International Securitisation, Factoring, Asset-based Lending and Receivables Finance—The Perfection of Assignments of Receivables in Respect of Third Parties and Insolvency Administrators

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Assignment; Conflict of laws; EU law; Harmonisation; Receivables; Third parties

Abstract

International securitisation, factoring, asset-based lending and receivables finance transactions require that the relevant receivables are effectively assigned and removed from the estate of the assignor. Perfection of assignment requires often the notification of the assignment to the relevant debtor(s) of the receivables, the assignment to be done in a specific form, the registration of the assignment in a company register, or documenting the date and time of the assignment. Whether any of such steps are required is to be determined pursuant to the substantive law applicable to the assignment. The substantive law applicable to the assignment is to be determined pursuant to the applicable conflict of law rules. There is great divergence in respect of both applicable substantive laws and the conflict of law rules relating to the assignment of receivables.

Introduction

General issues

The sale and assignment of account receivables and trade receivables is widely used throughout the world in banking and financing transactions. This applies both to true sale transactions as well as secured financing transactions. The key issue always is whether the assignment or creation of security contemplated in the relevant documentation is legally valid and enforceable and isolates the benefit of the receivables in favour of the beneficiary of the assignment or security from interference and access by other creditors of the assignor as well as interference by any potential bankruptcy, insolvency or other administrator or receiver of the assignor. In addition, it needs to be ensured by the assignee in each transaction that the acquired receivable cannot be validly assigned by the assignor a second time to another person. The rules which determine which rules govern the issue of the perfection of the assignment of the receivables or taking security over the receivables with effect against third parties—the so-called "conflict of law rules"—are not uniform throughout the world but vary from continent to continent and from country to country. Even within the EU there still are no uniform rules which apply in each of the 27 Member States. Local courts apply such conflict of law rules which they determine pursuant to either local law or, if relevant, applicable international treaties or, in case of Member States of the EU, directly applicable EU law. There are in principle four different approaches under conflict of law rules applicable in various countries: Either (i) the rules of the place of residence of the assignor apply, or (ii) the rules of the law which governs the receivable apply, or (iii) the rules of the place of residence of the debtor of the assigned receivable apply, or (iv) the assignor and the assignee are free to choose the law which shall govern the assignment of the receivable. Some jurisdictions, like Germany, provide for a mix of approaches depending on whether the assignment is done in the context of a true sale or as security. In Germany, the law governing the receivable is the relevant law for determining whether the assignment is perfected as such, in particular with effect against third parties and any potential insolvency administrator, but German law in addition thereto provides for specific German insolvency law rules to apply in case of assignments of receivables which are not done for true sale purposes but for security purposes and such German rules apply irrespective of the law which governs the receivables if the assignor is a subject to German insolvency proceedings.

The issue of which law is relevant for the perfection with effect against third parties of an assignment of receivables applies to any kind of receivables (in the US receivables are also often referred to as "account receivables" or "accounts"), including, for example, receivables arising from the sale of goods (trade receivables) or from the provision of services (service receivables), receivables arising from the leasing of vehicles, equipment or other products (lease receivables), receivables arising from the provision of loans (loan receivables), receivables arising from the use of credit

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cards (credit card receivables), receivables arising from the granting of licences of intellectual property (IP) rights (licence receivables), and others.

The issue of which law is relevant for the perfection with effect against third parties of an assignment of receivables is not only relevant for true sale assignments of receivables, but also for security assignments of receivables and other forms of taking security over receivables, including by way of pledge or charge.[1]

The relevance of the issues described in this article for banking and financing transactions is very broad and includes in particular securitisation, factoring[2] and invoice discounting, forfaiting, asset-based lending, trade finance, other forms of supply chain finance and receivables finance, and outright secured lending where security is taken over receivables.

The law determined pursuant to the applicable conflict of law rules is in particular relevant for a number of key issues in each transaction, including (1) whether the debtors of the relevant receivables need to be notified of the assignment in order to perfect the assignment with effect against third parties and in which form such notification must be made (registered mail or secure electronic mail or through bailiffs or by way of a note on the relevant invoice etc); (2) which form requirements (if any) apply to the assignment instrument (written form or notarisation or any other form) in order to perfect the assignment with effect against third parties; (3) whether the assignment needs to be registered in any relevant register, like for example (a) with Companies House in England and Wales in case that the assignment is a security assignment of, for example, German law governed receivables by an English company; or (b) UCC filings in the US in the case that the relevant assignor is a US company; and (4) any specific steps need to be taken in order to document date and time of the assignment (date certain/data certa) in order to perfect the assignment with effect against third parties.

Whether the term "third party" in respect of the perfection requirements for an effect against third parties does not only include other creditors of the assignor as well as subsequent assignees in case of a multiple assignment of one and the same receivable, but also bankruptcy and insolvency and other administrators and receivers, is also an issue which depends on the relevant applicable conflict of law rules.[3]

No harmonisation through international treaties

There is not yet a universal harmonisation of the rules for the perfection against third parties of assignments of receivables.

The United Nations Convention on the Assignment of Receivables in International Trade and Factoring of 12 December 2001 (UNCITRAL Convention)[4] has not yet come into force since it has, as of the time of writing this article, only been signed by four countries, i.e. Liberia, Luxembourg, Madagascar and the US.[5] If and once the UNCITRAL Convention would come into force between the signatories thereto, it would only apply to assignments of international receivables and to international assignments of receivables (art.1 No.1(a) thereof), meaning either receivables where the assignor and the debtor are located in different states or where the assignor and the assignee are located in different states (art.3 thereof). Such UNCITRAL Convention would not apply to domestic assignments (including first domestic steps in a chain of assignments) of receivables of domestic assignors and debtors. If, once and to the extent that the UNCITRAL Convention should apply in future, the general rule under art.22 thereof will be that the law of the state in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.

