

*CONFLICT OF LAWS FOR THE ASSIGNMENT  
OF RECEIVABLES: FROM A  
PROPERTY-CONTRACT APPROACH TO A  
RIGHTS-BASED APPROACH*

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### How to cite:

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**CONFLICT OF LAWS FOR THE ASSIGNMENT OF RECEIVABLES: FROM  
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**by**

**Kittiwat Chunchaemsai**

**Abstract**

The conflict of laws relating to the assignment of receivables raises characterisation difficulties. Based on the property-contract approach currently employed in legal systems, the characterisation of legal issues as contractual and proprietary results in complications. No general solution can be reached regarding the proprietary aspects of assignment, especially third parties' effectiveness and priority issues. This thesis establishes that the core cause of the difficulty resides in the property-contract approach itself. It therefore attempts to provide a new approach to the conflict of laws for assignment, namely, a rights-based approach. It argues against the property-contract approach on the ground that assignment is not a hybrid of contract and property. Rather, it proves that the true legal nature of assignment is not the transfer of items of property, but a contractual method for transferring contractual rights to payment in receivables. The assignment of receivables not only creates triangular relationships between assignor, assignee and debtor, but also has external effects on third parties. In the rights-based approach, there is no need to differentiate between the contractual and proprietary aspects of assignment. The conflict of laws for assignment is established based on the relationships of rights between relevant persons, i.e. the relationship of rights between assignor and assignee, that between assignee and debtor, and the relationship of rights as it affects third parties including priority issues. These are proposed as being governed by the law of assignment and of assigned receivables. The rights-based approach eliminates the need to refer to property law and resolves characterisation difficulties. Consequentially, it grants an opportunity to modernise and harmonise the law of assignment based on contract law. In this way, positive outcomes vis-à-vis the financial practice concerning the assignment of receivables are the end result of this approach.

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**by**

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*Submitted in accordance with the requirements for the degree of  
Doctor of Philosophy*

Durham Law School

Durham University

2015

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## List of abbreviations

Am Bankr LJ	American Bankruptcy Law Journal
Am JCL	American Journal of Comparative Law
Am JIL	American Journal of International Law
Anglo-Am L Rev	Anglo-American Law Review
BJIBFL	Butterworths Journal of International Banking and Financial Law
BUL Rev	Boston University Law Review
Bus Law	Business Lawyer
BYIL	British Yearbook of International Law
Cal L Rev	California Law Review
CBLJ	Canadian Business Law Journal
CBR	Canadian Bar Review
Chi-Kent L Rev	Chicago-Kent Law Review
CLJ	Cambridge Law Journal
Colum J Transnat'l L	Columbia Journal of Transnational Law
Colum L Rev	Columbia Law Review
Cornell L Rev	Cornell Law Review
CUP	Cambridge University Press
Dick L Rev	Dickinson Law Review
ELF	European Legal Forum
ERPL	European Review of Private Law
EUP	Edinburgh University Press
Gonz L Rev	Gonzaga Law Review
Harv L Rev	Harvard Law Review
Hastings Const LQ	Hastings Constitutional Law Quarterly
Holdsworth L Rev	Holdsworth Law Review
HUP	Harvard University Press
IBLJ	International Business Law Journal
ICLQ	International and Comparative Law Quarterly
ICR	International Corporate Rescue
IJGLS	Indiana Journal of Global Legal Studies
Ill L Rev	Illinois Law Review
JBF	Journal of Banking and Finance
JBL	Journal of Business Law
JCL	Journal of Contract Law
JIBFL	Journal of International Banking and Financial Law
JLS	Journal of Legal Studies
JPIL	Journal of Private International Law
JSAL	Journal of South African Law
KCLJ	King's College Law Journal
LCP	Law and Contemporary Problems
LFMR	Law and Financial Markets Review
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LSUP	Louisiana State University Press
McGill LJ	McGill Law Journal
MLR	Modern Law Review
Neb L Rev	Nebraska Law Review
Nw J Int'l L & Bus	Northwestern Journal Of International Law and Business

OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
RJCIPL	Rabel Journal of Comparative and International Private Law
Sellier	Sellier European Law Publishers
Stellenbosch L Rev	Stellenbosch Law Review
SUP	Stanford University Press
Tex Int'l LJ	Texas International Law Journal
Tul J Int'l & Comp L	Tulane Journal of International and Comparative Law
Tul L Rev	Tulane Law Review
UCLA L Rev	UCLA Law Review
ULR	Uniform Law Review
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
U Pa L Rev	University of Pennsylvania Law Review
Va J Int'l L	Virginia Journal of International Law
Yale LJ	Yale Law Journal

## **Statement of Copyright**

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## **Acknowledgements**

First and foremost, I would like to express my sincerest gratitude to my primary supervisor, Dr Orkun Akseli, for his invaluable supervision, patience, support, and motivation during these three years. I am also extremely grateful to my secondary supervisor, Dr Jonathan Mukwiri, for his advice and guidance in completion this thesis.

I would additionally like to thank Thammasat University for the scholarship offered for my doctoral studies. Many thanks also go to my friends for their understanding, support and encouragement throughout the process of this Ph.D.

Last but not least, I would like to express my deepest gratitude to my parents for their never-ending love, support and belief. Without them, I would not be where I am today.

*To my dear parents*

## CHAPTER 1: INTRODUCTION

This research focuses on conflict of laws relating to international voluntary assignments of receivables.<sup>1</sup> As an overview, there are three main legal subjects that are studied as these constitute the core substance of the thesis. The first subject is receivables, which are the object of assignment. The second subject is assignment, which is the method of transfer. While these two are substantive laws for the assignment of receivables, the third subject is conflict-of-law rules for an international assignment of receivables.

On the substantive aspect, this research questions the legal nature of the assignment of receivables. It argues against the notion that assignment has a hybrid legal nature involving contract and property. It intends to advance the notion that receivables are intangible and contractual rights. Assignment is a contractual method for transferring receivables. The true substantive nature of an assignment is a contractual matter. The legal treatment of assignment differs substantially from the traditional concept of property law which has been developed on the basis of tangible things.

From a conflict-of-laws perspective, this thesis doubts that the property-contract approach is the best solution to assignment in international scenarios. It will propose a rights-based approach to deal with assignment. In contrast to the property-contract approach, conflict-of-law rules under the rights-based approach are based on the true

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<sup>1</sup> Voluntary assignments are assignments that parties voluntarily choose or intend to make and effect. Involuntary assignments, by contrast, are assignments that occur by operation of law, such as subrogation of surety or insurance contracts and succession; see M Smith, *Law of assignment: the creation and transfer of choses in action* (OUP 2007) ch 16; the scope of this thesis is also limited to assignments by way of contract. Other forms of activities which can be viewed as assignments, such as by way of trust, are beyond the scope of this research. See OR Marshall, *The assignment of choses in action* (Pitman 1950) 80–99.

For the term receivables, it can be used to cover receivables either created by or originated from contracts and other legal actions. An example of the latter is a tort claim. However, it is not within the scope of this thesis. It is only contractual receivables that are the subject of the thesis. This matter is explained further in Chapter 2.

legal nature of assignment, i.e. an international transfer of contractual rights. Rather than characterising the legal issues arising out of assignment into contractual and proprietary, the rights-based approach treats them all together. Characterisation difficulties resulting from the mixing of contract and property will thus be resolved. The central claim in the thesis is that an international assignment of receivables should be regarded as a purely contractual matter. With everything considered, the current law which is based on the property-contract approach is inappropriate for the assignment. The rights-based approach is the methodology that ought to be adopted into a legal system the rules of which relate to the assignment, specifically conflict-of-law rules.

To introduce this thesis in more detail, the content of this chapter is structured as follows: firstly, the background to and development of this topic are illustrated in the first section. Next, the research question this thesis intends to address is presented in the second section. The research methodology this thesis utilises to develop its content is stated in the third section. Then, in the fourth section, the originality in research and significant contribution to knowledge are brought out. Finally, the whole structure of the thesis is described in the fifth section.

## **1.1 Research background**

It is not surprising that some leading legal scholars when referring to conflict of laws declare in their textbooks and articles that conflict-of-law rules for intangible things, e.g. receivables, are especially difficult to state with certainty.<sup>2</sup> This subject is also one

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<sup>2</sup> AV Dicey, L Collins, JHC Morris, *Dicey, Morris and Collins on the conflict of laws* (15th edn, Sweet & Maxwell 2012) 1355; JJ Fawcett, JM Carruthers and PM North, *Cheshire, North & Fawcett: private international law* (14th edn, OUP 2008) ch 30; M Bridge, 'The proprietary aspects of assignment and choice of law' (2009) 125 LQR 671; R Fentiman, 'Assignment and Rome I: towards a principled solution' (2010) 4 LFM 405; TC Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (2011) 60 ICLQ 29; H Beale, M Bridge, L Gullifer and E

of the most intractable areas of private international law.<sup>3</sup> Its complexity stems from various difficulties which are linked to the nature of receivables themselves, as well as their appearance in different governing legal systems involving international financing and secured transactions in cross-border activities.<sup>4</sup> Because of their nature, i.e. they only exist as legal rights or claims, the traditional approach of property law is unsuitable to regulate transfers of receivables. Traditional conflict-of-law rules for property which focus on the law of the place where things are located cannot be easily specified. Such an approach is likely to create complexity and confusion, in both theory and practice, regarding dynamic diversification in the trade and transfer of inherent rights in such intangible things.<sup>5</sup> Given the vast amount of international trade and many transfers of receivables in international financial markets, which are subject to different legal systems, comprehensive proposals from practitioners and academics to modernise and harmonise this area of law are required in order to facilitate financing activities linked to receivables.<sup>6</sup>

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Lomnicka, *The Law of Security and Title-Based Financing* (2nd edn, OUP 2012) 677; P Rogerson, *Collier's conflict of laws* (4th edn, CUP 2013) 396.

<sup>3</sup> JM Carruthers, *The transfer of property in the conflict of laws: choice of law rules concerning Inter Vivos transfers of property* (OUP 2005) 145; M Moshinsky, 'The assignment of debts in the conflict of laws' (1992) 108 LQR 591.

<sup>4</sup> Problems regarding conflict of laws are present in many aspects of international financing and secured transactions, for either tangible or intangible things. But, as stated at the beginning, this thesis only deals with international assignments involving receivables. See, for example, Beale, et al. (n 2) ch 22; A McKnight, *The Law of International Finance* (OUP 2008) ch 4.

<sup>5</sup> Intangibles rights cover a wide range of things. There are, for instance, (a) those which are pure intangibles or rights in actions which are contractual in nature such as a receivable from a loan or a sale contract; (b) those which are negotiable instruments and shares; and (c) those which are intellectual property such as copyright and trademarks. See Carruthers (n 3) 144–145; Dicey, et al. (n 2) 1155–1356; Fawcett, Carruthers and North (n 2) 1225; Rogerson (n 2) 396.

<sup>6</sup> See, for example, NB Cohen, 'Harmonizing the Law Governing Secured Credit: The Next Frontier' (1998) 33 Tex Int'l LJ 173; Buxbaum HL, 'Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform' (2003) 8 ULR 321; Goode R, 'Harmonised Modernisation of the Law Governing Secured Transactions: General-Sectorial, Global-Regional – An Overview' (2003) 8 ULR 341; NO Akseli, 'International harmonisation of credit and security laws: the way forward' in M Andenas and CB Andersen, *The theory and practice of harmonisation* (Edward Elgar 2012) 551–571; also HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009); NO Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (Routledge 2011) ch 8; BIICL, 'Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person'

An assignment of receivables has been regarded as a hybrid legal institution of contract and property.<sup>7</sup> A receivable, such as a loan or a sale price, comes from a contract, e.g. a contract for a loan and a contract for a sale. But it is also treated as a kind of property. When a receivable is transferred by way of assignment, it is seen as not only a contractual right that is assigned, but also a property. The assignment of receivables can be done by way of either sale or security. By sale, receivables are transferred outright from an assignor to an assignee. By security, receivables are used as security or collateral, e.g. to secure a loan. In terms of legal effects, while the former is a transfer of proprietary rights, the latter creates a security interest in the receivables.<sup>8</sup> Turning to an international assignment where a foreign element is involved and the laws of several jurisdictions may be linked as a governing law, conflict-of-law rules are thus needed to decide what law(s) shall be an appropriate applicable law. A suitable connecting factor must be found to establish an appropriate link between assignment and jurisdiction. Law(s) must be chosen from among the various jurisdictions.<sup>9</sup> A central role of conflict-of-law rules is to identify substantive rules that shall regulate a cross-border assignment.<sup>10</sup> Without conflict-of-law rules, persons who are involved in the assignment will not know with certainty what are their rights and obligations that flow from the assignment. Without knowing what the applicable law is, their legal positions cannot be determined. From the concept that an assignment is a hybrid of contract and property, conflict of laws relating to both contract and property is brought into the picture in order to deal with an assignment in an international context. As has been stated, this is a legal

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<[http://ec.europa.eu/justice/civil/files/report\\_assignment\\_en.pdf](http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf)> accessed 9 October 2015; European Commission, 'Action Plan on Building a Capital Markets Union' (COM (2015) 468 final) 23.

<sup>7</sup> A Flessner and H Verhagen, *Assignment in European private international law: claims as property and the European Commission's "Rome I Proposal"* (Sellier 2006) 2–4; Bridge (n 2) 677–678; Dicey, et al. (n 2) 1356–1357.

<sup>8</sup> Beale, et al. (n 2) 286; this matter is considered in Chapter 3.

<sup>9</sup> See Rogerson (n 2) ch 9; TC Hartley, *International commercial litigation: text, cases and materials on private international law* (OUP 2009) ch 22.

<sup>10</sup> See A Dickinson, 'European private international law: embracing new horizons or mourning the past' (2005) 1 JPIL 197.

area where the ‘autonomous law of contract collides with [the] non-autonomous law of property’.<sup>11</sup>

An explicit example of a conflicting approach between contract and property occurs in the *Raiffeisen* case.<sup>12</sup> In this case, it was argued by a third party that the assignment between assignor and assignee of the claim under the insurance contract was not valid since it did not satisfy the requirement of notifying the debtor in the appropriate way, as required by French law. The assignment was not perfected, i.e. it was not made effective against third parties. This is typically regarded as a proprietary matter. The Rome Convention 1980,<sup>13</sup> Article 12, was the law applicable at the time of the case. According to an authoritative report, Article 12 of the Rome Convention was not intended to apply to proprietary matters of an assignment.<sup>14</sup> Rather, it was suggested that such a matter, which is about the method for passing a property, should be governed by the *lex situs* of the assigned receivables.

Despite that, Mance LJ in the English Court of Appeal characterised the question as contractual and not proprietary.<sup>15</sup> The issue was viewed as what steps were necessary for an assignment to take place between an assignee and a debtor. It concerned the relationship between assignee and debtor. And this did not involve any property rights, it was simply a contractual matter. The judgment was that the effect of the assignment in question was determined by reference to the law of the assigned claim, according to Article 12(2) of the Rome Convention. That was English law while the law of *lex situs* of the receivable would be French law.<sup>16</sup> Today, this problem would be decided under

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<sup>11</sup> Bridge (n 2) 677.

<sup>12</sup> *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

<sup>13</sup> The 1980 Convention on the Law Applicable to Contractual Obligations (‘Rome Convention’).

<sup>14</sup> M Giuliano and P Lagarde, ‘Report on the Convention on the law applicable to contractual obligations. Official Journal C 282, 31 October 1980’ (1980) 10.

<sup>15</sup> *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, para 34.

<sup>16</sup> *ibid* paras 43, 81 and 83.

Article 14 of the Rome I Regulation<sup>17</sup> which is the descendant of the Rome Convention. Based on the approach developed by this case, it would give the same result.

The development of principles and practice for conflict-of-law rules dealing with an international voluntary assignment of receivables occurs not only in Europe and the United Kingdom but also in the United States. In Europe, to find the most suitable law governing the assignment of receivables, especially for proprietary matters, several solutions have been proposed. The law of the domicile of the owner, the law where the receivable is located, the proper law of the assigned receivables, and recently, according to the Rome I Regulation, the law which applies to the contract of assignment, have been developed and applied.<sup>18</sup> Furthermore, the law of the assignor's habitual residence was proposed when revising the rules.<sup>19</sup> This choice of law is also a rule that has been imposed by the United Nations Convention on the Assignment of Receivables in International Trade ('Receivables Convention').<sup>20</sup> In the United States, the laws which govern various aspects of legal issues arising from assignment, for either absolute transfer or security purposes, are contained in Article 9 of the Uniform Commercial Code ('UCC'). It is the law of the assignor's location that has been advanced as a conflict rule to govern proprietary matters of assignment.<sup>21</sup> Besides, the British Institute of International and Comparative Law ('BIICL') has published a detailed comparative study on the conflict of laws for assignment.<sup>22</sup> This study is an attempt to identify the advantages and disadvantages of contractual and proprietary approaches that are applicable in various countries. Its purpose is to see which conflict-of-law rules would

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<sup>17</sup> EC Regulation 593/2008 on the law applicable to contractual obligations ('Rome I Regulation').

<sup>18</sup> See art 14, recital 38 and art 27(2)

<sup>19</sup> Commission of the European Communities, *Proposal for a Regulation on the Law Applicable to Contractual Obligation (Rome I)* (COM (2005) 650 Final) 19.

<sup>20</sup> Art 30.

<sup>21</sup> S 9-301(1).

<sup>22</sup> BIICL (n 6).



be more suitable for assignment. However, in its conclusion, a comment is made that ‘no general solution is perfect’.<sup>23</sup>

## 1.2 Research questions

When considering the hybrid legal nature of contract and property, legal issues arising from the assignment of receivables are divided into contractual and proprietary. It is the ‘property-contract approach’ to assignment which is currently employed, not only in substantive aspects of law but also in conflict-of-law rules. Characterisation between contract and property is a preliminary matter that must be addressed. Depending on the category that a legal issue is classified under, it will be subject to either conflict-of-law rules for contracts or conflict-of-law rules for property. The property-contract approach, then, points to various possible choices of law rules. They are *lex situs* of receivables, the law of receivables, the law of assignment, the law of the assignor’s location, or even a combination of these rules. Although there are many debates and arguments regarding all these choices,<sup>24</sup> none of them appear to be universally accepted. No choice is perfect. No consensus can be achieved. Choice-of-law rules for assignment remain a mystery subject. This thesis will therefore attempt to provide a solution to this problem.

A core hypothesis of this research is that the property-contract approach does not treat an assignment of receivables according to its true legal nature. The hybrid approach of

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<sup>23</sup> *ibid* 402.

<sup>24</sup> See Dicey, et al. (n 2) 1357–1358; Fawcett, Carruthers and North (n 2) 1226–1240; Carruthers (n 3) ch 6; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 6) ch 8; Rogerson (n 2) 398–400; also Sigman and Kieninger (n 6); Flessner and Verhagen (n 7); Rogerson, ‘The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary and Misleading’ (1990) 49 CLJ 441; Moshinsky (n 3); THD Struycken, ‘The proprietary aspects of international assignment of debts and the Rome Convention, Article 12’ (1998) 3 LMCLQ 345; EM Kieninger and HC Sigman, ‘The Rome-I proposed Regulation and the assignment of receivables’ (2006) 1 ELF 1; Bridge (n 2); Fentiman (n 2); J Perkins, ‘Proprietary issues arising from the assignment of debts: a new rule?’ (2010) 6 JIBFL 333; HLE Verhagen and SV Dongen, ‘Cross-border assignments under Rome I’ (2010) JPIL 1; P Kiesselbach, ‘The assignment of debts: which law applies to the question who has the better proprietary right to an assigned debt?’ (2011) 26 BJIBFL 544; Hartley, ‘Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation’ (n 2); BIICL (n 6)

contract and property is not really the right way to proceed. As explained in the previous section, it cannot produce a harmonised solution. By itself, it raises further complications and only confuses the issue. The main research questions posed by this thesis are as follows: firstly, on the object of assignment, what is the true legal nature of receivables? Are they contractual rights or property? And why in the development of legal practice have they been treated as a kind of (intangible) property? Is it necessary for a receivable to be considered as property for it to be transferable? Secondly, on the method of transfer, what is the true legal substance of an assignment? How is it made? What is its effect? Is it really a hybrid of contract and property institutions? Thirdly, and lastly, regarding the conflict-of-law rules regulating an international assignment of receivables, is the property-contract approach suitable for the assignment and those rules? If not, what is a more appropriate approach to this subject matter? Is it a rights-based approach advanced in this thesis?

### **1.3 Research methodology**

To address all the research questions sketched out above, the principal methodology that is used throughout the thesis is comparative doctrinal legal research. A doctrinal enquiry will be conducted into legal concepts, categories and the criteria of law for an assignment of receivables, including conflict of laws in an international scenario.<sup>25</sup> This is to investigate the logic and reasoning of legal rules and the property-contract approach in the current legal system. Their relationships will be analysed. And their areas of difficulty will be revealed.<sup>26</sup> The aim of this doctrinal analysis is to argue that

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<sup>25</sup> PC Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in M van Hoecke, *Methodologies of legal research: which kind of method for what kind of discipline?* (Hart 2011) 94.

<sup>26</sup> See I Dobinson and F John, 'Qualitative Legal Research' in M McConville and WH Chui, *Research methods for law* (EUP 2007); C McCrudden, 'Legal research and the social sciences' (2006) LQR 632.

the property-contract approach does not work properly. It cannot provide answers to all the legal problems emanating from assignment.

Comparative law and conflict of laws may be ‘distinct but they interact’.<sup>27</sup> Their methods and functions rely on each other. Various mainstream systems of law affecting the assignment will be examined. These systems are English common law, the law of the European Union, American law, and the laws introduced by relevant international instruments. Using English law as a basic comparator, similarities and differences within it compared to other systems shall be analysed. The task of this comparative analysis is to attempt to identify patterns of legal backgrounds and understandings of those laws. Ideal relations among them will be established.<sup>28</sup> Presumably, they are all, more or less, based on the controversial property-contract approach. The difficulties that these legal systems have in common will be disclosed, as well as way to seek future improvement and harmonisation.

Finally, this thesis will propose a new way of thinking about an assignment of receivables. That new way is a ‘rights-based approach’. It will contest the current property-contract one. Generally, the term ‘rights-based approach’ to law or ‘rights-based analysis’ of law is described as a form of analysis that seeks to ‘develop an understanding of private law obligations which is driven, primarily or exclusively, by the recognition of rights we have against each other, rather than by other influences on private law, such as the pursuit of community welfare goals’.<sup>29</sup> This thesis seeks to

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<sup>27</sup> K Zweigert and H Kötz, *Introduction to comparative law* (T Weir tr, 3rd rev edn, Clarendon Press 1998) 6; M Reimann, ‘Comparative Law and Private International Law’ in M Reimann and R Zimmermann (eds), *The Oxford handbook of comparative law* (OUP 2008).

<sup>28</sup> See G Wilson, ‘Comparative Legal Scholarship’ in M McConville and WH Chui, *Research methods for law* (EUP 2007); Zweigert and Kötz (n 27) chs 1–3; G Dannemann, ‘Comparative Law: Study of Similarities or Differences?’ in M Reimann and R Zimmermann (eds), *The Oxford handbook of comparative law* (OUP 2008); G Samuel, ‘Does One Need an Understanding of Methodology in Law Before One can Understand Methodology in Comparative Law?’ in M van Hoecke, *Methodologies of legal research: which kind of method for what kind of discipline?* (Hart 2011); see details of the comparative methodology in Chapter 4.

