especially wonder what happens if an assignor alleges breach of the assignment or an invalid assignment and still requests payment before any assignee does or even thereafter, which may also be an issue where notification is not a matter of validity. Such a payment request could, however, hardly have the status of a notification upon an assignment and, it is submitted, should not be similarly treated.

[49] German case law is firm in that the debtor has no investigation duty and is only not discharged if he has actual knowledge that the assignment has not taken place. It does not seem necessary for him to go into any suspicion of more assignments or into the validity of the transfer, RGH, 19 September 1905, RGHZ 61, 245. It thus appears

motivated further by the need for payment finality and the release of a paying debtor. All resolves in this manner into the single question who has as far as the relevant debtor is concerned the collection right and whom he or she should pay (assuming the assignments concern monetary claims). Potential competing claimants are various assignees as full (putative) owners of the intangible asset, conditional owners, security interest holders or beneficiaries under a usufruct, their garnishing creditors or trustees in bankruptcy or the assignor for any reversions or upon an invalid assignment.

Their status and ranking amongst themselves is another matter of property law. In this connection the collection rights as between various assignees must also be considered as well

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that the first assignee who produces the assignment document to the debtor prevails although other assignees (or even the assignor) may have better rights. What if they present them before payment? The debtor must pay the assignee if ordered to do so by the assignor and also if an assignee officially notifies him of the assignment (sections 409 and 410 BGB). He needs then not worry about the various competing rights, and must pay the first notifying assignee if proper on its face. Other assignees should recover either from the assignor or from the collecting assignee knowing of their better rights.

In the US, section 9-406(a) UCC authorises the debtor to pay the assignor until notice. Thereafter he must pay the assignee. If requested by the debtor, the assignee must furnish reasonable proof of his rights; unless he has done so the debtor may still pay the assignor. The suggestion is here also that the debtor pays the first notifying assignee. There is no search duty and the various assignees will have to establish among themselves who will ultimately be entitled to the collection. In England, the situation under *Dearle v Hall* has already been discussed, with its emphasis on the *bona fides* of the debtor while paying. It leaves the sorting out of the better right in the first instance to the unsuspecting debtor who is a total outsider as far as the assignments are concerned and may leave him with a heavy burden, which could allow him to ignore the entire assignment or not pay anyone. Strictly speaking, it did not say anything about the right of the collecting assignee in the collections, only sorted out in later case law, see n 12 above.

as the question of the ultimate entitlement to the collection proceeds.[50] It is of a different and more traditional nature, and raises the question whether an assignee, having given notice to the debtor and having collected the money, may retain the proceeds if collected in good faith, thus unaware of the potentially better rights of any other assignee (or creditors of assignor and assignees). This is an aspect of the *nemo dat* rule and of *bona fide* purchaser protection related to the ability (in principle) of the assignor to transfer his claim more than once and is then a typical problem of double or subsequent assignments. The issue may also arise when there was a faulty assignment in a chain of them or when the present assignment agreement is invalid. It concerns the issue of sufficient disposition rights in the underlying claims and validity of the assignment itself, more properly raising the issue of *bona fides*, here in the transferee or assignee, see also the discussion in Section 4 above.

Although conceivably fraudulent, it should be realised that a second assignment of the same claim by the assignor does not need to be sinister in any way: it was already noted that the assignor may assign his claims first in a security transfer or in usufruct for some time and thereupon the remainder or excess value to another assignee so that a ranking may result. He may also make a conditional sale and a further assignment of the reversion. Normally this situation will be disclosed but in a bulk assignment of claims any remainders and reversions are likely to be included, or, to put it another way, the claims are implicitly assigned subject to any pre-existing limited or better rights therein, when the question arises to what extent these rights can still be enforced against debtors, as we have seen, and who is entitled to any collections.

[50] In England, it was settled that the *bona fide* collecting assignee can keep the collection, see *Rhodes v Allied Dunbar Pension Service Ltd*, [1989] 1 All ER 1161, n 12 above. It would seem to be in line with the *bona fide* purchaser protection that more generally obtains in the operation of equitable proprietary rights.

As any better rights of others may not have been apparent to a notifying assignee, the question thus arises how far he/she is protected upon giving notice and collecting, assuming the assignee gave good value for the assignment, which is resolved in the latter's favour in common law (in equity). [51] That is the cleanest solution. The conclusion is that the issue of the rights or proper ranking as a proprietary matter is not always determined by the seniority of the assignment itself and there may be other more conclusive considerations:

(a) notice to the debtor, at least in countries that see it as a requirement for the validity of the assignment;
(b) *bona fides* of the paying debtor, at least in countries that see it as relevant in this regard;
(c) *bona fides* of the assignee, at least in countries that allow protection against the *nemo dat* rule in the case of assignments of claims;
(d) filing, at least in countries that provide a filing facility in this connection; and
(e) the type of rights transferred, which may lead to a different regime for security transfers distinct from outright transfers or conditional transfers in finance sales

It is clear that all three clusters of issues: better rights of assignees, extra protection of debtors upon notification of the assignment, and the ultimate right to the collections amongst

[51] The law in the various States of the US remained divided, as mentioned in section 1.3 above. The rule still appears to be that the first assignee is the rightful owner of the claim upon assignment, and this regardless of notification to the debtor, although at least in New York a second assignee who manages to collect in good faith may retain the proceeds. That is also the approach of the Restatement (Second) of Contracts (section 342). For security assignments, section 9-406(a) UCC fails to provide a fundamental rule, although section 9-322(a) UCC maintains for all filed security interests the priority of the first finance statement. Filings thus prevent junior assignees from retaining their collections. It would suggest that they are always considered insiders with a search duty (especially to discover other financiers).

competing assignees (and creditors of assignors and assignees) are all issues of abstraction supported by *bona fides* considerations but in different ways. It is posited in this connection that for commercial reasons monetary claims upon assignment behave increasingly like *promissory notes* which rely for their status also on the abstraction principle supported by the notion of holder in due course. In professional dealings, it is ultimately the issue of liquidity, risk management, and payment finality especially relevant in bulk assignments for funding purposes, see the next Section. To repeat, it follows that payment obligations are increasingly allowed to be lifted out of existing contracts and assignees, debtors, and collecting creditors are given special protections, although, there may also be cooperation duties whilst the debtor and various creditors may lose out on other protections but may retain damage actions against the assignor in the internal relationship, although neither the assignment itself nor the duty of the debtor to pay the full amount of the assigned claims to the assignee would be affected.

