CROSS-BORDER ASSIGNMENTS UNDER ROME I

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A. INTRODUCTION

This paper discusses the law governing the property aspects of the assignment of claims under the Regulation on the law applicable to contractual obligations (“Rome I”). Rome I applies to contracts concluded as from 17 December 2009, replacing the Convention on the law applicable to contractual obligations of 1980 (the “Rome Convention”). Previously, disagreement existed in EU Member States as to whether the property aspects of an assignment were governed by Article 12 Rome Convention. With the aim of bringing clarity to this issue, the provision relating to assignment in Rome I includes some apparently minor amendments when compared to its predecessor in the Rome Convention. Nevertheless, as we will demonstrate in section C, in our opinion these amendments lead to the interesting conclusion that the property aspects of cross-border assignments are under Rome I governed by the law applicable to the underlying contract concluded between the assignor and the assignee. Already in Brandsma qq/Hansa Chemie AG, this conflict rule has been adhered to by the Dutch Hoge Raad. The criticism levied on this decision in legal literature and even by the judicial authority of another EU Member State indicates that our opinion will elicit similar opposition. In section D we will therefore examine the different conflict rules that have been proposed in legal writing to deal with the property aspects of an assignment, in order to consider whether another conflict rule would be more appropriate. Not surprisingly, these differ-
ent conflict rules correspond to the various different interpretations of Article 12 Rome Convention. In an attempt to reconcile these differences of opinion, we will propose a compromise solution in section E. To commence our line of reasoning, however, in section B the hybrid character of assignment in substantive law will be discussed.

B. ASSIGNMENT AS A HYBRID LEGAL INSTITUTION

Assignment may be characterised as a hybrid legal institution, involving features belonging to both the law of obligations and the law of property. The hybrid character of assignment is apparent in the assigned claim being the object of the assignment, as well as in the assignment itself. The assigned claim can be described as a personal right, whether of a contractual or of a non-contractual (e.g. a tort claim) nature, whose substance is determined by the law of obligations. At the same time, the assigned claim forms an (intangible) asset, a chose in action, which is itself capable of being transferred, charged or otherwise encumbered under the law of property.

The hybrid character of assignment is also demonstrated in the assignment itself. At the level of the law of property assignment is a disposition of a claim, while at the level of the law of obligations it constitutes the replacement of the creditor of a claim. The property aspects of assignment essentially concern the requirements for a valid transfer of the claim from the patrimony of the assignor to that of the assignee, and the ranking of competing property interests in respect of the same claim. In particular, the obligational aspects of assignment involve questions relating to the replacement of the original creditor (the assignor) by a new creditor (the assignee) and the implications thereof for the debtor. One such important question is, for example, whether and to what extent the debtor is allowed to raise against the assignee the defences that he would have been able to raise against the assignor if the assignment had not taken place.\(^5\)

This hybrid nature of assignment is not always fully recognised, particularly by those operating in legal systems where an assignment is either not regarded as an institution belonging to the law of property at all, or where there is no clear distinction between the obligational and property aspects of an assignment. In the latter jurisdictions, the underlying contract concluded between the assignor and the assignee is not only the source of the parties’ mutual obligations, but functions at the same time as the “disposition” causing the transfer of the assigned claim from the patrimony of the assignor to that of the assignee. For these jurisdictions, the expression “property aspects of assignment” may

\(^5\) See further Flessner and Verhagen, supra n 4, 2–3.
even be slightly confusing. We will nevertheless continue to use this wording, following the terminology used in Rome I.\(^6\)

Often the obligational and property aspects of claims and assignment interact. A good example of this is provided by the effect of a contractual limitation on the assignment of a claim. The question as to whether the assignor and the debtor have agreed to such limitation is obviously a matter belonging to the law of obligations, or more precisely the law of contract. The same is true for the question of whether a subsequent assignment results in a default of the assignor towards the debtor, which will mean that damages have to be paid. However, the question as to whether such contractual limitation actually prevents the transfer of the claim, as it does in some jurisdictions, will fall under the law of property.\(^7\)

This hybrid nature of assignment not only creates characterisation problems but can also be said to be one of the main causes of the diversity of opinion in the EU Member States in respect of the most suitable conflict rule for the assignment of claims. In the following section we will consider whether the different aspects of an assignment are governed by Article 12 Rome Convention and Article 14 Rome I.

C. Article 12 Rome Convention versus Article 14 Rome I

1. Article 12 Rome Convention

Article 12 Rome Convention applies to assignment. The provision reads as follows:

\[^{11}\]The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person (‘the debtor’) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.\(^6\)


\(\text{\textsuperscript{7}}\) See also HC Sigman and E-M Kieninger, “The Law of Assignment of Receivables: In Flux, Still Uncertain, Still Non-Uniform”, in HC Sigman and E-M Kieninger (eds), \textit{Cross-border Security over Receivables} (Munich, Sellier, 2009), 1, 24–29, with further references; Flessner and Verhagen, \textit{supra} n 4, 3.
2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor’s obligations have been discharged.