<sup>29</sup> A Robertson and D Nolan, *Rights and Private Law* (Bloomsbury Publishing 2011) 1; see also R Stevens, ‘The Conflict of Rights’ in A Robertson and HW Tang, *The goals of private law* (Hart 2009).

advance an understanding of assignment based primarily on the relationship of rights among persons. Those persons are assignor, assignee, debtor and third parties. Its aim is to make clear the foundational structure and operation of substantive laws of assignment and to re-establish legal principles and the understanding of conflict of laws regulating assignment in an international context. As shall be demonstrated in the thesis, the true legal nature of assignment of receivables is a transfer of contractual rights to payment. The rights-based approach proposes to treat assignment in this way. It covers both contractual rights *inter parties* and rights against third parties resulting from an assignment. This is the approach that matches the real substance of assignment. This doctrinal methodology will also be applied in an evaluative way in order to compare whether the present and proposed rules can work effectively in practice. Financing against receivables by way of assignment which is done via market practices, such as factoring,<sup>30</sup> will also be taken into consideration. The potential effects, whether positive or negative, if any, resulting from the new rights-based approach and its conflict-of-law rules will be examined. This will, as a consequence, shape the rights-based approach to the real practice surrounding assignment.

#### **1.4 Contribution to research**

As the thesis foundation, the central claim and argument developed herein seek to provide a more accurate understanding of the existing law based on the property-contract approach and then to establish and advocate a new reform of that understanding

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Among different areas of private law, this kind of analysis is mostly used to analyse tort laws. See Robertson and Nolan (n 29); also R Stevens, *Torts and rights* (OUP 2009); A Beever, *Rediscovering the law of negligence* (Hart 2007); for rights-based analyses of contract and property, see SA Smith, *Contract theory* (OUP 2004); B McFarlane, *The structure of property law* (Hart 2008); on rights-based theories of law in general see EJ Weinrib, *The idea of private law* (HUP 1995); R Dworkin, *Taking rights seriously* (Duckworth 1977); WN Hohfeld, 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 Yale LJ 16.

<sup>30</sup> R Goode and E McKendrick, *Goode on commercial law* (4th edn, Lexis Nexis 2009) 787–791; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 6) 28–31; F Oditah, *Legal aspects of receivables financing* (Sweet & Maxwell 1991) 32–35.

on the basis of the rights-based approach. On the theoretical side, there is as yet neither a clear approach nor rule regarding the international assignment of receivables in conflict of laws. A great deal of previous research has been conducted on the property-contract approach to the conflict of laws for assignment. The advantages and disadvantages of each conflict-of-law rule have been studied, but no general solution has been found.<sup>31</sup> This thesis does not approach it on that basis but rather with regard to the true legal nature of assignment. This research suggests that the main reason is because of the property-contract approach itself. As it is inconsistent with the true legal nature of assignment, the research identifies and specifies fundamental problems arising from such an approach, in terms of both substantive law and conflict of laws. By arguing against the property-contract approach, the thesis proposes a new way of thinking about and understanding this subject matter, namely, a rights-based approach. It intends to prove and establish that the true legal nature of assignment is a transfer of contractual rights and not a mixture of contract and property. An original theoretical analysis involves making a comparison of the rights-based approach and the property-contract approach. Its aim is to reveal problematic difficulties caused by the latter in characterising the contractual and proprietary issues of assignment. Also, a new set of conflict-of-law rules based on the proposed rights-based approach is drawn up, so that to offer a general solution to this legal problem.

On the practical side, the rights-based approach seeks to shed fresh light on a way to modernise and harmonise the law of assignment, hence supporting and facilitating international financing against receivables. It is an alternative to the traditional property-contract one. Receivables are one of the important financial assets.<sup>32</sup> They are utilised by businesses to enhance their credit and raise finance through selling or using them as

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<sup>31</sup> See, for instance, BIICL (n 6); Sigman and EM Kieninger (n 6); Flessner and Verhagen (n 7).

<sup>32</sup> Zweigert and Kötz (n 27) 33; Beal, et al. (n 2) 286; EP Ellinger, E Lomnicka and CVM Hare, *Ellinger's modern banking law* (5th edn, OUP 2011) 868; this matter is explained in Chapter 2.

security. Divergences in the law of assignment among national systems and unsettling debates on characterisation and choice-of-law rules based on the property-contract approach result in legal uncertainty. Through not knowing with certainty what law governs the international assignment of receivables, parties are not sure what rights and obligations they have. With the inability to find a general solution to the proprietary aspect of assignment, the diversity of national laws remains problematic. Harmonisation of the laws regulating receivables financing seems remote. This, in turn, creates legal risks; hence, there is an increase in transaction costs since the parties need to research and comply with many potentially governing laws.<sup>33</sup> It is work that is not easy to complete without investing a lot of time, effort and resources. The property-contract approach has been proven to be an obstacle to harmonising transnational secured transaction law. The rights-based approach, by contrast, advances a set of conflict-of-law rules to govern both the contractual and proprietary aspects of assignment. No characterisation of these two aspects needs to be done. No traditional proprietary concept of law or its difficulties needs to be referred to. The biggest obstacle to the harmonisation, residing in the proprietary aspect of assignment, can be overcome. The legal risk is minimised and legal uncertainty is avoided, hence reducing the cost of transaction and making credit more readily available to businesses. As such, the rights-based approach is shown to serve the notion of harmonised modernisation of the laws governing the international assignment of receivables, the end result of which is to support and facilitate cross-border financing against receivables on a global scale.<sup>34</sup>

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<sup>33</sup> Buxbaum (n 6); Cohen (n 6); Akseli, 'International harmonisation of credit and security laws: the way forward' (n 6) 554–557.

<sup>34</sup> Burman HS, 'Commercial Challenge in Modernizing Secured Transactions Law, The' (2003) 8 ULR 347; Goode (n 6); Buxbaum (n 6).

## **1.5 Structure of the thesis**

As there are three main legal areas concerned in this thesis – receivables, assignment and conflict-of-law rules – its main content is categorised accordingly. To study them thoroughly, the thesis is structured as seven chapters. This first chapter introduces the international assignment of receivables in conflict of laws. Its aim is to set up core research problems, main research methodologies, contributions to research and also the thesis's structure.

In Chapter 2, receivables which are the object of assignment are studied. Their legal status, as either contract or property, is investigated through conceptual developments of legal classification. This chapter focuses on examining and establishing the true legal nature of receivables. The answer to this question will lead to further advances of the research in subsequent stages. Although, a receivable has been categorised as an intangible property, the thesis challenges this debatable issue by way of doctrinal research methodology. The chapter also attempts to establish a new acceptable view of the nature of a receivable by arguing against the current property notion. Subsequently, its true legal nature is proposed. Ideally, a transnational receivable should be treated as a contractual right, especially in terms of conflict of laws.

Chapter 3 deals with assignment, a method of transferring receivables. The combination characteristics of contract and property are the main subject of research. In terms of historical developments, the assignment of a contractual right – or a chose in action in English legal terms – was formerly seen as a mere exception to the privity of contract doctrine. This subject fell under the law of contract and obligation. Later, it was classified as the transfer of an assignable property right. Assignment then takes on the hybrid nature of a law of contract and of property. Contractual-based and property-based rules of the law of assignment are clarified in this chapter. Developing from the

supposition in Chapter 2 that receivables are contractual rights, this thesis intends to clarify the true legal nature of assignment. It will question and answer why the assignment of receivables should be straightforwardly treated as the assignment of contractual rights, rather than as a hybrid of contract and property.

Chapter 4 turns to the conflict of laws regulating the international assignment of receivables. Conflict-of-law rules under English law and American law, including those of the European Union and those contained in international instruments, are considered. In Europe, it is the Rome I Regulation, which succeeds the Rome Convention, that covers this topic. International instruments significantly related to the subject are the UNIDROIT Convention on International Factoring 1988 ('Factoring Convention'), the United Nations Convention on the Assignment of Receivables in International Trade 2001 ('Receivables Convention'), the UNCITRAL Legislative Guide on Secured Transactions 2007 ('Guide') and the UNIDROIT Principles of International Commercial Contracts 2010 ('Principles'). The purpose of this chapter is to examine the principles and underlying policies currently applicable and to consider current global trends in legal reforms. Similarities, differences, advantages and flaws of these contemporary rules will be pointed out.

Chapter 5 analyses the legal approaches adopted in the present conflict of laws concerning the international assignment of receivables. It characterises the development of legal approaches involving the conflict of laws for assignment to proprietary, contractual and mixed approaches. The analysis of those approaches links back to substantive laws that have been developed from the legal principles of the nature of assignment and conflict-of-law rules, as discussed in Chapters 2 to 4. In Chapter 5, the current property-contract approach is first critically analysed. Subsequently, the alternative rights-based approach is advanced by way of comparing to the property-contract approach. Hypothetical cases involving the assignment of receivables will be



asked and answered. These cases are based on major legal disputes and problems that might arise in international commercial litigation. The aim is to investigate the application of a rule based on the rights-based approach. Using a specific situation as a case study will make it easier to engage in deep discussion. Moreover, this problem-solving analysis aims to clarify one of the research questions, i.e. the extent to which the conflict of laws can regulate and facilitate assignment in international scenarios.

In Chapter 6, the proposed rights-based approach to the conflict of laws vis-à-vis assignment is analysed. Emphasis is put on legal effects, in terms of both principal and practical perspectives, that might result from this new approach. By seeing assignment as a method of transferring receivables which are intangible marketable assets, this thesis does not limit its theme to legal theories and the literature. It also pays close attention to the practical effects, whether positive or negative, that might result from the application of conflict-of-law rules. The role of conflict-of-law rules for assignment in financial contexts is examined. The aim is to evaluate the advantages and disadvantages of these rules if they are applied in international financial practice.

Finally, Chapter 7 will summarise the thesis, its research content and findings. Future developments to the rights-based approach and the conflict of laws for international assignment of receivables will also be emphasised.

## CHAPTER 2: RECEIVABLES

To study the conflict of laws for an assignment of receivables, the first legal subject matter of this thesis is receivables. As the object of assignment, receivables are the things that are transferred from an assignor to an assignee. They are the sources of rights and obligations between relevant persons, i.e. assignor, assignee, debtor and perhaps third parties. They form the core of this chapter.

Originating from a contract, receivables are also counted as items of property.<sup>1</sup> This fundamental characteristic of receivables affects the approaches that a legal system uses to treat an assignment of receivables. The proprietary nature of receivables raises specific problems in international contexts since there is no clear rule for it nor understanding of it. This can be seen as a problem not only in substantive law but also in conflict of laws. When receivables are classified as property, transferring them in an international scenario will be governed by conflict-of-law rules for property. By contrast, the governing rules shall be those for a contract if receivables are classified as a contract.

As described in the previous chapter, the research questions studied in this chapter are: what is the true nature of receivables? Are they contractual rights or property? And why in the development of legal practice have they been treated as a kind of property? Although receivables have been categorised as property,<sup>2</sup> this thesis challenges such a categorisation. It will propose that receivables should be treated as contractual rights, particularly in terms of international assignment and the conflict of laws. The methodologies adopted in this chapter are doctrinal and theoretical research.

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<sup>1</sup> As described in Chapter 1, the scope of this research is limited to contractual receivables.

<sup>2</sup> This matter is discussed in Section 2.2.2.

In developing arguments about the true nature of receivables, this chapter is divided into four sections. Firstly, conceptual developments of law concerned with fundamental ideas of things and rights will be explored. In Section Two, receivables as the object of assignment will be studied. Their legal character will be analysed. Subsequently, by arguing that receivables should not be treated in the same way as property, this chapter will advance in Section Three that the true nature of receivables is that of a contract and so they should be treated as contractual rights. Finally, in Section Four, some interim remarks on receivables will be made before moving on to the law of assignment in the next chapter.

## **2.1 Conceptual developments**

Knowledge and reasoning in relation to law have at times been developed based on the inconstant beliefs, critical ideas and thoughts of a society. Legal theories and doctrines help us to understand laws but, in another dimension, they influence our thinking about the legal rules already developed and also those being developed. The classification of things is a fundamental concept established in a legal system. Its purpose is to categorise things and to deal with subsequent legal matters within a logical separated branch of law.<sup>3</sup>

In this section, the legal categorisation of things is first illustrated in order to clarify the current legal standpoint of receivables in a legal system. Next, two of the most important, though controversial, subjects – i.e. intangible things and choses in action – will be discussed. Lastly, an attempt will be made to identify the differences between contractual rights and property rights. The aim of these sections is to conduct a critical

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<sup>3</sup> See R Pound, 'Classification of law' (1924) 37 Harv L Rev 933; JE Penner, 'Basic Obligations' in P Birks, *The classification of obligations* (Clarendon Press 1997) 81.

analysis of the prominent legal concept of receivables. It will serve as a basis for further arguments.

### **2.1.1 Legal classification of things**

The legal classification of things affects the way a legal system considers a thing, and the way a thing is treated in a legal context. It is as such important to know where a ‘thing’ stands from a legal viewpoint if one is to understand and argue about governing rules. In this thesis, the research is on receivables, which are ‘intangible things’.

#### **(1) Meaning of things**

The word ‘things’ is legal language that is both elastic and elusive.<sup>4</sup> It is also problematic when an attempt is made to clarify a phrase such as an ‘interest in things’. The meanings of these words are hard to define with certainty. However, several theoretical approaches have been formulated to draw conclusive definitions. One of the broadest definitions that has been proposed on the basis of human perception is that ‘[a] thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing’.<sup>5</sup>

Where economics or business is concerned, a clear definition of either a thing or property is not a vital issue. That is because this approach is likely to determine that everything valuable should be also regarded as a thing in law.<sup>6</sup> Still, the word ‘things’ in property law differs somewhat from the same subject-matter as ‘things’ in the sense of

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<sup>4</sup> CK Allen, ‘Things’ (1940) 28 Cal L Rev 421, 421.

<sup>5</sup> F Pollock, ‘What is a Thing’ (1894) 10 LQR 318, 318.

<sup>6</sup> See JW Harris, *Property and justice* (Clarendon Press 1996) 145–149; RA Posner, *Economic analysis of law* (6th edn, Aspen Publishers 2003) 29–33, where property rights are defined as the right to the exclusive use of valuable resources; JE Penner, *The idea of property in law* (OUP 1997) 63–64, where it is stated that ‘not all valuable rights are regarded by the law as property rights’.

wealth. Being considered as wealth, things are treated as an external form of value and in those terms an opportunity cost.<sup>7</sup> The result of this is that no member of a class of things enjoys any special status.<sup>8</sup> In contrast, in terms of legal treatment,<sup>9</sup> legal systems have laid down patterns of vocabulary which tend to control perception;<sup>9</sup> and there are many different aspects, either major or minor, in the legal doctrines and rules dealing with each class of things.

With regard to the terms ‘interest in things’ or ‘right in things’, it has been observed that there exists a different aspect in the legal meaning of this phrase in comparison with the word ‘things’.<sup>10</sup> The interest in a thing might not be identical to that thing in itself. For example, it differs if one owns a thing, such as a horse, outright or one owns a half share in that horse with another.<sup>11</sup> Nevertheless, sometimes these two words are used interchangeably. The scope of the conception of things has been extended to include the realisation of interests in those things.<sup>12</sup> Therefore, speaking of a thing by itself might also refer to the legal interest in such a thing, e.g. ownership and possession.<sup>13</sup>

## **(2) Classification of things**

Things are broadly classified according to their physical and material nature. Two main categories are tangible or corporeal things, and intangible or incorporeal things. This is the division of property generally used in the Roman and civil-law system.<sup>14</sup> Tangibles are subdivided into immovable things such as land, and movable things such as goods. In the case of intangibles, it can simply be said that they are things that have no physical

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<sup>7</sup> B Rudden, ‘Things as Thing and Things as Wealth’ (1994) 14 OJLS 81, 86–87.

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> F Lawson and B Rudden, *The law of property* (3rd rev edn, OUP 2002) 19.

<sup>11</sup> *ibid.*

<sup>12</sup> Allen (n 4) 440.

<sup>13</sup> Rudden (n 7) 83.

<sup>14</sup> WW Buckland and P Stein, *A text-book of Roman law from Augustus to Justinian* (3rd edn, CUP 1963) 185–185, where it is stated that ‘Physical objects are given illustrations of *res coporales*. *Res incorporales* were abstract conceptions, notional things, and, as *res meant assets*, *res incorporales* were rights’; see also JHM van Erp and B Akkermans, *Cases, materials and text on national, supranational and international property law* (Hart 2012) 31–36 and 365–368.

or material object. Intangibles combine a wide range of various things, e.g. debts, receivables, negotiable instruments, shares, bonds and intellectual property.<sup>15</sup>

Terminology in a common-law system, however, is different. English property law, in particular, has not followed the Roman or civil-law tradition for the classification of things.<sup>16</sup> Rather, it has its own approach to this matter. First, there are two major groups of property: real property or realty such as land, and personal property or personalty.<sup>17</sup> Personal property is separated into choses in possession related to physical items like chattels or goods, and choses in action like receivables. It has a wider scope than realty, so one might simply say that ‘it comprises all property other than realty’.<sup>18</sup>

The non-matching legal classification of things across civil law and common law results from different approaches to historical developments regarding those things. Such dissimilarity leads to difficulties in dealing with the law of assignment for receivables. This topic will be discussed in the following two sections.

## **2.1.2 Intangible things**

### **(1) Property aspect of intangible things**

Nowadays, a significant part of the wealth of the world exists not only in tangibles but also in intangibles.<sup>19</sup> Fortunately, ‘[a] thing is no less a thing in law merely because it is

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<sup>15</sup> Lawson and Rudden (n 10) 29–49.

<sup>16</sup> U Mattei, *Basic principles of property law: a comparative legal and economic introduction* (Greenwood Press 2000) 7–21.

<sup>17</sup> Lawson and Rudden (n 10) 20–22; RJ Smith, *Property law* (6th edn, Pearson Longman 2009) 7–8; AP Bell, *Modern law of personal property in England and Ireland* (Butterworths 1989) ch 2.

<sup>18</sup> Smith (n 17) 7–8; Bell (n 17) 3.

<sup>19</sup> Especially in developed countries like the United States, it is estimated that 42 per cent of gross household asset were in financial form. This high ratio is also approached by the UK. In Japan, Canada and Germany, financial assets amount to approximately 28 per cent in comparison with real property and debts. See UNU-WIDER, ‘The World Distribution of Household Wealth’ <[http://www.wider.unu.edu/publications/working-papers/discussion-papers/2008/en\\_GB/dp2008-03/\\_files/78918010772127840/default/dp2008-03.pdf](http://www.wider.unu.edu/publications/working-papers/discussion-papers/2008/en_GB/dp2008-03/_files/78918010772127840/default/dp2008-03.pdf)> accessed 9 October 2015, 12-13.

intangible’.<sup>20</sup> Although intangible things already comprise a large diversity of things, a new type like financial derivatives has still to come into existence. It is therefore difficult to describe all the different kinds of intangibles with a generic term.<sup>21</sup> But in terms of a common reason for why various classes of intangible things have become property in a legal system, perhaps the most probable explanation is this: ‘[the] reason why [English property law] treats intangible interests as objects, as things, is because people are willing to buy them; and any thing which is the object of commerce may be treated as an asset, just as much if it is an abstraction like share in a company as if it is a physical object like a house or a car.’<sup>22</sup> Along the same lines, the theory of value suggests that, in a capitalist economic system, ‘value creating means property creating’.<sup>23</sup>

## **(2) Classification of rights in relation to intangible things**

A legal system usually makes a distinction between property rights and personal rights.<sup>24</sup> In principle, a property right or right *in rem* is a right in a property that can be asserted against a public. A personal right or right *in personam* is, by contrast, a right in a relationship between persons and against those persons only. Dealing with tangible property, i.e. immovable and movable, it seems easy enough to make a clear distinction; but where intangible property comes into the picture, drawing such a line is much harder and, as a result, becomes blurred. This is basically because in the case of tangibles there is a material property for a right *in rem* to reside in, whereas in the event

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It has also been recorded that the volume of household liquid financial assets such as bank deposits, equities, bonds and shares in the United States has exceeded 25 trillion US dollars since 2010. See SIFMA, ‘2012 Year In Review’ <[www.sifma.org/year-in-review2012](http://www.sifma.org/year-in-review2012)> accessed 9 October 2015; Lawson and Rudden (n 10) 29.

<sup>20</sup> Allen (n 4) 423.

<sup>21</sup> Lawson and Rudden (n 10) 29.

<sup>22</sup> *ibid* 21; see also K Gray and SF Gray, ‘The Idea of Property in Land’ in S Bright and J Dewar, *Land law: themes and perspectives* (OUP 1998) 35.

<sup>23</sup> JW Child, ‘The moral foundations of intangible property’ (1990) 73 *Monist* 578, 592–593.

<sup>24</sup> R Goode, ‘Ownership and Obligation in Commercial Transactions’ (1987) 103 *LQR* 433; M Bridge, *Personal property law* (3rd edn, OUP 2002) 12; LS Sealy and RJ Hooley, *Commercial law: Text, cases, and materials* (OUP 2009) 64–68; A Pretto-Sakmann, *Boundaries of personal property: shares and sub-shares* (Hart 2005) 88–93.

of pure intangibles such as receivables this is not the case. An example can be seen in the ownership right of a thing. Ownership is legal language that connotes a legal right to a thing, or *res*. A legal principle is able clearly to distinguish property rights from mere personal rights to delivery or the transfer of an asset.<sup>25</sup> It is, anyway, doubtful whether anyone can have ownership of an intangible thing such as a claim or receivable. To put it another way, can an intangible thing be an object of ownership? To respond to this question, different approaches have been used in different jurisdictions. There appears to be no consensus.<sup>26</sup> This problem also leads to such fundamental questions as: '[is] the distinction between corporeal and incorporeal about rights or things? Is the distinction between movable and immovable about rights or about things?'<sup>27</sup>

In addition to the classification of 'things', the classification of 'rights' is another important subject which should be mentioned here. The classification of rights benefits lawyers in understanding various aspects of intangible things and, of course, in advancing arguments in this thesis. Dissimilar approaches to the classification adopted by a legal system can, however, create further difficulties when grouping different categories of classified rights.

On the traditional classification of right *in rem* and right *in personam*, these two different kinds of rights are, respectively, described as: a right that clearly has an object to which a person is entitled, such as a property right in respect of a corporeal thing; and a right where an object is not so apparent, such as a right arising from an obligation.<sup>28</sup>

Focusing on their substance, rights can be classified as absolute and relative. A right will be relative if it has limited use whereas an absolute right refers to a right that is not

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<sup>25</sup> R Goode (n 24) 433.

<sup>26</sup> See van Erp and Akkermans (n 14) 378–384, where a comparative study shows that while some legal systems such as Germany and the Netherlands limit the application of ownership rights to corporeal things, others such as France and Belgium do not provide any clear indication, and it is difficult to draw any conclusion on yet others like England.

<sup>27</sup> GL Gretton, 'Ownings Rights and Things' (1997) 8 Stellenbosch L Rev 176, 176.