Again, it may be considered the consequence of the asset or proprietary status of claims. It follows that upon an assignment, the balance of protections is shifted between participants. To repeat, in the *commercial and professional* sphere, this may increasingly be seen as a common risk particularly of a debtor having requested and being given the advantage of credit and it becomes an ordinary benefit for the professional assignor and a protection for the professional assignee or funding entity. It may enable the assignor to find more readily the financing allowing him to extend credit to his clients. It even applies to assignees aware of the debtor's original protections if the receivable arises out of normal commercial or financial transactions. It appears to be the modern trend and stands to reason. It is part of the *commoditisation* process of receivables (and bank loans) altogether.

In this connection it may indeed be considered that if the debtor was asked to sign a *promissory note*, the abstraction and unimpeded transferability of the claim would have followed. The modern trend is that a negotiable instrument is no longer necessary to achieve a

similar transfer facility for receivables, at least if assigned in bulk for financing purposes. A similar policy may support the assignment of portfolios of bank loans in securitisations. It may be repeated in this connection that the abstraction principle is rougher than the notion of *bona fides* in that it does not depend for the protection of the assignee on what the latter knows or should find out in terms of the rights and duties of the debtor under his contract with the assignor.[52] It is objective and makes that the internal relationship loses its force and that its impact is reduced to the bare minimum. Even when further supported by the *bona fides* notion, like holders in due course, it is likely to be presumed and objectivated. [53] The result is a new balance or equilibrium of rights and obligations between all concerned when claims are traded.

[52] Negotiable instruments such as bills of exchange and promissory notes are normally treated as incorporating a claim and considered fully to separate it from the underlying legal relationship out of which it arises. That is the abstraction and independence principle at its strongest. The other aspect of the treatment of a claim like a chattel in this manner is its negotiability. These issues are connected but should be distinguished. The transfer of the promissory note is not through assignment but through the handing over of the document if to bearer or through endorsement and handing over if to order, even in legal systems such as the French and English that otherwise no longer require delivery for a transfer of title in chattels.

In legal systems that protect *bona fide* purchasers of chattels, as most civil law countries now do, the further consequence of this chattelisation is that *bona fide* purchasers for value of this type of paper are protected against the claims of any senior transferees or other third parties notably creditors of the transferors and do not have a search duty and are then more properly called holders in due course. In common law, this resulted under the law merchant. It may be increasingly relevant also for the transfer of claims.

[53] It shows that the concept of abstraction is different from that of *bona fide* acquisition but that they may support and reinforce each other as was already shown in section 3 above when there is no sufficient disposition right or the assignment agreement proves defective. Abstraction is a more forceful concept and is objective. See for the cut-off of these rights in equity also MP Gergen, "Privity", in Oxford handbook on New private Law (forthcoming).

The essence is that in bulk assignments of monetary claims for funding purposes including securitisations, the assignee/fund provider need not worry or worry less about the individual claims and their characteristics and origin or history.[54] They are like holders in due course of claims free of the underlying defences. Only the set-off rights would be retained by the debtor but may no longer cover counterclaims in respect of poor quality of goods delivered under a sales agreement: see the discussion in Section 3 above. Again, this would have to be sorted out with the assignor as would have been the case if there had been no assignment or if there had been a promissory note.

Clearly, the subject is of great significance in receivable financing and securitisations upon assignment of portfolios of monetary claims and collections thereunder, especially in asset backed funding. The issue is also important for the creditors of the various assignees who may seek to recover from these claims through garnishment. They are likely to prevail over creditors of an assignor if good value is paid for the assignment. They may also increasingly prevail over all other competitors if they manage to collect first in good faith.[55]

8. Liquidity, Risk Management, and Payment Finality.

[54] It is, on the other hand, also conceivable that at least in the *consumer sphere* consumer protections may disallow certain assignments or impose some new restrictions. For example, in mortgage banking, upon the assignment of floating rate mortgages, these mortgages could become subject to the interest rate structure of the assignee. It could be considered an unacceptable variation of the original contract, not achievable through an assignment without the debtor's consent, so that the interest rate structure of the assignor remains applicable. It is to underscore the fact that in professional dealings a different attitude may prevail.

[55] Whether this is so regardless of formal notice in countries that require it for the validity of the assignment may, however, remain more doubtful. In the US, there is an older Idaho case (from a State that required notification for validity) which rejected the claims to the collection made by creditors of the assignor before notification: *Houtz v Daniels* 211 Pac 1088 (1922).

Liquidity, risk management, and payment finality were already mentioned as other main concerns and major objectives in a modern approach to property law including the assignments of monetary claims. In professional dealings, they may be considered the true proprietary issues or challenges, rather than simple questions of mine and thine which are likely to operate between consumers or even transaction costs and standardisation. For professionals, the bottom line is foremost liquidity meaning free assignability with only a minimum of impediments. Risk management concerns the better use of assets to maximise their benefit notably by being able to use them in secured transactions, finance sales, and securitisations, whilst finality means payment certainty including a release of the debtor, well to be distinguished from the more abstract concept of legal certainty. It is substantially a proprietary issue also.[56]

As for the liquidity issue, it was already observed at the end of Section 2 that at least in professional dealings, all obligatory user, income and enjoyment rights conceded in the underlying assets tend towards proprietary expression and then move with the assets so as not to inhibit their transfer whilst they may ultimately be extinguished altogether at the level of the *bona fide* purchaser or collector under monetary claims.[57] Cooperation is required from

[56] Certainty in this more limited sense has traditionally been stressed in English case law ever since Lord Mansfield, especially in mercantile transactions; see *Vallejo v Wheeler* [1774] 1 Cowp 143, 153 (KB); see more recently *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] 1 Lloyd's Rep 571, 577 (Lord Bingham of Cornhill) and *Compania de Neviera Nedelka SA v Tradex Internacional SA, The Tres Flores* [1974] QB 264, 278 (Roskill LJ). For the US, see *McCarthy, Kenney & Reidy, P.C. v First National Bank of Boston*, 524 N.E.2d 390 (Mass. 1988), and also *Pero's Steak and Spaghetti House v Lee*, 90 S.W.3d (Tenn. 2002). It should not be confused with a more abstract notion of legal certainty. The more recent and new references in this connection to 'certainty' in the Preamble (6 and 16) of the EU Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations (Rome I) are misconceived and disappointing, but typical of traditional conflicts of laws thinking.

[57] DALHUISEN, *supra* note 11, at CH. 2, S. 1.1.1.

debtors, defences and excuses like extra burdens are deemphasised whilst assignment restrictions have no longer proprietary or third party effect. Formalities are pushed back, so are impeding individualisation, documentation and notification requirements. Abstraction is promoted, and there is increasingly the important analogy of the promissory note, see the previous Section.

Risk management depends to a large extent on party autonomy which in equitable assignments is favoured and promoted, helped by concepts of unity of debt portfolios, bulk transfers, and the potential inclusion of future debt, see Sections 5 and 6 above. The abstraction principle and notion of *bona fides* support the risk management facility also.

