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## H. NATIONAL REPORT THE NETHERLANDS<sup>376</sup>

### SUMMARY

#### 1. Substantive Law

Under Dutch substantive law a distinction is made between disclosed and undisclosed assignments. The effectiveness of both types of assignment requires the fulfillment of the general conditions for the transfer of property: (i) a valid legal basis (title, normally: a contract), (ii) the assignor having the power of disposition (*beschikkingsbevoegdheid*) of the claim to be assigned, and (iii) a "delivery" (*levering*) of the claim to the assignee (see article 3:84(3) Dutch Civil Code). In case of a disclosed assignment the delivery requires a deed of assignment and notification of the assignment to the debtor. An undisclosed requirement is effected by either an authentic (notarial) deed or a private deed that has to be registered in a non-public register held by the Dutch tax authorities.

#### 2. Conflict of Laws

According to Dutch private international law, the proprietary effects of an assignment are governed by the proper law of the contract pursuant to which the assignment of the claim takes place, in other words the underlying contract between the assignor and the assignee (see article 10(2) Conflicts Property Act). This conflict rule does *not* differentiate between proprietary effects "*inter partes*" and proprietary effects "*erga omnes*" and equally applies to all cross-border assignments, irrespective of the kind of transaction within which the assignment takes place.

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**TABLE OF STATUTES****A) Substantive Law**

<b>Statute</b>	<b>Provisions</b>
<b>Dutch Civil Code</b>	<b>Art. 3:45:</b>  <b>1. If a debtor, in the performance of a juridical act to which he was not obliged, knew or ought to have known that this would adversely affect the possibility of recourse of one or more of his creditors, the juridical act may be annulled; any creditor whose possibility of recourse has been adversely affected by the juridical act may invoke this ground for annulment, irrespective of whether his claim arose before or after the act.</b>  <b>2. Except for gratuitous acts, a juridical act, either multilateral or unilateral and directed at either one or more specific persons, can only be annulled because of prejudice to a creditor, if the persons with whom or in respect of whom the debtor performed the juridical act also knew or ought to have known that prejudice to one or more creditors would result from it.</b>  <b>3. Where a gratuitous juridical act is annulled because of prejudice, the annulment has no effect against a beneficiary who neither knew nor ought to have known that prejudice to one or more creditors would be the result of the juridical act, but only to the extent that he demonstrates that, at the time of the declaration or institution of the annulment action, he did not derive benefit from the juridical act.</b>  <b>4. A creditor attacking a juridical act as being prejudicial to him, can only annul the act on his own behalf and not to a larger extent than necessary to remove the prejudice to himself.</b>  <b>5. Proprietary rights on assets that were the subject of an annulled juridical act and that have been acquired by third parties in good faith, other than by gratuitous title, shall be respected. A third party acting in good faith who has acquired property by gratuitous title shall not be affected by the annulment to the extent that he shows that, at the time the property is claimed from him, he did not benefit from the juridical act.</b>
	<b>Art. 3:83:</b>  <b>1. Ownership, limited rights and claims are transferable, unless it is precluded by law or by the nature of the right.</b>  <b>2. Transferability of claims may also be excluded by an agreement between creditor and debtor.</b>  <b>3. Other rights are only transferable where the law so provides.</b>
	<b>Art. 3:84:</b>  <b>1. Transfer of property requires delivery pursuant to a valid title by a person who has the right to dispose of the property.</b>  <b>2. The title must describe the property in a sufficiently precise</b>

	<p>manner.</p> <p>3. A juridical act intended to transfer property for purposes of security or which does not have the purpose of vesting title in the acquirer after transfer, does not constitute valid title for transfer of that property.</p> <p>4. Where a delivery is made in the performance of a conditional obligation, the right thus acquired is subject to the same condition as the obligation.</p>
	<p><b>Art. 3:88:</b></p> <p>1. Although a transferor lacks the right to dispose of property, the transfer of registered property, a personal right or other property to which Article 86 does not apply, is valid if the acquirer is in good faith and if the lack of the right to dispose results from the invalidity of a previous transfer, which itself did not result from the transferor's lack of the right to dispose at that time.</p> <p>2. Paragraph 1 cannot be invoked in respect of claims referred to in Article 86a, paragraphs 1 and 2 and Article 86b, paragraph 1.</p>
	<p><b>Art. 3:94:</b></p> <p>1. In cases other than those provided for in the preceding article, rights to be exercised against one or more specific persons are delivered by means of an appropriate deed and notice thereof given by either the alienator or the acquirer to those persons.</p> <p>2. Delivery of a right exercisable against a specific person, who is however unknown on the day when the deed is drawn up, shall be retroactive to that day, provided that the right belongs to the alienator on that day and that notification is made with due speed once that person has been ascertained.</p> <p>3. These rights can also be delivered by an authentic or registered private deed made for such purpose without notification to the persons against whom such rights will be exercised, provided the rights already exist at the time of the delivery or will be acquired directly from a legal relationship which already exists at that time. The delivery may not be opposed vis-à-vis the persons against whom such rights must be exercised except after the alienator or the acquirer has informed them thereof. Article 88, paragraph 1 applies only in respect of an acquirer of a right delivered in accordance with the first sentence, when the acquirer is in good faith at the time the information referred to in the second sentence is given.</p> <p>4. The persons against whom the right is to be exercised can demand that they be given an extract, certified by the alienator, of the instrument and the title upon which it is based. Stipulations which are of no importance to these persons need not be included in the extract. If no deed has been drawn up stating the title upon which the right is based, they must be notified in writing of the contents of the title to the extent that this is of importance to them.</p>
	<p><b>Art. 3:97:</b></p>

	<p><b>1. With the exception of registered property and property which is prohibited to be the subject matter of a contract, future property may be delivered in advance.</b></p> <p><b>2. Delivery in advance of future property has no effect against a person who has acquired the property in advance as a result of an earlier delivery. In the case of a movable asset, the delivery is effective against such a person from the time the asset came into the actual possession of the acquirer.</b></p> <p><b>Art. 6:34:</b></p> <p><b>1. A debtor who has paid a person who was not authorized to receive payment, can invoke the payment as a discharge against the person to whom the payment should have been made, if he had reasonable grounds to believe that the recipient of the payment was entitled to the performance as a creditor or that payment was to be made to him for another reason.</b></p> <p><b>2. If a person loses his right to claim payment in such a way that the right vests retroactively in another person, the debtor may, with respect to that other person, invoke a payment made in the meantime, unless he should have refrained from payment on account of what he could have foreseen with regard to the loss of the right to claim payment.</b></p> <p><b>Art. 6:142:</b></p> <p><b>1. On the transmission of a claim, the new creditor also acquires its accessory rights, such as rights of pledge and mortgage, rights arising under surety, priority rights and the right to enforce enforceable judgments, orders and deeds relating to the claim and its accessory rights.</b></p> <p><b>2. Accessory rights include the right of the predecessor creditor to contractually agreed interest, to a penalty or to a forfeited penalty sum for non-compliance, except to the extent the interest was already due and payable or the penalty or penalty forfeited for non-compliance had already been forfeited at the time of transmission.</b></p> <p><b>Art. 7:633(1):</b></p> <p><b>1. A transfer, pledge or any other act as a result of which the employee grants any right to his wages to third parties shall be valid only to the extent that a seizure by garnishment of his wages would be valid.</b></p> <p><b>2. A power of attorney to claim wages must be granted in writing. Such a power of attorney may be revoked at any time.</b></p> <p><b>3. There shall be no derogation from this article.</b></p>
<b>Code of civil procedure</b>	<p><b>Art. 156:</b></p> <p><b>1. Deeds are signed pieces of writing, intended to serve as evidence.</b></p>