<sup>28</sup> W Mincke, 'Property: Assets or Powers – Objects or Relations as Substrate of Property Rights' (1996) JSAL 255, 256–258.



limited by the rights of others. In this terminology, it is then explained that ‘an absolute right is potentially directed against everybody’.<sup>29</sup> A relative right, in contrast, ‘is directed against a certain debtor only’.<sup>30</sup> Moreover, English law, as an example of a common-law system, divides rights into four categories: real rights (rights *in rem*); rights *ad rem* (rights *in personam ad rem*) referring to rights to have goods delivered or transferred; purely personal rights (rights *in personam*); and equities which denote personal power over the rights of another.<sup>31</sup>

Considering this classification, an individual legal set of rules should then be formed in order properly to handle each categorisation of rights.<sup>32</sup> In principle, whereas *in personam* rights are subject to the law of contract, *in rem* rights come under the law of property. Even though it is presently admitted that intangibles are one of the subject matters in today’s property laws,<sup>33</sup> legal problems relating to intangible things and associated with intangible rights still arise, specifically those involving receivables which are the main class of intangibles studied in this research. Such problems primarily originate from the relationship between and interactions of property law and contract law. This raises further issues which will be discussed later in this chapter.

### **2.1.3 Choses in action**

#### **(1) Definition and scope of choses in action**

In common-law terms regarding personal property, there is a ‘thing in action’ or a ‘chose in action’ which points to a thing or a right that can only be asserted by legal action. This phrase is used in parallel with ‘choses in possession’. According to a

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<sup>29</sup> *ibid* 257.

<sup>30</sup> *ibid*.

<sup>31</sup> R Goode and E McKendrick, *Goode on commercial law* (4th edn, Lexis Nexis 2009) 28–30.

<sup>32</sup> See Pound (n 3).

<sup>33</sup> A Pretto-Sakmann (n 24) 88–93; Lawson and Rudden (n 10) 29–31 and 36–38; M Bridge, L Gullifer, G McMeel and S Worthington, *The law of personal property* (Sweet & Maxwell 2013) 622–623.

statement by Fry LJ in *Colonial Bank v Whinney*, ‘all personal things are either in possession or in action. The law knows no *tertium quid* between the two.’<sup>34</sup> By definition, a chose in possession is mainly concerned with a physical thing of which one can take possession, whereas a chose in action is not.

A chose in action is incorporeal in its nature. It is simply a legally recognised right to action. Historically, much attention was paid by legal scholars to the question of ‘what is a chose in action?’ What sorts of things could be regarded as being included within the scope of this legal phrase?<sup>35</sup> A definition of a ‘chose in action’, which is generally accepted as correct,<sup>36</sup> was given by Channel J in *Torkington v Magee*: a chose in action is ‘a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession’.<sup>37</sup> However, a variety of things has been included under the heading of ‘choses in action’. Choses in action cover a wide range of personal property. It includes, but is not limited to, contractual rights, debts, receivables, negotiable instruments, stock, shares, intellectual property, and even rights to damages founded on tort actions.<sup>38</sup> It could be said that things covered by ‘choses in action’ overlap with the phrase ‘intangible properties’ employed in civil law. To be more specific, that overlap also includes receivables.

As a result, the various kinds of choses in actions are not usually treated under one particular area of law, but under separate branches of the laws to which they more

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<sup>34</sup> [1885] 30 Ch D 261, 285; see also Mackay of Clashfern (ed), *Halsbury's laws of England*, vol. 13 (5th edn, Lexis Nexis 2009) para 1.

<sup>35</sup> See HW Elphinstone, ‘What is a Chose in Action?’ (1893) 9 LQR 311; C Sweet, ‘Choses in Action’ (1894) 10 LQR 303; S Brodhurst, ‘Is Copyright a Chose in Action?’ (1895) 11 LQR 64; TC Williams, ‘Is a Right of Action in Tort a Chose in Action?’ (1894) 10 LQR 143; TC Williams, ‘Property Things in Action and Copyright’ (1895) 11 LQR 223; OR Marshall, *The assignment of choses in action* (Pitman 1950) 5–8.

<sup>36</sup> WS Holdsworth, ‘The History of the Treatment of "Choses" in Action by the Common Law’ (1920) 33 Harv L Rev 997, 997.

<sup>37</sup> [1920] 2 KB 427, 430.

<sup>38</sup> See Mackay of Clashfern (n 34) paras 4–12; Williams, ‘Is a Right of Action in Tort a Chose in Action?’ (n 35)

properly belong.<sup>39</sup> For example, shares are valuable units established by company law, while negotiable instruments and intellectual property have their own special sets of law. Thus the phrase ‘choses in action’ is neither a sign of nor a sole answer for the governing legal area of each type of them. Although receivables are grouped as choses in action, that does not automatically mean that they shall be governed by the same substantive laws as those for shares, negotiable instruments and intellectual property. Instead, a law should be adopted to deal with receivables on the basis of their real nature, i.e. a contractual claim enforceable by legal action.

## **(2) Property law and choses in action**

A chose in action is a right enforceable by legal action. It is a personal right of the rightholder against the person subjected to it. Initially, it is not a property right. As a personal right between identified persons, originally it cannot be assigned.<sup>40</sup> Inalienability and non-assignability have been the main characteristics of the nature of this kind of right.<sup>41</sup>

In the past, it was settled that a chose in action was inalienable. A chose in action was described as a right to bring a personal action, and the cause of action might concern a contract, property or tort.<sup>42</sup> It was a right arising from and to be asserted by a personal action. It did, to a large extent, depend on the law of procedure.<sup>43</sup> A right of action for the recovery of a thing including a receivable was regarded as ‘a specific *res*’.<sup>44</sup> However, this does not mean that a right of action is a thing. It is not a thing or *res* in itself but a claim or a mere right to action. It, in itself, comprises a cause of action giving rise to a right to legal action; hence it was not an alienable right. As a

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<sup>39</sup> Holdsworth (n 36) 998.

<sup>40</sup> *ibid* 1002–1006.

<sup>41</sup> *ibid* 1015–1006; WW Cook, ‘The Alienability of Choses in Action’ (1916) 29 Harv L Rev 816.

<sup>42</sup> Holdsworth (n 36) 997–998.

<sup>43</sup> *ibid* 1001.

<sup>44</sup> JB Ames, ‘The Disseisin of Chattels. III. Inalienability of Choses in Action’ (1890) 3 Harv L Rev 337.

consequence, ‘where one has a mere right against another, there is nothing that is capable of transfer’.<sup>45</sup> Furthermore, the substance of a chose in action only contains a personal obligation between the rightholder and the person subject to it. Historically, ‘assignment of such a right in action by the act of two parties was unthinkable.’<sup>46</sup> The non-assignability of choses in action was then ‘a necessary and logical deduction from the nature of [them]’.<sup>47</sup> Another reason from legal history is that the assignment of a chose in action was against the policy of law known as the objection of maintenance. It was believed that permitting such assignment ‘might lead to the oppression of debtors by assignees more powerful than the assignor’.<sup>48</sup>

After modifications surrounded by controversies, today, a chose in action has been extended from a mere right to bring a legal action against a person to be regarded as an item of property.<sup>49</sup> In the past, rights to action for a contractual obligation were absolutely prohibited for assignment.<sup>50</sup> Now it is a settled law that a contractual right can be assigned by an act of a party to the contract itself. Taking into account the broadest sense of the word ‘property’ it means valuable things – things that can be evaluated by, or transformed into, money. Rights, when admitted as valuable, are then included in the word ‘property’.<sup>51</sup> Another reason why intangible rights or choses in action are counted as property is because they are assignable; and only objects of property can be legitimately assigned.<sup>52</sup> In spite of its origin, a chose in action has been

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<sup>45</sup> *ibid* 339.

<sup>46</sup> Holdsworth (n 36) 1003.

<sup>47</sup> *ibid* 1016.

<sup>48</sup> Marshall (n 35) 36.

<sup>49</sup> *Alloway v Phillips* [1980] 1 WLR 888, 893; Bell (n 17) 11–12.

<sup>50</sup> Holdsworth (n 36) 1018–1022.

<sup>51</sup> Williams, ‘Property Things in Action and Copyright’ (n 35) 223.

<sup>52</sup> This issue is investigated in Chapter 3.

categorised as a class of property, to be more precise ‘intangible property’. A lawsuit thus becomes a property, i.e. a private property derived from the right to sue.<sup>53</sup>

Considering the reasons for value and assignability, this research argues that they are only assumptive rationalities that actually follow the features of intangible things. Neither of them should be a decisive factor for intangible things to be classified as property. An argument which can be found in legal history is that ‘the term chose in action was an established law term long before property came to be used in the wide sense of valuable things’.<sup>54</sup> As such, it seems unlikely to be accurate to require a right of action to be included under property as a condition precedent for it to be a chose in action or assignable. The question of whether a right is an assignable chose in action or not is different from the question of whether it is a property or not. Rights, including those which are contractual in nature, might be termed property in a common sense. This is generally because there are measurable values stored in them. However, their criteria are not like property in the same legal sense as land and tangible objects. In the case of receivables, they are monies payable under contracts, which is one of the classes of choses in action.<sup>55</sup> They are contractual claims against persons who are debtors subject to those receivables. Value and assignability are important features of intangible things, but it is not necessary to assume that intangible things, especially receivables, should be counted as items of property in a legal sense.

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<sup>53</sup> JA Blumenthal, ‘Legal Claims as Private Property: Implications for Eminent Domain’ (2008) 36 *Hastings Const LQ* 373, 373.

<sup>54</sup> Williams, ‘Is a Right of Action in Tort a Chose in Action?’ (n 35) 145; see also Marshall (n 35) 23–27.

<sup>55</sup> It was stated that there are three classes of choses in action. The first one is money payable under a contract; the second is money payable otherwise than under a contract, such as damages in a tort action; and the last one is intellectual property, such as copyrights, patent, and trade-marks. Marshall (n 35) 27–28; Elphinstone (n 35) 313.

## 2.1.4 Contract vs property notions of law

Contract and property are connected, but different, branches of law.<sup>56</sup> The greatest difficulty in a legal system is always knowing what the difference is between the two, and to be able to distinguish between them and draw a line in the middle of their linkages with minimal confusion or disguise. At this stage, the fundamental concepts of contract and property are examined alongside their core doctrines of contractual rights and property rights. This will serve as a fundamental basis to determine whether receivables are contract or property.

Property law ‘primarily concerns a person’s relation in, to, or over, a thing’.<sup>57</sup> It involves the fundamental question of what things can be counted as property in the eyes of the law. What is the nature of interests, particularly proprietary interests, contained in a piece of property? How, and to what extent, can a rightholder derive or gain benefit from them? The principle of ownership rights over a property might be the most vital legal concept there has ever been, but property law has broader concerns than that.<sup>58</sup> In particular, it is not limited to physical objects. It does, by contrast, cover so-called proprietary rights or interests in intangible things. Turning to contract law, it basically deals with legal relationships created by an agreement between persons. Although there is no formal definition of contract in English law,<sup>59</sup> its basic principles can be summarised as per the following statement. ‘A contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the

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<sup>56</sup> See Pound (n 3).

<sup>57</sup> D Pearce, ‘Property and Contract: where are we?’ in A Hudson, *New perspectives on property law, obligations and restitution* (Cavendish 2004) 88.

<sup>58</sup> Smith (n 17) 3–7.

<sup>59</sup> E McKendrick, *Contract law: text, cases, and materials* (4th edn, OUP 2010) 3–7.

It has also been noted that where a definition of contract appears in legislation, it differs ‘according to the particular legal system in which they appear’. H Beale, *Cases, materials and text on contract law* (2nd edn, Hart 2010) 39.

contracting parties.’<sup>60</sup> The law of contract is also known, specifically among civil-law systems, as a subject of the law of obligation.<sup>61</sup> The scope of the law of obligation is, however, wider than the law of contract. It is typically admitted that the law of obligation basically concerns ‘a person’s relation with another person’.<sup>62</sup> It is not limited to voluntary obligations, such as contracts, but also includes involuntary obligations, such as torts.

To distinguish between the spheres of property law and contract law, it is typically ruled that there is a limited number of proprietary rights that are accepted by property law. This doctrine is mostly known as the principle of *numerus clausus*.<sup>63</sup> According to this principle, the law of property is a mandatory rule limiting the number and content of property rights. Property rights created by law form a closed list. Individuals or parties by themselves are unable to create a proprietary right outside that list.<sup>64</sup> In contrast, the law of contract is about the principle of private freedom. Based on the freedom of contract doctrine, parties by themselves can create and modify rights and obligations enforceable among themselves, as long as they are not contrary to a fundamental public policy.

Once, it was claimed that property and proprietary rights listed in conformity with the *numerus clausus* principle were not exclusive. The idea was that any right could be categorised as proprietary if it was ‘definable, identifiable by third parties, capable in its

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<sup>60</sup> E Peel and GH Treitel, *The law of contract* (13th edn, Sweet & Maxwell 2011) 1.

<sup>61</sup> Such as in German Law, Beale (n 59) 40–41; however, it appears that common law sometimes uses this heading as well. See generally P Birks, *English private law* (OUP 2000).

<sup>62</sup> Pearce (n 57) 88.

<sup>63</sup> Referring to a closed list of property rights; B Akkermans, *The principle of numerus clausus in European property law* (Intersentia 2008) 6; van Erp and Akkermans (n 14) 65; Mattei (n 16) 55.

<sup>64</sup> The *numerus clausus* principle has quite a strong standing in the civil-law system, such as in Germany. But in other jurisdictions, like those of France, the Netherlands and English common law, the application of this principle is less strict. See generally Akkermans (n 63); A Fusaro, ‘The Numerus Clausus of Property rights’ in E Cooke (ed), *Modern studies in property law. Vol. 1, Property 2000* (Hart 2001); van Erp and Akkermans (n 14) 65–67 and 72–75.

nature of assumption by third parties, and have some degree of permanence stability'.<sup>65</sup> Nevertheless, it was later pointed out that 'this approach has never been used to admit a right [as proprietary], and there are many rights which have been rejected even though they satisfy the criteria'.<sup>66</sup> An example is the contractual license to occupy land which was held not to be a property right.<sup>67</sup>

Still, the *numerus clausus* principle has been the subject of controversies, on the one side, in terms of finding its underlying objectives as laid down in the property law. On the other side, it can continue to function as an indication of the scope of property law in comparison with contract law. For example, it has recently been illustrated that information costs and standardisation are two important reasons for *numerus clausus* which can be used to explain the fundamental differences between property rights and contract rights.<sup>68</sup> Since *in personam* rights involve an identified group of parties to a contract, the legal rules of contract then 'permit a high degree of customisation of rights and duties, and emphasise the importance of disclosing information particular to the parties to the *in personam* agreement'.<sup>69</sup> *In rem* rights, in contrast, affect an indefinite numbers of persons. '[The] legal rules associated with *in rem* rights are standardised and immutable, and focus on gross proxies like boundaries that are easy to observe and grasp by a large and heterogeneous population of duty-holders'.<sup>70</sup>

'Both civil-law and common-law jurisdictions have long recognised that certain legal rights are good "against the world" while others apply only against named persons or

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<sup>65</sup> *National Provincial Bank v Ainsworth* [1965] AC 1175, 1248 (Lord Wilberforce).

<sup>66</sup> W Swadling, 'Property: General Principles' in P Birks, *English private law* (OUP 2000) 209.

<sup>67</sup> *Ashburn Anstalt v Arnold* [1989] Ch 1.

<sup>68</sup> TW Merrill and HE Smith, 'Optimal standardization in the law of property: the numerus clausus principle' (2000) 110 Yale LJ 1; TW Merrill and HE Smith, 'The property/contract interface' (2001) 101 Colum L Rev 773; see a dissenting opinion in H Hansmann and R Kraakman, 'Property, contract, and verification: the Numerus Clausus problem and the divisibility of rights' (2002) 31 JLS S373.

<sup>69</sup> Merrill and Smith, 'The property/contract interface' (n 68) 852.

<sup>70</sup> *ibid.*



entities.’<sup>71</sup> The former have been called *in rem* or property rights, and the latter *in personam* or, more specifically, contract rights. Being the two great pillars of the legal-rights concept, several detailed theoretical approaches have been proposed to clarify them. Apart from *numerus clausus*, there appear to be two contrasting theoretical approaches which should be considered here.

In trying to clarify the distinction between personal rights and property rights, the first theory which should be mentioned is that of Hohfeld.<sup>72</sup> While defining the word ‘right’ in the narrowest sense as a synonym of ‘claim’ and a correlative of duty, he explains a right *in personam* as ‘a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of the few fundamentally similar, yet separate, rights availing respectively against a few definite persons’.<sup>73</sup> A right *in rem* is explained as ‘one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people’.<sup>74</sup> The result is that, in one of the Hohfeld’s conclusive opinions based on jural relations, ‘[a] right *in rem* is not a right “against a thing”<sup>75</sup> but one ‘against persons’.<sup>76</sup> All rights are thus rights against persons. Subsequently, this view has been attached to a well-known phrase, the ‘bundle of rights’. It is an idea intending to establish that property rights are merely a bundle of personal rights. A similar theory has been established by Kelsen, who declared that ‘every right to a thing is also a right against a person’.<sup>77</sup> ‘It is the relation between individuals which is of

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<sup>71</sup> *ibid* 780; Bell (n 17) 6–11.

<sup>72</sup> WN Hohfeld, ‘Fundamental legal conceptions as applied in judicial reasoning’ (1917) 26 *Yale LJ* 710.

<sup>73</sup> *ibid* 718.

<sup>74</sup> *ibid*.

<sup>75</sup> *ibid* 720.

<sup>76</sup> *ibid* 722.

<sup>77</sup> H Kelsen and M Knight, *Pure theory of law* (University of California Press 1967) 130.

primary importance ... [the] relation to the thing is of secondary importance, because it merely serves to clarify the definition of the first relation.’<sup>78</sup>

By strongly criticising the ‘bundle of rights’ concept, another theoretical approach has been advanced by Penner. He has argued that the ‘bundle of rights’ omits a fundamental aspect of *in rem* rights; that is to say, rights and duties *in rem* do not refer to any particular persons but to everyone in a relationship, through a property, with the owner.<sup>79</sup> He, in contrast to Hohfeld’s theory, has emphasised that ‘property is a right to thing’,<sup>80</sup> and ‘[a] necessary criterion of treating something as property is that it is only contingently ours’.<sup>81</sup> It has also been pointed out that ‘[what] distinguishes property rights is not just that they are only contingently ours, but that they could just as well be someone else’s’.<sup>82</sup> Therefore, from Penner’s viewpoint, contractual rights, choses in action and receivables are undoubtedly property.<sup>83</sup> On top of this, the law of property can be defined as law that concerns ‘the legal relations between persons with respect to things’.<sup>84</sup>

After all, one might find it bewildering and ask a simple question. What precisely are the differences between these two classes of rights, contract and property? Specifically, for this research’s purposes, when an intangible contractual right, or what could be called a chose in action, is being questioned, should the answer be that a contract can generate property, while a contractual right should be described as the object of a property right?<sup>85</sup> Or, a better approach might be, as someone has remarked, that ‘[there] is no “chose” or thing or res. There is [only] a right (or claim) against some person.’<sup>86</sup>

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<sup>78</sup> *ibid.*

<sup>79</sup> Penner (n 6) 25–27.

<sup>80</sup> JE Penner, ‘The “Bundle of Rights” Picture of Property’ 43 UCLA L Rev 711, 799–800.

<sup>81</sup> *ibid.* 802.

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> Swadling (n 66) 204.

<sup>85</sup> P Jaffey, *Private law and property claims* (Hart 2007) 82–83.

<sup>86</sup> AL Corbin, ‘Assignment of contract rights’ (1926) 74 U Pa L Rev 207, 207.

Together with this, '[there] can be no such thing as a legal relation between a person and a thing'.<sup>87</sup>

Nevertheless, it is true when one states that '[at] one level, property and contract are the same: proprietary and personal rights can both be conceived of as constituting assets'.<sup>88</sup>

This statement is based on an economic perspective, but it might not be quite correct from a legal perspective. As shall be considered in the following sections, many debatable legal points have been advanced regarding the contractual and proprietary nature of receivables. While some lawyers try hard to draw a dividing line between property and contract, others tend to blend them together.

## 2.2 Characteristics of receivables

Considering receivables as the object of assignment, this section concentrates on the principal features of receivables and their legal nature. Receivables are contractual *ab initio*. However, for some aspects, as shall be seen, they have been regarded as property and brought within the realm of property law. Subsequently, this notion has led to the application of property law to the contractual relations of receivables.

To argue against the property notion of receivables, the features of receivables are explored. This is to set the fundamental scene for the following questions. Where does a receivable come from, how does it occur and what are the legal relationship arising from it? Next, the research will discuss the property notion of receivables in order to determine why such a belief and concept have been developed. It will also examine whether a receivable can match with the legal nature of property as constituted in

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<sup>87</sup> AL Corbin, 'Legal analysis and terminology' (1919) 29 Yale LJ 163, 165.

<sup>88</sup> Pearce (n 57) 87.

property law or, to put it in another way, whether the legal principle of property, usually applied to tangible things, can be properly applied to intangible things like receivables.

### 2.2.1 Basic features of receivables

A 'receivable'<sup>89</sup> is a bond intentionally formulated by the parties to a contract. It is a consequence of a contractual relationship between the contracting parties, that is recognisable and enforceable by law. It is, in other words, a debt but the emphasis is on the perspective of the creditor, not the debtor.<sup>90</sup> A receivable is a right to payment for a creditor, but a debt is an obligation of a debtor. For a receivable to be formulated, there must be a party taking up a promise, according to the terms of a contract, to make a monetary payment to another party. On this side of the contract, such as a borrower taking out a loan, or the buyer in a sale contract, it creates a monetary obligation. The party who is under an obligation is the 'debtor', and the other who holds a right to payment is the 'creditor'. Upon performing in accordance with the terms of the contract, the debtor is thereby discharged from his debt or the receivable.

Another key aspect of a contract as a binding agreement, or as the source of a binding obligation, is the question of legal enforceability.<sup>91</sup> When a debtor, on whatever grounds or none, fails to perform his contractual obligations, subsequent matters in contract law will point to a breach of contract. As a result of this breach, it gives rise to the creditor having a right to enforce the contract against the debtor and/or claim damages in respect of losses originating from it. Whether this involves collecting unpaid receivables or enforcing contractual rights, it must however be done through a legal process, by bringing a legal action against the debtor before a court. This is an action *in personam*

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<sup>89</sup> This kind of relationship is also denoted by other terms, e.g. obligation, debt, chose in action, claim or right. See Mackay of Clashfern (n 34) para 5.

<sup>90</sup> R Goode and L Gullifer, *Goode on legal problems of credit and security* (Sweet & Maxwell 2008) 96.

<sup>91</sup> Peel and Treitel (n 60) 5–6.

based on the creditor's contractual right to sue, which is part of the underlying logic laid down in the phrase 'chase in action'. It could therefore be stated that by the term receivables is meant a right to the payment of a sum of money. Receivables are therefore contract and should be ruled by contract law.