Payment finality has contractual and proprietary aspects, especially the latter and basically means that the asset transfer it requires, either in cash or bank balances, once completed, cannot be undone through legal sophistry like a perceived lack of intent and capacity or of transfer formalities and other imperfections, and that a release of the debtor is implied unless there was fraud.[58] For assignment of monetary claims a similar approach should be taken to its validity,

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58 See for payment finality more generally, DALHUISEN, *supra* note 6, at CH. 1, S 3.1.3. There are a number of established legal techniques which may be summarised as follows:

(a) capacity, intent, disposition rights, and transfer requirements being de-emphasised or diluted,

(b) the notion of abstraction considering a transfer of money complete in its proprietary aspects once it is made regardless of defects in the underlying steps leading up to it unless there was fraud,

(c) analogies derived from the notion of independence in the case of negotiable instruments and letters of credit

(d) protection of *bona fide* payees, and

(e) justified reliance by the creditor/payee, assuming always that the amount was legally owed.

Different legal systems may take different approaches (or even a combination) or put the emphasis differently, but the objective is *always* finality, which in essence means the closest possible approximation to a cash payment. In the US the matter is the subject of statutory law in Article 4A UCC. It appears to rely on a combination of (a),

see the discussion in Section 4 above. There is here a more *subjective* or more *objective* view of payments possible, and there may be legitimate controversy in this area, but there is growing unanimity that the effectiveness of payments should not be undermined by subtle reasoning, both at the level of the payment method, intermediaries and systems used, nor at the level of the liberating effect.[59] The *objective* approach bears out that payments, once set in motion, should be seen as *independent* from their origin and from the defects that may attach to the original instructions and intent or, in the case of assignments of the underlying claims, to defects in the assignments themselves once the payments are made and the proceeds collected, absent fraud. It is again the issue of abstraction supported by the *bona fides* notion. Hence the recast balance between the rights and protections of assignor, assignee and debtors, and the further operation of the abstraction, *bona fide*, and party autonomy principles upon a professional bulk assignment, see Section 7 above. This is a public policy choice and economic necessity to which at least in professional dealings the law must conform.[60]

9. International Assignments and Private International Law

(b) and (d) (see also Comment section 4A-303). The Germans may rely more on (b). In many countries, statutory law may still be patchy or non-existent and the matter is left to case law.

[59] It is accepted that payment instructions to banks are not assignments but *sui generis* legal acts, see DALHUISEN, *supra* note 11, at CH. 1, S. 3.1.5.

[60] Whether, when and how such payments may still be reclaimed is then a separate issue. It is not normally done through an automatic reversal in the system but through a new action, probably based on unjust enrichment, that will result in a new set of payment instructions. The former payment will not then itself be undone. In other words, once payment is set in motion and is so to speak in the pipeline, it must be unhindered as it is in no one's interest to throw sand in the machine and is public policy.

The international aspects of the rights in claims remained long ignored in private international law and this part of the law is even now underdeveloped as the law of assignment itself in most countries still is. This is unavoidably reflected in its uncertain legal status at the international level and is demonstrated in private international law which has found it difficult to cope, especially in the proprietary (and enforcement) aspects of assignments and has found is very difficult to determine the applicable law. The conflicts rules developed so far have remained contentious.

The situation is complicated because of the various issues identified above. They may be summarised as follows:

(a) the problems with the asset status of claims and that they are property, domestically especially in Germany but also in England at law;

(b) the importance of their segregation from the legal relationship out of which they arise and the need for abstracting the proprietary or external aspects from the obligatory or internal aspects and their history;

(c) the difficulty with a proper distinction between the contractual, proprietary and enforcement aspects of assignments;

(d) the lack of a clear insight in the conditions of the assignment of monetary claims in terms of power, cause and formalities;

(e) the need for and importance of individual identification, documentation, and notice requirements in this connection, and in the consequences of the lack of any and the effect when becoming apparent only after collection;

(f) the need to consider the unity of portfolios of monetary claims for funding purposes, the question of liquidity and transferability especially in bulk including future (replacement) assets, and the differences in the types of proprietary rights that may be created in them;

(g) the effect of an assignment on the defences or excuses of the debtors and the impact of any resulting extra burdens for them, the issue of materiality and the cooperation duties of debtors, and the legal status of contractual assignment restrictions;

(h) the meaning of party autonomy in the creation of proprietary rights in monetary claims and the effect on assignees who were aware of them or should have been before they acquired an interest in the property;

(i) the concept of abstraction of the assignment itself and of any subsequent payment notice to the debtor and the approximation of trade receivables to the promissory note, a similar situation obtaining for commoditised bank loans;

(j) the question of the liberating payment to the first notifying assignee, its finality for the paying debtors, their search duties, and liberation in this respect;

(k) the ranking between various assignees and the entitlement to collections;

(l) the complications deriving from the tripartite nature of these transactions, the consequences of an assignment for assignor, assignee and debtors, the rebalancing of their interests and protections in international production and distribution chains, and the nature and importance of *bona fides* in all relationships;

(m) the need to determine when conflicts of laws arise and how and in what manner private international law becomes relevant, the problems internationally with determining location of an assignment commonly considered a key element in finding the applicable (domestic) property (and enforcement) law under traditional conflicts of laws rule;

(n) whether proprietary rights created in these assets can find acceptance elsewhere, notably in a foreign bankruptcy or in other types of enforcement proceedings against foreign debtors, and in what circumstances, under what conditions, or with what kind of adaptation; and

(o) the resolution between different public policies in countries most directly connected.

There are here major policy issues and practical complications. They result in considerable differences in approach to assignments with foreign aspects between the various domestic legal systems and in their courts. They complicate in particular the collection in other countries especially in assignments which transfer less than full title, like security and conditional assignments. Private international law has always found it difficult to cope with tripartite legal structures of which the assignment is one. It should be well distinguished from third party or proprietary effect which comes on top. It always had difficulty with public policy and property issues when assets moved between countries.

One consequence of the difficulty with the location of intangible assets is that the approach to chattels in private international law is not broadly followed in respect of claims which means that there is hardly a recognised legal framework for assignments in the conflicts of laws. As the approach for chattels is based on the proper creation or transfer of any proprietary rights created in them at their *situs* of origin with recognition or possible adaptation of the rights so acquired in countries of destination or enforcement, if necessary in terms of finding the nearest equivalent within that country's view of the *numerus clausus* of proprietary rights,[61] the fact that the *situs* of claims is more difficult to ascertain, is then the reason.[62] Another reason may be that the asset status of claims itself remains clouded.

Yet another reason might be found in the question when conflicts of laws truly arise, likely different in the contractual, proprietary, and enforcement aspects of claims. The contractual aspects are normally connected with parties being located in different countries, the proprietary and enforcement aspects with situations in which the asset moves between countries, which in the case of an assignment may mean a movement of the (residence of the) creditor to another

[61] DALHUISEN, *supra* note 11, at CH. 2, SS. 1.8.2 AND 1.9.4 (7TH ED. 2019).