The UNIDROIT Convention on International Factoring of 28 May 1988 (UNIDROIT Convention)[6] has already come into force and effect and applies, at the time of writing this article, between Belgium, France, Germany,

[1] For example, art.2(c) of the proposed Regulation on the law applicable to the third-party effects of assignments of claims (Proposal of 12 March 2018 COM(2018) 96 final, the "Proposed EU Assignment Regulation") provides that the term "assignment" means a voluntary transfer of a right to claim a debt against a debtor, including outright transfers of claims, contractual subrogation, transfers of claims by way of security and pledges and other security rights over claims and art.14(3) of the Regulation 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I Regulation) provides that the concept of assignment includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

[2] Factoring can be done in practice either as a true sale factoring (called in Germany "*echtes Factoring*") or as a non-true sale factoring (called in Germany "*unechtes Factoring*"). Non-true sale factoring is often qualified as a secured financing, secured by a security assignment of the relevant receivables. Whether a factoring transaction—or a securitisation transaction—is a "true sale" or not a true sale is relevant in some jurisdictions like in the US or in Germany (in particular in the context of ss.166, 170 and 171 of the German Insolvency Code) in respect of its treatment in a bankruptcy or insolvency of the assignor of the receivables. Whether a true sale exists depends on often very subtle tests in respect of, in some jurisdictions like the US, whether the credit risk relating to the assigned receivables is assumed by the purchaser of the receivables or, in other jurisdictions, like Germany, whether the credit risk relating to the assigned receivables is transferred to another person like, for example, the purchaser thereof. In this context it should be noted that the "assumption of risk" test and the "transfer of risk" test do not necessarily arrive at the same results, since sometimes there is a gap between transferring and assuming credit risks.

[3] For example, in Germany a perfected assignment of a receivable which has been perfected in accordance with the rules of the law which applies to the receivable would not only need to be recognised by third-party creditors and subsequent assignees of the receivable, but in principle also by a German insolvency administrator in a German insolvency proceedings since a perfected transfer removes the assigned receivable from the insolvency estate. However, a German insolvency administrator has specific rights in case that the assignment is only a security assignment and has not been done by way of a true sale (see in particular ss.166, 170 and 171 of the German Insolvency Code). The draft of the Proposed EU Assignment Regulation of 12 March 2018 (COM(2018) 96 final) in the draft form as amended by the Presidency of the Council of 28 May 2021 (Interinstitutional File: 2018/0044(COD) of the Presidency of the Council of the European Union of 28 May 2021/9050/21) available at: *https://data.consilium.europa.eu/doc/document/ST-9050-2021-INIT/en/pdf* [Accessed 12 October 2021]) also provides in s.22 of the Preamble that the effectiveness of the assignment against "third parties" is relevant for determining whether a receivable belongs to the insolvency estate of the assignor or not.

[4] United Nations Convention on the Assignment of Receivables in International Trade 2001 available at: *https://uncitral.un.org/en/texts/securityinterests/conventions/receivables* [Accessed 12 October 2021].

[5] "Status: United Nations Convention on the Assignment of Receivables in International Trade" available at: *https://uncitral.un.org/en/texts/securityinterests/conventions/receivables/status* [Accessed 12 October 2021].

[6] UNIDROIT Convention on International Factoring 1998 available at: *https://www.unidroit.org/instruments/factoring* [Accessed 12 October 2021].

Hungary, Italy, Latvia, Nigeria, the Russian Federation and the Ukraine.[7] The UK, the US and other countries are also signatories to that Convention, but it has not yet entered into force for those countries. Pursuant to art.2(1) thereof the UNIDROIT Convention applies whenever the receivables assigned pursuant to a factoring contract (as defined in the UNIDROIT Convention) arise from a contract of sale of goods between a supplier and a debtor whose places of business are in different states and those states and the state in which the factor has its place of business are Contracting States or both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State. However, the UNIDROIT Convention does not regulate the issue of perfection of assignments of receivables and the effects of assignments against third parties. Nevertheless, that Convention is of relevance in international finance transactions involving the assignment of receivables, since art.6(1) thereof provides that the assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment, i.e. any prohibition of assignment clauses are not effective.[8]

Further, on the level of the 28 Member States of the EU,[9] it was thought by many authors in legal literature and by many legal practitioners—even though this view was always disputed by other authors in legal literature—that the issue of the perfection of assignment of receivables with effect against third parties was regulated at EU level through art.12 of the Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980 (Rome Convention)[10] and through the subsequent provision of art.14 of the Rome I Regulation[11] which is the successor rule to art.12 of the 1980 Rome Convention.

Rome I Regulation

General

On 17 June 2008, the EU adopted Regulation 593/2008 on the law applicable to contractual obligations (Rome I Regulation). The Rome I Regulation is directly applicable EU law which is binding directly on all courts in each of the 27 Member States of the EU.[12] Like all EU law, it has to be interpreted not in accordance with the rules and practices in the different Member States nor in accordance with the rules of interpretation applicable to international treaties under art.31 of the Vienna Convention on the Law of Treaties, but autonomously in accordance with EU rules of interpretation as applied by the European Court of Justice.[13]

Even though EU law needs to be interpreted autonomously from an EU perspective, courts and legal literature in varying Member States of the EU arrived at different results when applying the Rome I Regulation to the issue of which rules apply to the perfection of the assignment of receivables with effect against third parties.

