Assignment of claims and possible conflict rules for third party effects

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The third-party effects of an assignment of a claim relate mainly to possible conflicts between the assignor and a competing assignee or between the assignee and creditors of the assignor, be it individual creditors seeking satisfaction of their claims or the insolvency estate of the assignor. Arguably, there may be a similar conflict between the assignor and the assignee’s creditors, but this has usually not been discussed in relation to Rome I regulation (593/2008).

Mostly, third-party conflicts must be solved according to national law, as international regulation is lacking.⁴ The solutions in national law are not harmonised and they vary quite a lot.⁵ Some jurisdictions require notification of the assignment to the debtor of the claim, other jurisdictions require registration of the assignment, in particular for assignments by way of security, and still other jurisdictions accept third party effects of the assignment without further formalities. The choice of applicable law is therefore of vital importance.

Three possible law conflict rules have been discussed as main options.⁶

The first option is the law of the habitual residence of the assignor (Zedentensitz). This option refers to an objective fact. It has advantages inter alia for the assignment of future claims, and it will often point to the same law as the one governing the assignor’s insolvency – the situation in which the effectiveness of the assignment is most important. On the other hand, there may be problems in ascertaining the relevant law for example if there are more than one assignor of the same claim. Further, the law of the assignor’s habitual residence will in many cases not be the same as the law governing the claim, which will apply to the relationship between the assignee and the debtor of the claim. For that reason, the assignee will have to make investigations into two different connecting factors.

The second option is the law of the assignment contract, that is the contract between assignor and assignee. It may be an advantage for the parties to adapt their contract to the law governing the third-party effects. This option will also allow the assignor and the assignee to choose the applicable law. Some would see this as an advantage; others would object to the aspect of contract parties thus indirectly deciding on the interests of third parties. The option may also create problems if there are competing assignments regulated by different laws.

A third option is the law of the assigned claim. This would solve the problem of different laws regulating the relationship between the assignee and the debtor of the claim on the one hand

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¹ The United Nations Convention on the Assignment of Receivables in International Trade (New York 2001) has still not entered into force. The UNIDROIT Convention on International Factoring (Ottawa 1988) has been ratified or accessed by only nine states.


⁴ MANKOWSKI and U. MAGNUS, Rome I Regulation : commentary, vol. 2, European commentaries on private international law ECPIIL, Sellier: Munich 2017 Article 14 Nos. 38–54. For a most comprehensive analysis, see also T. JUUTILAINEN, Secured credit in Europe. From conflicts to combatbility, Hart: Oxford 2018 passim.
and the third-party effects on the other. The option may be less favourable in cases of global assignments, typically in factoring transactions. Further, the coordination with the law on insolvency proceedings can become complicated.

In the Commissions proposal from March this year, the law of the habitual residence of the assignor has been chosen. There are certain exceptions, though. The law applicable to the assigned claim is decisive for cash credited to an account in a credit institution and claims arising from a financial instrument. Also, the assignor and the assignee may choose the law of the assigned claim in securitisation transactions.

The problem with the assignor who has moved to another country between two conflicting assignments (conflit mobile) has been solved in the proposal by making the first effective assignment decisive.

The law of the assignor’s habitual residence is the main rule also in the 2001 UNCITRAL convention on the assignment of receivables in international trade. From a Norwegian point of view, it is of interest that this option was chosen also by the Supreme Court of Norway in 2017 (HR-2017-1297-A).

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