[62] DALHUISEN, *supra* note 11, at CH. 2, SS. 1.9.4/5.

country. Since this is not a common occurrence and not the result of an assignment, it may be yet another reason why the proprietary aspects of claims remained underdeveloped in private international law.[63] Thus in full assignments, common in securitisations, assignments do not change the enforcement situation fundamentally, although the position of assignor, assignee and debtor and the balance of protections between them may still have shifted as a consequence of the assignment, as we have seen, but the situation may be quite different when the assignment is meant to create new rights in the underlying claims affecting their enforcement, notably in security assignments or in conditional or finance sales of monetary claims with debtors in many countries, when in the countries of enforcement the *numerus clausus* issue may loom larger as a matter of public policy.

The emphasis on the transfers of claims in bulk may distinguish the situation still further from the situation concerning chattels, where bulk transfers are mostly not (yet) a major issue in private international law, although the status and transfer of classes of chattels in or moving between different countries as part of the production and distribution process in international chains is now also becoming a more pressing issue when their likely transformation in replacement assets is another key aspect particularly in terms of the nature and preservation of security interests and their ranking or of finance sales when working capital for this entire international process must be obtained and asset backing offered.

It would appear that short of the unitising effect of transnationalisation through international custom or treaty law (or in the EU perhaps through regulations to the extent there is competency), see the discussion in the next Section, it is hard to find one national law and single regime that might find common acceptance in the traditional conflicts of laws approach, especially because there is not likely one national law for bulk assignments of claims with

[63] DALHUISEN, *supra* note 11, at CH. 2, S. 1.9.2.

debtors in different countries that might convince, be effective, and will be recognised as such in debtor countries. The law of the assignor would be the most practical solution and is often proposed, as we shall see, but it would probably be ignored in enforcement against debtors elsewhere under their own laws, likely a matter of public policy, again especially if these interests conflict with the *numerus clausus* of proprietary rights in the enforcement country.

As private international law does not have a clear way to deal with these issues, the proposition above was that such unity can only come from (a) accepting the abstraction principle in respect of (i) the separation of claims from the legal relationship out of which they arise, (ii) the assignment itself, and (iii) payment notices given thereunder, treating all monetary claims in international funding operations substantially like promissory notes, (b) from, or together with a greater degree of party autonomy in the description of the assets covered and in the type of interest transferred, (c) supplemented by the protection of *bona fides* in the various participants to ignore competing rights, and (d) a common approach to recognition in bankruptcy and to public policy. As we shall see this would require substantial transnationalisation of the applicable law, as indeed there was historically for promissory notes as product of the international law merchant.

As far as party autonomy is concerned, it was already noted in Section 2 that in countries that consider assignments part of the law of obligations, there may be more scope for it in assignments, like in Germany and countries following its lead. Still, it may also use the German concept of abstraction and separation of obligatory and proprietary rights. It would appear to allow parties to choose the applicable property law, either in the assignment agreement or in the underlying contracts out of which the claims arose, but it remains contentious and may now also be precluded by EU law perceptions as we shall see below. It remains easier in common law as also noted where more fundamentally greater party autonomy in these matters is not limited to a choice of the applicable law but might more directly and effectively result in the

creation of *equitable* proprietary rights subject to the protection of the public at large against such charges, although there remains always the issue of enforcement elsewhere in the country of the debtors. [64]

10 Private International Law Approaches, Characterisation and Recognition Issues. The EU Regulations.

Rather than the framework of contractual, proprietary, and enforcement aspects, or references to power, intent, formalities, and disposition rights in the proprietary aspects as in the case of other assets, and issues of proper creation in the country of origin and recognition with or without adaptation in the country of enforcement, the terms more commonly used and the distinctions made in conflicts of laws doctrine concerning assignments of claims are in the EU *validity*, *assignability* and *protection of the debtor*, not therefore *proprietary* status, or even *enforceability*.[65] However, these terms are *poly-interpretable* and may considerably overlap when their distinctive value disappears and its significance in the matter of the determination

[64] In should be noted in this connection that in common law countries all foreign proprietary interests are recognized as equitable, which means that professional parties in enforcement might still have had a search duty before they acquired the interest and be mindful in particular of other prior interests, even if foreign, but the general public could ignore them, see DALHUISEN, *supra* note 11, at CH. 2, SS. 1.8.3 AND 1.9.4.

[65] Earlier the English Court of Appeal suggested that there were at least five possible theories on the law governing the validity of the assignment: see *Republica de Guatemala v Nunez* [1927] 1KB 669; see more recently also *Raffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] 1 All ER (Comm) 961 in support of the law of the assigned underlying claim also for the validity of the assignment (in situations when the Rome Convention did not apply).

of the applicable law evaporates.[66] Thus validity may concern the assignment agreement, the transfer itself, the types of interests created, and the possibility of bulk assignments.

[66] In more recent Dutch case law, even in the proprietary aspects of assignments, sometimes the law of the underlying claim and in other cases the law of the assignment have been upheld as applicable following Art 12(1) and (2) of the 1980 Rome Convention rather than the law of the debtor or that of the assignor. This is then considered to allows for party autonomy and a contractual choice of law in proprietary matters under Art. 3 of the Regulation.

There are three Supreme Court cases in this connection, the last two of which have elicited considerable international interest: see HR 17 April 1964 [1965] NJ 23, HR, 11 June 1993 [1993] NJ 776, and HR, 16 May 1997 [1997] *RvdW* 126. See for a discussion of the first two cases, JH DALHUISEN, 'The Assignment of Claims in Dutch Private International Law' in *Comparability and Evaluation: Essays in Honour of Kokkini-Iatridou* 183 (Dordrecht, 1994), and for the last one T.H.D. Struycken, *The Proprietary Aspects of International Assignment of Debts and the Rome Convention, Article 12* (1998) *LMCLQ* 345. They show great uncertainty, see further DALHUISEN, *supra* note 11, at CH. 2, S. 1.9.4 N 380.

In the matter of a party choice of law, Dutch case law seems to follow German law, which has always had difficulty in distinguishing between the proprietary and contractual side of assignments as we have seen in Section 2 above. German law looks to the law of the underlying contract rather than to the law of the assignment in this connection, see G Kegel, *Internationales Privatrecht*, 6th ed. (Munich, 1987) 478; C Von Bar, 'Abtretung und Legalzession im neuen deutschen Internationalen Privatrecht' [1989] *RabelsZeitung* 462 and C Reithmann and D Martiny, *Internationales Vertragsrecht*, 5th ed. (Cologne, 1988), nos 214ff, although there is also some support for the law of the assignment.