	<p>2. Authentic deeds are deeds in the required form that have been drawn up by officials, to whom it has under or pursuant to the law been referred to produce evidence of their observations and actions in such a manner.</p> <p>3. Private deeds are all deeds that may not be characterized as authentic deeds.</p> <hr/> <p><b>Art. 475b:</b></p> <p>1. An attachment at a third party over one or more claims for periodic payments against the debtor that are exempt from attachment up to the protected earnings level is only valid to the extent that a periodic payment exceeds the protected earnings level.</p> <p>2. In case of attachments at several third parties over claims for periodic payments against the debtor that are exempt from attachment up to the protected earnings level, the protected earnings level will be allocated according to the amount of the periodic payments.</p> <p>3. Attachment over supplementary payments is only valid to the extent that it would have been valid if the payment was made in time during the attachment.</p> <hr/> <p><b>Art. 475h:</b></p> <p>1. A disposition, charge, waiver or administration order of a claim covered by the attachment, that is effected after the levy of the attachment, cannot be invoked against the creditor who levied the attachment. The same applies to a payment or surrender in spite of the attachment, unless the third party has done everything that could reasonably have been asked from him in order to prevent the payment or surrender.</p> <p>2. Article 453a applies by way of analogy to assets covered by the attachment.</p> <hr/> <p><b>Art. 720:</b></p> <p>1. The Articles 475a-475i, 476a and 476b, 479 and 479a are applicably by way of analogy. In the case of Article 475a(3), the claim over which an attachment is levied has to be explicitly defined in the application intended to obtain permission of the judge in interlocutory proceedings. Permission to levy attachment over a claim to a periodic payment stated in Article 475c may only be granted after the debtor has either been heard or has allowed the opportunity to be heard to pass.</p>
<p><b>Bankruptcy Act</b></p>	<p><b>Art. 35:</b></p> <p>1. If on the date of the bankruptcy order not all acts required for delivery by the debtor have been performed, the delivery can no longer be validly effected.</p> <p>2. If prior to the date of the bankruptcy order the debtor has delivered a future asset in advance, this will belong to the estate if it was acquired by him only after the beginning of the date of</p>

	<p>the bankruptcy order, unless it consists of fruit or plants not yet harvested and to which the debtor was entitled before the bankruptcy order by virtue of a right <i>in rem</i> or a lease or an agricultural lease.</p> <p>3. For the purposes of Articles 86 and 238 of Book 3 of the Civil Code a person acquiring from the debtor is deemed to have been aware of the debtor`s lack of legal capacity after the publication of the bankruptcy order referred to in paragraph 3 of Article 14.</p>
	<p>Art. 63a:</p> <ol style="list-style-type: none"><li>1. On the application of each interested party or <i>ex officio</i>, the bankruptcy judge may issue a written order stipulating that, for a stay-period not exceeding two months, each right of third parties to recourse against property belonging to the estate or to claim property under the control of the insolvent debtor or the liquidator may only be exercised with his authorization. The bankruptcy judge may extend this period once for a period of no more than two months.</li><li>2. The bankruptcy judge may restrict his order to specific third parties and attach conditions both to his order and to the authorization of a third person to exercise a right to which the latter is entitled.</li><li>3. If a third party has set the liquidator a reasonable time in respect of the former`s entitlement, such a period shall be stayed during the stay-period.</li><li>4. When so required by the applicant of the bankruptcy or by the debtor, the stay-period may also be announced by the court which issues the bankruptcy order. The stay-period which is announced simultaneously with the declaration of bankruptcy has effect from the date on which the bankruptcy order is issued, that day included therein.</li></ol>

**B) Conflict of Laws**

Statute	Provisions
Conflicts Property Act	<p><b>Art. 10:</b></p> <p><b>1. The assignability or chargeability of a personal claim is governed by the proper law of the assigned claim.</b></p> <p><b>2. In all other respects, the property law regime regarding a personal claim is governed by the proper law of the contract requiring the assignment or charge. That law especially determines:</b></p> <p><b>which requirements apply to a valid and effective assignment or charge;</b></p> <p><b>who is entitled to exercise the rights implied in the claim;</b></p> <p><b>by which rights the claim may be encumbered and the nature and content of such rights;</b></p> <p><b>in what way such rights may be altered, transferred and cease to exist, and the mutual relationship of such rights.</b></p> <p><b>3. The relationships between the assignee, respectively the creditor of the claim, and the debtor, the conditions under which the assignment or charge of the claim may be invoked against the debtor, as well as the question whether performance by the debtor leads to a discharge of his obligations, are governed by the proper law of the assigned claim.</b></p>

**C) Table of Case Law**

Decision	Reasoning
Hoge Raad 16 mei 1997, Nederlandse Jurisprudentie (NJ) 1998, no. 585 (Brandsma q.q./Hansa Chemie AG)	The conflicts rule of Article 12(1) Rome Convention does not only apply to the obligational relationship between the assignor and the assignee, but also to the assignment's proprietary aspects. The proprietary effects of a cross-border assignment are therefore governed by the law applicable to the underlying contract between the assignor and the assignee.
Hoge Raad 11 June 1993, Nederlandse Jurisprudentie (NJ) 1993, no. 776 (Caravan Centrum Zundert et al/Kreuznacher Volksbank AG I)	The issue of whether an existing or future claim may be assigned in advance is governed by the proper law of the claim.

## 1. INTRODUCTION

This report considers the general legal framework relating to the assignment of receivables in the Netherlands, in particular in respect of the law governing the proprietary effects of a cross-border assignment.<sup>377</sup> A brief outline of assignment under Dutch substantive law and an explanation of what we consider to be the assignment's proprietary effects will be provided in paragraph 2. In paragraph 3 the conflict rules regarding an international assignment will be discussed. In paragraph 4 we will examine some particular issues in more detail, such as multiple (competing) assignments, the prohibition on security assignments and the assignment of future claims. Paragraph 5 will subsequently deal with the assignment's "other third party effects", e.g. relating to the avoidance of an assignment as constituting a voidable preference (*actio pauliana*). Finally, insolvency situations will be discussed in paragraph 6.

## 2. ASSIGNMENT UNDER DUTCH SUBSTANTIVE LAW

### 2.1. Hybrid Legal Institution: Obligational and Proprietary Effects

Assignment may be characterised as a hybrid legal institution, involving features that belong to both the law of obligations and the law of property. The assignment's hybrid character 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, of either a contractual or a non-contractual (e.g. a tort claim) nature, the substance of which is determined by the law of obligations. At the same time, the assigned claim is an (intangible) asset, a *chose in action*, which is itself capable of being transferred, charged or otherwise encumbered under the law of property.<sup>378</sup> Its hybrid character is also visible 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 obligational effects 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 question is whether and to what extent the debtor is allowed to raise against the assignee the defences that he

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<sup>377</sup> In this report the terms "claims" and "receivables" will be used interchangeably, to indicate personal rights which are enforceable against specific obligors only and which have not been expressed to be payable on bearer or order (*vorderingen op naam*). Usually (but not necessarily), assignments relate to contractual claims to the payment of money. Whereas the terms "claims" and "receivables" are used to indicate the active side of an obligation (*verbintenissen*), the term "debt" is used to indicate its passive side, e.g. what is payable by the debtor to the creditor. The wording "proprietary effects" is deemed to have the same meaning as "property aspects", the expression that is used in recital 38 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177/16 ("Rome I").

<sup>378</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, p. 2.

would have been able to raise against the assignor if the assignment had not taken place.<sup>379</sup>

This report will focus on the *proprietary effects* of an assignment, which 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 proprietary interests in respect of the same claim.<sup>380</sup> This includes issues as to whether the transfer of the claim requires the giving of notice to the debtor, whether the assignment requires a valid underlying contract or other “cause”, who acquires title to the claim in case of multiple (competing) assignments and whether a claim may be assigned by way of security.<sup>381</sup> These issues will be further elaborated on in the following paragraphs of this report.

Often, the obligational and proprietary effects 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 a 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 a contractual limitation actually prevents the transfer of a claim, as it does in some jurisdictions, including the Netherlands, will fall under the law of property (see also paragraph 4.4 below).<sup>382</sup>

## 2.2. Requirements for Assignment

Under Dutch law an assignment may either be disclosed or undisclosed. Both types of assignment share the general requirements for the transfer of property of (i) a valid legal basis (*title*, normally: a contract), (ii) the assignor having the power of disposition (*beschikkingsbevoegdheid*) of the claim to be assigned, and (iii) a “delivery” (*levering*) of the claim to the assignee, as provided in article 3:84(1) of the Dutch Civil Code. The delivery in case of a disclosed assignment requires a deed

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<sup>379</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, p. 2; Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich: Sellier 2006, pp. 2-3; F.H.J. Mijnsen, P. de Haan e.a., *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. 3. Goederenrecht. Deel I. Algemeen goederenrecht*, Deventer, 2006, no. 271.