It is undisputed that this Article governs the obligational aspects of an assignment. The questions relating to the replacement of the assignor by the assignee are summed up in the second paragraph of Article 12 Rome Convention and are accordingly governed by the proper law of the assigned receivables.\(^8\) That law additionally governs the issue of assignability in both respects: not only the question as to whether a subsequent assignment in violation of a contractual limitation on transfer constitutes a breach of contract by the assignor vis-à-vis the debtor, but also the question of whether such contractual limitation actually prevents the claim from being transferred to the assignee. Moreover, it is clear that the obligational aspects with respect to the underlying contract between the assignor and the assignee are governed by the first paragraph of Article 12 Rome Convention and thus by the law that is applicable to the contract between them under the Rome Convention, eg by means of a choice-of-law provision. However, such consensus does not exist with regard to the property aspects of an assignment, ie the requirements that apply to a valid and effective transfer of a receivable from the assignor to the assignee. Different interpretations exist in relation to the question of whether these property aspects are governed by Article 12 Rome Convention and, if so, by its first or second paragraph. These different interpretations will be discussed in section D.

2. **Article 14 Rome I**

In succession to Article 12 Rome Convention, Article 14 Rome I reads as follows:

“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.

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.”

A preliminary observation is that the scope of the rules laid down in Article 14 Rome I has been extended, as a result of which the Article also governs con-

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\(^8\) See further Flessner and Verhagen, supra n 4, 2–3 and 8.
tractual subrogation. Moreover, a definition of assignment has been included in Article 14(3) Rome I. According to this definition, the provision is also applicable to assignments by way of security, pledges and other security rights over claims.10

Most remarkable, however, is the conclusion to be drawn from a comparison between Article 14(1) Rome I and Article 12(1) Rome Convention. In comparison to its predecessor, the rule incorporated in Article 14(1) Rome I shows an amendment which may at first glance seem relatively unimportant, but which – as demonstrated by Flessner in his article – in fact endorses the opinion expressed by the Dutch Hoge Raad that the law applicable to the contract between assignor and assignee (now Article 14(1) Rome I) also governs the property aspects of an assignment.11 This conclusion may be inferred from the replacement of the words “mutual obligations” in Article 12(1) Rome Convention with the word “relationship” in Article 14(1) Rome I. According to recital 38 of the preamble to Rome I, this should clarify that “article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee” (our italics). At least for jurisdictions such as Germany and the Netherlands this means that where Article 14(1) Rome I applies to the property aspects of an assignment, the property aspects towards third parties inevitably are included. The words “as between assignor and assignee” of the quoted phrase notwithstanding, in these jurisdictions the property aspects of an assignment between the assignor and the assignee cannot be separated from the property aspects of an assignment towards third parties, such as creditors of the assignor and/or the assignee. This may even already reflect the general view among the European jurisdictions when reviewed in conjunction with Articles 11:401(3) and 11:202 of the Principles of European Contract Law (PECL).12

9 Apart from this insertion, Art 14(2) Rome I contains no other substantial differences in comparison to Art 12(2) Rome Convention.
10 In addition, with Flessner we would assume that other rights in rem, such as the right of usufruct – though not a security right – also fall within the scope of Art 14 Rome I, given the fact that the creation of a right of usufruct on a receivable involves similar issues between the parties concerned. See A Flessner, “Die internationale Forderungsabtretung nach der Rom I Verordnung” (2009) 29 IPRax: Praxis des internationalen Privat- und Verfahrensrechts 35, 37; S van Dongen and AP Wenting, “Europa en internationale overeenkomsten. EVO wordt Rome I” (2009) 26 Nederlands Tijdschrift voor Burgerlijk Recht 82, 90.
12 Art 11:401(3): “The assignee’s interest in the assigned claim has priority over the interest of a creditor of the assignor who attaches that claim . . . after the time the assignment has taken effect under Article 11:202.” Art 11:202 PECL: “An assignment . . . takes effect at the time of the agreement to assign or such later time as the assignor and assignee agree” (O Lando et al
However, at most this may be different in respect of jurisdictions where the property aspects of an assignment between the assignor and the assignee (property aspects \emph{inter partes}) must be separated from requirements that have to be fulfilled in order to invoke the assignment against third parties (property aspects \emph{erga omnes}). Thus in such jurisdictions where under the law applicable pursuant to Article 14(1) Rome I a distinction is drawn between the \emph{inter partes} and the \emph{erga omnes} aspects, the relevant EU Member State’s courts would still be free to conclude that the \emph{erga omnes} aspects would in accordance with Recital 38 of the preamble be excluded from the scope of Article 14(1) Rome I. This should not, of course, prevent such courts from deciding that the law specified by Article 14(1) Rome I also governs the \emph{erga omnes} aspects as a matter of domestic private international law. A separation between property aspects \emph{inter partes} and \emph{erga omnes} may, for example, exist in French law. We will review this possibility in section C.3(a). We will also discuss whether it would be preferable to distinguish between “property aspects” and “other third party effects”, as other third party effects will include issues that do not belong to the assignment’s property aspects, but nevertheless are closely related to them, such as English registration requirements (to be discussed in section C.3(b)) and Dutch rules on civil recourse by creditors against assets owned by their debtor (see section C.3(c) below).