The core provision in this context has been art.14 of the Rome I Regulation.

Wording of article 14 of the Rome I Regulation

The wording of art.14 of the Rome I Regulation is as follows in English[14]:

> **"Article 14**
>
> **Voluntary assignment and contractual subrogation**
>
> 1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

[7] UNIDROIT Convention on International Factoring (Ottawa, 1988) available at: *https://www.unidroit.org/instruments/factoring/status/* [Accessed 12 October 2021].
[8] For prohibition of assignment rules and other factoring-related rules in various countries around the world, see European Bank for Reconstruction and Development (EBRD), *Factoring Survey in EBRD Countries of Operations*, 3rd edn (September 2018) available at: *https://www.ebrd.com/what-we-do/legal-reform/access-to-finance/factoring.html* [Accessed 12 October 2021]. That report also describes domestic regulatory rules in respect of whether factoring requires a banking licence or financial services licence to be obtained by the relevant purchaser of receivables. The regular purchasing of receivables is deemed to constitute a banking activity or a financial services activity and accordingly requires a licence in a variety of jurisdictions inside and outside of the EU, for example in Germany pursuant to ss.1(1a) No.9 and 32 of the German Banking Act, unless an EU passport applies in favour of the purchaser of the receivables or any other domestic exemption applies. Insofar as purchasers of receivables situated in third countries outside of the EU are concerned, see Dr J.P. Rinze, "German ruling aids foreign banks" (May 2005) I.F.L.R. 33–34 in respect of whether a "branch related approach" or a "distribution related approach" applies; the German regulator BaFin (*Bundesanstalt für Finanzdienstleistungsaufsicht*) still until today applies a distribution related approach.
[9] 27 since 1 February 2020, i.e. since the coming into force of the exit of the UK from the EU.
[10] Convention on the Law Applicable to Contractual Obligations [1980] OJ L266/1 available at: *https://eur-lex.europa.eu/resource.html?uri=cellar:22cc5c49-2b36-4962-aa60-e928a52efa66.0008.02/DOC_1&format=PDF* [Accessed 12 October 2021]. In respect of the 1980 Rome Convention, see in general Dr J.P. Rinze, "The Scope of Party Autonomy under the 1980 Rome Convention on the Law Applicable to Contractual Obligations" (1994) The *Journal of Business Law* 412.
[11] Regulation 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6.
[12] EU law in the form of a Regulation is directly binding in each Member State and has priority over the national laws of the Member States: European Court of Justice (ECJ) cases *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) EU:C:1963:1; [1963] E.C.R. 1 at 12; [1963] C.M.L.R. 105; *van Duyn v Home Office* (41/74) EU:C:1974:133; [1974] E.C.R. 1337 at 1348; [1975] 1 C.M.L.R. 1; *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (106/77) EU:C:1978:49; [1978] E.C.R. 629 at 644; [1978] 3 C.M.L.R. 263. For a summary of the relevant EU law principles, see also Dr J.P. Rinze, "The role of the European Court of Justice as a Federal Constitutional Court" [1993] *Public Law* 426, 433–434.
[13] For a summary of the methods of interpretation used by the ECJ, see Dr J.P. Rinze, "Methods of Interpretation in EC-Law" (1994) 26 *Bracton Law Journal* 57.
[14] For the sake of clarity, the ECJ actually looks at any and all language versions of EU law when interpreting EU law (*Commission of the European Communities v Germany* (107/84) EU:C:1985:332; [1985] E.C.R 2655 at 2666 at [10]; Rinze, "Methods of Interpretation in EC-Law" (1994) 26 *Bracton Law Journal* 57 at 59). Accordingly, the other 23 language versions of art.14 of the Rome I Regulation need to be reviewed and taken into account as well when interpreting the Rome I Regulation. The other 23 language versions of the Rome I Regulation are available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593* [Accessed 12 October 2021].

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims."

Different interpretation of article 14 of the Rome I Regulation in different Member States of the EU

Germany

Article 14 of the Rome I Regulation was interpreted in Germany on the basis of well-established case law of the German Federal Supreme Court (*Bundesgerichtshof*)[15] to mean that the law which governs the receivable is decisive for determining whether an assignment is perfected with effect against third parties, i.e. German law governed receivables need to be assigned in accordance with German law irrespective of where the assignor or the debtor thereof is resident in order to be effective against third parties.

The Netherlands

The *Hoge Raad*, i.e. the Highest Court of the Netherlands, held in 1997 in a case[16] of an assignment to a German resident assignee of Dutch law governed claims owed to a Dutch creditor by Dutch resident debtors under an assignment contract which was governed by German law, that German law—which was chosen as the governing law of the assignment contract—was the relevant law to determine the effectiveness and perfection of the assignment against the insolvency administrator of the Dutch insolvent assignor.[17] The *Hoge Raad* held that art.12(1) of the Rome Convention (which is now art.14(1) of the Rome Regulation), provided the assignor and the assignee of a receivable with the right to choose the law which shall govern the assignment of the receivable.[18]

UK

Insofar as the UK is concerned, it has been proposed that the English Court of Appeal held in 2001 in the case of *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC*,[19] where a Dubai resident assignor assigned under an English law governed contract to an Austrian resident assignee claims owed by a French debtor which were governed by English law, that art.12(2) of the Rome Convention (which is the predecessor of art.14(2) of the Rome I Regulation) would apply and that accordingly English law was the relevant law to determine the perfection of the assignment of the relevant receivable.[20]

Belgium

Article 87 para.3 of the Belgian Code of Private International Law provides that that the law of the state in which the assignor of the receivable has its habitual residence (*résidence habituelle*) at the time of the assignment of the receivable shall apply to the issue of perfection of assignment of receivables with effect against third parties.[21]

Luxembourg

To the extent that a specific transaction falls into the scope of the Luxembourg Securitisation Act, art.58 of the Luxembourg Securitisation Act 2004[22] provides that the law of the state in which the assignor is located governs the conditions under which the assignment is effective against third parties.