<sup>380</sup> Also explained in Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich: Sellier 2006, p. 1.

<sup>381</sup> See also Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich 2006, p. 1.

<sup>382</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, p. 3.

of assignment and notification of the assignment to the debtor.<sup>383</sup> In case of trade receivables, however, it is more common to use an undisclosed assignment, which is effected by either an authentic (usually a notarial) deed or a registered private deed.<sup>384</sup> Registration is in a non-public register held by the Dutch tax authorities and only serves to fix the date of the assignment.<sup>385</sup> Both a disclosed and an undisclosed assignment must sufficiently identify the receivables to be assigned. It is established case-law of the Dutch Supreme Court, the *Hoge Raad*, that this requirement is fulfilled if the deed of pledge contains such data, that it is possible to determine to which receivables it pertains - if necessary in retrospect. This means that a generic description in the deed of pledge may suffice.<sup>386</sup>

By fulfilling the aforementioned requirements the receivable will be transferred from the assignor to the assignee. It is important to note that this transfer is not only effective as between the assignor and the assignee, but also as against any interested third party, such as creditors of the assignor and/or the assignee. It is in this respect that in the observation in recital 38 of the preamble to Rome I, that “article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee” the underlined part may be considered rather ambiguous. Under Dutch and German law, for instance the wording “property aspects” (or proprietary effects) inevitably includes the effects towards third parties.<sup>387</sup> What is *not* included, are the assignment’s “other third party effects”. These are issues that - while being outside the scope of the assignment’s proprietary effects - are nevertheless closely related to them. The most important examples are rules on recourse by creditors against assets owned by their debtor or on voidable preference (*actio pauliana*, see further paragraph 5 below).

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<sup>383</sup> See article 3:94(1) in conjunction with article 3:84(1) Dutch Civil Code. A private deed suffices, which may in accordance with article 156(1) and (3) of the Dutch Code of Civil Procedure (Wetboek van burgerlijke rechtsvordering) be any piece of writing that intends to serve as evidence.

<sup>384</sup> See article 3:94(3) in conjunction with article 3:84(1) Dutch Civil Code. In article 156(2) of the Dutch Code of Civil Procedure it is stated that authentic deeds are deeds in the required form that have been drawn up by a qualified official or by any other person that has been given equivalent rights. The undisclosed assignment has been (re)introduced in the Dutch Civil Code in 2004 in order to facilitate legal practice. See with respect to this issue Hendrik Verhagen, M.H.E. Rongen, *Cessie (preliminary advice Association for Civil Law (Vereniging voor Burgerlijk Recht))*, Deventer 2000, p. 14-15 and 21-35; M.H.E. Rongen, Hendrik Verhagen, *De cessie naar huidig en komend recht: de cirkel is weer rond*, Weekblad voor privaatrecht, notariaat en registratie (WPNR) 2003.

<sup>385</sup> It should be noted that Dutch law does not impose requirements on companies to register charges over debts.

<sup>386</sup> See e.g. Hoge Raad 14 October 1994, *Nederlandse Jurisprudentie* (NJ) 1995, no. 447 (Spaarbank Rivierland/Gispen q.q.); Wim Reehuis et al, *Pitlo, Het Nederlands burgerlijk recht. Deel 3. Goederenrecht*, Deventer: Kluwer 2006, pp. 90-92 and 278-279.

<sup>387</sup> See further Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, *Journal of Private International Law* 2010, p. 5, with additional references; Axel Flessner, *Die internationale Forderungsabtretung nach der Rom I Verordnung*, IPRax: Praxis des internationalen Privat- und Verfahrensrechtssupra 2009, pp. 38-43; Axel Flessner, *Rechtswahlfreiheit auf Probe – zur Überprüfung von Art 14 der Rom I-Verordnung*, in Jürgen Baur et al (eds), *Festschrift für Gunther Kühne zum 70. Geburtstag*, Frankfurt a/M 2009, p. 704.

The effectiveness of an assignment under the law of property, in other words the assignment's proprietary effects, has to be separated from the obligational question as to whom the debtor must make payments. Assuming that the assignment is valid, the answer to this latter question entirely depends on whether the debtor has been notified.<sup>388</sup> After notification of the assignment the debtor is no longer able to discharge his obligations by making payments to the assignor, but is instead obliged to make payments to the assignee. As has been stated above, notification also serves as one of the requirements that need to be fulfilled for a disclosed assignment. In case of such an assignment, notification will consequently usually determine both the point in time on which the assignment becomes effective, and the point in time from which the debtor can only discharge himself by making payments to the assignee.<sup>389</sup> This is, however, different in the case of an undisclosed assignment, where notification only serves to determine to whom the debtor must make payments. In this respect the second sentence of article 3:94(3) Dutch Civil Code states that (its effectiveness notwithstanding) the undisclosed assignment *may not be invoked* against the debtor before notification by the assignor or the assignee.<sup>390</sup> Even a debtor who has not been notified of the assignment but who does have factual knowledge of it, may not be able to discharge himself by making payments to the assignee.<sup>391</sup>

### 2.3. Ranking of Multiple (Competing) Assignments

If the same receivable happens to be assigned twice, obviously only one of the (intended) assignees will become entitled to the claim. Under Dutch law priority is given to the assignment that has been completed first. This means that in case of two disclosed assignments, priority is granted to the assignment that has been notified to the debtor first. In the situation of two undisclosed assignments, priority will also be given to the firstly completed assignment. For an authentic deed the date of completion is the date of signature by the qualified official (usually a civil law notary); for a registered private deed it is the date of registration, which is deemed to be the date on which the deed is provided for registration with the tax

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<sup>388</sup> In case of an invalid assignment on the other hand, the debtor will not be able to discharge himself by making payments to the assignee, unless he does so in good faith (see article 6:34 Dutch Civil Code).

<sup>389</sup> Usually, because notification may also be effected before the drawing up of the deed of assignment. See Henk Snijders, Eline Benoeming Rank-Berenschot, *Goederenrecht (Studiereeks Burgerlijk Recht)*, Deventer 2007, p. 302, with further references.

<sup>390</sup> As stated in article 3:94(3), second sentence, Dutch Civil Code (original text: "De levering kan niet worden tegengeworpen aan de personen tegen wie deze rechten moeten worden uitgeoefend dan na mededeling daarvan aan die personen door de vervreemder of de verkrijger").

<sup>391</sup> See also Henk Snijders, Eline Benoeming Rank-Berenschot, *Goederenrecht (Studiereeks Burgerlijk Recht)*, Deventer 2007, p. 304. This issue is slightly controversial: see e.g. Wim Reehuis et al, *Pitlo. Het Nederlands burgerlijk recht. Deel 3. Goederenrecht*, Deventer 2006, pp. 232-233; M.H.E. Rongen, Hendrik Verhagen, *De cessie naar huidig en komend recht: de cirkel is weer rond*, Weekblad voor privaatrecht, notariaat en registratie (WPNR) 2003, p. 690.

authorities.<sup>392</sup> It has to be emphasized that with respect to priority issues an undisclosed assignment is considered equivalent to a disclosed assignment, e.g. meaning that if notification of a disclosed assignment occurs *after* the date of registration of the private deed of an undisclosed assignment, it is the disclosed assignment that will produce no effect.<sup>393</sup>

The aforementioned priority rules will in most cases be decisive as to determine who is entitled to the claim, for Dutch law offers only limited protection to a *bona fide* second assignee. It follows from article 3:88(1) Dutch Civil Code that a *bona fide* second assignee is only protected if the absence of power of disposition of the assignor results from the invalidity of a previous assignment, which itself did not result from the assignor lacking the power of disposition at the time of the earlier assignment.

*Example 1.* A claim is assigned from assignor A to assignee B and subsequently from assignor B to assignee C. After the assignment B-C it appears that the assignment A-B is invalid because the underlying contract has been rescinded for mistake. Given that such a rescission has retroactive effect, B is deemed to have never been entitled to the claim, as a result of which the assignment B-C is invalid as well.

*Example 2.* Assignor A firstly assigns its claim against his debtor to assignee B and secondly to assignee C.