3. Property Aspects and Other Third Party Effects in Substantive Law

\textit{(a) French Law: Articles 1689 and 1690 Cc}

Under French law, Article 1689 of the French Code civil (Cc) provides that the transfer of a claim is effected by a contract between the assignor and the assignee. Nevertheless, Article 1690 Cc also requires that the assignor or the assignee either formally notify the debtor of the assignment through the agency of a bailiff (\textit{huissier}), or have the assignment acknowledged by the latter party by way of an “authentic” deed.\footnote{Similar provisions exist in, for example, Luxembourg law.} Until the fulfilment of these prerequisites, the assignment cannot be invoked against third parties (\textit{tiers}).\footnote{P Malaurie, L Aynès and P Stoffel-Munck, \textit{Les obligations} (Paris, Defrénois, 2007), 778–79.} Although these requirements have to be fulfilled in respect of the debtor of the claim, the word “\textit{tiers}” in Article 1690 Cc includes not only the debtor but also any

interested third party, such as other creditors of the assignor or the assignee or – potentially – subsequent assignees. These other third parties will need to approach the debtor in order to verify whether a receivable has been effectively assigned.\textsuperscript{15} As a consequence, these Articles may be argued to reflect a separation of property aspects in French law, indicating that a different property regime applies between the assignor and assignee (Article 1689 Cc) than towards third parties (Article 1690 Cc).\textsuperscript{16} The question is, however, whether such separation of property aspects forms an absolute rule in French law. We strongly doubt that this is the case. The reach of the rules embodied by Articles 1689 and 1690 Cc – and consequently the separation of property aspects – is not absolute.\textsuperscript{17}

Firstly, in order to facilitate professional transactions in France, simplified assignments (cessions simplifiées) have been introduced, such as the assignment to a fonds commun de créances (FCC) or a cession Dailly. An FCC is a securitisation vehicle which issues units in order to give its unit-holders co-ownership interests in the receivables assigned to the FCC, whereas a cession Dailly designates the assignment of claims by a professional party to a bank, as security for credit provided by that bank.\textsuperscript{18} In accordance with Articles L214-43 and L313-27 of the French Monetary and Financial Code (Code monétaire et financier, CMF) in order to be effective a simplified assignment requires the delivery to the assignee of a list of the receivables to be assigned on a bordereau, the wording of which has been dictated by decree. As from the date of the bordereau, the assignment is effective both between assignor and assignee and towards third parties without the need for any other formality to be fulfilled.\textsuperscript{19} Such third parties shall even include the debtor under the assigned claim. Nevertheless, a debtor who pays the assignor as a result of not being aware of the assignment will be discharged, so that the notification of the assignment to the debtor remains a useful tool.\textsuperscript{20}

Secondly, contractual subrogation – also regulated in Article 14 Rome I – is an important institution in French law. Originally considered a payment modality, contractual subrogation has developed into a mode of transferring a claim.\textsuperscript{21} Contractual subrogation occurs if a party, the subrogé, agrees with the

\textsuperscript{15} \textit{Ibid}, 776 and 780.
\textsuperscript{17} (Apparently) contra, Sigman and Kieninger, supra n 7, 57–59, referring to F Bauer, \textit{Die Forderungsabtretung im IPR} (doctoral thesis Munich, Frankfurt a/M, Verlag Recht und Wirtschaft, 2008), 51 et seq.
\textsuperscript{18} See further Art L313-23 CMF; Flessner and Verhagen, supra n 4, 15–16.
\textsuperscript{19} See in addition Art L515-21 CMF; Malaurie, Aynès and Stoffel-Munck, supra n 14, 786–87.
\textsuperscript{21} \textit{Ibid}, 757.
creditor of a receivable, the subrogeant, that the former party pays the latter. This payment has the effect that the receivable is transferred from the subrogeant to the subrogé. The subrogation may only be invoked against the debtor of the claim transferred by way of subrogation after he has become aware of it. The enforceability of the subrogation against other third parties, however, does not require the fulfilment of any formalities. For this reason, contractual subrogation has the same economic function in France that assignment has in other jurisdictions such as the Netherlands. This may be illustrated by different structures that are used in a factoring transaction. Whereas under a factoring transaction in the Netherlands the receivables owed to a professional party (the assignor) by its clients may be transferred to a factor (the assignee) by way of assignment, in France a factor (the subrogé) agrees with a professional party (the subrogeant) to pay the amounts that are due under the receivables and as a consequence of which these receivables are transferred to the factor by way of subrogation. Not only does the functional equivalence of assignment and subrogation justify their joint regulation in Article 14(1) Rome I, it also means that a separation of property aspects in France may not be argued solely on the basis of Articles 1689 and 1690 Cc.

The idea of an erosion of a separation between property aspects inter partes and property aspects erga omnes is supported by the current state of the law in another Romanistic jurisdiction, Belgium, as well as by the provisions proposed in a French project intended at reforming the law of obligations, the Avant-projet Catala. In Belgium, Article 1690 of the Civil Code has been amended to the effect that the conclusion of the agreement to assign makes the assignment enforceable against third parties (including the assignor’s creditors), with the exclusion of the debtor under the assigned claim. Only in the case of an ignorant debtor can the transfer of the claim not be invoked until the debtor has been notified or has recognised the assignment. The function of notification and recognition is exclusively confined to the law of obligations: both determine to whom the debtor must make payments. In the Avant-projet Catala the rule embodied in Article 1690 has also been abandoned: the proposed Article 1254 Cc provides that the creation of a deed suffices in order for the assign-
ment to be enforceable against third parties, excluding the debtor under the assigned claim.27