There is no unanimity in The Netherlands but the law covering the assignment agreement may now also be controlling under Dutch law, see CO Hoekstra, 'Het toepasselijke recht op de derden werking van een international cessie' [The law applicable to third party effect in international assignments], *WPNR* 7274 (2020); the applicability of the law of the underlying claim is defended in the proprietary aspects in an older Dutch dissertation: see LFA Steffens, *Overgang van Vorderingen en Schulden in het Nederlandse Internationaal Privaatrecht* [Transfer of Claims and Liabilities in Dutch Private International Law] (Deventer, 1997). Earlier in the Netherlands, RIVF Bertrams and HLE Verhagen preferred the law of the assignment: 'Goederenrechtelijke Aspecten van de Internationale Cessie en Verpanding van Vorderingen op Naam' (1993) 6088 *Weekblad voor*

Assignability may cover transferability, type of proprietary rights created, modalities of the transfer, and debtor protection. Debtor protection issues may cover defences and extra burdens but also the type of notice that must be accepted, better collection rights of others, and the liberating effect of payment.

Importantly, by using these terms, there is no distinction between the contractual and proprietary (or enforcement) effects which are then both covered by the same conflict rule. It may be said straight away that in these various aspects, the 2008 EU Regulation (Rome I) in Article 14 hardly achieved any greater clarity. The subject is simply little understood and it might have been better if the EU had left it alone for the moment altogether. It got unstuck leading ultimately and correctly to the elimination of proprietary issues from its coverage by the ECJ, [67] but it remains to be considered whether this will further clarify the terminology used

Privaatrecht, Notariaat en Registratie 261, see also A Flessner and HLE Verhagen, *Assignment in European Private International Law, Claims as Property and the European Commission's Rome 1 proposal* (Munich, 2006)THD Struycken, above, prefers the law of the residence of assignor. Dalhuisen, above, defends the applicability of the law of the residence of the debtor.

It would appear that the question which assignee has the better right to collect from the debtor can hardly be determined by the law of the assignment contract or the law applicable to the underlying contract and the claims arising out of it and a party choice of law would run up against the enforcement regime in the place of the debtor. Note that there is here no search for nearest domestic equivalents in the proprietary rights that may be so created when recognition abroad becomes an issue, mainly in the place of the various debtors in enforcement under security or conditional assignments.

[67] The ECJ in its decision of Oct. 9 2019, *BGLBNP Parisbas SA v Teambank AG*, Case C-548/18, ECLI:EU:C:2019:848 decided the issue and considered the 2008 Regulation not applicable to proprietary issues, and it may be assumed not to enforcement issues either. The reasons given were that a choice of law was scrapped in the text of Art. 14(3) and further the clarification in the draft 2018 Regulation on the Law Applicable to Third Party Effects of Assignment of Claims even though not law.

and the distinctions remain unclear whilst it is still a question of analysis what is contractual and therefore covered, and what is not, especially in countries that still see assignments as an issue of the law of obligations. [68]

Article 14 states that validity is determined by the law of the assignment perceived as a contractual matter subject to the concept of characteristic obligation of Article 3 or a contractual choice of law by the parties; assignability is a matter of the law of the agreement out of which the claims arise, so is debtor protection. But especially in the last aspect this remains wholly unsatisfactory. The place of the debtor will normally determine enforcement, which like the proprietary aspects, is not a contractual matter either.

Again, the most pressing issues are the recognition of a portfolio of receivables as one assignable class of assets regardless of the place of the debtors, the issue of segregation of these claims from the contracts out of which they arise wherever the debtors are, and the types of rights that can be created in them and will be enforced. The conclusion must be that private international law has not been able to come to a convincing solution.

The Preamble (38) to the 2008 Regulation had tried to clarify that Art. 14 of the 2008 Regulation also meant to deal with proprietary aspects of assignments, but quite apart from the legal effect of a declaration in the Preamble, there were considerable problems with the terminology, as it seemed to be limited to the relationship between assignor and assignee. It has already been said that the nature of proprietary rights becomes apparent truly in respect of third parties so that one could conclude that the Preamble (in its innocence) only served to underline that the 'real' proprietary effects of the assignment were excluded.

Article 14(3) was added in 2008 and appeared to bear out the idea that the proprietary aspects were also covered where it extended the reach of Article 14 to outright assignments and security assignments, without, however, indicating the applicable law.

[68] It means that in each EU country, the normal rules of private international law continue to prevail in the proprietary (and enforcement) aspects of assignments and there is no EU uniformity in approach to the choice of law issues in these matters.

The EU in its 2018 Proposal for a Regulation on the Law Applicable to Third Party Effects of Assignment of Claims in Article 2(d) went into third party effect, there defined as 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. This was only a partial coverage of third party effect and was substantially limited to issues of ranking between various assignees.[69] The law of the assignor was proposed, (rightly it is submitted) *no* party choice of law was allowed. It did notably not cover the asset status of claims and the modalities and formalities of their transfer, all property issues.[70] The segregation of the claims and the recognition of the rights concerning them elsewhere in the EU seemed assumed and collection and enforcement rights against the debtor and its defences were not mentioned.[71]

[69] In Article 5, the Draft attempted to define the scope of the applicable law (being the law of the assignor) which was meant to cover (only) (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 right 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.

[70] There may have been some exuberance on the part of the drafters especially in Rec. 15 which sought to cover all proprietary effects of assignments of claims between all parties involved, even between assignee and debtor, subsequently excluded in Art. 5, cf. also A Dickinson, "Tough Assignments: the European Commission's Proposal on the Law Applicable to the Third-Party Effects of Assignments of Claims", 38 *IPRax*, 337 (2018).

[71] For the assignment of accounts receivable, the most important issues in this regard in the US are also the conflicts arising in double assignments or in garnishments of the assigned accounts, As far as security interests are concerned, the issue of their proper place and law of filing may arise even when no asset moves as long as the owner is elsewhere, certainly if the normal filing place is at the place of the owner. The *lex situs* seems primarily involved but could point to the place of the owner for publication of *non-possessory* security interests. The

Modern opinion, especially among commercial lawyers, makes a much sharper distinction between the contractual and non-contractual aspects of assignments and often opts for the law of the debtor in the latter aspects.[72] They see it as a normal extension of the *lex situs* notion,

formalities of creation would then be decided by the law of his place, although that might not ultimately be sufficient. If there is or cannot be a filing in the US, the question of ranking may arise in the case of enforcement against US based debtors if there are other security interests in their debts.

This matter gave rise to further thought in the UCC, revisited in the 1998 revisions of Article 9. The emphasis is here in respect of the formalities concerning the creation of non-possessory security interests on the law of the borrower/transferor/owner who concedes the security interests rather than on that of the *situs* of his assets given as security and is clearer in the 1998 revision of Article 9 than in the older text: see s 9-103 (old) and s 9-301(1) (new). It does not solve the ranking issue concerning receivables in the US.