Since in the first example the invalidity of the previous assignment A-B has *not* resulted from the assignor lacking the power of disposition, but instead from the absence of a valid cause (contract), C may be able to invoke the protection of article 3:88(1) Dutch Civil Code, provided that he acted in good faith at the time of the assignment B-C. Depending on the type of assignment, however, a further limitation may apply, which forms an exception to the principle mentioned above, that an undisclosed assignment is considered equivalent to a disclosed assignment. For, in case of an *undisclosed* second assignment, protection will only be provided if the assignee notifies the debtor and is in good faith *at the time of notification*.<sup>394</sup>

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<sup>392</sup> See F.H.J. Mijnsen, P. de Haan e.a., *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. 3. Goederenrecht. Deel I. Algemeen goederenrecht*, Deventer 2006, no. 281c; Hoge Raad 14 October 1994, Nederlandse Jurisprudentie (NJ) 1995, no. 447 (Sparbank Rivierland/Gispen q.q.); M.H.E. Rongen, Hendrik Verhagen, *De cessie naar huidig en komend recht: de cirkel is weer rond*, Weekblad voor privaatrecht, notariaat en registratie (WPNR) 2003, p. 688.

<sup>393</sup> See also W.H.M. Reehuis et al, *Pitlo. Het Nederlands burgerlijk recht. Deel 3. Goederenrecht*, Deventer 2006, p. 219; Henk Snijders, Eline Benoeming Rank-Berenschot, *Goederenrecht (Studiereeks Burgerlijk Recht)*, Deventer 2007, p. 301.

<sup>394</sup> See article 3:94(3), fourth sentence, Dutch Civil Code; Wim Reehuis et al, *Pitlo. Het Nederlands burgerlijk recht. Deel 3. Goederenrecht*, Deventer, 2006, pp. 219 and 242-243.

In the second example, article 3:88(1) Dutch Civil Code may not be relied on by C, because the absence of power of disposition of A at the time of the second assignment A-C does not result from the invalidity of a previous assignment. The assignment A-B will consequently prevail over the second assignment A-C, being the assignment that has been completed first.

### **3. ASSIGNMENT UNDER DUTCH PRIVATE INTERNATIONAL LAW**

#### **3.1. The “Hansa”-Case**

The Dutch conflict rule relating to the proprietary effects of an international assignment has been formulated by the Dutch Supreme Court in the case of *Brandsma q.q./Hansa Chemie AG*.<sup>395</sup> In this judgment the Supreme Court decided that the proprietary effects of a cross-border assignment are governed by the law applicable to the underlying contract between the assignor and the assignee.<sup>396</sup>

The facts of this case are the following. A German seller, Hansa Chemie AG (“Hansa”) had sold chemicals to a Dutch purchaser, Bechem Chemie BV (“Bechem”). Hansa's general conditions provided that the transfer of the chemicals was subject to a so-called *verlängter Eigentumsvorbehalt*, a prolonged retention of title, more specifically an *Eigentumsvorbehalt mit Vorausabtretungsklausel* (a retention of title prolonged by an assignment in advance).<sup>397</sup> This clause allowed Bechem to sell on the chemicals before payment of the purchase price to Hansa, on the condition of a security assignment in advance of all future claims against subsequent buyers. A day after the first sale Bechem did indeed sell on the chemicals to another Dutch purchaser, Senzora BV (“Senzora”). The purchase price for the first sale had not yet been paid, when Bechem was declared bankrupt a few weeks later. The first purchase agreement between Hansa (also the assignee) and Bechem (the assignor) was governed by German law; Dutch law on the other hand was applicable to the second purchase agreement between Bechem (the assignor) and Senzora (the debtor) and therefore to the claim to be assigned.

The question that arose was whether the effectiveness of the assignment had to be determined in accordance with Dutch or German law. In other words: which law was applicable to the assignment of a claim that was itself governed by Dutch law,

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<sup>395</sup> Hoge Raad 16 mei 1997, Nederlandse Jurisprudentie (NJ) 1998, no. 585 (Brandsma q.q./Hansa Chemie AG).

<sup>396</sup> See the first part of par. 3.5 of the Supreme Court’s judgment. The judgment is, however, slightly ambiguous. From the second part that same paragraph it could be derived that the assignment’s proprietary effects are governed by the law chosen for the assignment specifically, which may be different from the law chosen for the underlying agreement between the assignor and the assignee pursuant to which the assignment takes place.

<sup>397</sup> See, e.g., Harm Peter Westermann, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band. 3. Schuldrecht. Besonderer Teil* (§§433-610. Finanzierungsleasing. HeizkostenV. BetriebskostenV. CISG), Munich 2008, no. 87-88.

but that took place in accordance with an agreement governed by German law? The answer to this question was crucial in order to determine whether the assignment was effective. Under Dutch law it would most likely have been ineffective, since (i) security transfers are generally prohibited in article 3:84(3) Dutch Civil Code (see further paragraph 4.2 below), and (ii) not all requirements had been fulfilled before Bechem was declared insolvent.<sup>398</sup> As a consequence of this invalidity the claim against Senzora would still form part of Bechem's insolvent estate. German law, on the other hand, provided the possibility to effect an assignment by a mere agreement between the assignor and the assignee, without any restrictions relating to the assignment of future claims by way of security. The applicability of German law would therefore mean that Hansa could seek recovery from the assigned claim.

In its judgment the Supreme Court first examines whether the proprietary effects of an assignment are within the scope of article 12 of the (then applicable) Convention on the law applicable to contractual obligations of 1980 (the "Rome Convention").<sup>399</sup>

The Court admits that this cannot be deduced from the wording of article 12 Rome Convention. On the basis of a historical interpretation of this provision, however, the Court rules that it also applies to "the contract of assignment, the juristic act by which the claim is transferred" (our italics).<sup>400</sup> In this regard the Court considers most decisive that it follows from the Giuliano/Lagarde Report that the text of article 12(1) Rome Convention was not intended to exclude from its scope the transfer of the claim itself, in other words the assignment's proprietary effects. The drafters only decided not to use the originally intended words "the assignment of a right by agreement" because this could have created the misunderstanding that the law designated by article 12(1) Rome Convention would also govern the effects of the assignment for the debtor, exactly what article 12(2) Rome Convention aims to prevent.<sup>401</sup>

The Supreme Court subsequently considers whether, given the applicability of article 12 Rome Convention, the assignment's proprietary effects are addressed by the first or by the second paragraph of article 12, in other words by the law applicable to the underlying contract between the assignor and the assignee (article

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<sup>398</sup> More particularly Senzora had not yet been notified, a crucial requirement in a time when the only type of assignment recognized under Dutch substantive law was the disclosed assignment.

<sup>399</sup> OJ 2005, C 334/1 (consolidated version). See par. 3.4.1 of the Supreme Court's judgment.

<sup>400</sup> See par. 3.4.2-3.4.4 of the Supreme Court's judgment (original text in par. 3.4.4: "de overeenkomst van cessie, de rechtshandeling waarbij de vordering wordt overgedragen").

<sup>401</sup> See par. 3.4.4-3.4.6 of the Supreme Court's judgment. Cf. Giuliano/Lagarde Report, comment to article 12 Rome Convention (OJ 1980, C 282/34): "Such a form of words had in fact been approved initially by most of the delegations, but it was subsequently abandoned because of the difficulties of interpretation which might have arisen in German law, where the expression "assignment" of a right by agreement includes the effects of it upon the debtor: this was expressly excluded by Article 12(2)". See also Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich, 2006, p. 9.