(b) English Law: Registration Requirements

We believe that “other third party effects” shall include registration requirements, such as those which are imposed by English law. In England, certain security assignments have to be filed in the appropriate public registers in order to make the security effective against subsequent transferees (including assignees), chargees and garnishees, and in insolvency proceedings opened in respect of the company granting the security. We think that these filing requirements have to be considered separately from the property aspects of an assignment. Indeed, one may doubt whether the English registration requirements even form part of English property law.28 By way of illustration, under English law security given by a company, eg by way of a security assignment, over assets such as so-called “book debts”, must be registered at Companies House in accordance with Part 25 of the Companies Act 2006 (“CA 2006”). The registration requirements only apply when the company (for our purposes, the assignor) is incorporated in the United Kingdom, or has a registered establishment there.29 In the latter case the requirements have been laid down in the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009.30 The question as to which law governs the property aspects of the security assignment is irrelevant for the purposes of the registration requirements because, according to the English Court of Appeal, the applicable law to an assignment is the proper law of the assigned claim (see further infra, section D.3). The registration requirements may consequently be applicable to an assignment governed by a foreign property law regime, whilst they may not necessarily apply to a security assignment governed by English property law.31

It is submitted therefore that the issue of public filing has to be dealt with by examining the necessity of a specific conflict rule. In order to do so, a distinction should be made between situations in which (individual or collective) enforcement measures are taken in the country where the assignor resides, and situations in which the same claim has been assigned or charged multiple times. In the latter situation, the impact of public filing upon the rights of

27 See the proposed Art 1254-2.
28 See also PL Davies, Gower and Davies’ Principles of Modern Company Law (London, Sweet & Maxwell, 2008), 1182–83.
29 Ch 1 of Part 25 CA 2006 applies to companies registered in England, Wales or Northern Ireland, whereas Ch 2 governs companies registered in Scotland.
30 SI 2009/1917, which entered into force on 1 October 2009. Only specific security given over property situated in the UK has to be registered; however, it seems unclear how the location of “book debts” has to be determined.
31 Flessner and Verhagen, infra n 4, 55–57.
competing assignees has to be determined in accordance with the law designated by the conflict rule for the property aspects of assignments (see further infra, section D.4). We would regard this purely as a question belonging to the law of property. In situations of individual or collective civil recourse in the assignor’s country of residence, however, we are leaving the realm of property law. In these situations instead it is possible to argue that the effects of public filing must be recognised in accordance with the law of the assignor’s residence.32 This would sufficiently take into account the interests of states with a public filing system, while at the same time it would not impose the mandatory application of the law of the assignor’s residence to the property aspects of assignment in cases where that law does not require public registration.33 We would consequently recommend that a conflict rule be added to Rome I stating that in the case of individual or collective enforcement measures taken with respect to the assignor in his country of residence, the question of whether the assignment must be filed in a public register in order to be enforceable against the (collective or individual) creditors shall be governed by the law of the assignor’s residence.34

(c) Dutch law: Attachment and Voidable Preference

A second example of what we consider to be the “other third party effects” of an assignment is demonstrated by the Dutch rules on recourse by creditors against assets owned by the debtor. As a matter of Dutch law, where a creditor (C) obtains an attachment over a claim owed to his debtor (A), this does not prevent a subsequent assignment of that claim to a third party (B).35 In other words, from a property law perspective the attached claim is still transferred from the patrimony of A to that of B. However, as a consequence of Article 475h of the Dutch Code of Civil Procedure, the assignment cannot be invoked against the creditor who has levied the attachment. The assignment from A to B, although intrinsically valid as a matter of property law, may still be ignored by C. This is a legal fiction: although in reality a transfer of the claim to B has taken place, C can treat the claim as if it still belongs to A.

32 The scope of this conflict rule may be extended to other forms of publicity, equivalent to that of public filing. For instance, under Austrian law a security assignment must be entered into the ledgers of the assignor, in order to enable the assignor’s creditors to verify whether their debtor’s claims have been encumbered with security, see eg H Koziol and R Welser, Bürgerliches Recht. Band 1 (Vienna, Manz, 2002), 369 and 343. Notification to the assigned debtors should not be regarded as equivalent to public filing. See also Einsele, supra n 11, 109–13, who argues that such registration requirements should be regarded as “overriding mandatory provisions” (Art 9 Rome I).
33 See further infra, section D.2.
34 Flessner and Verhagen, supra n 4, 71–76.
35 See also the example given in Garcimartín Alférez, supra n 6, 233.
A similar effect takes place where an individual creditor is able to avoid an assignment as constituting a voidable preference (*actio pauliana*: Article 3:45 Dutch Civil Code). Where the creditor, C, has not taken a prior attachment on the claim but is able instead to avoid the assignment from A to B on the basis of voidable preference, this would not unwind the transfer from A to B because as a matter of property law the claim would still belong to the patrimony of B. However, C would be able to take recourse against this claim, as if the claim was still owned by his debtor A. These rules concerning attachments and voidable preferences, although directly affecting the legal consequences of an assignment, are clearly not within the scope of Article 14(1) Rome I. As a consequence, although a claim may have transferred under the (property) law applicable pursuant to Article 14(1) Rome I, the question of whether certain creditors can ignore this transfer, because the claim has been attached or because the assignment constitutes a voidable preference, may be governed by a different law.