From practical developments, receivables are one of the most important ways to raise finance, not only in domestic but also in international markets.<sup>92</sup> Abbreviated from accounts receivable, the term 'receivables' is traditionally a business term usually referring to amounts due to ('receivable' by) a business.<sup>93</sup> In the widest sense, it covers 'all monetary obligations owed to a business underpinning its cash flow'.<sup>94</sup>

Accounts receivable financing is a continuing arrangement whereby funds are made available to a business concern by a financing agency that purchases the concern's invoices or accounts receivable over a period of time or makes that concern advances or loans, taking one or a series of assignments of the accounts as primary collateral security.<sup>95</sup>

Originating in American jurisdiction, receivables or accounts receivable have been regarded as the object of a financial asset and a method of raising finance. It was first a basis for short-term financing in the textile trade,<sup>96</sup> and subsequently a basis for financial formulation and development in business activities.<sup>97</sup> Before such a formulation, at a time when things incorporeal were not acknowledged as financial

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<sup>92</sup> According to Factor Chain International, the volume of domestic and international factoring and invoice discounting business within, for example, the European Union was estimated at over 140 billion euros in 2010. In addition, based on a report from SIFMA, the total factoring turnover of EU member states increased almost 30% from 2006 to 2010, reaching 1,045,069 million euros. This information has been cited in BIICL, 'Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person' <[http://ec.europa.eu/justice/civil/files/report\\_assignment\\_en.pdf](http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf)> accessed 9 October 2015.

<sup>93</sup> H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd edn, OUP 2012) 273.

<sup>94</sup> EP Ellinger, E Lomnicka and CVM Hare, *Ellinger's modern banking law* (5th edn, OUP 2011) 872.

<sup>95</sup> RJ Saulnier and NH Jacoby, 'The Development of Accounts Receivable Financing' in *Accounts Receivable Financing* (NBER 1943) 17.

<sup>96</sup> *ibid* 15–16.

<sup>97</sup> G McCormack, *Secured credit under English and American law* (OUP 2004) 209.

assets or a source of wealth, receivables were virtually unused in financing strategy.<sup>98</sup>

As the credit economy has developed, an account – e.g. owed by a purchaser to a seller – has been regarded as a storage value representing a claim for money.<sup>99</sup> Such an account can be formed as a financial asset. Being able to be sold or attached as a security,<sup>100</sup> receivables help businesses to raise funds and support monetary systems. In effect, receivables have an important part to play in circulating credit through markets. It is admitted that receivables financing is created by, and results from, the driving force of financial demand.<sup>101</sup> According to its vital role in international financial markets, there exists a need for suitable regulation over receivables. At present, the word receivables is an official term written into several rules of law. Take, for instance, the definition of a receivable as described in the Receivables Convention, i.e. a ‘contractual right to payment of a monetary sum’.<sup>102</sup> Along the same lines, the Guide defines the meaning of a receivable as ‘a right to payment of a monetary obligation’.<sup>103</sup> Receivables is, nowadays, not only a business expression but also a vital subject matter of law.

Along with receivables, there is another phrase that should be examined, i.e. ‘book debts’. In principle, both receivables and book debts are regarded under the English law as choses in action, i.e. rights enforceable by court action.<sup>104</sup> Still, the term receivables is nowhere defined in English law.<sup>105</sup> Instead, the term ‘book debts’ is advanced by English courts. Its meaning is narrowly described as debts arising in the ordinary course of business and due or becoming due to the proprietor of that business in that such debts

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<sup>98</sup> M Nathan, ‘Civil Code and Modern Methods of Financing’ (1975) 50 Tul L Rev 583, 588.

<sup>99</sup> *ibid.*

<sup>100</sup> See A Dunham, ‘Inventory and accounts receivable financing’ (1948) 62 Harv L Rev 588; CG Moore, ‘Developments in Factoring, Inventory Liens and Accounts Receivable Financing’ (1961) 17 Bus Law 801; CC Craig, ‘Accounts Receivable Financing: Transition from Variety to Uniform Commercial Code’ (1962) 42 BUL Rev 187.

<sup>101</sup> Saulnier and Jacoby (n 95) 18–25.

<sup>102</sup> See art 2(a); under the UCC, receivables financing has a very wide scope. Basically, it includes all rights to payment of monetary obligations. See s 9-102(a)(2).

<sup>103</sup> Para 20; however, it should be noted that while the Receivables Convention applies only to contractual receivables, the Guide applies to non-contractual receivables as well.

<sup>104</sup> See Beale, et al. (n 93) 273–274; *Torkington v Magee* [1920] 2 KB 427 (Channel J).

<sup>105</sup> F Oditah, *Legal aspects of receivables financing* (Sweet & Maxwell 1991) 19.

should or could be entered in well-kept books relating to that business, whether they are in fact entered in the books of the business or not.<sup>106</sup> Under English law, ‘book debts’ is a term with a specific meaning and a specific scope of application.<sup>107</sup> It comprises a special type of transaction that must be registered. According to English law, therefore, not all receivables are book debts.<sup>108</sup> Receivables are a broader term than book debts.<sup>109</sup> It includes, but is not limited to, book debts. Nevertheless, comparing ‘receivables’ and ‘book debts’, it has been noted that ‘modern commerce, influenced by American terminology, tends to use the wider term “receivables” to refer to all debts owed to a business’.<sup>110</sup> This also avoids confusion with book debts.<sup>111</sup>

Receivables have typically been separated into two types. The first one, which is a primary concern of this research, is ‘pure receivables’, i.e. rights to payment which are not embodied in a document.<sup>112</sup> The second type is ‘documentary receivables’, such as a bill of exchange, a promissory note, or other negotiable instruments where there are documents which, by and in themselves, represent the receivables.<sup>113</sup> Considering pure receivables, what thing can be categorised as a receivable, and where does a right in a receivable come from? Receivables have been defined as rights to payment of a sum of money. Generally, they can originate from various kinds of obligations, e.g. the price of

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<sup>106</sup> Beale, et al. (n 93) 274; *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 WLR 964, 983 (Buckley J); *Shiple v Marshall* (1863) 143 ER 567; see also Oditah (n 105) 20; Goode and Gullifer (n 90) 109–110; G McCormack, *Registration of Company Charges* (2nd edn, Jordans 2005) 86–87.

<sup>107</sup> Such as s 860(7)(f) of the Companies Act 2006, and s 344 of the Insolvency Act 1986.

<sup>108</sup> Nevertheless, these two terms are sometimes used interchangeably in commerce. Oditah (n 105) 19–21; J Benjamin, *Financial law* (OUP 2007) 382; Beale, et al. (n 93) 274.

<sup>109</sup> Ellinger, Lomnicka and Hare (n 94) 871–872; a distinction between these two terms occurs when the registrability of a transaction is concerned. For example, in the context of a secured transaction such as a charge created by a company, if a receivable constitutes a book debt, creating a security interest in it is a registrable transaction. Under s 860 of the Companies Act 2006, it must be registered to perfect the security. Only the compulsory 21-day limit for registration has now been removed by the Companies Act 2006 (Amendment of Part 25) Regulation 2003. However, in the case of an outright sale, such registration is not needed. See Beale, et al. (n 93) ch 10; Goode and Gullifer (n 90) 108–111.

<sup>110</sup> Beale, et al. (n 93) 274.

<sup>111</sup> Goode and Gullifer (n 90) 96; Law Commission Report on Company Security Interests No 296 (LAW COM No 296, 2005) para 4.1.

<sup>112</sup> Oditah (n 105) 25; Goode and Gullifer (n 90) 96.

<sup>113</sup> It has been noted that there is another kind of receivable, i.e. a ‘claim evidenced by some kind of writing’, in which a document does not embody a receivable but is only an evidence of it. Oditah (n 105) 25–27.

goods sold on credit, rentals due under a hire-purchase agreement, and amounts due from clients for services rendered.<sup>114</sup> These are also examples of book debts. Other examples that have not been treated as book debts since they do not arise in the core course of business are bank accounts and bank balances. They are simply money deposited in a bank.<sup>115</sup>

Furthermore, taking into consideration the definition of a receivable laid down in Article 2 of the Receivables Convention, it is a contractual right to payment of a monetary sum. From this definition, it has been explained that a non-monetary performance right such as a right to performance or a right to request delivery is excluded.<sup>116</sup> The exclusion also includes non-contractual receivables ‘arising by operation of law, such as tort receivables, receivables arising in the context of unjust enrichment, tax receivables or receivables determined in court judgments or arbitral awards, unless they are confirmed in a settlement agreement’.<sup>117</sup> In principle, ‘[receivables] arising from any type of contract are intended to be covered’.<sup>118</sup>

Examples of receivables that have been given are as follows:

A broad variety of receivables are included, such as receivables from the supply of goods, construction and services, irrespective of whether the contracts are commercial or consumer contracts. Also included are toll road receipts, royalties, damages for breach of contract, interest, non-monetary claims convertible to money and returned goods (at least, in the relationship

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<sup>114</sup> Ellinger, Lomnicka and Hare (n 94) 871.

<sup>115</sup> *Re Brightlife Ltd* [1987] Ch 200; *Northern Bank Ltd v Ross* [1990] BCC 883; see also Goode and Gullifer (n 90) 109; Oditah (n 105) 23; Ellinger, Lomnicka and Hare (n 94) 871.

<sup>116</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (A/CN.9/470) para 31.

<sup>117</sup> *ibid* para 29; see also SV Bazinas, ‘Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade’ (2001) 9 *Tul J Int'l & Comp L* 259.

<sup>118</sup> UNCITRAL (n 116) para 29.



between the assignor and the assignee, provided that they take the place of the assigned receivables).<sup>119</sup>

It is apparent from the definition and scope of receivables that they are in themselves based on and consist of contractual obligations. Their fundamental characteristics are contractual. A conclusion which can be drawn here is receivables result legally from the contractual relations creating them. They are rights to payment stemming from contractual agreements between contracting parties.

In practice, receivables can comprise not only many, but also a variety of, debts or rights to payment of monetary sums; and they are often traded in bulk.<sup>120</sup> Speaking of receivables does not mean a right to payment in the singular, but rather a bulk of rights to payment. Bulk assignments of receivables are handled in financial practice. This can involve not only single, large-value receivables but also large volume of low-value receivables.<sup>121</sup> Evidence of this can be found in the Receivables Convention. For instance, Article 8 prohibits the ineffectiveness of an assignment of receivables on the ground that it is an assignment of more than one receivable. Article 9(3), though it is not directly meant to describe receivables, also indicates various possible origins of receivables.<sup>122</sup> Dealing with an assignment of receivables is not like a situation where a single right to payment against an individual debtor has been transferred. The bulk may be composed of many rights to payments arising from different contracts and against different debtors. When assigned in bulk, it means that the assignee might acquire rights

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<sup>119</sup> SV Bazinas, 'UNCITRAL's contribution to the unification of receivables financing law: the United Nations Convention on the Assignment of Receivables in International Trade' (2002) 7 ULR 49.

There are certain exceptions in that some types of receivables are excluded from the scope of application of the Receivables Convention. Those are financial receivables arising from securities, letters of credit, bank deposits and so forth. See art 4(2); SV Bazinas, 'Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade' (2003) 11 Tul J Int'l & Comp L 275, 281–282.

<sup>120</sup> For instance, 'when loans are securitized, or consumer receivables are assigned to raise finance, or transferred to a factor'. R Fentiman, 'Assignment and Rome I: towards a principled solution' (2010) 4 LFM 405, 409.

<sup>121</sup> UNCITRAL (n 116) para 90.

<sup>122</sup> A rule like this is also stated in s 9-102(a)(2) of the UCC.

to payment based on various contracts and against various debtors. A bulk of receivables is not one piece of property but an intangible that is composed of many individual rights to monetary payment. Each one of them has its own characteristics which depend on the contractual relationship creating them. The substance of receivables in this circumstance is a bundle comprising a number of individual and separable contractual relationships between creditors and debtors.<sup>123</sup> Such a situation makes things far more complex than when dealing with a receivable generated by a single contract. When the treatment of bulk receivables is being considered, it is common to distinguish this matter from an assignment of a single receivable.<sup>124</sup>

By assuming that receivables are an item of property, this approach has been seen as making them easier to handle. A group of various kinds of contractual rights to payment has been brought into the picture of an item of property to respond to their value and assignability. Affirming the right to assign, the property approach diminishes some problems based on contract law, such as the privity of contract, the non-assignability of contractual rights, and some concerns about the obligations of relevant debtors. These contractual problems can basically be regarded as an obstacle to the transferability of receivables. It is then unsurprising why treating receivables as an object of property is more than welcomed in a legal system. It arises as well in financial practice where it is common to use proprietary language in saying that receivables can be owned and sold.

Another issue that should be mentioned here is proprietary effects of receivables. After being transferred, an assignment of receivables has not only contractual but also proprietary effects.<sup>125</sup> A significant proprietary effect of an assignment is that it transfers the proprietary rights over assigned receivables from an assignor to an

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<sup>123</sup> See also the Receivables Convention, art 8.

<sup>124</sup> Fentiman (n 120) 409.

<sup>125</sup> See M Bridge, 'The proprietary aspects of assignment and choice of law' (2009) 125 LQR 671; the law of assignment is studied in Chapter 3.

assignee. As a result, the assignee is able to assert this right against third parties, such as other creditors and insolvency representatives of the assignor. In general, to speak of a right which can be asserted against a third party is to speak of a property right. This is because only property rights can have an *in rem* effect which can be asserted against the whole world. This issue is another reason leading to the classification of receivables as property.

Despite their principal features as contracts, the proprietary picture of receivables in practice puts them into the position of mixed subject matter between contract and property. This, in turn, makes receivables much more complex and much harder to handle in a legal sense. By arguing against such a proprietary notion, this research calls for a further discussion of the property view of receivables. It then proceeds to investigate the property aspect of receivables under subsequent headings.

### **2.2.2 Receivables from a property aspect**

Despite having their roots in contract law, receivables have many issues mentioned in property law. It begins with the belief that receivables should be counted as property. According to the legal classification, property law is another set of rules governing the legal matters of receivables. However, this might not be straightforward or conclusive to manage when the nature of receivables and the content of property law are scrutinised.

#### **(1) Receivables and notions of property**

There are at least three primary causes regarding the question of why receivables have been regarded as items of property. The first two causes come from theoretical deductions, while the third seems to relate more to practical usage.

Firstly, receivables seem to be widely acknowledged as property when the word ‘property’ is used instead of the word ‘things’. Having been investigated previously, ‘[the] word “things” catches the idea that, whatever it is, it is an asset; it has value, it can be inherited and traded, and can be reached by its holder’s creditors’.<sup>126</sup> By containing valuable monetary payments, receivables which have fallen within the scope of the ‘things’ are thus treated as a type of personal property, in the category of intangible property. Receivables are subcategorised as pure intangibles, referring to ‘a right which is not in law considered to be represented by a document’.<sup>127</sup> In contrast with documentary intangibles, such as negotiable instruments, there is no need for any material object to embody a receivable for it to be seen or recognised as a valuable.

The second cause relates to transferability, which is an important feature of a proprietary right in a property.<sup>128</sup> Once a receivable has been recognised as a transferable or assignable thing it is, on the one hand, commonly acknowledged that a receivable is property because it is transferable. On the other hand, it has been stated in reverse that because a receivable is assignable, it is property.<sup>129</sup> This is also the same logic as that of a chose in action as property.<sup>130</sup> Now, from such circular reasoning of property and assignability no one can be sure of what the real cause is, or what the consequences are.

Thirdly, despite their immateriality, receivables are imagined in practice as if they are a real object. The language and jargon used in financial markets are in line with the receivable-as-property notion.<sup>131</sup> Using such sentences as ‘the lender owns the receivables’, ‘the creditor can sell his receivables’ or ‘the financier is buying some

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<sup>126</sup> Lawson and Rudden (n 10) 29; see 2.1.1 and 2.1.2.

<sup>127</sup> Goode and McKendrick (n 31) 51; Bridge, *Personal property law* (n 24) 6-8.

<sup>128</sup> Bell (n 17) 11; Smith (n 17) 12-13.

<sup>129</sup> The assignability of receivables is examined further in Chapter 3.

<sup>130</sup> Goode and Gullifer (n 90) 96; Beale, et al. (n 93) 273-274; Ellinger, Lomnicka and Hare (n 94) 868-872.

<sup>131</sup> Lawson and Rudden (n 10) 30; Bell (n 17) 11-12.

other's receivables' makes an intangible receivable look like tangible property. This causes further complications, and perhaps more confusion, about the true nature of receivables. Nevertheless, businesses can use any fanciful word they like in any way they want to describe the matter of receivables. It is not their duty, but that of lawyers, to classify receivables under a legal methodology, and to solve a legal problem arising from them correctly and properly.

## **(2) Receivables and substance of property rights**

On the general notion of receivables as a form of property, it has been illustrated that a receivable is property for reasons of value and assignability. Take the following statement as an example: '[a receivable] is a monetary obligation owed by one person to another which is an item of value because it can be transferred to a third party by way of sale or security for a loan'.<sup>132</sup> Even though it is a debatable question whether a receivable should be treated as an object of property, how far it can be appropriately governed by property law? The answer to this question is not clear. In fact it varies amongst countries.<sup>133</sup> To investigate further into these controversial matters, relevant legal substance of property rights as prescribed in property law must be examined closely.

### **(2.1) The negative aspect of property rights**

First of all, although a property has been regarded as containing a right *in rem* which is against the whole world – i.e. against an indefinite class of persons – assertion of this right seems to be less positive than that of a right *in personam*. Property rights, in theory, grant the owner rights to access and control. On the one hand, the rightholder obtains a monopoly right over the use of his property. On the other, it has been admitted

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<sup>132</sup> Bridge, *Personal property law* (n 24) 6.

<sup>133</sup> See van Erp and Akkermans (n 14) 365–378.

that a property right is a negative or defensive right in its nature.<sup>134</sup> This is in the sense that it excludes others from accessing it. The substance of this negative aspect prevents other persons from using or performing certain acts over the property.<sup>135</sup> It also prohibits interference with respect to a property under that right.<sup>136</sup> Such features might be labelled a ‘negative duty of abstention’<sup>137</sup> or a ‘right of exclusion’.<sup>138</sup>

A result of this negative right is there is no useful point to consider whether a rightholder can assert his property rights against unidentified people in daily life. An *in rem* right will turn out to be a positive right only where it is violated. At the time of such violation, it is reasonable for the rightholder to exercise his property rights. However, this is a right that can only be asserted against a specific person who is the violator. A right *in rem* will therefore be transformed into an *in personam* right for the ground of sanctioning.<sup>139</sup> Thus, a property right like ownership might be referred to as ‘absolute’; but in term of exercising this right, it comes under the heading of ‘relative’.<sup>140</sup>

A receivable has a contradictory scenario. It is always a right *in personam* by its very nature. Having a receivable, the rightholder has the right to bring an action before a court against the debtor, and against the debtor only. Bringing such an action is also a way to enforce and obtain the benefits of that receivable. This is regarded as a positive way of exercising this kind of personal right. Furthermore, in contrast with obligations *in rem*, ‘[*in personam*] obligations can be either duties of performance or abstention’.<sup>141</sup>

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<sup>134</sup> A property rightholder is generally protected by the law of tort. See Bell (n 17) 7–11.

<sup>135</sup> See *Anchor Brewhouse Developments v Berkeley House* [1987] 2 EGLR 173, where it was held by Scott J that where the cranes are being hung in the air space over the property of another, it constitutes a trespass representing an interference with possession or with right to possession.

<sup>136</sup> See Swadling (n 66) 209; AM Honoré, ‘Rights of Exclusion and Immunities Against Divesting’ (1959) 34 Tul L Rev 453, 458–459.

<sup>137</sup> Merrill and Smith, ‘The property/contract interface’ (n 68) 788–789.

<sup>138</sup> See Honoré (n 136); TW Merrill, ‘Property and the Right to Exclude’ (1998) 77 Neb L Rev 730.

<sup>139</sup> R Grantham and C Rickett, ‘Property Rights as a Legally Significant Event’(2003)’ 62 CLJ 717, 729–730.

<sup>140</sup> Bridge, *Personal property law* (n 24) 28–29.

<sup>141</sup> Merrill and Smith, ‘The property/contract interface’ (n 68) 789.

Both of them can be formed by contracts. A duty to perform actively might involve, for instance in the case of a sale contract, delivering the goods sold or making a payment for the cost of the goods. As for the *in personam* duties of abstention, an example is a covenant not to compete.<sup>142</sup>

## (2.2) The concept of ownership and possession

The second legal substance concerns two of the most important legal principles laid down in property law. Those are the concepts of ownership and possession. 'Ownership' is a legal institution denoted to 'the greatest possible interest in a thing which a mature system of law recognises'.<sup>143</sup> It is meant to describe 'the right which gives its holder the highest degree of access and control',<sup>144</sup> or 'the ultimate right to use the object or right in question'.<sup>145</sup> Having ownership over a thing means the thing belongs to the owner, and the owner holds a bundle of rights in respect of that thing.<sup>146</sup> He is able to assert his ownership rights in that specific thing against any persons.

Alongside ownership, another proprietary concept which should be considered is possession. Since common-law countries have little concern with ownership, instead, the proprietary rights of the holder primarily emphasise possession. 'Possession' in English law is a word from a piece of legal shorthand referring to a set of rules applicable to particular facts.<sup>147</sup> Those facts are about 'a person's title to land, goods or any other type of subject-matter over which it is possible to have property rights'.<sup>148</sup> As a matter of fact, there exist two central elements of possession. The first element is 'the

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<sup>142</sup> *ibid.*

<sup>143</sup> AM Honoré, 'Ownership' in AG Guest (ed), *Oxford essays in jurisprudence* (OUP 1961) 108.

<sup>144</sup> Swadling (n 66) 218.

<sup>145</sup> Smith (n 17) 6.

<sup>146</sup> 'Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary.' See further descriptions in Honoré, 'Ownership' (n 143) 112–124.

<sup>147</sup> DR Harris, 'The concept of possession in English law' in AG Guest (ed), *Oxford essays in jurisprudence* (OUP 1961) 70; F Pollock and RS Wright, *An essay on possession in the common law* (William S. Hein 2000).

<sup>148</sup> Swadling (n 66) 218–221.

exercise of factual control'.<sup>149</sup> The second one is 'the concomitant intention to exclude others from the exercise of control'.<sup>150</sup>

Although their legal concepts are not exactly the same,<sup>151</sup> ownership as well as possession is a right connecting to a specific object. Their structures and substance are based on incidents of the greatest interest of the rightholder in relation to a thing. Additionally, their underlying principle is for the purpose of protecting the property rights of the holder.

Originally, the concept of either ownership or possession had no role to play in a receivable. This was because of its character as a personal contractual relation based on a contract. Receivables have no material object. Even today, when the words 'ownership' and 'possession' are used on some occasion with intangible things, including receivables, their legal meaning and understanding are not the same as when applied to tangible properties.<sup>152</sup> This is simply because intangibles can neither be owned, nor possessed, nor delivered nor transferred in a similar manner to land or goods and chattels. Moreover, by their nature, receivables have an advantage over tangibles, since '[they] are not susceptible to physical loss, damage or deterioration'.<sup>153</sup>

A creditor – or, to use ownership language, an owner – of a receivable might be able to perform acts which would bring about extinguishment of the receivable,<sup>154</sup> such as executing it, assigning it, novating it, setting it off with another receivable, or even releasing it. Rules on extinguishing a receivable do not work in the same way for extinguishing property rights as those structured by property law. They are developed in

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<sup>149</sup> Bridge, *Personal property law* (n 24) 17.