[72] See Roy Goode, COMMERCIAL LAW 1241 (4TH ED. 2010); JH DALHUISEN n. 64 above; A Sinay-Cytermann 'Comment' (1992) 81 *Revue critique de droit international privé* 35; MARK MOSHINSKY, THE ASSIGNMENT OF DEBTS IN THE CONFLICT OF LAWS, (1992) 109 *LQR* 613, although preferring the law of the assignor in the case of bulk assignments. See for support for the law of the debtor also *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 and CLIVE SCHMITTHOFF, THE ENGLISH CONFLICT OF LAWS 211 (3RD ED. 1954).

See for the early acceptance of the *lex situs* notion in this connection and of its close relationship to the place of enforcement, FRIEDRICH VON SAVIGNY, W GUTHRIE (tr original 1849 text), A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 366 (2ND ED. 1889), cf also the original view of A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 533 (1896).

In more recent times A.A. Ehrenzweig accepted the law of the debtor in matters of his protection, A TREATISE ON THE CONFLICT OF LAWS 641 (1962); *cf* also ERNST RABEL, THE CONFLICTS OF LAW, A COMPARATIVE STUDY 3 424, 434 (1950): see in the US from an early date *Moore v Robertson* 17 N.Y.S. 554 (1891).

In the meantime, Art 2(g) of the EU Bankruptcy Regulation of 2002 defines the *situs* of a claim as the Contracting State in which the debtor has its main interest. This is a most important definition, as the doubts on the principle of the *lex situs* applying in the proprietary and enforcement aspects of receivables usually derives from the difficulty in agreeing the proper *situs* of claims.

which they perceive as a legal not a physical concept, and emphasise the close relationship between the proprietary and enforcement aspects, the latter being normally governed by the law of the debtor (except where enforcement is sought against his assets in other countries). Indeed, attachments and garnishments necessarily take place at the place of the asset, which in the case of claims would normally appear to translate into the place of the debtor.

In strictly private international law terms, modern case law tends to confirm this tendency and it has often been held that a debt is situated where it is properly enforceable, thus normally at the place of the debtor.[73] In England, it does strictly speaking not rule out another place if payment is agreed elsewhere, provided, however, there is an enforcement possibility in that place. If not, the *situs* of the claim is for this purpose still at the debtor's residence, it being the residual enforcement rule.[74] In fact, creating a contractual enforcement jurisdiction away from the place of the debtor does not change the location of the debt, which requires a more objective criterion. Again, it suggests as proper legal *situs* of a debt the place where claims are *normally* enforceable, which is the place of the debtor (and only changes when he moves to another country with the related re-characterisation and adjustment problems, as already mentioned, especially relevant if the assignment is conditional or for security purposes only).

In this connection, it has also been argued that assets are located where they are controlled, which is therefore more likely to be at the place of the owner or assignor.[75] Also in the US the

[73] See the Privy Council in *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 WLR 1035: see also Art 2(g) of the EU Bankruptcy Regulation.

[74] *Re Herbert Wagg & Co Ltd* [1956] Ch 323.

[75] See T.H.D. Struycken, n 66 above 345, and EM Kieninger 'Das Statut der Forderungsabtretung in Verhältnis zu Dritten' [1998] 62 *RabelsZeitung* 678.

law of the assignor's business is sometimes held to be the more appropriate to apply.[76] This is clearly not always so in the case of chattels and need therefore also not be so in the case of intangible claims. It has nevertheless the attraction that in the case of a bulk transfer the law of the residence of the assignor would apply in principle in the proprietary aspects rather than the law of the debtor, which would have meant a different regime for each assigned receivable,[77] but again there is perforce still such a difference in regime when it comes to enforcement of the proprietary claims and recognition of their assignments and its modalities elsewhere. The unity that may be achieved by locating all assets at the place of their owner thus exists only at the surface and may still be considered artificial.[78] To avoid more problems than necessary, in practice, bulk assignments are normally in respect of portfolios of claims grouped per country of debtors.

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[76] See the authoritative *Comment*, 67 YALE L.J. 401, 418 (1958), but see also A.A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 640 (1962), warning against a dogmatic approach in this area. In any event adequate protection of the debtor may dictate otherwise. Where the assignor continues to collect, the relevant receivables could still be considered included in his estate upon a bankruptcy of the assignor: *Benedict v Ratner*, 268 U.S. 353 (1925), although not all State courts followed this. Garnisheeing creditors have been held protected by the law of the state of garnishment, likely to be that of the debtor's residence: *Lewis v Lawrence*, 30 Minn. 244 (1883).

The assignability issues, including the effect of contractual limitations on the assignability, are mostly held to be governed by the law of the underlying relationship out of which the claim arose, but policy considerations may supersede this approach, especially to support justified expectations of the debtor: *In re Poma's Will*, 192 NY Supp.2d 156 (1959). The matter of set-offs and defences has in the main been settled by statute preserving for the debtor all those arising until the date of notification, while his own courts would naturally protect him in collection suits when the *lex fori* includes such a statute, *cf* also ss 2-210 and 9-404ff UCC.

[77] See for bulk assignments also the approach of Mark Moshinsky, n 72 and GERHARD KEGEL, INTERNATIONALES PRIVATRECHT 478 (6TH ED. 1987).

[78] The law of the assignee is normally not considered and recommends itself only as the most efficient in the case of the assignee's bankruptcy.

11. The Way Forward for International Assignments. Transnationalisation of the Law of Commerce and Finance.

It is submitted that for international assignments the asset status of claims, the segregation of (monetary) claims from the relationship out of which they arise, the unity of portfolios of claims, their transferability, the proprietary rights that can be created in them, and the possibility of bulk assignments also covering future claims regardless of the location of assignors, assignees and debtors must increasingly be accepted and respected as a practical requirement and economic need, not in the least in international asset backed funding. The situation is acute in asset classes moving between different countries as part of international production and distribution chains when their likely transformation into replacement assets including receivables is a key aspect in the preservation of acquired proprietary rights particularly in terms of the nature of security interests and their ranking or of finance sales when working capital for this entire process must be obtained and asset backing offered. It is also relevant in securitisations which concerns the commoditisation of bank loans.

To be effective, it requires transnationalisation where domestic laws and courts accept international practices and legitimate requirements and needs of the business community. As we have seen, private international law does not have a convincing way of dealing with these issues because it can only think in domestic terms. The proposition is that unity can only come from international practices that accept the abstraction principle, reinforced by *bona fide* protection of the various participants and accepting a considerable degree of party autonomy in the description of the assets covered and in the types of interest transferred, itself also detached from local laws which are often well behind, whilst treating all monetary claims in international funding operations more like promissory notes, themselves originally also the product of the transnational law merchant.