[15] BGH (VIII ZR 158/89) judgment of 20 June 1990, NJW (*Neue Juristische Wochenschrift*) 1991, 637 which was based on art.33 of the German Introductory Code to the Civil Code which in turn was based on art.12 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations and which was the predecessor of art.14 of the Rome I Regulation. Such German case law was originally established by the German *Reichsgericht* (Imperial Court) in a decision of 19 March 1907 (in case Rep.II.406/06). Insofar as German legal authors are concerned see: A. Flessner, *Die internationale Forderungsabtretung nach Rom I-Verordnung* (IPRax: Praxis des Internationalen Privat- und Verfahrensrechts, 2009), p.38. Even though many arguments had been brought forward for this point of view (in particular reference was made to the wording of s.38 of the Preamble to the Rome I Regulation which says that art.14(1) also applies to the "property aspects" of an assignment), the proposal that the law which governs the receivable is the law decisive for determining the effectiveness of the assignment against third parties was rejected by other legal authors in Germany (for example, E.-M. Kieninger in F. Ferrari, E.-M. Kieninger and P. Mankowski, *Internationales Vertragsrecht*, 3rd edn (2018), art.14, para.11).

[16] *Hoge Raad*, judgement of 16 May 1997, No.16470 *Rechtspraak van de Week* (RvdW) 1997, 739 (*Brandsma/Hansa Chemie*).

[17] T.C. Hartley, "Choice of Law regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation" (2011) I.C.L.Q 29, 42, 43.

[18] Hartley, "Choice of Law regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation" (2011) I.C.L.Q 29, 43; E.-M. Kieninger, "Das auf die Drittwirkungen der Abtretung anwendbare Recht", *Neue Juristische Wochenschrift*, 2019, p.3355.

[19] *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC (The Mount I)* [2001] EWCA Civ 68; [2001] Q.B. 825.

[20] Hartley, "Choice of Law regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation" (2011) I.C.L.Q 29, 45; it is not entirely clear from the case *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* whether English law was held to be the relevant law to determine the effectiveness of the assignment because English law was the law applicable to the receivable which was assigned or because English law was the law chosen to govern the assignment contract, but it seems from [48] of that judgment and the criticism expressed therein against the *Hoge Raad* judgment (see fn.16 above) in [51] and [52] of the English Court of Appeal judgment as well as the acknowledging reference to the German BGH judgment of 20 June 1990 (see fn.15 above) that the Court of Appeal tended to the proposal that English law was to be applied because of English law being the governing law of the receivable which was assigned. The European Commission proposed in its report of 29 September 2016 on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person COM(2016) 626 final, p.7 (Commission Report) (available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0626&from=EN* [Accessed 12 October 2021]) that under English conflict of law rules the law governing the receivable to be assigned is the relevant applicable law.

[21] Kieninger, "Das auf die Drittwirkungen der Abtretung anwendbare Recht", *Neue Juristische Wochenschrift*, 2019, p.3355; Commission Report COM(2016) 626 final, p.7.

[22] Luxembourg Securitisation Act 2004 available at: *https://www.cssf.lu/wp-content/uploads/L_220304_securitisation.pdf* [Accessed 12 October 2021].

However, to the extent that the Luxembourg Securitisation Act does not apply, the relevant Luxembourg conflict of law rules are not clear. Luxembourg courts took in the past a case-by-case approach and applied in many cases the law of the residence of the debtor or sometimes of the underlying law of the assigned receivable. As a matter of Luxembourg law, third-party creditors could therefore attach the Luxembourg receivables of an assignor if the debtor is located in Luxembourg even after they have been sold and assigned to the purchaser to the extent that such attachment is done prior to notification of the assignment to the debtor. In the scenario of multiple assignments of the same Luxembourg receivable, the assignee who has notified the assignment to the debtor first may enforce the Luxembourg receivable against the debtor provided that the debtor is located in Luxembourg.

France

From a French conflict of law perspective, the issue of which law governs the perfection of the assignment of a receivable with effect against third parties is not clear. Legal authors are divided but the current rule (stemming from case law) is that the law of the residence of the debtor applies.[23] Often, in an international context, by way of precaution, formalities (if any) to achieve enforceability as against the debtor are carried out under the various laws at stake.

Spain

Under Spanish law, the law governing the assigned receivables shall be the relevant law for purposes of the perfection of the assignment against the debtor and for purposes of the effects of the assignment vis-à-vis third parties. This is the conflict of laws criterion included in para.3 of art.17 of Royal Decree-law 5/2005 on financial collateral security.