4. Article 27(2) Rome I

Article 27(2) Rome I provides that the European Commission shall submit “a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties”. This might give one reason to assume that, despite the foregoing, the property aspects of an assignment against third parties are not covered by the current version of Article 14 Rome I. It is submitted, however, that a different interpretation of Article 27(2) Rome I is a better one, removing the apparent incongruity of Articles 14(1) and 27(2) Rome I. This interpretation is based on the distinction we introduced supra between the “property aspects” and “other third party effects” of an assignment. Article 14(1) Rome I would in this interpretation entirely apply to the property aspects of assignment. The other third party effects, such as the aforementioned registration requirements and the Dutch rules on recourse by creditors against assets owned by their debtors, would fall within the scope of Article 27(2) Rome I. In this interpretation Article 27(2) Rome I instructs the Commission to submit a report on the question as to which laws govern these other effects of an assignment.57

As Flessner correctly points out in his article, the view that Article 27(2) Rome I excludes all property aspects of an assignment would be incompatible with the text, purpose and character of Rome I. First of all, the text of Article 27(2) Rome I at least leaves open the possibility that all property aspects of an assignment are covered by the current version of Article 14 Rome I, as the Article requires a report, to be accompanied by a proposal to amend the

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56 Ibid, 234–35.
57 See also supra, section C.3(b); Van Dongen and Wenting, supra n 10, 89–90.
Regulation, only “if appropriate”. In other words, an amendment to the current text of Article 14 Rome I may not be considered necessary. In such event, even if one would conclude that “effectiveness . . . against third parties” is identical to “property aspects”, the issue would continue to be covered by Article 14(1) Rome I. The view that the property aspects of assignment are not regulated in Rome I unless an amendment thereto is made would secondly be contrary to the purpose of Rome I as a continuation and elaboration of the Rome Convention. In the opinion of a number of European courts, the property aspects of assignment are regulated by the Rome Convention.38 There simply remains no agreement about the question as to whether they are governed by the first or by the second paragraph of Article 12. Finally, the absence of a provision for this issue in Rome I would give the EU Member States complete freedom to determine a conflict rule regarding the property aspects of assignment. It seems highly implausible that the European legislator would authorise such a return of private international law to that of the period before the Rome Convention.39 Apparently, the view that it is not necessary to introduce a new rule for the property aspects of assignment was shared by (representatives of) a number of EU Member States during the negotiations on Rome I.40

To clarify, this is not to say that the report to be submitted by the Commission will not address the property aspects and the other third party aspects of an assignment. It is even conceivable that the Commission may develop a compromise solution for a conflict rule on the property aspects of assignment (as suggested infra, section E). This conflict rule may be supplemented by a specific rule for other third party effects, in particular registration requirements (infra, section C.3(b)). However, as long as Rome I is not amended, in our view Article 27(1) does not preclude the conclusion that the property aspects of assignment are currently within the scope of Article 14(1) Rome I.

5. Conclusion

In conclusion, throughout sections C.2–C.4 it has been submitted that the better distinction is not that between inter partes and erga omnes property aspects, but rather that between “property aspects” on the one hand and “other third party effects” on the other. Under this approach, the question of whether a claim has transferred from the patrimony of the assignor to that of the assignee is governed by the law designated by Article 14(1) Rome I. The requirements for a claim to be validly transferred from an assignor to an assignee, in particular whether a deed of assignment and/or notice to the debtor of the assigned

38 See infra, section D.
39 Flessner, supra n 10, 38–39; Flessner, supra n 11, 704–06. Cf Reithmann and Martiny, supra n 11, 295.
claim are required, are governed by the proper law of the underlying contract between the assignor and the assignee. This certainly is true where the law governing this contract makes no distinction between the *inter partes* and the *erga omnes* property aspects of assignment, as is the case in Belgian, Dutch and German law. It could even be argued that where the applicable law is French law or a law with similar rules on assignment (eg Luxemburg law), all the property aspects of assignment fall within the scope of Article 14(1) Rome I. In this interpretation, only the question whether certain creditors (or an insolvency representative) can for certain purposes (lack of registration, attachment, voidable preference) ignore an intrinsically valid transfer is outside the scope of Article 14(1) Rome I and, consequently, within that of Article 27(2) Rome I.

D. DIFFERENT CONFLICT RULES FOR ASSIGNMENT

1. Introduction

In our interpretation of Article 14(1) Rome I, the requirements for a claim to be effectively transferred from an assignor to an assignee are governed by the proper law of the contract concluded between them. This conflict rule was adhered to as long ago as 1997 by the Dutch Hoge Raad in the *Hansa*-decision. The criticism that has been levelled against this decision indicates that our opinion will in all likelihood elicit resistance. For that reason, we will examine the different conflict rules that have been proposed in legal writing to govern the property aspects of an assignment, in order to consider whether another conflict rule would be more suitable. Each different conflict rule that has been submitted coincides with one of the various different interpretations in relation to the question of whether the property aspects of an assignment are governed by Article 12 Rome Convention and – if so – by its first or second paragraph. We will review these conflict rules on the basis of these different interpretations.