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid* 16–33.

<sup>152</sup> J Ghestin, M Billiau and G Loiseau, 'The regime of Claims and Debts' in JHM van Erp and B Akkermans, *Cases, materials and text on national, supranational and international property law* (Hart 2012) 369–370.

<sup>153</sup> Goode and Gullifer (n 90) 95.

<sup>154</sup> Cook (n 41) 819–821.



the area of contract law, not property law. As oppose to an intangible property like a receivable, a tangible property is at the same time a subject of property rights. Once, for instance, a property subject to such rights is totally destroyed, absolutely transferred, or transformed into a new thing,<sup>155</sup> the property rights stored within it consequently disappear. In contrast, to make a claim for a right to payment incurred by a receivable, the creditor must assert his right over the debtor personally. By this it means the claim is not specific to any property of the debtor. It focuses on the debtor's monetary obligation. Consequently, although the debtor's property is gone, the creditor's right is still in existence.

Therefore, as far as a receivable is concerned, the words 'ownership' and 'possession' may be used if one prefers, but it should be made clear that the concepts must be adjusted and the rules changed accordingly, based on its real nature.

### (2.3) Extended rights in property

Rights in property involve not only a relationship between people and things, but also 'the effect of that relationship on the world at large'.<sup>156</sup> This results in other prominent features of property rights which should be taken into consideration. They are: (a) the capacity to bind third parties, (b) the amenability to specific relief, and (c) the immunity to the consequences of insolvency.<sup>157</sup> These characteristics of property rights derive from the idea that 'property rights constitute strong legal rights'.<sup>158</sup> In comparison with contractual rights, it is suggested that 'contractual rights remain as weak as ever'.<sup>159</sup> As far as this thesis is concerned, the three additional features should be classified as an expansion of the scope of property rights which are extended from the rightholder

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<sup>155</sup> Swadling (n 66) 377–384.

<sup>156</sup> Bridge, *Personal property law* (n 24) 12.

<sup>157</sup> Pearce (n 57) 108.

<sup>158</sup> *ibid.*

<sup>159</sup> It is stated that such a conclusion is limited to rights which are categorised as 'primary rights', i.e. rights to things or under contracts themselves. In terms of 'secondary rights', i.e. the right to receive compensation when primary rights are breached, the differential gap seems to be smaller. *ibid* 108–109.

himself to other relevant persons. They are the extended outcome of *in rem* rights affirming the effect of property rights against the world at large. Nevertheless, it is unsurprising in stating that contractual rights are weaker than proprietary rights in this regard. Furthermore, all three additional features of property rights are also a fundamental ground why rights in receivables should be separated from rights in a property. They are the reason demonstrating that receivables do not have the same logic, having been explained by the legal notion of property.

A receivable is a contractual bond between the contracting parties. It is a right *in personam* of one party enforceable by an action *in personam*, in principle, only against another party. Initially, it has no capacity to extend its legal binding to or to impose any burden on third parties.<sup>160</sup> This concept is known as the privity of contract. The ability to assert against a third party is generally a feature of a property right; conversely, assertion against a third party is the test for a property right.<sup>161</sup> Nevertheless, there are some underlying grounds in saying that ‘obligations can only be subject to property rights in the hands of third parties’.<sup>162</sup> This can be achieved through assignment, so that it has commonly been stated that one of its effects is that an assignment of receivables can bind a third person.<sup>163</sup>

With regard to the amenability to specific relief, ordering a promisor to render a specific performance in accordance with a contractual term is not in a court’s favour, especially in a common-law country. Instead, the normal remedy for non-performance is damages. Specific performance has been regarded as ‘an extraordinary remedy’.<sup>164</sup> It has been seen in the eyes of English courts as ‘an equitable remedy which is available in the

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<sup>160</sup> Bridge, *Personal property law* (n 24) 26.

<sup>161</sup> Benjamin (n 108) 443; Gray and Gray (n 22) 36.

<sup>162</sup> Benjamin (n 108) 444.

<sup>163</sup> This subject concerns law of assignment which is studied in the next chapter.

<sup>164</sup> Beale (n 59) 65.

discretion of the court',<sup>165</sup> where traditionally damages are an inadequate remedy.<sup>166</sup> Moreover, there is no binding rule in this area.<sup>167</sup> By contrast, the remedy of specific relief is preferable when enforcing a property right. It is typically issued in a case of wrongful interference with ownership or possession in order to keep and protect the legal status of the proprietary rights of the owner from being interrupted illegally.<sup>168</sup>

The last content of extended property rights is their immunity in insolvency situations. In the event that a debtor is unable to pay for receivables he is subject to,<sup>169</sup> a creditor who holds a secured transaction or other type of security granted by the insolvent debtor in supplement of the receivables-created transaction is likely to have a proprietary right over the debtor's property which is subject to such an arrangement. The secured arrangement generates the same result as in case of the owner of a property, notwithstanding that that property is in the hands of the debtor. This is also true even if the insolvent debtor is in wrongful possession of that property. The rightful owner has a right to regain his property, since that property is regarded as never forming part of the insolvent's estate.<sup>170</sup> In contrast, mere receivables, however large the amounts they may be for, cannot constitute a property right over a specific property of the debtor. Claiming for a right to payment under an unsecured receivable must be done against the debtor and over the debtor's assets in a general sense. Unlike a secured transaction, it does not direct to any particular unit of the debtor's property.<sup>171</sup> An unsecured creditor has 'merely the right to sue for his money and to invoke the process of law to enforce a

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<sup>165</sup> McKendrick (n 59) 931.

<sup>166</sup> *ibid.*

<sup>167</sup> See *Co-operative Insurance Society v Argyll Stores (Holdings)* [1998] AC 1 (Lord Hoffmann).

<sup>168</sup> For instance, trespass, nuisance and interference with property under tort laws; J Davis, 'Tort' in P Birks, *English private law* (OUP 2000) 480–487 and 499–509.

<sup>169</sup> For insolvency law, see, IF Fletcher, *The law of insolvency* (4th edn, Sweet & Maxwell 2009); R Goode, *Principles of corporate insolvency law* (4th. edn, Sweet & Maxwell 2011); E Warren and JL Westbrook, *The law of debtors and creditors: text, cases, and problems* (6th edn, Wolters Kluwer Law & Business; Aspen Publishers 2009).

<sup>170</sup> Bridge, *Personal property law* (n 24) 13.

<sup>171</sup> Goode and McKendrick (n 31) 489–490.

judgment against the [debtor]'.<sup>172</sup> This is true even when the debtor becomes insolvent and such creditor will likely gain nothing at the end of the insolvency collective procedures.

A main aim of insolvency law is to establish a process for the orderly collection and realisation and the fair distribution of the debtor's assets.<sup>173</sup> Emphasisingly, a general terminology that is used is the word 'assets'. The underlying reason of this is because this term refers to valuable things of the debtor that specifically constitute property for the purpose of insolvency law or insolvency estate.<sup>174</sup> It includes but is not limited to tangible assets. Intangible assets like contractual rights to payment or receivables are also covered. Broadly speaking, this law intends to capture anything that have element of benefit or entitlement.<sup>175</sup> Seeing a receivable as a valuable contractual right to payment which is a thing in action and an asset does not differ or affect the law of insolvency. Rather, it is in conformity with the insolvency special regime.

### **2.3 True nature of receivables**

This thesis therefore advances that, besides being an important kind of financial asset, the true nature of receivables is that of contractual rights. This is the approach that proposes that receivables should be treated as per their origins. The reasons for this proposal will be provided after the practical standing point that receivables are financial assets is set out.

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<sup>172</sup> *ibid* 624–625.

<sup>173</sup> V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 9 and 29; Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) ch 1; R Goode, *Principles of corporate insolvency law* (4th edn, Sweet & Maxwell 2011) 94.

<sup>174</sup> See Insolvency Act 1986, s 436; UNCITRAL Legislative Guide on Insolvency Law (2004) 75-76 and recommendations 35-38.

<sup>175</sup> *ibid* 179, referred to *Re SSSL Realisations (2002) Ltd* [2004] EWHC 1760 Ch, 60 (Lloyd J).

### 2.3.1 Receivables as financial assets

Financial assets may consist of a very wide range of intangible things.<sup>176</sup> The essential characteristic of a financial asset is that it is a store of value which is capable of being exchanged for a real (or material) valuable thing.<sup>177</sup> There is no doubt about the financial status of receivables. Receivables in themselves are valuable assets, especially in terms of financial practice. By consisting of rights to claim for monetary payments, receivables are ‘mobile items of wealth, one of the many possible forms which “capital” may take as a factor in production in economic life, much like goods or land’.<sup>178</sup> They are valuable storage and financial assets, both in financial and legal contexts. Economically, receivables are shown as assets on the creditor’s balance sheet. They can be utilised by converting them into cash or using them as collateral to secured creditors’ transactions with others.<sup>179</sup> Legally, a receivable is a personal relation between creditor and debtor; the value in it is directly connected to the financial status of the debtor. It does not bind to, or depend upon, a specific property counted in the bulk of the debtor’s assets.

Financing against receivables or ‘receivables financing’ is the term used to denote ‘transactions whereby a business raises money on the basis of its receivables’.<sup>180</sup> Commonly, it is in the context of the life cycle of assets. For instance, a stock in trade having been sold produces a receivable that can be turned into cash, and this is subsequently reinvested in a new raw material to produce a new stock.<sup>181</sup> It was observed by the Law Commission that ‘[for] many companies, a major part of their assets will be in the form of money due to them under contracts, particularly for goods

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<sup>176</sup> For instance, money, debts and securities; P Wood, *Law and practice of international finance* (University edn, Sweet & Maxwell 2008) 3.

<sup>177</sup> *ibid* 3-5.

<sup>178</sup> K Zweigert and H Kötz, *Introduction to comparative law* (T Weir tr, 3rd rev edn, Clarendon Press 1998) 33.

<sup>179</sup> Ellinger, Lomnicka and Hare (n 94) 868.

<sup>180</sup> Beale, et al. (n 93) 286.

<sup>181</sup> Goode and Gullifer (n 90) 96.

and services supplied'.<sup>182</sup> In other words, these assets are receivables which companies can raise money against through assignment, by way of either sale or security.<sup>183</sup> Receivables financing via bulk assignments, such as a large volume of low-value receivables, has been regarded as one of the financial methods that is 'at the heart of significant financing practices'.<sup>184</sup>

Although receivables have been regarded as a financial asset, they are not a concrete property like land or other corporeal items. Measurement of their value is based on the contracts generating them. At this point, it is submitted that there are two main factors which denote the economic value of receivables: 'the length of time before they become payable and how likely the account-debtors are to fulfil their obligations'.<sup>185</sup> In short, these are questions of enforceability, i.e. whether such receivables will be successfully enforced in order for the rightholders to receive actual payments.<sup>186</sup> Their values rely considerably on, and attach to, their origins, which are the terms of the contracts generating them.

From a broad perspective, no matter how a legal system treats receivables – i.e. whether as proprietary rights under property law or as contractual rights under contract law – it is not going to change the status of receivables as financial assets. This is part of the true nature of receivables which has been developed in financial practice. However, their appearance at law is undeniable and unavoidable. This generates a powerful force, in the sense that legal principles and rules are crucial factors facilitating this form of financial asset.

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<sup>182</sup> Law Commission Report (n 111) para 4.1.

<sup>183</sup> See NO Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (Routledge 2011) 28–31; methods of assignment are explained in Chapter 3.

<sup>184</sup> UNCITRAL (n 116) para 83.

<sup>185</sup> Beale, et al. (n 93) 275.

<sup>186</sup> *ibid.*

### 2.3.2 Receivables as contractual rights

A contract is the result of a consensus intention of contracting parties. It is a private agreement recognised by law, and not a result of actions or things created by the law itself. The principle underlying this private action is the freedom of contract, and not the *numerus clausus* established in property law. This is the factor that distinguishes contractual obligations from other legal obligations.<sup>187</sup> A receivable or a right to payment is the result of a contract. Its content links back to the contract creating it. A receivable is a contractual right or interest recognised by law.<sup>188</sup> It is a personal relationship between debtor and creditor, and not a relationship of debtor or creditor with an unidentified indefinite class of person. The latter is typically a descriptive explanation of a property right.

A receivable is indeed a contractual right to monetary payment which is a personal obligation between debtor and creditor. '[It] is not a sum of money belonging to the creditor, but in the possession of the debtor.'<sup>189</sup> It only stores a valuable asset expected to be received by the rightholder. Being a creditor simply means to have an incorporeal asset, i.e. a right to payment or a right to sue (choses in action). He, in other words, is not an owner of a thing or a property. It is only when the debtor has actually paid him that the creditor definitely has some 'thing' that is real. That 'thing' then will be in his *in rem* dominant, i.e. in his ownership or possession according to the principle of property law. By contrast, before receiving such a real payment, the thing the creditor has is a chose in action, or an *in personam* right derived from the contract enforceable by an action *in personam* against the debtor, and as such the debtor only. From a legal standpoint, a receivable is thus owed to, not owned by, the creditor. The phrase 'the

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<sup>187</sup> Peel and Treitel (n 60) 1.

<sup>188</sup> M Smith, *Law of assignment: the creation and transfer of choses in action* (OUP 2007) 24-26; Odithah (n 105) 32-43.

<sup>189</sup> *ibid* 32.

creditor owns a receivable', as used in daily life, has no effect on this true legal nature of the receivable. It cannot change the legal procedure for exercising the creditor's right to payment. This is the actual way for him to gain the monetary value stored in such a receivable.

Theoretically, it is true that contract and property are integrated at some intersections in legal methodologies. Still, contract law and property law are essentially different.<sup>190</sup> In a rights-based analysis of contractual and proprietary rights, a right incurred by a receivable is certainly not a 'right to things'. It is a personal right against a person. Although a thing like an amount of money is the end result of that right, such a monetary outcome happens only after the creditor successfully enforces the receivable. This beneficial result might be called an 'interest' in a receivable, but that is not the 'right to a thing' in the same manner as an *in rem* right. The thing the creditor purports to receive is derived from the value of the receivable linking to the contract creating it, and not a specific material thing in the debtor's property. Moreover, is a receivable a 'right between persons with respect to things'? A receivable is of course a right between persons, but it has nothing to do with 'things' in a material sense. For all concerned, it highlights an 'act', whether of performance or even non-performance, by the debtor. Again, a thing, if any, is merely the end result of this act.

In contrast, is a receivable a right to monetary payment against a person? The answer expressed by this research is positive. But, it should be noted that this thesis is unlikely to be on the same side as that of the 'bundle of rights' terminology. Rights *in rem* do not comprise only rights against persons. There is another dimension, i.e. 'things' which must be taken into account when analysing property rights. This additional criterion is to ascertain that there is a thing for property rights to be attached to or to reside in.

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<sup>190</sup> See also JS Kraus, 'Philosophy of Contract Law' and P Benson, 'Philosophy of Property Law' in JL Coleman and S Shapiro, *The Oxford handbook of jurisprudence and philosophy of law* (OUP 2002).



Consequently, the main argument of the thesis is that since the true nature of a receivable is a contract generating a valuable *in personam* right without a need for any ‘thing’ to be attached to, the methodological approaches employed in examining a right *in rem* which connects to a material ‘thing’ do not match the receivable.

In addition, considering the notions of receivables and the various important contents of proprietary rights, it can be seen that the nature of receivables does not align with property’s legal principles. A receivable consists of a positive right rather than a negative one. That positive right is a legal ‘claim’ whereby the rightholder has to take legal action before a court to enforce payment. Next, a receivable cannot be owned or possessed in accordance with the concept of ownership and possession. Nor can it come under physical loss or damage. Instead, its risk is the debtor becoming insolvent. If that happens, unsecured creditors are unlikely to survive the insolvency of the debtor. Rights within a receivable, which is a claim or a chose in action, do not expand like the extended rights in property identified under property law. They cannot, by themselves, affect third parties or strangers automatically. Their available remedies, if in breach or unpaid, are based on damages as set out in contract law.

Although a contractual receivable has been treated as a financial asset, it has the same meaning when economists have analysed, in the widest sense, that ‘all “rights” are property rights’.<sup>191</sup> For the particular word ‘rights’ is meant to cover anything valuable that can be traded economically. This does not mean it is necessary either to categorise those rights as objects of property or proprietary rights, or to put them under the umbrella of property law, unless it is logical and proper to do so. If one really needs to apply the word property to explain a receivable, it is the term ‘contractual property’ that is most appropriate. This term reflects the real character of a receivable in an ordinary or

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<sup>191</sup> Harris (n 6) 146.

economic sense of property. By contractual property, it means a property that stems from a contract or, in other words, a property that refers to a contractual obligation.

As for legal nature of a receivable which is a contractual right, it is not crucial, at least in the eyes of the law, to view it otherwise. As far as this research is concerned, the property approach to receivables has made things less complicated only at first glance. This is mainly because it has omitted the true legal substance of receivables. Receivables do contain a bundle of contractual rights to monetary payment. They are intangible things that one can neither touch, possess, own, nor sell as is the case with tangible objects. Receivables are transferred not by delivery of possession or ownership, but instead through assignment. This is because a right residing in a receivable is not an absolute property right of the rightholder for him to transfer like a property right in a real object. It is, by contrast, a contractual right to payment receivable by him. Assigning a receivable is thus the transfer of a receivable contractual right, not a proprietary one. Regarding the proprietary effect of receivables resulting from an assignment as examined in this chapter, it is quite straightforward to enquire whether the proprietary effect can truly characterise the rights in receivables. Is it not the 'effect' likely to be created by assignment? 'Receivables', on the one side, are the object of assignment. 'Assignment', on the other side, is the method of transferring receivables. Though typically connected, they are in fact not the same legal matter. The claim that there is a proprietary effect arising out of the assignment of receivables is unlikely to be able to change the primary nature of receivables.

Taking into consideration the condition of rights vested in receivables, they can be either present or future.<sup>192</sup> Receivables are typically divided into two kinds: existing and

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<sup>192</sup> Goode and Gullifer (n 90) 96.

future.<sup>193</sup> English courts have taken the position that ‘[all] contractual rights are vested from the moment when the contract is made, even though they may not presently be enforceable, either because the promisee must first perform his own part, or because some condition independent of the will of either party (such as the elapsing of time) has yet to be satisfied’.<sup>194</sup> Thus, the term ‘existing receivables’ under English law covers a wide range of rights generated by contracts, though they are not currently due. This kind of receivable, such as a right to interest under a loan, a sum payable for goods or services not yet delivered or rendered, or a sum payable under an existing construction contract, might be labelled ‘unearned rights to payment’.<sup>195</sup> These unearned debts are potential and, as such, existing.<sup>196</sup> They are all categorised as existing receivables.

In the case of ‘future receivables’, they are ‘[receivables] expected under contracts which have no present existence whatever, but which every going concern expects to result from future contracts into which it might enter. Such [receivables] are neither earned nor payable.’<sup>197</sup> From a creditor’s perspective, future receivables are rights which do not yet exist or belong to him.<sup>198</sup> From the English case law *Tailby v Official Receiver*,<sup>199</sup> debts or receivables which are classed as future are those which may occur and become due in any business or trade the assignor may carry on after the time of

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<sup>193</sup> In addition to these two kinds of receivables, there is a third one that is ‘contingent receivables’, i.e. ‘an obligation or promise which may in a certain future event become a debt’. However, contingent receivables are generally included in the group of future receivables, bearing in mind that there is an important distinction between these two concerning registration issues when a security over each one of them has been created under English law. Oditah (n 105) 27–32.

<sup>194</sup> *Colonial Bank v European Grain and Shipping* [1988] 3 WLR 60, 67–68 (Mustill LJ).

<sup>195</sup> Oditah (n 105) 28.

<sup>196</sup> *ibid* 29.

<sup>197</sup> *ibid* 30.

<sup>198</sup> These rights are sometimes called ‘future property’. Peel and Treitel (n 60) 724; *Tailby v Official Receiver* (1888) 13 App Cas 523.

There is a case where the existence of future receivables depended upon contingencies. This kind of receivable can be called a ‘contingent receivable’, referring to ‘an obligation or promise which may in a certain future event become a debt’. Contingent receivables might be regarded as a third type of receivable. Otherwise they might be included in the group of future receivables, bearing in mind that there is an important distinction between these two concerning registration issues, when a security over each one of them has been created under English law. Oditah (n 105) 27–32; McCormack (n 106) 88.

<sup>199</sup> (1888) 13 App Cas 523; see also *Holroyd v Marshall* 11 ER 999.

assignment. It was decided in this case that future book debts are, though mere expectancies, neither too vague nor too uncertain to be assigned in equity for value, if they are of such a nature and so described as to be capable of being ascertained and identified. Those future debts will be bound as the subject matter of an assignment and subsequently be subject to a good title of the assignee when they come into existence. Like bulk receivables, future receivables have been regarded as a significant financial asset employed in financial practice.<sup>200</sup> The Receivables Convention, Article 8, also affirms the effectiveness of an assignment of future receivables. However, the term ‘future receivables’ varies amongst legal systems.<sup>201</sup> It is also used to define the scope of existing receivables. For example, the criteria which have been adopted under the Receivables Convention for making a separation between future and existing receivables are based on the time of the conclusion of the original contract and the time when the contract of assignment is concluded.<sup>202</sup> A receivable arising under a contract which has been concluded before or at the time of the conclusion of a contract of assignment is considered to be an existing receivable. Otherwise, if a receivable arises after the time of assignment, it will be classified as a future receivable.<sup>203</sup>

Considering those two kinds of receivables, namely existing and future receivables, they are by their natures based on contracts. Along the same lines as their basic features, the conditions of appearance of these receivables are rooted in the terms of the contracts creating them. Their real substance is a class of contractual rights to payments, either

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<sup>200</sup> Financing against future receivables commonly used in large-scale, revenue-generating infrastructure projects, e.g. future electricity fees from a dam project, future telecommunication charges from a telephone system and future toll-road receipts from highway construction. UNCITRAL (n 116) paras 8 and 83.

<sup>201</sup> HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009) 14; moreover, the effectiveness of an assignment of future receivables is not recognised in all legal systems. UNCITRAL (n 116) para 83.

<sup>202</sup> Art 5(b).

<sup>203</sup> See UNCITRAL (n 116) para 56.

already existing or likely to exist in the future. Receivables are therefore bundles of contractual rights directly related to the law of contract.

## **2.4 Summary remarks**

By emphasising the true nature of receivables, this chapter contends that receivables are indeed contractual relations. Receivables are, by their very nature, different from land and other tangible objects though they are, in general, things and financial assets. But in legal classification, in particular, they are intangibles which need special legal treatment. A legal system should not adopt the property approach only on the grounds of their value and assignability. It should look at their origins and treat them as what they really are.

Comprising a right to payment, receivables are from a legal viewpoint contractual interest. They constitute contractual assets that are subject to the domain of contract law, and not property objects like the content of property law. Receivables are not items of property by themselves. The real value contained in them is the possibility of turning them into money. Such money is the end result which can be achieved after a successful legal process of enforcing the contract creating those receivables. The true legal nature of receivables is contractual rights resulting from contractual relationships. Although receivables can be seen in practice as a financial asset or a contractual property, their concepts and principles do not belong to property law. They should therefore be treated as contractual rights according to their true nature and falling within the sphere of contract law, rather than a form of property subject to property law or a confusing combination of the two.