Other

Pursuant to the Commission Report of 2016 on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person,[24] it has been proposed that in EU Member States Poland and Italy the relevant law which governs the receivable which is to be assigned shall be relevant for the issue of perfecting the assignment of the receivable with effect against third parties[25] whereas in the US the perfection of most assignments is governed by the law of the assignor's location (as determined under Section 9 307 of the Uniform Commercial Code adopted in a substantially uniform manner in all 50 states in the US).[26]

Judgment of 9 October 2019 of the European Court of Justice (ECJ) in BGL BNP Paribas SA v TeamBank AG (C-548/18)

Since there was no clarity on whether art.14 of Rome I Regulation deals with the question which law shall apply to the perfection of assignments of receivables with effect against third parties and since further there was no clarity as to which law actually applies, the German Higher Regional Court (*Oberlandesgericht*) of Saarbrücken brought on 8 August 2018[27] a preliminary proceedings to the Court of Justice pursuant to art.267 of the Treaty on the Functioning of the EU.

Facts

The facts of the case where as follows: a national of Luxembourg, but resident of Germany, was employed by a Luxembourg employer under Luxembourg law. A German bank (TeamBank AG) granted a German law governed loan to the employee and the employee assigned to the German bank as security all its claims to receive remuneration from the Luxembourg employer. Three months later the employee obtained another loan, this time from a Luxembourg bank (BGL BNP Paribas SA) and assigned the same remuneration claims as security for that second loan to the Luxembourg bank under a Luxembourg law governed assignment contract. The Luxembourg bank notified the assignment to the Luxembourg employer, the German bank did not do so. The employee became insolvent and German insolvency proceedings were commenced. Under German law, notification of an assignment is not required to perfect the assignment, but under Luxembourg law it is. Accordingly, in this case if German law applied the assignment to the German bank would have had priority over the assignment to the Luxembourg bank, but if Luxembourg law applied, the priority position would have been reversed.

Which law therefore took precedence? The German court requested the ECJ to give a preliminary ruling and asked the following questions:

- Does art.14 of the Rome I Regulation apply to third-party effects in the event of multiple assignments?
- If the first question is to be answered in the affirmative, to which law are the third-party effects subject in this case?

[23] Commission Report COM(2016) 626 final proposes on p.7 that under French conflict of law rules the law of the habitual residence of the debtor of the assigned receivable is the relevant law.
[24] Commission Report COM(2016) 626 final.
[25] Commission Report COM(2016) 626 final, p.7 which references also Spain in respect of such rule. Insofar as Italy is concerned the Commission Report also sets out that the legal position in Italy is disputed between legal authors since some legal authors propose that the law of the assignor's habitual residence shall apply.
[26] Commission Report COM(2016) 626 final, p.7. See also M. Dechamps, "Conflict-of-laws rules on assignment of receivables in the United States and Canada" (2019) 24 *Uniform Law Review* 649–663.
[27] *OLG Saarbrücken* (4 U 109/17) [2018] WM (*Wertpapier-Mitteilungen*) at 2323.

- If the first question is to be answered in the negative, is that provision applicable mutatis mutandis?
- If the third question is to be answered in the affirmative, to which law are the third-party effects subject in this case?

The ECJ Judgment of 9 October 2019

Based on that preliminary ruling request of the Higher Regional Court (*Oberlandesgericht*—OLG) of Saarbrücken, the European Court of Justice held on 9 October 2019[28] that art.14 of the Rome I Regulation is to be interpreted in such way that it neither directly nor indirectly regulates which law shall apply to the multiple assignment of one and the same receivable by the same assignor to different assignees and which law shall apply to the issue of whether the assignment is effective against third parties.

The reasoning of the ECJ in principle was that (1) the wording of art.14 of the Rome I Regulation does not address third-party effects of assignments of receivables[29]; (2) pursuant to the legislative history of the Rome I Regulation the institutions of the EU (Commission, Parliament and Council) were not able to agree on a specific provision dealing with third-party effects of assignments in the Rome I Regulation since the Council rejected the proposal from the Commission to insert such a provision as art.13(3) into the Rome I Regulation[30]; and (3) art.27(2) of the Rome I Regulation requires the Commission to submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties' and, if appropriate, a proposal to amend the Rome I Regulation.[31] Accordingly, the ECJ held that it follows, therefore, that under EU law as it currently stands, the absence of rules of conflict expressly governing the third-party effects of assignments of claims is a choice of the EU legislature and in the light of all such considerations, the answer to the questions referred to it by OLG Saarbrücken is that art.14 of the Rome I Regulation must be interpreted as not designating, directly or by analogy, the applicable law concerning the third-party effects of the assignment of a claim in the event of multiple assignments of the claim by the same creditor to successive assignees.[32]

The subsequent German judgment of OLG Saarbrücken of 20 February 2020

That ECJ judgment created a complex situation for the German court since the German legislator had removed in 2009 in the context of the introduction of the Rome I Regulation the previous art.33 of the German Introductory Code to the German Civil Code (EGBGB) which had dealt on the domestic German level with the issue of which law applies to the perfection of assignments of receivables with effect against third parties. The German legislator had removed that art.33 EGBGB on the basis that it was thought that such issue was dealt with in art.14 of the Rome I Convention.

There are not yet any final views on that issue which have been developed after 9 October 2019 in Germany and there is not yet a decision of the German Federal Supreme Court (*Bundesgerichtshof*—BGH).