In this way, transnational notions of abstraction, *bona fides*, and party autonomy may particularly suggest that inroads into the *numerus clausus* principle of proprietary rights are becoming more universally acceptable in re4spect of monetary claims and are supported on the one hand by the protection of *bona fide* collecting assignees (or even all assignees collecting in the ordinary course of business) and on the other by adequate safeguards for debtors to obtain a proper release upon payment to such assignees wherever they may be located, whilst the public at large is protected against unusual proprietary charges. It is practical and may overcome unsuitable and arbitrary local property and assignment laws at the same time and ease the problem of recognition and adaptation of these rights in other countries. Professional parties would still have a search duty and may have to be mindful in particular of other prior interests or interested parties in the place of enforcement but the general public could ignore them.[79] That should be the approach unless relevant public policy forbids it.

Transnationalisation means here direct application of international notions by the courts and local enforcement agencies. The technique is that of public international law and its sources, following the universalist approach of Grotius that before the 19th applied to all law and its application, [80] and is still embodied in Art. 38(1) of the Statute of the International Court of Justice. These sources are fundamental principle, customary law, treaty law, general principle, and indeed party autonomy subject to equitable practice in proprietary matters. It concerns all commerce and finance and the law of assignments is here only presented as an example.

Rules may still be derived as general principle from domestic laws, especially the equity example in common law countries and in the US the approach in Article 9 UCC. They could also derive from international Conventions such as the 1988 UNIDROIT Factoring Convention

[79] See DALHUISEN, *supra* note 11, at CH. 2, S. 1.8.1.

[80] JH DALHUISEN, 1 DALHUISEN ON TRANSNATIONAL AND COMPARATIVE COMMERCIAL, FINANCIAL AND TRADE LAW CH. 1, S. 1.2.7 AT N 183 AND S. 1.4.5 (7TH ED. 2019).

and the 2001 UNCITRAL Convention on Assignments of Receivables in International Trade, even in non-Contracting States, whose true problem was, however, that they could not make the leap to treating receivables in the nature of promissory notes, were not comprehensive, and continued to have problems with bulk assignments of claims with debtors in various countries especially in collection and enforcement. Few ratifications followed. For treaty law or similar instruments to be successful, it would appear that in respect of international assignments there needs to be the following aims which would also be minimum requirements of bankruptcy law adaptation in interested countries and therefore also in the EU and its Member States:

(a) promote the separation of monetary claims from the underlying relationship out of which they arise and their assignability;

(b) promote the unity of portfolios of monetary claims and do away with their individualisation and objective identification requirements, back the validity of a bulk assignment through one act of transfer based on a reasonable identification or description of the assets and accept the inclusion of future claims as least to the extent they are replacement assets;

(c) do away with any individual documentation and notification requirement as a precondition for the validity of the assignment;

(d) determine the basic requirements in terms of disposition rights of the assignor, the validity of assignment agreements, and any remaining formalities, and cover the situation when any of these conditions fails especially if becoming apparent only after collection has already taken place;

(e) require all debtors to pay the assignee upon proper notice, valid on its face, limiting their investigation duties and implying a liberating payment and its finality;

(f) limit the defences of the debtors to those that are material, accepting that liquidity of monetary claims is ultimately in the interest of all, and that a measure of co-operation of

debtors may therefore be demanded and also acceptance of reasonable extra burdens in particular when the funding was necessary to support the credit given in the receivable;

(g) do away with the third-party effect of contractual assignment restrictions at least for monetary claims;

(h) clarify the debtor's rights and assignor's obligations in respect of duties of the assignor that automatically transfer with the claim;

(i) promote the transferability of commercial contracts subject to the transferor remaining a guarantor of the performance of his duties thereunder;

(j) define and recognise in all Contracting States the type of interests that can be created, promote receivable financings potentially as conditional ownership structures, facilitate securitisation of bank loans, and accept floating charges as security interests ranking from the day of their creation;

(k) consider the effect of party autonomy in the creation of proprietary rights and the implied acceptance and recognition by those who knew or as professionals should have known of any such prior rights when acquiring an own interest in the underlying claims;

(l) establish the order *inter se* among competing assignees and protect the *bona fide* collecting assignee with a search duty only for professional insiders;

(m) sustain collection agreements and the notion of segregation of the proceeds; and

(n) is aware of the other sources of transnational law which may supplement or even supersede such treaty law, as there may be transnational fundamental and general principle and transnational custom and practice and an enhanced status of party autonomy in professional dealings, whilst in a proper application of the *lex mercatoria* local laws may retain a residual gap filling function if all else fails but it becomes part of transnational law and must shed its typical domestic features in the process.

This may not be easily achievable by treaty law although, quite apart from the question of sufficient EU jurisdiction (it is not strictly speaking a matter of private international law in the more traditional sense), it could be a realistic aspiration in the EU or a Regulation rather than its 2018 Draft now suspended and would have a much more comprehensive scope. It should not be conclusive either but must remain open to developments in the broader international market that far exceeds the EU internal market; it is a recognition issue unless public order dictates otherwise and is the essence of the operation of the modern *lex mercatoria* and the way forward for the EU if it means to be serious in these matters.[81] It also eclipses the common law that remains territorial even if more attuned to business, also when chosen by the parties as such a choice cannot cover third party or proprietary effect or the public interest; these are not at the free disposition of the parties. In the international market place, such rules must derive more objectively and directly bottom up from fundamental legal principle, international custom, general principles derived from domestic laws, even from some form of party autonomy in proprietary matters subject to the protections mentioned. The EU should open up to this law and, rather than adopting a prescriptive approach, recognise international market practices for what they are barring public policy. It could start doing so by Recommendation for the opening of Member State laws. Especially in bankruptcies.

The result is a more informal but probably also a more responsive type of uniform law that facilitates international bulk assignments, even the recognition of rights in receivables when a debtor moves to or comes from another country or when the type of collection right so created needs enforcement against assets of the debtor abroad. The key question is always *who has the collection right and may retain the collections* and whether the debtor was right or wise not to

[81] DALHUISEN, *supra* note 80, at CH. 1, S. 3.2.2.

pay the assignee in view of his own protection or any better right of other assignees or perhaps even the creditors of assignors and assignees in a chain.

Transnational law, particularly international custom and practice, may here set uniform standards to be recognised especially in local bankruptcies and local bankruptcy laws should be accommodating and be encouraged to do so, again unless public policy forbids it. It is more properly the area of law of modern international finance. It was already said that the more the notion of abstraction is accepted in respect of the transfer of monetary claims when they are commoditised, the more like *promissory notes* and negotiable instruments or semi-chattels they become, see Section 7 above. That would also mean that they become more susceptible to transnational ownership and assignment facilities regardless of more traditional *numerus clausus* restrictions. It is submitted that this is the better way forward, at least for international bulk assignments in commerce and finance and a key building block for professional dealings and their funding operations including securitisations of bank loans.