## CHAPTER 3: ASSIGNMENT

This chapter examines a method of transfer, assignment. ‘Assignment’ is a way of transferring receivables from one person to another, from assignor to assignee.<sup>1</sup> In the general notion, assignment has been claimed to be a hybrid legal institution of contract and property.<sup>2</sup> This is the approach that has been adopted to the assignment of receivables. It will henceforth be referred to as ‘the property-contract approach’. However, the aim of this research and particularly of this chapter is to unravel the confusing picture of assignment under the property-contract approach. It is also to question whether an assignment really has such a hybrid nature, and to what extent each aspect of that nature controls the law of assignment. In answering these questions, this research attempts to deconstruct such hybrid compounds by studying and analysing each characteristic individually. In this way, a legal issue concerning the assignment of receivables will disclose whether it falls within the sphere of proprietary or contractual areas.<sup>3</sup>

A task this thesis aims to accomplish is to resolve the confusing treatment of an assignment as contract and property. A new way of thinking about assignment will be proposed. A core idea of the chapter is to propose that, in contrast with the property-contract approach, assignment should be treated as a method of transferring rights that is separate from the mixture of property and contract laws. This proposed idea is ‘the rights-based approach’. Assignment is not only a transaction involving transfer rights, it

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<sup>1</sup> See also LS Sealy and RJ Hooley, *Commercial law: Text, cases, and materials* (OUP 2009) 933–939; AP Bell, *Modern law of personal property in England and Ireland* (Butterworths 1989) 361.

<sup>2</sup> See A Flessner and H Verhagen, *Assignment in European private international law: claims as property and the European Commission's "Rome I Proposal"* (Sellier 2006) 2–4; M Bridge, ‘The proprietary aspects of assignment and choice of law’ (2009) 125 LQR 671, 677–678; K Zweigert and H Kötz, *Introduction to comparative law* (T Weir tr., 3rd rev edn, Clarendon Press 1998) ch 33.

<sup>3</sup> See Chapter 1 for the full research question and methodology.

is also a transaction the result of which is to create a new class of rights.<sup>4</sup> Assignment is, initially, a method of transferring contractual rights or interests. The things being transferred are classes of intangible contractual rights against persons. They are rights to payment which are derived from assigned receivables. But, as a result of assignment, a new class of rights is also created. This class of rights is relative rights between relevant persons. In terms of legal relationships, they can be divided into three classes: (1) rights of assignee against assignor; (2) rights of assignee against debtor; and (3) rights of assignee against third parties. Various important legal issues involved in assignment can subsequently be categorised into each class of these three groups of relations, notwithstanding that they are contractual or proprietary under the property-contract approach. A better way of treating assignment is therefore to regard it as a distinct method of rights transfer according to its legal nature.

In examining the subject of assignment, this chapter is structured as four sections. It will first explore the conceptual developments of laws and assignment in light of both theoretical and practical prospects. Subsequently, detailed studies on contractual and proprietary aspects concerning assignment will be conducted and analyses performed in Sections Two and Three. Finally, summary remarks regarding the nature of assignment and the proposed rights-based approach will be advanced in Section Four. The results of the debate conducted in this chapter will lead to a significant formulation of conflict-of-law rules for regulating assignment.

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<sup>4</sup> See also R Stevens, 'Contractual Aspects of Debt Financing' in DD Prentice and A Reisberg (eds), *Corporate finance law in the UK and EU* (OUP 2011) 216.

### **3.1 Conceptual developments of law and assignment**

In this section, historical developments in the law related to assignment are studied first. The law of assignment has long been a controversial issue.<sup>5</sup> As shall be seen, many legal concepts of assignment have been advanced and opposed by legal scholars. The main legal point in conducting this research concerns the assignability doctrine of contractual receivables. This background will serve as a basis for the two legal notions of assignment, contract and property, which will be presented accordingly. After that, the principal methods of financing against receivables will be investigated. Whatever ways the legal theories may be, assignment is in a practical sense one of the most important methods for transferring receivables when financing business. Legal issues and disputes consequently arising from these transactions need to be correctly clarified and resolved under a proper area of law.

#### **3.1.1 Historical developments: from non-assignability to assignability**

From non-assignability, or formally inalienability, to assignability, or formally alienability, the principal matter this research casts doubt on is not the rules of the former, as stated in historical reviews. It focuses, rather, on the underlying reasons for the assignability doctrine which gradually becomes a significant factor in such a historical switch. To examine this fundamental development of laws on assignment, both doctrines will be discussed, respectively, below.

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<sup>5</sup> See OR Marshall, *The assignment of choses in action* (Pitman 1950) ch 2.



## (1) Doctrine of non-assignability

The law on assignment of receivables have been controversial. Debates mostly not for but against this matter were conducted centuries ago. Looking back at those times, an assignment of a receivable was, at the very beginning, not legally permitted. As the object of assignment, a receivable or a chose in action was originally not assignable.<sup>6</sup> Once, it was manifestly claimed that '[the] rule that a chose in action is not assignable was a rule of the widest application. A creditor could not assign his [receivable]'.<sup>7</sup> This doctrine was claimed to be 'a principle of universal law'.<sup>8</sup> Nevertheless, such a view is incorrect and clearly not the law at the present time. Nowadays, a settled law is that intangible things such as receivables or choses in action are, to a large extent, assignable.<sup>9</sup> As far as this thesis is concerned, it is worth mentioning the major reasons for the non-assignability of receivables as seen in the past. This will serve as a basis to counter the reasons why the transferability of receivables by way of assignment has been developed. It is also to show the participation of contract and property laws governing assignment.

The early lawyers found it hard to think of the transfer of something intangible, like receivables or contractual rights.<sup>10</sup> The early debate on this subject was probably a matter of inalienability relating to the assignment of receivables. A receivable, or a

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<sup>6</sup> However, there appeared to be certain exceptions to the non-assignability of receivables. These were, for instance, an assignment by or to the king and a transfer by way of a power of attorney. See F Lawson, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 LQR 516; F Lawson, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 LQR 547; also PH Winfield, 'Assignment of Choses in Action in Relation to Maintenance and Champerty' (1919) 35 LQR 143; Marshall (n 5) ch 2; Mackay of Clashfern (ed), *Halsbury's laws of England*, vol. 13 (5th edn, Lexis Nexis 2009) paras 14 and 16–17; A Pretto-Sakmann, *Boundaries of personal property: shares and sub-shares* (Hart 2005) 159–160.

<sup>7</sup> JB Ames, 'The Disseisin of Chattels. III. Inalienability of Choses in Action' (1890) 3 Harv L Rev 337, 337

<sup>8</sup> *ibid* 339.

<sup>9</sup> See WS Holdsworth, 'The History of the Treatment of "Choses" in Action by the Common Law' (1920) 33 Harv L Rev 997; WW Cook, 'The Alienability of Choses in Action' (1916) 29 Harv L Rev 816; SJ Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1932) 48 LQR 547; also Marshall (n 5) chs 3 and 5; Pretto-Sakmann (n 6) 158–163.

The issue of non-assignment clause is investigated in Section 3.2.2.

<sup>10</sup> F Pollock and FW Maitland, *The history of English law*, vol. II (2nd edn, CUP 1898) 226; also cited in E Peel and GH Treitel, *The law of contract* (13th edn, Sweet & Maxwell 2011) 712; Bell (n 1) 361–362.

chose in action, was regarded as an inalienable thing. It was a personal relationship giving a creditor a right to sue his debtor. ‘Historically, claims of action, choses in action, rights of suit, and lawsuits themselves have been treated as personal and inalienable.’<sup>11</sup> The law did not recognise the assignment of ‘a bare cause of action’; consequently, it would be struck down.<sup>12</sup> A lawsuit was not a property. To claim for, or enforce, a receivable is to bring a legal action. This could not be divided, hence it was non-assignable.

The history of English law also shows that ‘contractual rights were personal and not assignable. Only gradually did the law permitting assignment develop.’<sup>13</sup> A receivable which typically originates from a contract was considered too personal to be assigned. It creates a personal relationship between parties, i.e. debtor and creditor. It is thus implied that such a relationship ‘forbids the substitution of any other parties for the original ones’.<sup>14</sup> This is called the ‘too personal objection’.<sup>15</sup> Another objecting reason for assignability is based on the ground of public policy. This is the law of maintenance and champerty<sup>16</sup> which, as an effect, prohibited the transfer of a mere right to litigate. A chose in action is a kind of right to action. Assigning it could be regarded as a transfer of a mere right to action. ‘[While] property can be fully assigned, a bare right to litigate cannot.’<sup>17</sup> This objection was also rooted in the strictly personal character of contract.<sup>18</sup> It is primarily concerned with the contractual relations between, and only between, the parties who are persons that each contracting party intends to deal with in the first place.

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<sup>11</sup> JA Blumenthal, ‘Legal Claims as Private Property: Implications for Eminent Domain’ (2008) 36 *Hastings Const LQ* 373, 373; M Radin, ‘Maintenance by Champerty’ (1935) 24 *Cal L Rev* 48.

<sup>12</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, 703 (Lord Roskill); G McMeel, ‘The modern law of assignment: public policy and contractual restrictions on transferability’ (2004) 1 *LMCLQ* 483, 494–498.

<sup>13</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85, 109 (Lord Browne-Wilkinson); see also Bell (n 1) 361–362.

<sup>14</sup> Marshall (n 5) 35–36; McMeel (n 12) 490; see also Bailey (n 9) 549, where it was suggested that punishment of a debtor by imprisonment according to the Debtors Act 1869 in the past might underlie such non-assignability.

<sup>15</sup> Marshall (n 5) 36–45.

<sup>16</sup> See M Smith, *Law of assignment: the creation and transfer of choses in action* (OUP 2007) 318–337.

<sup>17</sup> Winfield (n 6) 160.

<sup>18</sup> *ibid* 143.

The purpose was to protect a debtor, since it was argued that an assignment might lead to the oppression of the debtor, either by an assignee more powerful than the assignor,<sup>19</sup> or by someone whom the debtor does not trust.<sup>20</sup> Once the non-assignability doctrine has been overruled by the assignability doctrine, it is then appropriate to develop some sort of rules to ensure that '[the debtor] is no worse off (or at least in legal if not practical terms in no worse position) by having a new creditor (transferee) thrust upon him'.<sup>21</sup>

## **(2) Doctrine of assignability**

Through the development of legal principles, the doctrine of non-assignability has been replaced by its opposite – the doctrine of assignability.<sup>22</sup> This new development permits and supports the free transferability of wealth which is driven by financial needs and interested commercial actors.<sup>23</sup> The reasons of former times are not so cogent in a time when finance based on credit has evolved and subsequently been enlarged. '[Modern] legal systems tend to recognise that rights are transferable.'<sup>24</sup> As per the statement of Rose LJ in *Re Bank of Credit and Commerce International SA (No 8)*:

The discovery in comparatively modern times that the right to receive payment of a [receivable] is a saleable commodity has been of enormous commercial and economic importance; it hugely expanded the opportunities for obtaining credit by permitting the recycling of receivables and their use as security for financing.<sup>25</sup>

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<sup>19</sup> Marshall (n 5) 36 and 45–61.

<sup>20</sup> Lawson, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (n 6) 548–549.

<sup>21</sup> McMeel (n 12) 487–488.

<sup>22</sup> Cook (n 9).

<sup>23</sup> McMeel (n 12) 483.

<sup>24</sup> *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2000] SLT 1123, 1139 (Lord Rodger of Earlsferry).

<sup>25</sup> [1996] Ch 245, 259, cited in F Oditah, *Legal aspects of receivables financing* (Sweet & Maxwell 1991) 1–2; see also F Oditah, 'Recurrent Issues in Receivables Financing' in J Armour and J Payne (eds), *Rationality in Company Law: Essays in Honour of DD Prentice* (Hart 2009) 321–353.

The doctrine of assignability was developed in equity by the Court of Chancery.<sup>26</sup> Since the Supreme Court of Judicature Act 1873<sup>27</sup> was enacted, and subsequently replaced by the Law of Property Act 1925 (the Property Act),<sup>28</sup> a receivable has certainly been assignable. A legal claim comprising a claim of action or a right to sue has been seen as an alienable or assignable thing and, in various contexts, a form of property.<sup>29</sup> The right to payment in a receivable is then counted as a kind of private property. The concept of alienability regards it as contrary to the public interest for assets to be tied up indefinitely.<sup>30</sup> Consequently, free transferability is more important for the public interest than prohibiting it. Traditionally, this concept has been directed only towards physical property, such as land. At present, it has also been applied to intangibles, including, of course, receivables.<sup>31</sup>

It is uncertain why such a change, though slow, finally happened. Besides being influenced by financial practice, fundamental arguments from a legal perspective supporting the doctrine of assignability are investigated next. Firstly and most interestingly, there exists a debate on the legal standpoint of assignment, i.e. whether it is in the ambit of contract or property, or both. Assignment is a method of transfer formulated by a contract. It constitutes a contractual relationship between the parties. A receivable is also a contractual right subject to the contract originating it. An assignment is thus considered a subject of contract law. As described above, the initial logic of the non-assignability doctrine was that a creditor could not assign his receivable because it was a contractual relation between him and his debtor which was regarded as too personal to be assigned. In order to regard a receivable as a transferable thing, a property approach has been employed to contest the strictly too personal view of

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<sup>26</sup> Lawson, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (n 6) 516.

<sup>27</sup> S 25(6).

<sup>28</sup> S 136(1).

<sup>29</sup> Blumenthal (n 11) 373–374; Pretto-Sakmann (n 6) 158–159.

<sup>30</sup> R Goode, 'Contractual prohibitions against assignment' (2009) 3 LMCLQ 300, 300–301.

<sup>31</sup> *ibid.*

contract law.<sup>32</sup> Categorising a receivable as a piece of property is the idea of the property approach. By this, the assignment of a receivable will not be seen as the transfer of a contractual relation. Instead, it will be classed as a transfer of property. As a result of this idea, there will be no wrong if a creditor is made the owner of a receivable and exercises his ownership right by transferring it to others, in a similar manner to that of the owner of a tangible property. Subsequently, the legal principle of ownership is adopted as a basic understanding of the law of assignment. A receivable can be assigned or sold for a value by way of an assignment contract. In this line of development, an assignment is therefore composed of both contractual and proprietary perspectives.

Next, another objection which was formerly known as the law of maintenance and champerty prohibiting the transfer of a bare cause of action has been reconsidered. The basic background of this law is to prevent a third person trafficking in litigation and thereby profiting from it. However, this objection was later found to be unconvincing.<sup>33</sup> The interest of a creditor invested in a receivable has been recognised and its assignment has been gradually accepted. The rules limiting the assignment of receivables or choses in action are, in contrast, minimised. Moreover, once a receivable is seen as property, assigning it is no longer the transfer of a mere right of action. ‘An assignment of a mere right of litigation is bad ... but an assignment of property is valid, even although that property may be incapable of being recovered without litigation.’<sup>34</sup> An assignee with a legitimate or genuine commercial interest can therefore enforce the assignment of a right of action.<sup>35</sup> The objection based on the ground of litigation trafficking could not prevent developments in the law of assignment.

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<sup>32</sup> See Winfield (n 6); Marshall (n 5) 36–40.

<sup>33</sup> Winfield (n 6); Marshall (n 5) 45–61; McMeel (n 12) 494–498.

<sup>34</sup> *Dawson v Great Northern & City Railway Co* [1905] 1 KB 260, 271 (Stirling LJ).

<sup>35</sup> *Trendtex Trading Corp v Credit Suisse* [1982] AC 672 (Lord Roskill); McMeel (n 12) 494–498.

Nowadays, only certain types of receivables or choses in action have been classed as non-assignable.<sup>36</sup> The underlying reasons are either because such receivables are personal obligations or because transferring them is against public policy. For instance, if a receivable is a personal obligation the purpose of which is to perform solely for a specific person, such receivable cannot be assigned, since assigning it would render the obligation a different one.<sup>37</sup> In other cases involving certain sums, such as public salaries or pensions and rights to payment arising from divorce proceedings, it is public policy that precludes their assignment.<sup>38</sup>

### 3.1.2 Contemporary legal notions of assignment

As a result of legal developments, assignment has been regarded as a hybrid legal institution of contract and property. The notion of the property-contract approach has brought about property law and contract law to deal with assignment. This is one area of law where contract and property are intertwined. As the philosophical foundation of the law of assignment, a general statement is this:

[There] is [a] related but distinct difference between: the transactional dimension of the proposed transfer, which relates solely to its impact on the immediate parties – transferor and transferee; and the proprietary dimension, which entails that it becomes binding on the obligor and other third parties, including the transferor’s other creditors or his trustee-in-bankruptcy.<sup>39</sup>

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<sup>36</sup> See Bell (n 1) 379-381.

<sup>37</sup> See *Shayler v Woolf* [1946] 1 Ch 320; *Tolhurst v Associated Portland Cement Manufacturers (1990) Ltd* [1902] 2 KB 660; Smith (n 16) 337-340; G Tolhurst, *The assignment of contractual rights* (Hart 2006) 212-245.

<sup>38</sup> Smith (n 16) 314-318; Peel and Treitel (n 10) 737-738 and 742-743; Mackay of Clashfern (n 6) paras 92-100.

<sup>39</sup> McMeel (n 12) 486.

It calls for further investigation regarding the assignment and legal principles of property and contract.

### **(1) Assignment, property law and contract law**

As a principle of contract law, assignment is a contractual method for transferring rights or choses in action from one person to another. It is legally formulated as a contract and subject to contract law. On the notion of assignment in property law, it has its roots in classifying a mere contractual receivable as property, as property law principally deals with, *inter alia*, the question of what things can count as property and can generate proprietary interests, rather than being a mere personal or contractual relationship.<sup>40</sup> Once a receivable is counted as property, it brings the transferability of receivables into the realm of property law. Although a contract can be regarded as generating an object of property, the content of rights attached to it is certainly determined by the contract and is a matter of contract law. However, ‘the position of the creditor as against third parties, including the validity of transfers, and claims arising from an invalid transfer is in principle a matter of property law’.<sup>41</sup> The legal concepts of property originally used with land and movable tangible objects have then been applied by analogy to the assignment of receivables.

#### **(1.1) General principles**

A voluntary assignment is a contractual transaction between assignor and assignee.<sup>42</sup> There must be an agreement between them. It has thus long been acknowledged that ‘[an] assignment always operates by way of agreement or contract’.<sup>43</sup> Still, there seems to be an unsettled debate regarding the contractual legal status of assignment as it is

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<sup>40</sup> F Lawson and B Rudden, *The law of property* (3rd rev edn, OUP 2002) 4.

<sup>41</sup> P Jaffey, *Private law and property claims* (Hart 2007) 83.

<sup>42</sup> Smith (n 16) 455–458; this is a case of voluntary assignment, as opposed to involuntary assignment, such as subrogation, succession or statutory assignment in a bankruptcy procedure. Involuntary assignment is outside the ambit of this research.

<sup>43</sup> *Wright v Wright* (1750) 22 ER 1111, 1112; see also Marshall (n 5) 82.

argued that ‘English law does not see assignment as a “contract”’; accordingly there need not be any consideration given or promised by the assignee.’<sup>44</sup> But this argument is unlikely to be true, especially in some aspects of assignment.<sup>45</sup> Take, for example, an assignment to transfer future receivables, a consideration in this case is legally required.<sup>46</sup> In addition, an assignment cannot be formed if there is not some sort of communication between the persons involved. ‘[An] assignment has no effect unless it is communicated to the assignee by the assignor, or by someone with his authority; or unless it is made in pursuance of a prior agreement between assignor and assignee.’<sup>47</sup>

Consider also the concept of ownership, which is a fundamental idea of property law that has a significant effect on the understanding of assignment. Ownership is widely accepted as the greatest property right that one can have.<sup>48</sup> For an intangible asset such as a receivable, a creditor is regarded as the owner of a receivable and as having a beneficial proprietary right in his hands.<sup>49</sup> He, as a rightholder – or, in property language, an owner – has legal powers in performing acts not only ‘which will bring about the extinguishment of the [receivable]’,<sup>50</sup> but also ‘which will both divest the creditor’s right *in personam* against the debtor and invest an assignee with a similar right’.<sup>51</sup> Consequently, the creditor holds the legal right to transfer as well as being the owner of a property. To put it in another way, other people, in principle, have no right to protest that a creditor shall not exercise his legal powers.<sup>52</sup> This analysis is advanced by applying the Hohfeldian method of analysing the ownership of a chose in action.<sup>53</sup>

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<sup>44</sup> H Beale, *Cases, materials and text on contract law* (2nd edn, Hart 2010) 1295.

<sup>45</sup> See *Re Westerton* [1919] 2 Ch 104; also Peel and Treitel (n 10) 725–726.

<sup>46</sup> *ibid* 724; Beale (n 44) 1295; *Tailby v Official Receiver* (1888) 13 App Cas 523.

<sup>47</sup> Peel and Treitel (n 10) 721.

<sup>48</sup> See K Campbell, ‘On the General Nature of Property Rights’ (1992) 3 KCLJ 79.

<sup>49</sup> See Bell (n 1) 4–5.

<sup>50</sup> Cook (n 9) 819.

<sup>51</sup> *ibid*.

<sup>52</sup> *ibid* 820.

<sup>53</sup> Marshall (n 5) 38; Cook (n 9) 819; WN Hohfeld, ‘Some fundamental legal conceptions as applied in judicial reasoning’ (1913) 23 Yale LJ 16.



Influenced by the concept of property, proprietary rights have also been used as a basic explanation in constituting a set of rules on assignment. In itself, the assignment of a receivable is said to involve the transfer of some kind of proprietary right.<sup>54</sup> Apart from viewing a contractual receivable as property, another principal reason is because an assignment has a legal effect that is able to be asserted not only against the debtor but also against other third parties – such as other creditors of the assignor or other competing assignees. This is a proprietary aspect of assignment. Property law has then become another main pillar of the law of assignment, in addition to contract law, both in terms of legal validity and legal effects.

### (1.2) Legal validity

To make an assignment contract, either legal or equitable, the mutual intention of assignor and assignee to transfer a receivable is the main ingredient.<sup>55</sup> Although, as opposed to an equitable assignment, a legal assignment must be in writing, no particular form of words has to be used.<sup>56</sup> ‘The language is immaterial if the meaning is plain.’<sup>57</sup> As a minimum standard, the language used should be able to be understood as referring to the intention of the parties to conclude such an assignment. Moreover, as an assignment is a transaction between assignor and assignee, a debtor’s consent is typically not necessary.<sup>58</sup> This general principle was identified and confirmed by Lord Millet in *Mulkerrins v PricewaterhouseCoopers*,<sup>59</sup> by stating that ‘[the] benefit of a contract may be assigned to a third party without the consent of other contracting parties ... A receivable is freely assignable both at law and in equity without the debtor’s consent.’ This is because, in the ordinary sense, it does not matter to the debtor whether

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<sup>54</sup> TC Hartley, ‘Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation’ (2011) 60 ICLQ 29, 31; HLE Verhagen and SV Dongen, ‘Cross-border assignments under Rome I’ (2010) JPIL 1, 2–3; Tolhurst (n 37) 36.