However, there are good arguments to refer to the views which pre-existed in Germany prior to the adoption of the Rome I Regulation. There had been in principle two views: the first view was a minority view and referred to the laws of the country in which the assignor is situated[33] and the second view was the above-described majority point of view and the traditional view of the case law of the German Federal Supreme Court that the law governing the receivable is the decisive law for determining the third-party effect of the assignment.[34]

On 20 February 2020, the Higher Regional Court (*Oberlandesgericht*—OLG) of Saarbrücken held[35] that such second view, i.e. the pre-existing majority view in Germany that the law governing the receivable shall be the decisive law, is the current position under German law. The OLG Saarbrücken allowed appeal to the BGH, but no appeal was lodged.

Accordingly, there are good arguments to hold that the current German conflict of law position is that the law which governs the receivable is the law decisive for the issue of whether an assignment has been perfected with effect against third parties.

[28] *BGL BNP Paribas SA v TeamBank AG Nurnberg* (C-548/18) EU:C:2019:848; [2019] I.L.Pr. 39; also see Kieninger, "Das auf die Drittwirkungen der Abtretung anwendbare Recht", *Neue Juristische Wochenschrift*, 2019, p.3368 onwards.
[29] *BGL BNP Paribas SA v TeamBank AG Nurnberg* (C-548/18) EU:C:2019:848; [2019] I.L.Pr. 39 at [31].
[30] *BGL BNP Paribas SA v TeamBank AG Nurnberg* (C-548/18) EU:C:2019:848; [2019] I.L.Pr. 39 at [33].
[31] *BGL BNP Paribas SA v TeamBank AG Nurnberg* (C-548/18) EU:C:2019:848; [2019] I.L.Pr. 39 at [34].
[32] *BGL BNP Paribas SA v TeamBank AG Nurnberg* (C-548/18) EU:C:2019:848; [2019] I.L.Pr. 39 at [37]–[38].
[33] See the German legal literature cited in Martiny in *Münchener Kommentar zum BGB*, 7th edn (2018), paras 24–25 to art.14 of Rome I Regulation and the relating footnotes and Kieninger, "Das auf die Drittwirkungen der Abtretung anwendbare Recht", *Neue Juristische Wochenschrift*, 2019, p.3356.
[34] BGH (VIII ZR 158/89) decision of 20 June 1990, NJW 1991, 637 at 638; OLG Karlsruhe RIW, *Recht der Internationalen Wirtschaft*, 1993, p.505; *Schroeter v Maier-Lohmann, Entscheidungen zum Wirtschaftsrecht* 2/2020, p.33; and see the literature cited in Martiny in *Münchener Kommentar zum BGB*, 7th edn (2018), paras 24–25 to art.14 of Rome I Regulation and the relating footnotes.
[35] OLG Saarbrücken (4. Zivilsenat), *Urteil vom* 20 February 2020—(4 U 109/17), *Neue Zeitschrift für Insolvenzrecht*, 2020, p.443.

Proposal of an EU Regulation on the law applicable to the third-party effects of assignments of claims

Current status of the Proposed EU Assignment Regulation

On 12 March 2018, the European Commission published a Proposal for a Regulation to govern the law applicable to the third-party effects of assignments of claims (the Proposed EU Assignment Regulation).[36]

On 13 February 2019, the EU Parliament passed a number of amendments and marked-up the proposal from the EU Commission as its first-reading position.[37]

The draft of the Proposed EU Assignment Regulation was marked-up on 28 May 2021[38] by the Presidency of the Council of the European Union to the Permanent Representatives Committee/Council.

The Proposed EU Assignment Regulation is still being discussed within the Institutions of the EU and has not yet been adopted.

Content of the Proposed EU Assignment Regulation

The Proposed EU Assignment Regulation deals with which law applies to determine the effectiveness and perfection of the transfer of title—and the creation of other rights like pledges and charges—in relation to claims and receivables vis-à-vis third parties.

General principle set out in the Proposed EU Assignment Regulation

The general principle set out in art.4 of the Proposed EU Assignment Regulation is that the law of the habitual residence of the assignor will apply (art.4(1)) unless:

- the claim is cash credited to a bank account or claims arising from financial instruments, in which case the law governing the account or the financial instrument will apply (art.4(2)); or
- there is a securitisation, in which case the assignee and the assignor can choose the law applicable to the assignment (art.4(3)).

Direct applicability

The Proposed EU Assignment Regulation will, once adopted at EU level and subject to an 18-month waiting period (art.15),[39] have direct applicability in all Member States without the need to be implemented into the domestic laws of the Member States. All courts of the Member States of the EU would then need to apply the Assignment Regulation in respect of all such assignments which are concluded on or after the application date. However, the Assignment Regulation will not apply in, and does not bind the courts of, Denmark (Recital 37 of the Preamble to the Proposed EU Assignment Regulation), it will only apply in Ireland if Ireland opts into the Assignment Regulation (Recital 36 of the Preamble to the Proposed EU Assignment Regulation) and will not apply to the UK since the UK has ceased to be a Member State of the EU as of 1 February 2020, unless the UK decides on a purely domestic level to apply it following Brexit.

The Proposed EU Assignment Regulation does not allow parties to contract out of the Assignment Regulation or to agree—subject to a few specific option rights described below—the applicable law which shall regulate the assignment of claims.

Worldwide effect

The Proposed EU Assignment Regulation is expressed to have universal application (art.3). That means that it will apply the law designated by it, even if this is not the law of any Member State. For example, if a Brazilian exporting company assigns an invoice or other claim arising from a contract governed by German law to an EU assignee, then Brazilian law will apply in determining whether the assignment was effective vis-à-vis third parties, and not German law.