12(1)) or by the proper law of the assigned claim (article 12(2)). Here the Court deems important the apparently exhaustive character of the enumeration in article 12(2) Rome Convention and the observation in the Giuliano Lagarde Report referred to above. Since the assignment's proprietary effects are not mentioned in article 12(2) Rome Convention, one has to conclude that they are within the scope of article 12(1) Rome Convention. Additional grounds for this decision are that (i) if article 12(1) Rome Convention solely applied to the contractual agreement between the assignor and the assignee, it would be redundant, lacking any independent significance beside the general rules of article 3 (choice of law) and 4 (objective conflict rule) of the Rome Convention; (ii) application of the proper law of the assigned claim in accordance with article 12(2) Rome Convention would often lead to the undesirable situation that the legal relationship between the assignor and assignee is governed by two different legal systems, and (iii) application of the proper law of the assigned claim would deprive the assignor and the assignee of the possibility to choose the law governing the assignment.<sup>402</sup>

The Hansa-judgment has been thoroughly discussed by both Dutch and foreign authors and has found proponents as well as opponents.<sup>403</sup> One of the main criticisms that has been put forward by the opponents is that by adhering to the rule that the proprietary effects of a cross-border assignment are governed by the law applicable to the underlying contract between the assignor and the assignee, the Dutch Supreme Court effectively allows the assignor and the assignee to agree on the law that governs the assignment.<sup>404</sup> The supposed dangers of party autonomy - that have, as it should be underlined, however, not presented themselves in the fourteen years that have passed since the Hansa-judgment - notwithstanding, the conflict rule formulated by the Dutch Supreme Court has been codified in article 10(2) of the Dutch Conflicts Property Act (*Wet conflictenrecht goederenrecht*, "Conflicts Property Act"), which took effect on 1 May 2008.<sup>405</sup>

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<sup>402</sup> See par. 3.5 of the Supreme Court's judgment; Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich 2006, pp. 9-10.

<sup>403</sup> Among the proponents are Verhagen (case notes in *Jurisprudentie Onderneming & Recht (JOR)* 1997/77; Vlas (case notes in *Ars Aequi* 1998, p. 213-220); the State Committee on Private International Law (the "State Committee") in its Report on International property law (November 1998, see [www.rijksoverheid.nl/documenten-en-publicaties/rapporten/1998/11/01/internationaal-goederenrecht.html](http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/1998/11/01/internationaal-goederenrecht.html)), p. 45-46. Opponents include Teun H.D. Struycken, *The Proprietary Aspects of International Assignment of Debt and the Rome Convention, Article 12*, *Lloyd's Maritime and Commercial Law Quarterly* 1998; Eva-Maria Kieninger, *Das Statut der Forderungsabtretung im Verhältnis zu Dritten*, *RabelsZ* 1998; De Boer (case notes in *Nederlandse Jurisprudentie (NJ)* 1998, no. 585; Steffens (case notes in *Nederlands Tijdschrift voor Burgerlijk Recht* 1997, p. 212-217).

<sup>404</sup> See, e.g., Eva-Maria Kieninger, *Das Statut der Forderungsabtretung im Verhältnis zu Dritten*, *RabelsZ* 1998, p. 693-694; Teun H.D. Struycken, *op. cit.*, p. 354-356. See also Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich, 2006, p. 10-11.

<sup>405</sup> See in more detail on the argument of party autonomy Hendrik Verhagen, Sanna van Dongen, *Cross-Border Assignments under Rome I*, *Journal of Private International Law* 2010, p. 17; Axel

### 3.2. The Conflicts Property Act

Article 10 of the Conflicts Property Act contains the Dutch conflict rules relating to an international assignment. The provision reads as follows:

1. The assignability or chargeability of a personal claim is governed by the proper law of the assigned claim.
2. In all other respects, the property law regime regarding a personal claim is governed by the proper law of the contract requiring the assignment or charge. That law especially determines:
  - a. which requirements apply to a valid and effective assignment or charge;
  - b. who is entitled to exercise the rights implied in the claim;
  - c. by which rights the claim may be encumbered and the nature and content of such rights;
  - d. in what way such rights may be altered, transferred and cease to exist, and the mutual relationship of such rights.
3. The relationships between the assignee, respectively the creditor of the claim, and the debtor, the conditions under which the assignment or charge of the claim may be invoked against the debtor, as well as the question whether performance by the debtor leads to a discharge of his obligations, are governed by the proper law of the assigned claim.

The issues mentioned in article 10(1) and 10(3) Conflicts Property Act are also - and beyond all doubt - regulated by article 14(2) Rome I. The Conflicts Property Act additionally provides that the pledging or charging of receivables should, for the purpose of finding the applicable law, be treated in the same way as their assignment.<sup>406</sup> This is also in accordance with article 14(3) Rome I. In case of a concurrence between both provisions, article 14 Rome I naturally prevails. With respect to this issue the State Committee makes the - in our view disputable - observation that article 10 of the Conflicts Property Act also applies to the assignment of claims arising from other sources than contracts, e.g. tort claims, thereby indicating that the assignment of such claims is not governed by article 14 Rome I.<sup>407</sup>

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Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich 2006, pp. 21-36; Report of the State Committee, p. 52.

<sup>406</sup> For the sake of simplicity and because most of our observations equally apply to both concepts, we will however continue to limit ourselves to the assignment of claims.

<sup>407</sup> See the Report of the State Committee, p. 44. We would, however, argue that as a consequence of a systematic interpretation of Rome I and its counterpart, Regulation 864/2007 of the European

Whether the proprietary effects of an assignment are also regulated by article 14 Rome I is on the other hand highly controversial.<sup>408</sup> As long as this issue is not clarified by either the EU Court of Justice, or the EU legislator, the proprietary effects of assignment will in practice be deemed to be governed by the rule laid down in article 10(2) Conflicts Property Act. This leads to the assignment's proprietary effects being governed by the proper law of the contract pursuant to which the assignment of the claims takes place, in other words the underlying contract between the assignor and the assignee. It should be underlined that this conflict rule does *not* differentiate between the proprietary effects as between the assignor and the assignee (sometimes referred to as proprietary effects "*inter partes*") and the proprietary effects in respect of third parties (effects "*erga omnes*"). Such a distinction is incongruous with the system of Dutch substantive property law (see also paragraph 2.2 above).<sup>409</sup> Moreover, the conflict rule equally applies to all cross-border assignments, irrespective of the kind of transaction (e.g. factoring, securitisation) within which such an assignment takes place. A differentiation according to various types of transactions would not only be redundant, but would also lead to characterisation problems.<sup>410</sup> It is therefore preferable to have a conflict rule which itself allows to have the assignment's proprietary effects governed by the law that is most suitable to structure different types of transactions as efficiently as possible.

Article 10(2) Conflicts Property Act refers to the proper law of the underlying contract between the assignor and the assignee. The law applicable to this contract has to be determined by article 3 (choice of law) or articles 4-8 (objective conflict rules) Rome I. In commercial transactions the applicable law will usually be the law chosen in accordance with article 3 Rome I. In this respect article 3(1) Rome I generally allows the parties to an agreement to make a choice of law for only a part of the agreement, which is sometimes also called "depeçage". The possibility to make a partial choice of law enables the parties to have the proprietary effects of an international assignment governed by a separate law (see article 3(1), second sentence, Rome I).

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Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), which does not contain a provision on assignment, article 14 Rome I is also applicable to the assignment of non-contractual claims.

<sup>408</sup> This has been argued by Axel Flessner, *Die internationale Forderungsabtretung nach der Rom I Verordnung*, IPRax: Praxis des Internationalen Privat- und Verfahrensrecht 2009, p. 38-43; Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, pp. 5-13, with further references to authors supporting this interpretation as well as authors arguing against it. See e.g. contra Jeroen van der Weide, *De internationale cessie en verpanding van vorderingen Europees geregeld!?*, Maandblad voor Vermogensrecht (MvV) 2008, p. 107.

<sup>409</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, p. 5.

<sup>410</sup> See *ibid.*, p. 19.

Example. A bank provides credit under a loan agreement to a Dutch lessor that leases rolling stock to lessees in various jurisdictions, including Germany. The loan agreement is governed by English law. The lessor wants to assign the lease instalments arising from its lease agreement with the German lessee by way of a German *Sicherungsabtretung*.