2. The Law of the Assignor’s Residence or the Law of the Debtor’s Residence

The first interpretation holds that the validity and effectiveness of an assignment were not regulated in Article 12 Rome Convention, because questions

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of property law fell outside the scope of the Rome Convention. In this interpretation, the law applicable to an assignment is subject to national private international law rules, for instance providing for the applicability of the law of the jurisdiction of the habitual residence of the assignor or that of the debtor under the assigned claim. This interpretation is adhered to in Belgium, where an assignment is governed by the law of the jurisdiction of the assignor’s residence. In contrast, the applicability of the law of the jurisdiction where the debtor has its residence is the rule most commonly held by in France.

However, under French law an important exception to this rule applies to the assignment to an FCC and/or to a cession Dailly (see supra, section C.3(a)). Articles L214-43 and L313-27 CMF stipulate that the assignment of receivables to such FCC or to a bank as part of a cession Dailly is enforceable against third parties, irrespective of the law governing the assigned claims or the law of the jurisdiction where the debtor has its residence. To such assignments a different conflict rule applies, providing that the applicable law shall be that of the law of the jurisdiction of the assignee’s residence.

In our opinion, a conflict rule on the property aspects of an assignment based on a geographical connecting factor – such as the residence of the assignor or the debtor – would be undesirable. In general, the resulting conflict rule would be far too rigid and would add another law to transactions that are already of a hybrid and complex cross-border nature. In addition to these general disadvantages, some specific observations may also be made.

A conflict rule connecting the property aspects of the assignment to the law of the assignor’s residence is believed by some to offer a uniform solution where the law governing the receivables cannot be established at the time of the assignment (assignment of future receivables) and/or where a portfolio of receivables is governed by many different laws (bulk assignments). In the great majority of bulk assignments of (existing or future) receivables, such receivables will in fact be governed by the same law as a result of the fact that the assignor will often be a professional market participant, entering into contracts with a standard choice-of-law clause. As such, this theoretical benefit is of limited value in practice. Indeed, in some cases it may be even more problematic to
determine the establishment of the assignor. Using the example of a securitisation transaction, the securitisation vehicle, the special-purpose vehicle (SPV), is usually incorporated in one country, managed from another country and is the titleholder of a receivables portfolio, with debtors resident in a third country. Which law is the law of the assignor’s residence? Is it the law of the SPV’s place of incorporation, with which the assignment is only superficially connected, or is it the law of the country from which the SPV is managed, which may be difficult to ascertain for third parties?50 Another advantage of such a conflict rule has been argued to be the protection of the interests of the assignor’s creditors, who would be able to rely on this law’s requirements, concerning the registration and/or notification of the assignment.51 As has been submitted in recent publications, this latter advantage will obviously be realised only if the law of the assignor’s residence provides for registration in an adequate registration system which is easily accessible to its creditors.52 Therefore, we believe that this does not constitute a decisive argument in favour of the law of the assignor’s residence governing the property aspects of an assignment. Instead, we would be more inclined to introduce a specific conflict rule for registration issues, as we also considered supra in section C.3(b).

One advantage cited in relation to the idea of a conflict rule connecting the property aspects of an assignment to the law of the debtor’s residence is that the debtor’s residence represents the lex situs of a receivable. However, this is based on a fiction, since in the physical world receivables evidently do not have a situs.53 More importance could be attached to the view that this conflict rule would underline the close relationship between property aspects and enforcement, given the fact that enforcement measures may take place in the debtor’s jurisdiction where the courts will apply their own procedural enforcement rules (lex fori). We agree that there may well be some advantages in the courts being able to apply their own law to the assignment of the claim as well.54 However, enforcement procedures do not necessarily have to take place in the state of the debtor’s residence, because the jurisdiction in relation to enforcement issues may be based on other grounds, such as a forum choice or the location of the debtor’s assets.55 Moreover, we cannot see the need for the law governing property rights on receivables to correspond with the law governing enforcement measures in connection with such receivables. The procedural

50 See also Garcimartín Alférez, supra n 6, 242.
51 See eg Sigman and Kieninger, supra n 7, 62; Struycken, supra n 42, 359.
52 Perkins, supra n 40, 240; Garcimartín Alférez, supra n 6, 239 and 248.
53 Flessner and Verhagen, supra n 4, 37.
54 Ibid, 38.
enforcement rules of the forum that are created for analogous domestic legal institutions may by way of assimilation be applied to property rights that are governed by a foreign law. Not only do we consider the advantages of a conflict rule providing for the applicability of the law of the debtor’s location of residence to be more ostensible than real, we also consider it inappropriate for the aforementioned bulk assignments. If the assignor is involved in cross-border transactions, and has debtors with residences in a number of different countries, such a conflict rule would complicate the assignment of the receivables – this time not only theoretically, but also in practice – because the assignment would need to comply with the rules of as many different jurisdictions as there are debtors residing in.