Because of this rule (set out in art.3), the Proposed EU Assignment Regulation will have a major impact on international trade finance involving the assignment of receivables and could create uncertainty over which law is applicable if the relevant third country's law does not recognise the rule contained in art.4(1).[40]

[36] Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims COM(2018) 96 final. The other 23 language versions of the proposal are available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A96%3AFIN* [Accessed 12 October 2021].

[37] European Parliament Legislative Resolution of 13 February 2019 on the Proposed EU Assignment Regulation available at: *https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2019/02-13/0086/P8_TA(2019)0086_EN.pdf*. The other 23 language versions of the mark-up from the EU Parliament are available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP%3AP8_TA%282019%290086* [Both accessed 12 October 2021].

[38] Interinstitutional File: 2018/0044(COD) of the Presidency of the Council of the European Union of 28 May 2021/9050/21 available at: *https://data.consilium.europa.eu/doc/document/ST-9050-2021-INIT/en/pdf* [Accessed 12 October 2021]

[39] Or alternatively 24 months as contemplated in the proposal by the Presidency of the Council.

[40] Article 11(1) of the Proposed EU Assignment Regulation provides that such Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when the Proposed EU Assignment Regulation is adopted and which lay down conflict of laws rules relating to the third-party effects of assignments of claims. However, that applies only to international conventions which have been signed by a Member State at the time of the Proposed EU Assignment Regulation being adopted and accordingly does not apply to the UNCITRAL Convention (with the exception of Luxembourg, which already is a party to the UNCITRAL Convention). In contrast to the 2001 Cape Town Convention on International Interests in Mobile Equipment and the Protocols thereto, for which Recital 33a of the Preamble to the Proposed EU Assignment Regulation (in the form of the text as amended by the Presidency of the Council) provides a general carve-out, there is no rule contained in the Proposed EU Assignment Regulation which would allow Member States to become a party to the UNCITRAL Convention. However, if the EU as such would become a party to the UNCITRAL Convention, then the UNCITRAL Convention would be embodied into EU law and would be binding on the Member States of the EU as well.

Bank accounts and financial instruments

Bank accounts and account pledges will, pursuant to art.4(2) of the Proposed EU Assignment Regulation continue to be governed by the law of the country where the relevant bank is situated, provided that the account mandate and account relationship provides that the law of that country shall govern the banking relationship.

However, because of the definition of "credit institution", this will only apply to bank accounts held with banks, the head offices of which are situated within the EU and to branches of third country banks to the extent their offices are within the EU.[41]

As far as other banks situated outside of the EU are concerned, art.4(2) would not apply.[42] In respect of those institutions, the general rule contained in art.4(1) would apply, i.e. the relevant account security will be governed by the law of the country where the bank has its habitual residence, meaning—pursuant to art.2(f)—the place of the central administration of the bank.

Insofar as financial instruments are concerned, the law governing the instrument shall apply in determining the effectiveness and perfection of the assignment. Article 2(i) of the Proposed EU Assignment Regulation provides that the term "financial instrument" means the instruments specified as such in the MiFID II Directive (s.C of Annex I of Directive 2014/65 of 15 May 2014).[43]

It is an open issue whether and how this would affect the German *Schuldschein* market since *Schuldscheine* with a term of more than 397 days may not qualify as a financial instrument. And that could mean that secondary trading in such *Schuldscheine* could become quite complex since the assignment of the relevant *Schuldscheine* would not be governed by German law but potentially by various different laws depending on where the place of the central administration of the previous holders of the *Schuldscheine* is situated.

Securitisation

Article 4(3) of the Proposed EU Assignment Regulation provides that the assignor and the assignee of a receivable may choose the law applicable to the assignment of the securitisation. However, the Proposed EU Assignment Regulation does not define "securitisation".[44] Accordingly, the term "securitisation" will need to be determined, although it may well end up being the case that the definition of securitisation contained in art.2 No.1 of the Securitisation Regulation 2017/2402 of 12 December 2017[45] is used.

In any event, there are still some uncertainties. Does art.4(3) mean that the law can be chosen on all levels of the securitisation? For example, if an Italian company securitises a portfolio of trade receivables which are governed by French law, by using a Luxembourg purchasing special purpose vehicle (SPV), in such a situation the Italian originator and the Luxembourg purchaser could choose German law for the assignment thus avoiding all the complexities of French and Italian law relating to the assignment. That would make the securitisation much easier and less complex, as compared to the position as it is today. However, if (as it is often the case in such a scenario) the Luxembourg SPV then assigned the purchased receivables to a security trustee, which law would apply to that onward-assignment to the security trustee? German law under art.4(3) of the Assignment Regulation or Luxembourg law under art.4(1) of the Assignment Regulation?

What is the position in respect of factoring, asset-based lending and invoice discounting?

Article 4(3) of the Proposed EU Assignment Regulation only applies to securitisations. It does not apply to other forms of receivable finance such as factoring, asset-based lending or invoice discounting. Insofar as they are concerned, the general rule set out in art.4(1) of the Assignment Regulation applies and the law of the central place of administration of the assignor determines the effectiveness and perfection of the assignment vis-à-vis third parties.

The consequence of that rule is that the Proposed EU Assignment Regulation would make the financing of portfolios of receivables (which could be subject to a multitude of jurisdictions) much easier, where they are owned by one assignor situated in one jurisdiction. In that case, it will be much easier to identify the one relevant law applicable.

Conversely, it will make it more difficult to finance portfolios of those receivables where assignors are situated in various jurisdictions but the receivables themselves are governed by the same law.