In this example, the option to partially choose the applicable law allows the parties to the loan agreement to agree that the obligation to assign the lease instalments owed by the German lessee is not governed by English law, but instead by German law. Since a choice of law may in accordance with article 3(2) Rome I also be modified after the conclusion of a contract, such a partial choice of law relating to the proprietary effects of an international assignment may also be made afterwards, for example in the deed of assignment.<sup>411</sup>

## **4. PARTICULAR ISSUES**

### **4.1. Multiple (Competing) Assignments**

A particular issue that should be tackled first is that of multiple (competing) assignments. The conflict rule laid down in article 10(2) Conflicts Property Act, which refers the proprietary effects of assignment to the law applicable to the underlying contract between the assignor and the assignee, is perfectly able to solve situations of multiple (competing) assignments. Unfortunately, opponents to such a conflict rule usually claim that it is not. The rule has even been accused of leading to a deadlock situation in circumstances in which a receivable has been assigned multiple times and each assignment is governed by a different law. Such a multiple assignment would lead to a priority conflict between the various assignees, for which a conflict rule referring assignment to the law governing the underlying contract between the assignor and the assignee would provide no solution.<sup>412</sup> This point of criticism is clearly wrong and is based on a - regrettably very persistent - misunderstanding. The proper approach to any situation of multiple (competing) assignments is to bear in mind that even if a claim has been assigned multiple times, there will always be a first and a 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

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<sup>411</sup> See also Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, Munich, 2006, pp. 11-12.

<sup>412</sup> See e.g. F.J. Garcimartín Alférez, *Assignment of claims in the Rome I Regulation: Article 14*, in Franco Ferrari, Stefan Leible (eds.), *Rome I Regulation. The law applicable to contractual obligations in Europe*, 2009, pp. 237-238; Harry Sigman, Eva-Maria Kieninger, *The Law of Assignment of Receivables: In Flux, Still Uncertain, Still Non-Uniform*, in Harry Sigman, Eva-Maria Kieninger (eds.), *Cross-border Security over Receivables*, Munich, 2009, p. 61.

proprietary rights that have, by virtue of the first assignment, been established in accordance with the law governing the first assignment have to be recognised.<sup>413</sup>

Example. Assignor A firstly assigns its claim against his debtor to assignee B and secondly to assignee C. The first assignment is governed by English law, whereas the second assignment is governed by Italian law.

In such a case, the proprietary effects of the first assignment A-B would have to be determined by English law and those of the second assignment A-C by Italian law. In judging the proprietary effects of the second assignment from A to C, however, the earlier transfer of the claim from A to B should not be disregarded. 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 applicable to the assignment from A to C (Italian law) protection is offered to C as a *bona fide* assignee.<sup>414</sup>

This approach has been criticized in a recent article for being “too much tilted towards the Dutch/German approach (under which the first assignment prevails) (...)”, for it would “not pay sufficient regard to the English approach (under which the second assignee may gain priority if he is unaware of the first assignment and is the first to notify the debtor)”.<sup>415</sup> It is submitted that this point of criticism cannot be justified. Whether the second assignment eventually prevails, will entirely depend on the extent to which the law governing that second assignment protects *bona fide* assignees. If in our example the second assignment A-C is governed not by Italian but by English law and English law indeed offers protection to assignee C as long as he is unaware of the first assignment A-B and is the first to notify the debtor (e.g. when the first assignment A-B was of a undisclosed nature), then assignee C would indeed become entitled to the claim.

It has to be underlined that this is not in any way different from the approach that would be used in cases of multiple transfers of tangible property.<sup>416</sup>

Example. A sells a painting to B and transfers title to the painting to B in England, while remaining in possession of the painting (a transfer *constitutum possessorium*). A then subsequently takes the painting to Italy, where he sells and delivers it to C.

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<sup>413</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, pp. 17-18.

<sup>414</sup> See also *ibid.*, p. 18.

<sup>415</sup> See Trevor Hartley, *Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation*, International and Comparative Law Quarterly 2011, p. 51 (footnote 58).

<sup>416</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, p. 18.

Consistent with the *lex situs* rule, the first transfer A-B has to be determined in accordance with English law and the second transfer A-C in accordance with Italian law. As a result of the first transfer, A will have lost his power to dispose of the painting. A subsequent transfer of A to C may nevertheless be effective, if according to Italian law C's title as *bona fide* purchaser has precedence to that of the original owner B. Such a result will beyond doubt be recognised by the English courts under the *lex situs* rule.<sup>417</sup> It is submitted that the same approach be adopted in case of multiple (competing) assignments of the same claim.

#### **4.2. Prohibition of Security Assignments**

Article 3:84(3) Dutch Civil Code contains the so-called prohibition of *fiducia* (*fiduciaverbod*). A legal act which intends to transfer property for purposes of security or which does not have the purpose of vesting title in the acquirer may not result in a valid legal transfer of that property. As a result of this provision, an assignment by way of security stands a chance of being invalid. Claims that would in other jurisdictions be subject to a security assignment, will consequently have to be pledged if the transfer of the claims is governed by Dutch law. In some transactions, however, a right of pledge will not be considered an appropriate alternative. In this respect the State Committee referred to the following (summarized) example.<sup>418</sup>

Example. A Dutch airline company intends to bring an aircraft into use. With the aim of gaining tax advantages, the aircraft is sold and delivered by an aircraft constructor to a foreign investment company. The investment company finances the purchase partly from its own capital and partly from external funds, provided for by a Dutch bank under a loan agreement. The investment company leases the aircraft to the airline company and assigns its rights to receive the lease instalments to the bank, as security for the repayment of the loan. In addition, the airline company deposits with the bank an amount of money equal to the amount lent by the bank to the investment company.

Since in this example the bank is both debtor and creditor to both the investment company and the airline company, the bank will have the possibility of set-off. More specifically, in relation to the airline company the bank will be able to set off its rights to receive the lease instalments against its obligation to pay interest on the amount received on deposit. In relation to the investment company the bank will be able to set off its rights to receive interest under the loan agreement against its obligation to turn over the lease instalments. The possibility of set-off is, however, not available in the case where the bank has only been granted a right of pledge

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<sup>417</sup> Cf. Lawrence Collins (red.), *Dicey, Morris and Collins on the Conflict of Laws*, 2006, No. 24-061 and 24-062. A classic example is *Winkworth v. Christie Manson and Woods Ltd and Another* [1980] 2 WLR 937.

<sup>418</sup> See the Report of the State Committee, p. 48.

over the lease instalments.<sup>419</sup> The Dutch conflict rule allows the parties to such a transaction to make use of a security assignment instead of a right of pledge. For, it is the law applicable to the loan agreement that governs the proprietary effects of the assignment. If, for example, the loan agreement is governed by English law, it will be English law that determines whether a security assignment is valid and effective.

### **4.3. Transfer of Security Interests and Other Ancillary Rights**

The assigned receivables may be secured by security interests, in which case the question arises as to whether the assignment results in the security interests being transferred as ancillary rights as well.

Example. As part of a securitisation transaction a Dutch originator (a bank) assigns its receivables arising from loan agreements secured by rights of mortgage to an English SPV

Which law determines whether in such an example the mortgages are transferred as ancillary rights? It is submitted that this issue is not governed by the law applicable to the assignment of the receivables. Instead it has to be dealt with in accordance with the law applicable to the ancillary security interest itself, e.g. the *lex situs* of the immovables subjected to the right of mortgage.<sup>420</sup> Similarly, if the ancillary right is not a right of mortgage over an immovable but a right of pledge over the receivable itself, it would be the law governing the right of pledge that determines whether the right of pledge passes to the assignee. In case the law governing such an ancillary right of pledge or mortgage is Dutch law, article 6:142 Dutch Civil Code would provide that the transfer of a receivable by way of assignment results in the assignee also obtaining all ancillary rights, including rights of pledge and mortgage.<sup>421</sup>

### **4.4. The Assignability of a Claim**

The law governing a receivable also determines its assignability, as is stated in article 14(2) Rome I and article 10(1) Conflicts Property Act. Assignability means the capability of a receivable to be the object of an assignment. Whether a claim may be assigned will under the law of the Netherlands have to be decided on the basis of article 3:83 Dutch Civil Code. Its first paragraph provides that ownership, limited rights and receivables are freely transferable, unless this is precluded by law

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<sup>419</sup> See also the Report of the State Committee, p. 49; N.E.D. Faber, *Verrekening* (dissertation Nijmegen), Deventer, 2005, p. 27.

<sup>420</sup> See article 2 Conflicts Property Act.