3. The Proper Law of the Assigned Claim

According to a second interpretation, adhered to by the German Bundesgerichtshof and the English Court of Appeal, the property aspects of an assignment were within the scope of Article 12(2) Rome Convention. This implies that the validity and effectiveness of an assignment is determined by the proper law of the assigned claim. The most important advantage of this conflict rule is that it has the effect that the obligatory and property aspects of an assignment – which in substantive law often interact – are governed by the same law. All persons who have an interest in the assignment (assignor, assignee, debtor, competing claimants) would consequently only have to look at one legal system in order to assess their rights in respect of the relevant claims. At the same time, potential adaptation and characterisation problems would be avoided. For instance, the question may arise as to whether the law governing the possibility of the assignment of future receivables falls within the scope of the conflict rule relating to the assignability of a claim (Article 14(2) Rome I) or within that of the conflict rule related to the property aspects (Article 14(1) Rome I). A disadvantage would be that this conflict rule may be difficult to apply in the

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56 Flessner and Verhagen, supra n 4, 40.
57 Ibid. 37–39.
59 In its judgment of 11 June 1993, [1993] Nederlands Jurisprudentie (NJ), No 776, the Dutch Hoge Raad held the first interpretation, whereas in legal literature the second interpretation has been adhered to. See Flessner and Verhagen, supra n 4, 46; Sigman and Kieninger, supra n 7, 44-45.
case of bulk assignments. Nevertheless, as we explained in the preceding section, in our opinion this objection would in most cases be relevant more in theory than in practice. Another disadvantage of this conflict rule may be its lesser flexibility in comparison to a conflict rule favouring party autonomy.60 Such a conflict rule would be applicable according to the third interpretation, which is to be discussed in the following section.

4. The Proper Law of the Underlying Contract between Assignor and Assignee

The third, and in our opinion most appropriate, interpretation is that the property aspects of an assignment are subject to the law applicable to the underlying contract concluded between the assignor and the assignee. The law governing this contract has to be determined in accordance with Article 3 Rome I (choice of law) or Articles 4–8 Rome I (objective conflict rules).61 As mentioned above, the Dutch Hoge Raad followed this reading in the Hansa-decision.62

The fact that it favours party autonomy has been the main point of criticism on the Hansa-decision.63 It is submitted, however, that the supposed dangers of party autonomy are exaggerated. Practice in the Netherlands in the 13 years following the Hansa-decision demonstrates that the parties to an assignment normally choose the underlying contract between the assignor and the assignee to be governed by either the law applicable to the assigned claims or the law of the jurisdiction of the residence of the assignor or assignee. In the case of (in our view unlikely) “abuse” of party autonomy (eg a choice of law with the sole purpose of frustrating the rights of the assignor’s creditors), institutions such as voidable preference (actio pauliana), tort, fraus legis or ordre public could provide a remedy.64 Another point of criticism of this conflict rule relates to multiple assignments. The applicability of the proper law of the contract between the assignor and the assignee has been said to lead to deadlock situations in circumstances in which a receivable has been assigned multiple times and each assignment is governed by a different law. As a result, a priority conflict is said to arise between the assignees, for which a conflict rule referring assignment to the proper law of the underlying contract between the assignor and the assignee would provide no solution.65 This point of criticism is clearly wrong. Even if a claim has been assigned multiple times, there will always be a first

60 Flessner and Verhagen, supra n 4, 43–48.
61 See Flessner, supra n 10, 42–43.
63 See eg Kieninger, supra n 42, 693–94; Struycken, supra n 42, 354–56.
64 Flessner and Verhagen, supra n 4, 31–32; Flessner, supra n 10, 41.
65 See eg V Sagaert, “De zakenrechtelijke werking van de cessie: de nieuwe ipr-regeling na de wet van 2 augustus 2002” (2003) 40 Tijdschrift voor Privaatrecht 361, 580; Garcimartín Allérez, supra n 6, 237–38; Sigman and Kieninger, supra n 7, 61, who give the impression to act contrary to
and second assignment. The validity of each assignment has to be determined in accordance with the law governing that assignment. In assessing the validity of the second assignment, however, possible property rights that have, by virtue of the first assignment, been established in accordance with the law governing the first assignment have to be recognised. For example, assignor A first assigns its claim on his debtor to assignee B and then secondly to assignee C. The first assignment is governed by English law, whereas the second assignment is governed by Italian law. In such case, the property aspects of the first assignment (A to B) would have to be determined by English law and those of the second assignment (A to C) by Italian law. Nevertheless, in judging the property aspects of the second assignment from A to C, the earlier transfer of the claim from A to B is of importance. As a result of the first transfer from A to B, A has lost his title to the claim subsequently assigned to C, so that C would only be able to acquire the claim if under the law governing the assignment from A to C (Italian law) protection is offered to a *bona fide* purchaser of a claim. The principle is exactly the same as with tangible property. A sells a painting to B and transfers title of the painting to the latter in England, while remaining in possession of it. A then subsequently takes the painting to Italy, where he sells and delivers it to C. If under Italian law C’s title as a *bona fide* purchaser overrides that of the original owner B, that result will be recognised by the English courts under the *lex situs* rule. Likewise, in the example above, it will be Italian law which decides whether C as *bona fide* purchaser of the claim is protected against the earlier assignment from A to B. Needless to say, a “problem” of multiple assignments, each governed by a different law, may also occur when applying the law of the assignor’s residence as that place of residence may undergo alterations during the period between two assignments. For example, in a securitisation transaction receivables are not only assigned by a company, the originator, to the SPV but also by the SPV to its bondholders. Especially in the case of an SPV it is not unusual for it to alter its country of residence and thereby the law that will govern future assignments.