<sup>55</sup> *ibid* 32 and 44; Smith (n 16) 190–202; Beale (n 44) 1295.

<sup>56</sup> Peel and Treitel (n 10) 720; Marshall (n 5) 80–82.

<sup>57</sup> *William Brandt’s Sons & Co v Dunlop Rubber Company Limited* [1905] AC 454, 462 (Lord Macnaghten).

<sup>58</sup> Peel and Treitel (n 10) 712.

<sup>59</sup> [2003] 1 WLR 1937, 1941.

the benefit of the contract is enjoyed by the creditor or by a third person of the creditor's choice.<sup>60</sup> For the validity of an assignment in terms of property law, it focuses on assignability requirements. The appearance of a receivable as an object of property being assigned is taken into consideration. The requirement of a proprietary right is another concern being an important factor if an assignment is to be valid.<sup>61</sup> For example, an assignor must own the receivable assigned, and the receivable being assigned must exist as present property.<sup>62</sup>

From a theoretical viewpoint, although an intangible thing has no material form that can be physically possessed, owned or delivered, a notice of assignment is established as a replacement for delivery of possession or ownership. Its function is analogous to taking possession or ownership of a tangible property. As has been submitted, formulating such a notice is the nearest equivalent to a performance that makes the assignment seem more actually and physically real.<sup>63</sup> However, assignment under English law can take effect either at law or in equity. A legal assignment must be absolute and not purport by way of charge only, whereas an equitable assignment can be either. A legal assignment is subject to Section 136(1) of the Property Act whereby formal validity is required. It must be in writing. An express notice must also be given to the debtor. Until it is received the assignment can only take effect in equity. An equitable assignment, by contrast, is effective even without such a notice. In financial practice, the assignment of

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<sup>60</sup> *Southway Group Ltd v Wolff and Wolff* [1991] 28 ConLR 109, 124 (Bingham LJ).

<sup>61</sup> Tolhurst (n 37) 53–62.

<sup>62</sup> *ibid* 136 and 138, respectively.

However, in English law, an assignment of future choses can take effect in equity as an agreement to assign which must be supported by consideration. See *Talby v Official Receiver* (1888) 13 App Cas 523; Smith (n 16) 247–251; Peel and Treitel (n 10) 724; AG Guest, *Guest on the law of assignment* (Sweet & Maxwell 2012) 101–109.

<sup>63</sup> See R Goode, 'Protection of Interests in Movables in Transnational Commercial Law, The' (1998) 3 ULR 453, 456–457; also s 25(6) of the Supreme Court of Judicature Act 1873; S Brodhurst, 'Is Copyright a Chose in Action?' (1895) 11 LQR 64, 68–69.

receivables is conducted both on notification and non-notification bases.<sup>64</sup> Notifying a debtor of an assignment is, therefore, not a requirement for every assignment.<sup>65</sup>

### (1.3) Legal effects

Being a valid assignment, one of its effects is to create a relationship, i.e. rights and obligations, between assignor and assignee. This relationship will be subject to the contract of assignment. An assignment is not a contract between assignee and debtor. Through it, there is no contractual relationship directly linking the assignee and the debtor. No contract is made between them. Consequently, a settled law regarding the position of a debtor is that the assignee does not become a party to the original contract which creates the receivables assigned. The assignor or creditor is not replaced by the assignee.

A notice of assignment is used as a device to bind the debtor to an effective result of the assignment. Giving the debtor a notice of assignment will, as an example, prevent him getting a good discharged by paying the assignor; instead, he has to make payment to the assignee.<sup>66</sup> Besides, it has a significant effect on a priority problem. The leading authority in this matter is *Dearle v Hall*,<sup>67</sup> where one of the basic rules is that, amongst competing assignees, the first one who gives notice of assignment to the debtor prevails. Although notifying the debtor is not always necessary, it is in fact in the interest of the assignee.

In terms of legal enforcement, rights that have been assigned to the assignee include the right of action. Principally, to enforce receivables there is no need for the assignee to resort to any help from the assignor. The law of assignment generally permits him to

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<sup>64</sup> R Goode and E McKendrick, *Goode on commercial law* (4th edn, Lexis Nexis 2009) 788; Smith (n 16) 215–219.

<sup>65</sup> See Marshall (n 5) 103–104; Bell (n 1) ch 15.

<sup>66</sup> Smith (n 16) 362–363; see also CH Tham, 'Notice of assignment and discharge by performance' (2010) LMCLQ 38.

<sup>67</sup> (1828) 3 Russ 1; see also *Re Dallas* [1904] 2 Ch 385.

sue the debtor to enforce the receivables assigned. As a procedural matter, the assignee can bring an action by himself and in his own name in the event that the assignment is legal, or by joining the assignor if the assignment is equitable.<sup>68</sup> However, in terms of substantive law, the result of an assignment imposes that the assignee's rights against the debtor are, using English law's phrase, subject to equities. This means that the debtor is able to raise any defence that he has against the assignor to the assignee. This defence is not only limited to defects in the assignor's rights but also include certain claims which the debtor has against the assignor.<sup>69</sup>

From a proprietary viewpoint, the effectual result of an assignment does not manage to transfer contractual rights from assignor to assignee. What it does is more likely transfer ownership of the assigned receivables from the former to the latter. The assignment passes the assignor's beneficial ownership right against the debtor to the assignee. More importantly, an effect of the assignment is to create proprietary effects for the assignee, not only against the assignor but also against other persons. Such effect gives him a right to claim from the debtor payments for the receivables assigned to him. It also provides him with a right to protect his interests against other third parties, i.e. the assignor's creditors or other insolvency representatives, or any other competing assignees or third parties asserting a competing claim on the receivables.<sup>70</sup> Whenever it comes to third-party effects of any rights, this is beyond the ambit of contract, and hence in the sphere of property law. In turn, this leads to other legal considerations based on general principles of property law when an issue concerning assignment is raised. For instance, a notice of assignment has been viewed as a way to perfect

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<sup>68</sup> In English law, if an assignment is legal according to s 136(1) of the Property Act, an assignee holds a right to sue in his own name without the necessity of joining an assignor as a party to action. In the case of an equitable assignment, a general rule is that an equitable assignee can bring an action in his own name but the assignor must be joined in the action. Tolhurst (n 37) 391 and 397; Guest (n 62) 61–62 and 97–99.

<sup>69</sup> See Peel and Treitel (n 10) 730–734.

<sup>70</sup> See Bridge (n 2); McMeel (n 12).

proprietary rights in the receivable assigned. A problem of competing assignments is to be decided by an analogical understanding of a proprietary right to a thing based on a notice as the method for taking possession.<sup>71</sup>

According to the present legal notion of assignment which is generally based on the property-contract approach, one thing that can be seen is confusion. Some matters relate to property law, while others contract law. This is a confusing combination deeply embedded in the law of assignment. It is rooted in the fundamental idea that assignment is a mixture of property and contract. As is accepted, ‘the difficulty of assignment is largely due to its character as a hybrid of contract and property’.<sup>72</sup>

## **(2) Assignment and receivables financing**

In financial practice, receivables are a financial asset that can be used for raising finance. This is typically called receivables financing by which financing is raised against receivables. In this subsection, several scenes in which receivables financing is developed by way of assignment will be illustrated. Apart from seeing how the law of assignment is employed in practice, this will serve as a fundamental background for further practical analysis regarding the property-contract approach to the law of assignment and its role in international financing against receivables.

A business sector that provides a method of receivables financing is commonly known as ‘factoring’.<sup>73</sup> The ‘factor’ acts as a buyer to purchase receivables from the ‘client’ (the seller), who is the original rightholder or creditor of such receivables. A debtor of receivables is called a ‘customer’. Relationships between factor and client are governed

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<sup>71</sup> See *Dearle v Hall* (1828) 3 Russ 1; another instance of the property aspect of assignment is an assignment by way of trust where the assignor can declare himself a trustee of the assignee. See *Fitzroy v Cave* [1905] 2 KB 364 (Cozens-Hardy LJ); Marshall (n 5) 84–99; this way of assignment is effective even if the assignment breaks a non-assignment clause contained in the original contract creating the receivable assigned. See *Don King Production Inc v Warren* [2000] Ch 291; Guest (n 62) 51–52; T Hans, ‘Banking: Alienating Unassignable Rights’ (2001) JBL 422.

<sup>72</sup> Bridge (n 2) 677.

<sup>73</sup> For a thorough study of factoring, see N Ruddy, S Mills and N Davidson, *Salinger on factoring* (4th edn, Sweet & Maxwell 2006).

by a factoring agreement.<sup>74</sup> Via this mechanism, the factor finances the client by prepayment of the purchase price of the receivables.<sup>75</sup> From a financial viewpoint, one of the main functions of the factor is to assume the credit risk, namely, the risk of non-payment by the customer. That risk was formerly borne by the client. Another function attached to this is to offer the client the proposition of collecting receivables.<sup>76</sup> From the factor's perspective, unless the purchase price of such receivables has been discounted from their real value in such a way that it minimises that risk significantly, the enforceability of receivables is his primary concern. It is the way to obtain payment or gain a benefit as anticipated.<sup>77</sup>

An assignment of receivables can be created by way of either sale or security. Through assignment, receivables can be transferred outright as an absolute sale or used as a security, such as to secure a loan.<sup>78</sup> Economically, both of them can achieve the same outcome as they can provide finance for a business. Under English law, however, assignments by way of sale and by way of security are treated differently.<sup>79</sup> The first method of assignment might be separated into discounting receivables and outright transfer.<sup>80</sup> 'Receivables, whether in a pure or negotiable form, may be discounted for immediate cash',<sup>81</sup> hence providing finance for a business. This is the case where the purchase price is discounted from the face value of the receivables. A transaction is typically called by several names, such as discounting receivables, blocks discounting

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<sup>74</sup> Goode and McKendrick (n 64) 790–791.

<sup>75</sup> *ibid* 789–791; Sealy and Hooley (n 1) 1026–1033.

<sup>76</sup> RJ Saulnier and NH Jacoby, 'The Development of Accounts Receivable Financing' in *Accounts Receivable Financing* (NBER 1943) 18–20.

<sup>77</sup> R Fentiman, 'Assignment and Rome I: towards a principled solution' (2010) 4 *LFMR* 405, 410.

<sup>78</sup> H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd edn, OUP 2012) 286; Oditah, *Legal aspects of receivables financing* (n 25) 32–35; G McCormack, 'Present and Future of Real and Personal Security: England' in J Bell, *Studies in UK Law 2002* (UKNCCL 2002) 158–160.

<sup>79</sup> NO Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (Routledge 2011) 29; Sealy and Hooley (n 1) 1018–1026.

<sup>80</sup> See Oditah, *Legal aspects of receivables financing* (n 25) 32–35.

<sup>81</sup> *ibid* 33.

and invoice discounting.<sup>82</sup> In case of financing by outright transfer, receivables are assigned outright from the rightholder to, for example, his creditor. It is stated that this will occur where '[a] creditor who presses his debtor for payment may be satisfied with an assignment of a debt owed to his debtor by a third party'.<sup>83</sup> Financing against receivables through this method is then a way for the 'discharge or reduction of an existing indebtedness'.<sup>84</sup> As a matter of practice, both outright transfer and discounting arrangements are metaphorically seen as the sale of receivables. The creditor or client will immediately receive money from the financier or factor for the discounted price of the receivables. As a matter of law, nevertheless, either outright transfer or discounting of receivables is processed through assignment. An assignment is a contract employed in transferring intangible things. It differs from a sale contract as regularly used in transferring tangible property. The assignment of receivables is to transfer rights to payment, not to transfer ownership or possession of any property. This is one of the ways in which a transfer of receivables differs from a transfer of other tangible property. Furthermore, receivables are financial assets which can serve as a security to support another financial transaction, the result of which is to ensure the payment of money or the performance of an obligation under that particular transaction – such as a loan.<sup>85</sup> Receivables can be mortgaged or charged.<sup>86</sup> In this context, they are another form of collateral creating security rights which are another form of property rights for a secured creditor.<sup>87</sup> Likewise, this financial technique is completed through an assignment by

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<sup>82</sup> *ibid* 33-34; Goode and McKendrick (n 64) 789. It is mentioned that the term factoring aims to deal with receivables owed by trade customers, whereas block discounting involves consumer customers. Beale, et al. (n 78) 287; see also *Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* [1992] BCLC 609; Sealy and Hooley (n 1) 1033–1034.

<sup>83</sup> Oditah, *Legal aspects of receivables financing* (n 25) 71.

<sup>84</sup> *ibid* 33 and 71.

<sup>85</sup> G McCormack, *Secured credit under English and American law* (OUP 2004) 209-211; still, it is stated that '[most] receivables financing is structured as a sale rather than a security transaction'. Beale, et al. (n 78) 286.

<sup>86</sup> See R Goode and L Gullifer, *Goode on legal problems of credit and security* (Sweet & Maxwell 2008) ch 3; Beale, et al. (n 78) 286–302.

<sup>87</sup> Bell (n 1) 4.

way of security, as opposed to by way of a sale. Whether an assignment is considered as a sale or a security depends largely on the real intention of the contracting parties to the assignment, and it shall be determined based on the substance rather than the form of the transaction.<sup>88</sup> A transaction described by the parties as a purchase or a sale may be characterised as a loan based on the security of receivables, either because that does not represent the true intention of the parties or because, despite the description given by the parties, its legal effect is that of a secured transaction.<sup>89</sup> Though these security rights are characterised as a property right, it can be claimed that they are actually created by a contract.<sup>90</sup>

There exists a further important legal aspect resulting from the distinction between outright assignment and assignment by way of security which should be mentioned here. Formally, an outright sale of receivables is not registrable while the creation of security over receivables usually is.<sup>91</sup> Under the Companies Act 2006, an assignment by way of a charge on the book debts of a company needs to be registered principally within 21 days after the day on which the charge is created, otherwise it is not as effective against third parties.<sup>92</sup> However, this legislation has recently been revised by the Companies Act 2006 (Amendment of Part 25) Regulations 2013 which came into force on 6 April 2013. According to this new regulation, the criminal penalty against the company as a result of failure register charge within the 21-day limit has been removed. But, in terms of civil validity, delivery of particulars relating to a charge created to registrar within the time limit has still of profound important and should continue, otherwise the charge is void against third parties.<sup>93</sup> Another difference between

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<sup>88</sup> *Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* [1992] BCLC 609 (Lord Wilberforce); Akseli (n 79) 29–30.

<sup>89</sup> Goode and Gullifer (n 86) 98–99.

<sup>90</sup> Bell (n 1) 16.

<sup>91</sup> Goode and Gullifer (n 86) 101.

<sup>92</sup> Part 25, ss 860, 870 and 874; see also Beale, et al. (n 78) 401–428.

<sup>93</sup> Ss 859A, 859D and 859H.



assignment by way of sale and by way of security is that a statutory assignment subject to Section 136(1) of the Property Act must be absolute and not purporting to be by way of charge only. An assignment by way of charge is constituted as an equitable assignment which can take effect only in equity.<sup>94</sup> Considering the effects of assignment, one distinctive point can be made.<sup>95</sup> Assignment by way of sale involves an outright transfer, in which a receivable must be absolutely transferred from the assignor to the assignee. As such, the assignor has no right to redeem. In contrast, where a receivable has been assigned by way of security it could be said that the ownership of that receivable has not been transferred. What is given to the assignee is merely a preferential right over the receivable. The assignor thus retains a right of redemption.<sup>96</sup>

### **3.2 Contractual-based rules of assignment**

Assignment operates by way of a contract. It is formed by an agreement between the parties. The law of contract thus plays a significant role in regulating it. In this section, the legal rules specifically founded in the contractual aspects of assignment are examined. Insofar as this research is concerned, contract law relating to assignment can be divided into four main groups: assignment contract, non-assignment clause, the legal relationship between assignor and assignee, and the legal relationship between debtor and assignee. They will be discussed in turn.

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<sup>94</sup> See also Goode and Gullifer (n 86) 104–107; Beale, et al. (n 78) 172; Smith (n 16) ch 10.

<sup>95</sup> Goode and Gullifer (n 86) 99; Akseli (n 79) 30.

<sup>96</sup> Akseli (n 79) 30; Goode and Gullifer (n 86) 99.

For further points of distinction between assignment by way of sale and by way of security, see Akseli (n 79) 30–31.

However, under the UCC art 9, there is no such distinction between these two types of assignment. Its scope of application covers any transaction that creates a security interest, regardless of its form. In other words, it covers assignments both by way of sale and by way of security. This is the functionalism of the UCC. See s 9-109; for the term ‘security interest’, s 1-201(b)(37); also McCormack, *Secured credit under English and American law* (n 85) 71–72 and 245.

### 3.2.1 Assignment contract

According to the principles of contract law, the subject of assignment was originally treated as an adjunct to the privity of contract. It was regarded as an exception to privity.<sup>97</sup> The doctrine of privity of contract effectively prevents contracting parties from conferring rights or imposing obligations upon a person who is not a party to the contract.<sup>98</sup> And at the same time, it prevents a third party from having a right to enforce the terms of the contract. According to this doctrine, 'a contract can be enforced neither by nor against third parties'.<sup>99</sup> However, with assignment, contract law does allow a contracting party to transfer his rights under a contract to a third party.<sup>100</sup> By being able to put a third party into a contractual relationship, the assignment is therefore seen as an exception to privity.

To see the characteristics of assignment more clearly, another transaction which is regularly used when making a comparison with it is novation.<sup>101</sup> Assignment differs from novation. While the former is a deal between two parties, assignor and assignee, the latter involves three parties. They are the debtor and creditor who are the parties to the original contract to be novated, plus a third party. Unlike assignment, novation requires the consent of all three parties. Besides, novation, as opposed to assignment, does not merely involve a transfer of rights.<sup>102</sup> The method of novation is such that the parties to the original contract agree to extinguish the contract between them, and one party agrees to enter into a new contract with the third party. As a consequence of novation, the extinguished contract is replaced by a new contract. The replacement contract can itself create not only new rights, but also new obligations. The new contract

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<sup>97</sup> Bridge (n 2) 681; J Chitty and H Beale, *Chitty on contracts* (30th edn, Sweet & Maxwell: Thomson Reuters 2008) paras 18-003 and 18-077; RM Merkin, *Privity of contract: the impact of the Contracts (Rights of Third Parties) Act 1999* (LLP 2000) 21 and 39–41.

<sup>98</sup> Goode and McKendrick (n 64) 113–114.

<sup>99</sup> PS Atiyah and SA Smith, *Atiyah's introduction to the law of contract* (6th edn, OUP 2005) 338.

<sup>100</sup> E McKendrick, *Contract law: text, cases, and materials* (4th edn, OUP 2010) 989.

<sup>101</sup> Peel and Treitel (n 10) 713; Tolhurst (n 37) 33–34; Smith (n 16) 98.

<sup>102</sup> Tolhurst (n 37) 34.

may, otherwise, fully substitute a third party for a party to the original contract, but not have the result of altering the rights and obligations of the parties as originally contracted.<sup>103</sup> By formulating a new contract, there is then no need to resort back to the original one. Unlike assignment, the debtor in the original contract can become a party to the novation. As a substantive result, contractual rights, obligations and liabilities can thus be transferred. In contrast, it is only contractual rights that can be transferred by way of assignment.<sup>104</sup> But one thing that these two types of transaction have in common is that they are both contracts.

Operating as a contract, assignment is substantially ruled by contract law. There are two further points regarding the contractual side of assignment that should be considered. The first point concerns one of the main ingredients of an assignment, i.e. an intention to transfer. 'It is a requirement of all consensual assignments that the assignor intends to assign.'<sup>105</sup> An intention to create legal relations is an essential element of a binding contract. It is the way that parties to a contract exhibit and express their intention to be bound by the terms of an agreement.<sup>106</sup> In the case of assignment, a requirement is that the assignor must intend to pass his rights against his debtor to the assignee. Whether such intention exists or not is a matter of fact. In determining it, the transaction in question must be considered. As a matter of law, it largely depends on the construction of the contract, since it evidences the intention to assign.<sup>107</sup> Relevant statements and documents will be construed in order to seek such an intention. The form of word is immaterial as long as they show an intention to assign.<sup>108</sup>

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<sup>103</sup> See *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645.

<sup>104</sup> McKendrick (n 100) 990.

<sup>105</sup> Tolhurst (n 37) 314.

<sup>106</sup> McKendrick (n 100) 273–274; Peel and Treitel (n 10) 171.

<sup>107</sup> See Tolhurst (n 37) 315–329; Peel and Treitel (n 10) 183–184.

<sup>108</sup> *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128, 134 (Cotton LJ); *William Brandt's Sons & Co v Dunlop Rubber Company Limited* [1905] AC 454, 462 (Lord Macnaghten), in this case the position of the debtor in connection with the transaction, alleged to be an assignment, was also

The second point is about contractual formalities. According to a general principle of contract law, a contract can be in any form. '[An] oral contract is generally just as binding as a written one.'<sup>109</sup> Purposes that require a certain form, such as in writing, in the law of contract mainly involve reasons of certainty, protection and proof or evidence.<sup>110</sup> An assignment subject to Section 136(1) of the Property Act must be in writing. Along the same lines as its predecessor,<sup>111</sup> '[the] object of this section was to dispense with the necessity for joining the assignor as a party in cases in which his presence was unnecessary and inconvenient'.<sup>112</sup> However, this statute only provides an alternative method for making an assignment. It has been remarked that this requirement 'does not affect the substantive law of assignment, but merely provides improved machinery'.<sup>113</sup> As a consequence of this statutory requirement, it confers on an assignee a legal right to sue. To this extent, the position of an assignee as a question of procedure has been improved. He can effectively sue the debtor, not in the name of the assignor but in his own name as the assignee.<sup>114</sup> The statutory rules are unlikely to be a contractual formality. In contrast, it primarily serves the purpose of procedural law. Furthermore, the requirement for a form is only for a statutory assignment. In the case of an equitable assignment, there is no need for any written document. An assignment can take effect in equity even though it is not in writing. From an international perspective, most legal systems, e.g. in Europe, do not impose any formal requirements for validating an assignment.<sup>115</sup> Additionally, there appears to be some movement on

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investigated. In a case where the meaning of statements or documents is not clear, all relevant extrinsic evidence will be considered as a supplementary factor. Tolhurst (n 37) 315–316.

<sup>109</sup> McKendrick (n 100) 260.

<sup>110</sup> Peel and Treitel (n 10) 187–188; H Kötz and A Flessner, *European contract law* (Clarendon Press 1997) 80–81; McKendrick (n 100) 262–264.

<sup>111</sup> The Supreme Court of Judicature Act 1873, s 25(6).

<sup>112</sup> Marshall (n 5) 161; Smith (n 16) 267.

<sup>113</sup> *ibid* cited *Re Westerton* [1919] 2 Ch 104, 113; *Marchant v Morton Down & Co* [1920] 2 KB 829, 832; Marshall (n 5) 161 and 166; Peel and Treitel (n 10) 719–720.

<sup>114</sup> *Re Westerton* [1919] 2 Ch 104, 113–114.