<sup>421</sup> See also Henk Snijders, Eline Benoeming Rank-Berenschot, *Goederenrecht (Studiereeks Burgerlijk Recht)*, 2007, p. 298; F.H.J. Mijnsen & P. de Haan e.a., *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. 3. Goederenrecht. Deel I. Algemeen goederenrecht*, 2006, no. 282.

or by the nature of the right. A statutory provision preventing the assignment of a claim is for example to be found in article 7:633(1) Dutch Civil Code, limiting the assignability of wages below a certain threshold, the so-called “protected earnings level” (*beslagvrije voet*, see also article 475b *et seq.* Dutch Code of Civil Procedure).<sup>422</sup> The assignability of a receivable may also be precluded due to its highly personal nature, as is the case with respect to pension and alimony claims.<sup>423</sup>

According to article 3:83(2) Dutch Civil Code the assignability of a claim may additionally be excluded by way of an agreement to that effect between the assignor and the debtor. Here we see again the interaction between the assignment’s obligational and proprietary issues that has already been mentioned in paragraph 2.1 above. The law governing the receivable not only determines the question as to whether a non-assignability clause has been validly agreed between the assignor and the debtor, but also the question as to whether such a clause actually prevents the assignment of the receivable to the assignee. If the governing law is Dutch law, violation of a non-assignability clause not only results in the assignor being liable toward the debtor for breach of contract, but also in the invalidity of the assignment itself.<sup>424</sup> Since under the law of the Netherlands in such cases there is hardly any protection available to *bona fide* assignees, a non-assignability clause has almost absolute effect.<sup>425</sup>

#### 4.5. Future Receivables

The assignment of future receivables involves the following three issues, which have to be dealt with separately: (i) whether a claim is considered to be future or an already existing claim; (ii) whether a future claim may be assigned in advance; and (iii) what requirements apply to such an assignment in advance. The first issue will obviously be determined by the law governing the claim. Which conflict rule applies to the second issue, however, is less self-evident. Although it is submitted that it is most appropriate to refer this issue to the conflict rule relating to the assignment’s proprietary effects (article 10(2) Conflicts Property Act), the Dutch Supreme Court decided otherwise.<sup>426</sup> According to the Court this issue is governed

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<sup>422</sup> See also Wim Reehuis et al, *Pitlo. Het Nederlands burgerlijk recht. Deel 3. Goederenrecht*, 2006, p. 73.

<sup>423</sup> See also *ibid.*, pp. 74-75.

<sup>424</sup> As has been confirmed in Hoge Raad 17 January 2003, *Nederlandse Jurisprudentie* (NJ) 2004, no. 281 (Oryx/Van Eesteren). See also Wim Reehuis et al, *Pitlo. Het Nederlands burgerlijk recht. Deel 3. Goederenrecht*, 2006, pp. 75-76, 80-82; Hendrik Verhagen, M.H.E. Rongen, *Cessie (preliminary advice Association for Civil Law (Vereniging voor Burgerlijk Recht))*, 2000, pp. 96-118.

<sup>425</sup> A *bona fide* assignee may only be protected within the limits of article 3:36 Dutch Civil Code, applicable in case an assignee justifiably relied on statements or actions of the debtor that wrongly suggested the assignability of the claim.

<sup>426</sup> Hoge Raad 11 June 1993, *Nederlandse Jurisprudentie* (NJ) 1993, no. 776 (Caravan Centrum Zundert et al/Kreuznacher Volksbank AG I). Contrary views have been expressed in Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, 2006, p. 43; Harry Sigman, Eva-Maria Kieninger, *The Law of Assignment of Receivables: In Flux, Still Uncertain, Still Non-Uniform*,

by the proper law of the future claim, in other words the law governing the contract from which the claim will arise (article 14(2) Rome I and article 10(1) Conflicts Property Act). The third issue is, of course, governed by the law that is applicable to the proprietary effects of assignment.

Example. A Dutch lessor leases rolling stock to a Dutch lessee. The (operational) lease agreement is governed by Dutch law. All lease receivables arising under the lease agreement are sold and assigned to a German SPV, under a receivables purchase agreement governed by German law.

In such an example it will be for Dutch law to decide whether the lease receivables are considered to be existing or future receivables. According to Dutch Supreme Court case law, lease receivables have to be regarded as future receivables insofar as they correspond to future periods in time.<sup>427</sup> Dutch law additionally governs the question as to whether future receivables may be assigned in advance. As a general rule, article 3:97 Dutch Civil Code provides that future assets may be delivered in advance. The manner in which such an assignment in advance has to be realised will on the other hand be determined by German law as the law applicable to the underlying agreement between the assignor and the assignee (the receivables purchase agreement).

Were this latter issue, e.g. the assignment of future claims in advance, to be governed by Dutch substantive law, the following should be noted. Dutch law only recognises an undisclosed assignment in advance of future claims that are directly acquired from a legal relationship that already exists at the time of the assignment.<sup>428</sup> The availability of a disclosed assignment is, of course, also limited, but merely in a practical way, resulting from the requirement of notification of the assignment to the - future - debtor. A - successful - assignment in advance generally leads to the assignee becoming entitled to the claim as soon as it comes into existence. This result may however be precluded by insolvency proceedings opened in respect of the assignor (see further paragraph 6.2 below).

#### **4.6. The Position of the Debtor**

According to both article 10(3) Conflicts Property Act and article 14(2) Rome I the position of the debtor is established by the provisions of the proper law of the assigned claim. This law determines the conditions under which the assignment

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in: Harry Sigman, Eva-Maria Kieninger (eds.), *Cross-border Security over Receivables*, 2009, p. 44-45.

<sup>427</sup> Hoge Raad 30 January 1987, *Nederlandse Jurisprudentie* (NJ) 1987, no. 530 (Westland Utrecht/Emmerig q.q.).

<sup>428</sup> See article 3:94(3) Dutch Civil Code. See also Henk Snijders, Eline Benoeming Rank-Berenschot, *Goederenrecht (Studiereeks Burgerlijk Recht)*, 2007, p. 345; F.H.J. Mijnsen & P. de Haan e.a., *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht. 3. Goederenrecht. Deel I. Algemeen goederenrecht*, 2006, no. 281f.

may be invoked against the debtor, as well as the question of whether performance by the debtor leads to a discharge of his obligations. If the assigned claim is governed by Dutch law, these questions will accordingly have to be answered on the basis of Dutch law, e.g. meaning that an assignment may only be invoked against the debtor after its notification and that in addition only after notification a debtor may discharge himself by making payments to the assignee (regardless of the debtor having factual knowledge of the assignment, see also paragraph 2.2).

An interesting related question is whether the debtor may continue to discharge himself by way of set-off against claims he has against the assignor. After a disclosed assignment, the debtor's right of set-off is limited. He may set off his debt to the assignee against a claim he has against the assignor only if (i) both arise out of the same legal relationship or (ii) the debtor's claim against the assignor became due and payable prior to notification of the assignment.<sup>429</sup> For non-disclosed assignments this is different. Since a non-disclosed assignment does not prevent the debtor from obtaining discharge by making payments to the assignor, the debtor will equally be able to continue to set off his debt against a claim he has on the assignor, as long as he has not been notified of the assignment. The proper law of the assigned claim may not only decide whether the debtor may rely on set-off, but also the set-off itself. In case the assigned claim and the counter-claim of the debtor are governed by different laws, it will according to article 17 Rome I be the law applicable to the claim against which the right to set-off is asserted that determines whether set-off may be relied on. In case the debtor invokes the right to set-off, the applicable law will be the law governing the assigned claim.

## **5. THE ASSIGNMENT'S "OTHER THIRD-PARTY EFFECTS"**

Under Dutch law, a distinction may not so much be drawn between the *inter partes* and *erga omnes* proprietary effects of an assignment (as has already been stated in paragraph 3.2 above), but instead between the assignment's proprietary effects on the one hand and other third-party effects on the other. Such "other third-party effects" will include issues that do not belong to the assignment's proprietary effects, but nevertheless are closely related to them. An important example under Dutch law is formed by the rules on recourse by creditors against assets owned by their 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 third party B.<sup>430</sup> In other words, from a property law perspective the attached claim is still transferred from the patrimony of assignor A to that of assignee B. As a consequence of articles 475h(1) and 720 of the Dutch Code of Civil Procedure

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<sup>429</sup> See article 6:130(1) Dutch Civil Code.

<sup>430</sup> As has been confirmed in Hoge Raad 20 February 2009, Nederlandse Jurisprudentie (NJ) 2009, no. 376 (Ontvanger/De Jong).