How does the Assignment Regulation differ to the EU Insolvency Regulation?

Whilst there should be no difference (Recitals 9 and 22 of the Preamble to the Proposed EU Assignment Regulation), nevertheless there are.

For example, the relevant test for the purposes of art.4(1) of the Proposed EU Assignment Regulation in determining the "habitual residence" of the assignor is the "place of central administration" (art.2(f) of the Proposed EU Assignment Regulation whereas the test under the Insolvency Regulation[46] is the "centre of main interests" (COMI) pursuant to art.3(1) of the EU

[41] This may change if the proposal of the Presidency of the Council is adopted to make such rule broader.
[42] This may change if the proposal of the Presidency of the Council is adopted to make such rule broader.
[43] Directive 2014/65 on markets in financial instruments [2014] OJ L173/349.
[44] This may change if the proposal of the Presidency of the Council to define that term is adopted.
[45] Regulation 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation [2009] OJ L347/35.
[46] Regulation 2015/848 on insolvency proceedings [2015] OJ L141/19.

Insolvency Regulation and the presumption that the COMI is the company's registered office. There is no such assumption under the Proposed EU Assignment Regulation.

Applying either of those tests may result in the same answer but it cannot be excluded that the location of the assignor could be different in some circumstances, resulting in uncertainty as to which law might apply to cross-border assignments in insolvencies.

Further, unlike under the EU Insolvency Regulation where the presumption of COMI requires the company to have held its centre of main interests for three months, the same does not apply under the Proposed EU Assignment Regulation. Therefore, it could make it difficult to identify the "place of central administration" if the assignor has recently changed location, and again, the ability to identity the relevant applicable law.

Amendments proposed by the European Parliament to the Proposed EU Assignment Regulation

The EU Parliament has proposed a number of amendments to the draft proposed by the EU Commission. The most striking proposal by the EU Parliament is the deletion of the originally proposed securitisation specific rule under art.4(3) of the Proposed EU Assignment Regulation and the deletion of the relating Recital 28 of the Preamble to the Proposed EU Assignment Regulation (proposed amendments Nos 12 and 22).

Amendments proposed by the Presidency of the Council to the Proposed EU Assignment Regulation

The Presidency of the Council has proposed a number of amendments to the draft proposed by the EU Commission. The text of the proposals takes into account the examination of the Commission proposal made by the relevant working party at previous meetings and the comments put forward by delegations.

Such proposals include:

- a number of additional carve outs in art.1 of the Proposed EU Assignment Regulation from the scope of application of the Proposed EU Assignment Regulation rather than specific rules under art.4 of the Proposed EU Assignment Regulation, in particular in respect of transferable securities, money-market instruments and units in collective investment undertakings and claims incorporated in a certificate or represented by a book-entry, crypto-assets and transfers of security rights over assets other than claims, in particular immoveable property and moveable property subject to registration in a public register laid down by law;
- adding an express carve out to the definition of "assignment" for transfers of contracts, in which both rights and obligations are included and novations of contracts including rights and obligations;
- adding a specific definition of the term "securitisation" (and by not deleting the specific rules for securitisations rejecting the proposal made by the EU Parliament);
- expanding the scope of art.4(2) of the Proposed EU Assignment Regulation (which provides that the law which governs the receivables shall be the decisive law) to also financial contracts and netting arrangements, claims arising out of foreign exchange spot transactions, claims arising out of transactions on financial markets or participation in financial market infrastructures, electronic money claims, credit claims arising out of agreements whereby credit is granted in the form of a loan and—through introducing a new Recital 27b to the Preamble—claims arising out of syndicated loans and claims arising out of lending-based crowdfunding;
- expanding the scope of art.4(3) of the Proposed EU Assignment Regulation (which provides that in a securitisation the applicable law for the effects against third parties can be chosen by the parties of the securitisation) to transactions for the issuance of covered bonds; however, the EU Council also proposes to amend such art.4(3) in such way that only the law of the residence of the assignor or the law applicable to the assigned claims can be chosen; and
- adding in a new art.10 para.2 carve outs for a number of EU Directives which contain conflict of law rules.

At the time of writing, it is not clear whether and with which contents, exemptions, carve outs and special rules deviating from the general principles, the Proposed EU Assignment Regulation will be adopted and come into force. The different currently applied approaches in various Member States of the EU are based on domestic traditions and are so different that it appears to be cumbersome to override such traditional approaches and replace them by the principle that the law of the habitual residence of the assignor of a receivable shall govern the requirements for the perfection of the assignment of the receivable with effect against third parties. However, there would be some logic in such approach since it would not only provide for legal certainty, but would also fall into line with the insolvency analysis of the effects of an assignment, in particular when it is done for security purposes, in an insolvency of the assignor, since the relevant insolvency law to be applied would be the law

of the COMI of the assignor. Further, such approach would also fall into line with the international approach taken under art.22 of the UNCITRAL Convention and could enhance international harmonisation.

Summary

The law applicable to the issue which law determines whether an assignment of receivables or the taking of security over receivables is perfected with effect against third parties, is currently neither harmonised on an international level nor within the EU. In essence, four different approaches exist: The law where the assignor is situated or the law which governs the receivable or the law where the debtor is situated or the law chosen by the parties to the assignment. Since there are too many differences between the laws to be applied in respect of notification, form and registration requirements, such aspects need to be thoroughly analysed in each transaction which involves aspects of more than one jurisdiction.