It may still be asked how such practices or custom can be formed or identified. Party autonomy in a contractual structuring approach is not sufficient to deal alone with proprietary issues without support in customary law, perhaps not even in the more limited terms of equitable proprietary rights. Custom and practices will start with such financial structuring and therefore with contractual arrangements. When are they lifted to the higher plane of international custom in the manner of what equity provides in common law countries? That is general usage or acceptance in the community it concerns, here the international business and banking community and this can be rapid once such a community conforms.[82] Treaty law or EU Regulation could help but is not truly necessary and can hardly be the product of international compromise imposed from above. It is not requested by business and greater

[82] JH Dalhuisen, *Legal Orders and their Manifestation: The Operation of the International Commercial Legal Order and its Lex Mercatoria*, 24 Berkeley J. Int'l L. 129 (2006).

formalisation would not appear to be required until such time that the international community itself asks for help, e.g. to set up filing facilities. Accommodating bankruptcy laws are a more necessary start and states should signal their willingness to accommodate (public policy permitting and there is no obvious impediment, see the next Section).

Legal scholarship can help in identifying the practices and formulating general principles. At this stage, it is submitted that this is primarily a matter of providing guidance. Legal texts are never more and often defective. Those that do the round like the ones of UNCITRAL, UNIDROIT, PECL, and DCFR show so in abundance. A better example may have been the formulation of Trust Principles by Professor Hayton at Nijmegen University in 1999.[83] It brought clarity to the subject and reduced it to its essentials. More may not be truly needed at this stage and here informed legal scholarship can help and it is its task. Naturally if all goes off the rails, public policy and international minimum standards might still correct but it is not in the interest of the international market place to let it come to this. Openness and recognition of its practices are the more direct concern.

12. Issues of Justice, Social Peace, and Efficiency. The Problems with Public Policy. International Minimum Standards

Once transnationalisation takes hold, it is legitimate and necessary to ask more generally in how far it can fulfil its social function and promote justice, social peace and efficiency. It is obvious that national public policies may trump it when international activity comes demonstrably onshore, but it is also true that if affected countries want to have the advantages

[83] DALHUISEN, *supra* note 11, at CH. 2, S. 1.6.7; see also David Hayton, *The Developing European Dimension of Trust Law*, 1 KING'S COLLEGE L.J. 48 (1999).

of globalisation and international funding for their participants, they must cooperate and facilitate unless it becomes offensive. It is not likely that the law of assignment as practiced between professionals is likely to do so. The equitable interests are unlikely to reach the general public and what can be encumbered and the ranking that may result should not be of major concern but an issue between professionals amongst themselves. Hence the large degree of party autonomy between them.

Regulation is there to help in its concern about financial stability, conduct of business, and market integrity, but even then, in conduct of business, it needs to be less concerned with professional dealings where international minimum standards may also substitute, e.g. to protect against complicated (derivative) structures and the trading in it, but *caveat emptor* remains a valid principle especially in commercial dealings where differences in bargaining power are also less of an issue barring abuse of dominant positions for which there are other remedies. Privacy concerns would not appear to be central in matters of assignment either but international tax considerations are likely to be relevant and may concern the development of international minimum standards in that context.

In professional commercial and financial dealings efficiency considerations may be of more particular concern and relevant in the promotion and interpretation of the business laws and it may be independently pleaded to give true effect to legal structures when used in the international market place. Again, they will be tempered by international minimum standards like tax evasion and avoidance concerns. Those concerning public health and the environment may be less relevant for assignments.

13. Conclusion.

The law of assignment has acquired great significance in the last generation as legal building block for modern financing techniques in a highly leveraged society. Whatever the merits of

this leverage, it is not likely to go away. Better credit facilities mean cheaper credit and the law can be instrumental provided it remains responsive, now at the international level. This requires at this juncture abandonment of a nationalistic and formal private international law perspective in favour of a better understanding of what is going on and is needed and of how and in which way legal transnationalisation can contribute and how legal scholarship can help in this effort and hopefully explain and simplify the argument. Assignment of monetary claims is only one example and part of the larger picture of the transnationalisation of commercial and financial law which is the consequence of globalisation on the scale we now experience it where a new equilibrium between national and international forces must be found, also in private law formation and its application.

This concerns all commercial nations involved in the international commercial and financial flows. For the moment, the issue is more in particular how the EU can better guide the financial business that comes to it from London after Brexit but it suggests a model also relevant for others. The Draft Common Frame of Reference (DCFR) that once figured as some model for EU codification is consumer law and such an effort cannot handle modern finance. This kind of law remains closed and territorial whilst openness is required and acceptance of international market practices, especially those supporting equitable proprietary rights in trusts, floating charges, finance sales like repos, leases and recourse factoring, assignments, set-off, the holding of investment securities, and securitisations. Even if on occasion the underlying activities may still remain purely local, they are likely increasingly to derive their structure from the international model and remain part of it.

To get the perspective and predictability needed, this requires broad international acceptance of established practices unless public policy forbids it and the EU should help lead, not prescriptively under its own rules but as a matter of recognition of the international order and others should follow. Merely maintaining the attitude of national legal systems would appear

futile and is not demanded by public policy. In professional dealings, both contract law and party autonomy should be accepted for what they are even in movable property matters. In the international sphere these are not state licensed concepts and have greater independence as source of law subject to their own checks and balances, in property especially cutting off proprietary or third-party effect at the level of non-professional third parties or the public at large.

For the EU to support this business, if necessary legally to retrieve it from the dominance of the common law and its service providers especially in London, it must adapt in order to facilitate and be relevant and dependable. Beyond necessary regulation and consideration of internal public policy, the essence is that it should respect international market practices, accommodate the bankruptcy laws accordingly, and otherwise only interfere if business asks for help.[84] It is in truth an aspect of respecting the international community, international law, and the rule of law itself, to which the common law should also adapt in international professional dealings to remain truly relevant. Especially in commerce and finance, the EU (let alone its individual Member States) cannot succeed if it believes that it should monopolise all law formation and operation in its territories, even if it were given that power, and frustrate the law-making function of civil society and its contribution to the law formation process. Neither should other countries unless they have a true policy interest. Centralising this function at the level of the EU or any regional levels would still make this law territorially limited, less diverse, less participatory, less democratic in that sense, and likely to be self-defeating. A fortress Europe or similar mentality is not going to help to support legitimate international business.

[84] Letter JH Dalhuisen to Editor of the Financial Times, Sept. 24 2020.

It was submitted that only when the practices of the international market place and modern finance are respected can this business safely flow from London to the EU or to anywhere else and prosper.