(*Wetboek van Burgerlijke Rechtsvordering*), however, the assignment cannot be invoked against the creditor who levied the attachment. In other words, the assignment from A to B, although *intrinsically valid* as a matter of property law, may still be ignored by creditor C. This is a legal fiction: although in reality a transfer of the claim from A to B has taken place, C can treat the claim as *if* it still belonged to A.<sup>431</sup>

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 mentioned above, 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 10(2) Conflicts Property Act. As a consequence, although a claim may have transferred under the (property) law applicable pursuant to article 10(2) Conflicts Property Act, the question as to whether certain creditors may ignore this transfer, because the claim has been attached or because the assignment constitutes a voidable preference, may be governed by a different law.<sup>432</sup>

## **6. ASSIGNMENT AND INSOLVENCY SITUATIONS**

### **6.1. European Insolvency Regulation<sup>433</sup>**

The effectiveness of an assignment will of course be crucial in the event of insolvency proceedings opened in respect of the assignor. Therefore, in this paragraph 6.1 we will shortly consider some relevant rules relating to cross-border insolvency proceedings in general. In the following paragraph 6.2 we will examine certain rules of Dutch insolvency law in more detail.

On the basis of article 3(1) of the European Insolvency Regulation the courts of the EU Member State in which the assignor has its centre of main interests ("COMI") will have jurisdiction to open (main) insolvency proceedings in respect of the assignor. In case the assignor is a company or legal person, its COMI is - without proof to the contrary - deemed to be located at its place of incorporation. Article 4 European Insolvency Regulation subsequently provides that the *lex concursus*

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<sup>431</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, p. 10.

<sup>432</sup> See also Hendrik Verhagen, Sanne van Dongen, *Cross-Border Assignments under Rome I*, Journal of Private International Law 2010, p. 11.

<sup>433</sup> Council regulation 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000, L 160/1 ("European Insolvency Regulation").

governing the insolvency proceedings will be the law of the EU Member State where the proceedings are opened. However, the European Insolvency Regulation provides several exceptions to this rule.

One of the most important exceptions is to be found in article 5 European Insolvency Regulation. This provision implies that the opening of insolvency proceedings shall not affect rights *in rem* on property that is located outside of the EU Member State at the opening of the proceedings. Consequently, the opening of insolvency proceedings has no implications for e.g. security assignments (as well as charges) on claims that have to be located outside that EU Member State. What is important here is the location of the claim, not the law applicable to the security assignment's proprietary effects. For the purposes of article 5 European Insolvency Regulation, article 2(g) locates claims in the EU Member State in which the debtor has its COMI (see also paragraph 6.2 below).<sup>434</sup>

## **6.2. Dutch Insolvency Law**

Assuming that the assignor's COMI is in the Netherlands, it may be subject to Dutch bankruptcy proceedings (*faillissement*), governed by Dutch law as *lex concursus*. In such a situation, article 35 of the Dutch Bankruptcy Act (*Faillissementsrecht*) may result in certain assignments not being effective as against the insolvent estate. Firstly, article 35(1) Dutch Bankruptcy Act affects assignments that have not been completed on the day of the opening of the proceedings. Whether or not an assignment is completed, will have to be determined according to the law governing the proprietary effects of that assignment, e.g. the proper law of the underlying contract between the assignor and the assignee. This may very well be a different law than that of the Netherlands. Secondly, the assignment of future claims may be prevented by article 35(2) Dutch Bankruptcy Act. An assignment in advance may not be invoked against the insolvent estate insofar as the assignment relates to receivables that on the day of the opening of the proceedings are still deemed to be future receivables. As explained in paragraph 4.5 above, this has to be determined in accordance with the law governing the receivables to be assigned, which may equally result in the applicability of another law than Dutch law.

Article 35(2) Dutch Bankruptcy Act raises an interesting question when looked at from the perspective of Article 5 European Insolvency Regulation. The question concerns the following example.

Example. A lessor, with its COMI in the Netherlands, has leased property situated in Germany to a lessee with its COMI in Germany, pursuant to an (operational) lease agreement governed by Dutch law. The lessor has sold the lease rentals to a Dutch factoring company and assigned the (future) lease receivables in advance by way of

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<sup>434</sup> See further on article 5 European Insolvency Regulation Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, 2006, pp. 73-74.

a disclosed assignment governed by Dutch law. During the term of the lease the lessor is declared bankrupt in the Netherlands. Pursuant to article 35(2) Dutch Bankruptcy Act the lease receivables accruing after the commencement of the insolvency proceedings would vest in the insolvent estate.

The question is whether article 5 European Insolvency Regulation provides protection against article 35(2) Dutch Bankruptcy Act, when the debtor of the assigned receivables has its COMI in another member state. It could be argued that it does not, since article 5 European Insolvency Regulation only protects rights *in rem* existing at the time of opening of insolvency proceedings. In the example above, although the assignment has already taken place in advance, the assignee has not yet acquired title to the receivables, as they have not yet come into existence. We would argue, however, that where the law governing the assignment's proprietary effects allows the assignment of future receivables, to the effect that once the receivables come into being they would (in the absence of insolvency) be automatically acquired by the assignee, the latter already has obtained a right *in rem* deserving protection under article 5 European Insolvency Regulation.<sup>435</sup> This interpretation brings the effects of an assignment of future receivables more in line with those of other jurisdictions, where receivables arising under contracts which have already come into existence before the commencement of insolvency proceedings can be subjected to a "bankruptcy-proof" assignment.<sup>436</sup> Whether Dutch courts would be prepared to adopt this approach can, however, not be predicted.

Another - temporary - obstacle that may be relevant for the assignee under a security assignment (or the chargee under a charge), is a moratorium (*afkoelingsperiode*), that may be granted by the bankruptcy judge on the basis of article 63a Dutch Bankruptcy Act. During such a moratorium, the assignee (or chargee) may not take recourse against the claim. Pursuant to article 5 European Insolvency Regulation, however, such a moratorium may only affect security rights on claims against debtors who have their centre of main interest in the Netherlands.

## **7. CONCLUSION**

The general legal framework of assignment in the Netherlands, as provided in this report, is the result of a trend towards a more "consensualised" assignment, a trend which can also be found in (the substantive laws of) other European

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<sup>435</sup> For, one could say that the pledgee already has a right *in rem* "in statu nascendi" or a "property expectation" that should be treated in the same manner as a "fully grown" right in rem.

<sup>436</sup> See also Miguel Virgós, Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice*, 2004, p. 101; Hendrik Verhagen, M.H.E. Rongen, *Cessie (preliminary advice Association for Civil Law (Vereniging voor Burgerlijk Recht))*, 2000, pp. 39-41.

jurisdictions.<sup>437</sup> This development has shown itself both in substantive and in private international law. At the level of substantive law, with the undisclosed assignment it has become possible for the assignor and the assignee to agree upon when a claim transfers from the estate of the assignor to that of the assignee. The corresponding conflict rule allows the assignor and the assignee to choose the law applicable to the assignment's proprietary effects. It is important to note that practice in the Netherlands during the fourteen years that have passed since the Hansa-judgment does *not* show an abuse of the freedom to choose the governing law. What it does show instead is the assignor and the assignee usually choosing a "related" law, such as the proper law of the assigned claim or the law of the residence of the assignor, varying their choice according to the need to efficiently structure each individual transaction. In - apparently very rare - situations in which party autonomy is abused, e.g. where a law has only been chosen in order to frustrate the rights of the assignor's creditors, solutions are provided for by tools such as voidable preference (*actio pauliana*), tort, *fraus legis* or *ordre public*. It is therefore submitted that the conflicts rule applicable to the assignment's proprietary aspects should be in line with this trend of consensualisation. This could easily be achieved by removing the current, unconvincing division between property aspects "*inter partes*" and "*erga omnes*", e.g. by clarifying that the latter property aspects are also included in the wording "property aspects" of recital 38 of the preamble to Rome I and, as a result, in the term "relationship" in article 14(1) Rome I.

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<sup>437</sup> See also Axel Flessner, Hendrik Verhagen, *Assignment in European Private International Law*, 2006, p. 23; Hendrik Verhagen, M.H.E. Rongen, *Cessie (preliminary advice Association for Civil Law (Vereniging voor Burgerlijk Recht))*, 2000, pp. 28-31.