Not only are we of the opinion that the objections against this conflict rule are unconvincing, but it is also our firm belief that it would rather be an advantage if the assignor and assignee could make a choice of law for an assignment. Such a choice of law would provide them beforehand with certainty about the governing law and would thus stimulate cross-border trans-

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66 Cf Collins, supra n 58, 24-023-5. A classic example is *Winkworth v Christie Manson and Woods Ltd and Another* [1980] 2 WLR 937.

67 See further Flessner and Verhagen, supra n 4, 32–26; Flessner, supra n 11, 706–15, who explains various cases of multiple assignments. See also Einsele, supra n 11, 114–15.

68 Perkins, supra n 40, 240–41; Garcimartín Alférez, supra n 6, 242.
actions between EU Member States. As a consequence, a conflict rule enabling party autonomy may be more in conformity with the fundamental freedoms of the EC Treaty than other conflict rules.\(^{69}\) The freedom to choose the governing law would furthermore enable the assignor and assignee to choose a law that is in conformity with market practice and, if necessary, to have a chain of linked assignments governed by the same law. In addition, a conflict rule based on party autonomy would provide the assignor and assignee with the possibility to ensure the recognition of the assignment in the debtor’s jurisdiction, by choosing the law that would be applicable according to the conflict rule of that jurisdiction.\(^{70}\) A final advantage of applying the proper law of the underlying contract between the assignor and the assignee would be that this obligational contract between the assignor and the assignee and the assignment itself – closely connected in substantive law – would be governed by the same law.\(^{71}\)

5. Special Conflict Rule for Factoring

It has been suggested that in the case of factoring agreements assignments should be governed by the law of the assignor’s residence, whilst in other cases the law governing the assigned receivables should apply.\(^{72}\) This is an inappropriate solution, both in theory and in practice. In theory there is no good reason why assignments taking place pursuant to factoring agreements should be treated differently to assignments taking place within the framework of other financial or commercial transactions. In practice, however, this solution would often create characterisation problems. A wide variety of transactions take place under the heading of “factoring”, such as receivables financing, outright sale of receivables and simple debt collection. For this reason, it is extremely unlikely that it will be possible to come up with a definition of factoring that can continue to be used with a sure hand in order to determine whether the law of the assignor (factoring) or the law of the assigned receivable applies.

E. Compromise Solution

Our interpretation of Article 14(1) Rome I means that the property aspects of an international assignment are governed by the proper law of the underlying contract concluded between the assignor and the assignee (see supra, section C). As we demonstrated in the previous section, we are convinced that this would be the most appropriate conflict rule for determining the law applica-
ble to the property aspects of assignment. Given the criticism that has been levelled at this conflict rule in legal doctrine, we realise, however, that it may not be acceptable to the European legislator. We would therefore suggest the following compromise solution: that the law applicable to the property aspects of an international assignment is the proper law of the assigned claim, in combination with a limited choice-of-law possibility for the law of the assignor’s residence. We believe that this solution could offer the “best of both worlds” as the applicability of the law governing the assigned claim means that the assignor, assignee and debtor would only have to look at one legal system in order to assess their rights in respect of the relevant claims (see also supra, section D.3).73 In situations where this conflict rule may be difficult to operate, with particular reference to a bulk assignment of a portfolio of receivables governed by different laws and/or future receivables, whose applicable law cannot be determined or predicted, the parties to the assignment may choose instead the applicability of the law of the assignor’s residence. This example is used regularly in legal writing in order to argue in favour of the law of the assignor’s residence in preference to the proper law of the assigned claims. The assignor and the assignee can consequently avoid uncertainty as to the law governing their assignment, by making a choice of law. This would mean that proponents of party autonomy would see their wish fulfilled, albeit only partially, since the assignor and the assignee have only two potential sets of laws at their disposal from which they can select the most appropriate to govern the assignment. Finally, since the range of laws that can be chosen is limited, and the laws are both so closely connected with the assignment, it is difficult to imagine that even the most ardent adversaries of party autonomy will have a problem with this compromise solution.

F. CONCLUSION

There is no unanimity among the EU Member States as to whether the property aspects of an assignment, in essence regarding the question whether a claim has been effectively transferred from the assignor to the assignee, fall within the scope of Article 12 Rome Convention. The interesting purpose of the amendment that has been made in Article 14(1) Rome I is to clarify that the provision applies to the property aspects of an assignment as between the assignor and assignee. However, the property aspects of an assignment inter partes cannot be separated from the property aspects erga omnes, such as creditors of the assignor or assignee. As a consequence, the property aspects of an international assignment are governed under Rome I by the law that applies

73 Flessner and Verhagen, supra n 4, 48.
to the underlying contract concluded between the assignor and the assignee. This is in our opinion not altered by Article 27(2) Rome I because our interpretation of this Article confines its extent to the assignment’s other third party effects, eg the issue of whether registration of the assignment in a public register has to take place before the assignee is able to recover his claim with priority over the ordinary creditors of the insolvent assignor or over any other creditor taking enforcement measures against the assigned claim outside of insolvency proceedings. It is recommended that this specific issue should be governed by the law of the assignor’s residence. Should this interpretation not be acceptable to the European legislator, it is suggested that upon its revision a compromise solution be adopted in respect of Article 14, pursuant to which the property aspects of assignments are governed by the proper law of the assigned claim, in combination with a limited choice-of-law possibility for the law of the assignor’s residence.