<sup>115</sup> See A Salomons, 'Deformalisation of Assignment Law and the Position of the Debtor in European Property Law' (2007) Centre for the Study of European Contract Law Working Paper Series 5–8.

the deformalisation of assignment laws. The purpose of this is to facilitate financial activity involving the transfer of claims.<sup>116</sup> An example can be taken from the UN Receivables Convention where there is no rule imposed as to the formal validity of assignment.<sup>117</sup>

### 3.2.2 Non-assignment clause

On the one hand, the general principle of a right to assign states that ‘a party is free to assign all or any of its rights under a contract’.<sup>118</sup> The benefit of a contract can be assigned to a third party. On the other hand, the parties also have a right according to the principle of freedom of contract to preclude or limit such a right to assign. A contractual term functioning like this is called a non-assignment, or an anti-assignment, clause. It is a contractual prohibition on the transferability of receivables subject to it. Take for instance the words of Lord Millet:

[The] general rule is that the benefit of a contract may be assigned to a third party without the consent of the other contracting party. If this is not desired, it is open to the parties to agree that the benefit of the contract shall not be assignable by one or either of them, either at all or without the consent of the party. There is nothing objectionable in this; a party is entitled to insist that he deals with only the particular party with whom he has contracted ... But, unless he takes the precaution of including in the contract a prohibition of assignment, he has no right to object to it.<sup>119</sup>

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<sup>116</sup> *ibid* 3–4.

<sup>117</sup> Despite that, it does contain conflict-of-law rules relating to the form of an assignment contract. See art 27.

<sup>118</sup> R Goode, ‘Assignment Clauses in International Contracts’ (2002) IBLJ 389, 391.

<sup>119</sup> *Mulkerrins v PricewaterhouseCoopers* [2003] 1 WLR 1937, 1941.

From a legal viewpoint, there is no reasonable objection to such a contractual term. In contrast, a non-assignment clause is inserted in a contract for a number of reasons.<sup>120</sup> Firstly, it is a genuine commercial interest of a contracting party that underlies this clause. The purpose of a non-assignment clause is to allow a party to ensure that his contractual relations are only with the person he has agreed and no one else.<sup>121</sup> A debtor may hold a legitimate interest in prohibiting an assignment.<sup>122</sup> He is entitled to insist that he wants to deal only with the particular party with whom he has contracted.<sup>123</sup>

Aiming to protect a debtor from potentially negative results arising out of an assignment is the second ground behind the insertion of a non-assignment clause. In a circumstance where there is no non-assignment clause, a debtor who overlooks a notice of assignment and pays the assignor does not get a good discharge. And he can be compelled to make a second payment for the benefit of the assignee.<sup>124</sup> Besides, the debtor cannot rely upon new equities against the assignor if they arise after receiving a notice of assignment. By preventing an assignment, it is a debtor's desire that 'rights of set-off arising from continued mutual dealings between the debtor and the assignor are not cut off'.<sup>125</sup> Another consideration for non-assignment is the fact that, in contrast to continued relations with the assignor, the assignee is a one-off relationship with the debtor. He might have no incentive to preserve the debtor's goodwill.<sup>126</sup> A further supporting statement is that an assignor 'would be less interested in the performance of his side of the contractual bargain if he has assigned his right to benefits under the contract to a

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<sup>120</sup> See B Allcock, 'Restrictions on the Assignment of Contractual Rights' (1983) 42 CLJ 328; R Goode, 'Inalienable Rights?' (1979) 42 MLR 553; G McCormack, 'Debts and Non-assignment Clauses' (2000) JBL 422; NO Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' (2009) 7 JBL 650.

<sup>121</sup> *Don King Production Inc v Warren* [2000] Ch 291, 319 (Lightman J).

<sup>122</sup> Goode, 'Contractual prohibitions against assignment' (n 30) 302–303.

<sup>123</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85, 105 (Lord Browne-Wilkinson); *Mulkerrins v PricewaterhouseCoopers* [2003] 1 WLR 1937, 1941 (Lord Millet).

<sup>124</sup> *Brice v Bannister* (1878) 3 QBD 569; see also Tham (n 66).

<sup>125</sup> Goode, 'Assignment Clauses in International Contracts' (n 118) 396; Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' (n 120) 656–657; see also *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85 (Lord Browne-Wilkinson).

<sup>126</sup> McCormack, 'Debts and Non-assignment Clauses' (n 120) 425.

third party'.<sup>127</sup> Moreover, from the debtor's perspective, there might be a potential difficulty in 'tracking down the assignee so as to make payment'.<sup>128</sup>

To support the unfettered operation of financial activities, the topic of non-assignment is, nevertheless, considered to have a conflicting purpose, between protecting debtors and promoting free assignability. It is also a contest between freedom of contract and freedom of commerce.<sup>129</sup> Anyway, a point which should be made first is that the following debate concentrates on the prohibition of the assignment of contractual rights or receivables that has not yet been performed. It does not concern a non-assignment clause that seeks to prohibit a transfer of the proceeds of receivables after they are received by the creditor. Whenever the debtor pays the receivable, it is the money – or property – that is in the hands of the assignor. The debtor has no legitimate interest in restricting the assignor if he wishes to transfer his property to a third person. This kind of non-assignment clause, if any, would be contrary to a public policy that prohibits absolute restraint on the alienation of property.<sup>130</sup>

Initially, it is a matter of contract construction whether and to what extent a contract prohibits or restricts the assignment of contractual rights.<sup>131</sup> Prohibiting a creditor from assigning his rights under contract prior to performance can be seen as a condition of the debtor's obligation to perform, not a restraint on the creditor's right of alienation of property.<sup>132</sup> As such, non-assignment can be effective. In principle, it will, subject to the terms of the contract, render an assignment in breach of such prohibition ineffective. A

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<sup>127</sup> *ibid* cited the situation in *Don King Production Inc v Warren* [2000] Ch 291.

<sup>128</sup> McCormack, 'Debts and Non-assignment Clauses' (n 120) 426.

<sup>129</sup> Goode, 'Contractual prohibitions against assignment' (n 30) 301; see also Oditah, 'Recurrent Issues in Receivables Financing' (n 25) 350; Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' (n 120).

<sup>130</sup> See Goode, 'Contractual prohibitions against assignment' (n 30) 304–305; McMeel (n 12) 508; Smith (n 16) 344–345; Tolhurst (n 37) 249–257.

<sup>131</sup> See Goode, 'Inalienable Rights?' (n 120) 554; Allcock (n 120) 339–342.

<sup>132</sup> Goode, 'Contractual prohibitions against assignment' (n 30) 304–306, referred to *Sack v Neptune Meter Co* (1932) 258 NYS 254, 261 (Untermyer J).

result is that the assignee cannot assert his assigned rights against the debtor.<sup>133</sup> Assignment in breach of such a clause will not give the assignee a right to claim for the assigned receivables against the debtor. The assignee will, as a result, not be able to receive the beneficial interests assigned to him. Still, it does not follow that an assignment in breach of a non-assignment clause is in total ruins. It is still effective between the assignor and assignee. A non-assignment clause cannot prevent the assignee from acquiring rights against the assignor,<sup>134</sup> as this solely concerns the relationship between them, in which the debtor plays no part.

Regarding the effects of assignment, it has been claimed that a contractual prohibition against assignment ‘operates purely as a matter of contract and does not affect the transfer of ownership of the contract right’.<sup>135</sup> Assignment certainly operates by way of contract. However, it is a means of transferring a contractual right, not a physical object. In the case of a receivable, it is a transfer of a right to payment from assignor to assignee. Such payment is purported to be performed by the debtor. On this line of reasoning, it has been stated that ‘[unlike] tangibles where title and possession can be vested in different people, the nature of contractual rights as choses in action does not allow a transfer of title without a transfer of the actual right to performance’.<sup>136</sup> The thing being transferred by assignment is a legal title to such a contractual right. Although it has been argued that this is not true in terms of equitable ownership,<sup>137</sup> there is a counter argument. By referring to equitable ownership in this context, such ownership is but a right to receive a performance in general or a payment in particular.

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<sup>133</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85, 108–109 (Lord Browne-Wilkinson).

<sup>134</sup> Allcock (n 120) 329–330; Goode, ‘Contractual prohibitions against assignment’ (n 30) 307–308; McMeel (n 12) 498–511; see also *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85, 108 (Lord Browne-Wilkinson); *Hendry v Chatsearch Ltd* [1998] CLC 1382.

<sup>135</sup> Goode, ‘Contractual prohibitions against assignment’ (n 30).

<sup>136</sup> Tolhurst (n 37) 248; this statement was also cited in Goode, ‘Contractual prohibitions against assignment’ (n 30) 305, in which it was commented that it is certainly true of legal title to a contract right.

<sup>137</sup> Goode, ‘Contractual prohibitions against assignment’ (n 30) 305.



On this point, there is no material substance to which the purported assignment can actually attach for the benefit of either assignor or assignee. This is the essence of equity that regards as done that which ought to be done. A legal event is seen to be initiated even before it actually happens. Therefore, a contractual prohibition against assignment operates purely as a matter of contract. It does not involve the transfer of ownership, even an equitable one.

Although, a non-assignment clause can effectively prevent the result of assignment between assignee and debtor, it cannot operate to invalidate an assignment contract between assignor and assignee.<sup>138</sup> The assignment can still be effective as far as they are concerned. In a case where a contract expressly prohibited assignment, even between assignor and assignee, it was claimed that this contractual term was ‘repugnant to the creditor’s ownership and ought not to be countenanced’.<sup>139</sup> Since a receivable is a form of property and such a term will render the receivable inalienable, it can no longer function to invalidate the assignment.<sup>140</sup> Nevertheless, this opinion was later commented on in *Helstan Securities Ltd v Hertfordshire County Council*,<sup>141</sup> that it was *obiter dictum* and only concerned the relation between assignor and assignee. An assignment can be a good assignment between them. Such a non-assignment clause can still prevent the debtor affecting from the assignment in relation to the assignee. The debtor’s legal status is still protected by this type of non-assignment clause.

The contractual analysis is indeed consistent with the effect of a non-assignment clause.<sup>142</sup> This is where contracting parties can conclude an agreement not to dispose of their rights under a contract to a third party. ‘[If] assignment were viewed only in

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<sup>138</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85, 108 (Lord Browne-Wilkinson); see also Akseli, ‘Contractual prohibitions on assignment of receivables: an English and UN perspective’ (n 120) 658.

<sup>139</sup> Goode, ‘Inalienable Rights?’ (n 120) 556.

<sup>140</sup> *ibid* referred to *Shaw & Co v Moss Empires and Bastow* (1908) 25 TLR 190; see also *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85, 106–107 (Lord Browne-Wilkinson).

<sup>141</sup> [1978] 3 All ER 262 (Croom-Johnson J).

<sup>142</sup> Bridge (n 2) 683.

proprietary terms, it would be significantly harder to give effect to non-assignment clauses.’<sup>143</sup> The property in a receivable would belong to the assignor; and it would be his sole decision, as the owner of a property, whether to assign it or not. The position of the debtor would be unlikely to be taken into account.

Considering the contractual approach to an assignment of receivables, ‘all receivables are assignable unless the assignment is prohibited by agreement, statute, or owing to public policy consideration’.<sup>144</sup> Before making an assignment, one should therefore look through an individual receivable that is intended to be assigned in order to ascertain that such a receivable can be legally transferred. Otherwise, one may not obtain a beneficial interest in the receivable as expected. Legal issues that should be reviewed are the validity and content of the contract creating the receivable. Additionally, the financial status of a debtor subject to it should be checked to clarify whether he is likely to pay for the receivable. Despite its usefulness, a common concern is that this examination is unlikely to occur in reality where a bulk of receivables is assigned. Transferring receivables in bulk is the transfer of a bundle of contractual rights to payment, a detailed examination of each and every receivable is consequently regarded in financial practice as impractical.<sup>145</sup>

Also, it has been argued that it is impractical for a transferee of bulk receivables to conduct an examination of each receivable to see whether it has a non-assignment clause or not; such a clause has thus been regarded as an obstacle to assignment.<sup>146</sup> If this argument is accepted and one wishes to override a non-assignment clause created

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<sup>143</sup> *ibid.*

<sup>144</sup> Akseli, ‘Contractual prohibitions on assignment of receivables: an English and UN perspective’ (n 120) 650.

<sup>145</sup> Goode, ‘Inalienable Rights?’ (n 120) 556, cited *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262.

<sup>146</sup> See McCormack, ‘Debts and Non-assignment Clauses’ (n 120); Akseli, ‘Contractual prohibitions on assignment of receivables: an English and UN perspective’ (n 120).

by the intention of the parties to a contract, the next consideration has to be made on the ground of public policy. According to one view:

[If] there is shown to be some legitimate public interest (and it should not be assumed that what is convenient for banks and financiers necessarily equates with the public interest) in denying effect to such clauses, the only appropriate legal route for such a public policy over-ride is through legislation.<sup>147</sup>

This is a contest between the principle of free transferability and the legitimate interests of the debtor. For the sake of facilitating the free flow of credit in the present economic atmosphere, favour is given to the former principle. Taking into account the aim of creating a continuous flow of receivables for financing an ongoing business, it is then proposed that this is a reason of public interest and declaring that a non-assignment clause should not be effective.<sup>148</sup> Freedom of contract is, in this regard, overridden by freedom of commerce. Creating such a rule in legislation is the next step. The Receivables Convention, for instance, provides in Article 9 that an assignment of receivables is effective, notwithstanding an anti-assignment clause.<sup>149</sup> The Factoring Convention also adopts such an approach.<sup>150</sup> Another example can be derived from the UCC, Article 9, where it is declared that an anti-assignment term in an agreement

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<sup>147</sup> McMeel (n 12) 511; M Bridge, *Personal property law* (3rd edn, OUP 2002) 162.

<sup>148</sup> Goode, 'Inalienable Rights?' (n 120); Goode, 'Contractual prohibitions against assignment' (n 30) 300, 316–318; Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' (n 120); T Prime, 'Restrictions on the assignment of debts: A reply to an earlier article and the Law Commission' (2008) 23 BJIBFL 71.

<sup>149</sup> See SV Bazinas, 'Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade' (2003) 11 Tul J Int'l & Comp L 275, 286–287; UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (A/CN.9/470) paras 98–104; Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' (n 120).

<sup>150</sup> Art 6(1).

between assignor and debtor is ineffective. Moreover, an assignor acting contrary to such a term is not deemed to be in breach of the agreement with his debtor.<sup>151</sup>

### 3.2.3 Relationship between assignor and assignee

There are two categories for the legal relationships arising from an assignment; one is between assignor and assignee, the other is between debtor and assignee. Here, the former relationship is examined.

An assignment creates a contractual relationship between assignor and assignee. Their relation is governed by the terms of the assignment contract,<sup>152</sup> subject to the law of contract. Firstly, the assignor is bound by the assignment. He must answer to the assignee for non-performance or breach of contract according to the remedial rules of the applicable law.<sup>153</sup> Secondly, assignment involves a transfer of the right to receive a payment from a debtor under the contract. It is not a transfer of the entire contract. The transferred right is a right against one specific person, i.e. the debtor. It is not a proprietary right against the whole world. Furthermore, after an assignment, neither debtor nor assignor completely drops out of the picture.<sup>154</sup> As a matter of law, an assignment does generate legal relationships between assignee, assignor and debtor. The original contract creating the assigned right and the relationship between assignor and debtor have still to be taken into consideration. The right of the assignee is not fully

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<sup>151</sup> Ss 9-406(d) and 9-408(a); see also NB Cohen and WH Henning, 'Freedom of Contract vs. Free Alienability: An Old Struggle Emerges in a New Context' (2010) 46 *Gonz L Rev* 353, 364–365.

There also exists a movement in the United Kingdom to override the effect of a non-assignment clause regarding small and medium-size businesses. See Small Business, Enterprise and Employment Bill 2014–15 <<http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html>> accessed 9 October 2015, part 1.

<sup>152</sup> See also the Receivables Convention, art 11.

<sup>153</sup> For example, if the assignor, after the assignment but prior to the obligor receiving notice of assignment, discharges the obligor from the receivable assigned. Tolhurst (n 37) 383–385; see *Re Patrick* [1891] 1 Ch 82, 88, where it was stated by Lindley LJ that 'the assignor of a [receivable] is liable to be sued by the assignee, if the assignor himself defeats his own assignment by getting in or releasing the [receivable] assigned'.

<sup>154</sup> Smith (n 16) 356.

formulated. He is not the sole rightholder, or some might say the owner. Property rules are unlikely to be applied at this stage. Another point which should be mentioned here is that a notice of assignment to the debtor is not required to make an equitable assignment effective between assignor and assignee.<sup>155</sup> It is only in the case of a statutory assignment that giving a written notice to the debtor is required.<sup>156</sup>

### **3.2.4 Relationship between debtor and assignee**

With regard to the legal relationship between debtor and assignee, a core principle is that '[the] assignment of a [receivable] transfers the benefit of the contract to the assignee but does not substitute him as a party to the contract'.<sup>157</sup> This means the assignment does not substitute the assignee for the assignor. Also, as a matter of contract, there is neither a contractual arrangement nor a contractual relationship between the assignee and the debtor. An assignment does not create privity between them.<sup>158</sup> This is not the case with novation. As such, the assignee might be seen as a stranger to the original contract generating the receivable assigned. However, the whole point of an assignment is for the assignee to receive the beneficial rights assigned to him. So, the question is how and in what way the debtor, as a result of the assignment, has to pay the assignee instead of the assignor.

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<sup>155</sup> *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch D 128.

<sup>156</sup> S 136(1) of the Property Act.

<sup>157</sup> Goode, 'Assignment Clauses in International Contracts' (n 118) 391; additionally, an assignment does not confer rights on the assignee under the Contracts (Right of Third Parties) Act 1999. Peel and Treitel (n 10) 720.

<sup>158</sup> Therefore, it was stated that, as a result of this doctrine, 'the assignee is dependent upon the continued existence of the contract and the continued legal existence of the parties to the contract'. Tolhurst (n 37) 63 referred to an Australian case, *Re Kenneth Wright Distributors Pty Ltd (In Liquidation)* [1973] VR 161.

Basically, it does not matter to the debtor whether the benefit of a contract is enjoyed by the creditor or by a third person of the creditor's choice.<sup>159</sup> Subject to the terms of a contract, a creditor may ask his debtor to make a payment to another person, especially if the debtor agrees to do so.<sup>160</sup> Anyway, an assignment differs from a mandate. By setting up a mandate, the creditor does not intend to transfer his right, but merely instructs the debtor to make a payment on his behalf.<sup>161</sup> It is more like a contract of agency.<sup>162</sup> A contract for an assignment is also different from a contract for the benefit of a third party. The latter type is, in principle, a contract whereby the parties mutually agree to render the benefit of the contract to a third party who is not party to this agreement. Compared to assignment, there is no need for the third party to agree with the promisee (creditor) in order to call for the benefit from the promisor (debtor). As a principle, it follows that this contract cannot be enforced directly by the third party.<sup>163</sup> But, according to the Contracts (Rights of Third Parties) Act 1999, an exception to the general principle is provided. A third party, subject to certain conditions, has a right to enforce a term of the contract that grants him a benefit.<sup>164</sup>

Moving on to another aspect of the relationship between debtor and assignee, a notice of assignment is established as a means of communication to a debtor subject to the receivable assigned. From a proprietary perspective, a notice is seen as a concrete act in transferring a receivable. It is the nearest equivalent to the physical features of possession and ownership. In fact, sending a notice has nothing to do with the ownership and possession of the assigned receivable. A notice is only a method of

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<sup>159</sup> *Southway Group Ltd v Wolff and Wolff* [1991] 57 BLR 33 CA (Bingham LJ).

<sup>160</sup> See Peel and Treitel (n 10) 714.

<sup>161</sup> See *Re Williams* [1917] 1 Ch 1; *Rekstin v Severo Sibirsko Gosudarstvenoe Akcionerное Obschestvo Komseverputjand the Bank for Russian Trade Limited* [1933] 1 KB 47.

<sup>162</sup> Smith (n 16) 193–194.

<sup>163</sup> This is generally because there is no consideration that moves from the third party to the obligor (debtor). *ibid* 98–99; see *Tweddle v Atkinson* (1861) 121 ER 762, 764 (Crompton J); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

<sup>164</sup> S 1, the Contracts (Rights of Third Parties) Act 1999; see also Smith (n 16) 99–100.

communicating an intention to transfer. Although, a valid assignment may not need a notice, a notice of assignment can serve as concrete evidence of an assignor's intention to assign.<sup>165</sup> Through a notice, the contracting parties to the assignment can inform the debtor about the assignment. It is for the debtor to acknowledge that the right of the assignor has been transferred to the assignee. An analogy to property concepts as a supporting explanation seems unnecessary in this regard.<sup>166</sup> Furthermore, not every assignment needs a notice for it to be effective. Under English law, a written notice is only a requirement for a statutory assignment.<sup>167</sup> An equitable assignment, by contrast, can be made validly without a notice to the debtor. Besides, if the parties to an equitable assignment wish to give a notice to the debtor, it needs not to be in writing.<sup>168</sup> Though a notice is not required for the perfection of an equitable assignment, it is highly recommended as it is necessary to constitute the right of the assignee against the debtor. Giving a notice of assignment is a way to involve the debtor in the effectual result of the assignment. Only after receiving a notice must the debtor account to the assignee.<sup>169</sup> He can get a good discharge by paying the assignee, and not the assignor.<sup>170</sup> Without such a notice, the debtor may discharge his obligation by paying the assignor. The reason for this is that before receiving a notice of assignment, the debtor has no knowledge of the assignment. He is entitled to assume that he remains liable to the creditor, and only the creditor. Payment to the assignor will thus discharge the receivable.

Another issue on this topic concerns enforcement of the right assigned. Initially, even though there is an assignment, the assignee cannot enforce his right by himself. Mere

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<sup>165</sup> Smith (n 16) 197-199; Tolhurst (n 37) 319-329.

<sup>166</sup> See Peel and Treitel (n 10) 721.

<sup>167</sup> The Property Act, s 136(1).

<sup>168</sup> *Re Worcester* (1868) LR 3 Ch App 555.

<sup>169</sup> See Smith (n 16) 360-363.

<sup>170</sup> *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430; *Stocks v Dobson* (1853) 4 ER 411; also Tham (n 66).

The principle is basically the same under the Receivables Convention, arts 17(1)-(2), and the UCC, s 9-406. See McCormack, *Secured credit under English and American law* (n 85) 233-235; NO Akseli, 'The principle of debtor protection under the UN Convention on the Assignment of Receivables' in S Kroll and LA Mistelis (eds), *International Arbitration and International Commercial Law: Synergy* (2011) 513-516.

assignment does not give the assignee a right to sue. According to the privity of contract, ‘only the parties to a contract may sue or be sued upon the contract’.<sup>171</sup> Since the assignee is not a party to the original contract, he cannot sue the debtor for the receivable assigned, joinder of the assignor as a party to the action is required, otherwise the assignee must sue the debtor in the name of the assignor.<sup>172</sup> Nevertheless, it is now settled law that if an assignment is effective as a statutory one, the assignee has a right to sue the debtor in his own name.<sup>173</sup> The position of an assignee as a matter procedural law has been improved by legislation.<sup>174</sup> It is only for an equitable assignment that the equitable rule requires the assignee, when seeking to enforce his rights against the debtor, to join the assignor as a party or at least to sue the debtor in the name of the assignor. The equitable assignee ‘is not in a position to exercise directly against [the debtor] any right conferred by the contract on [the assignor]’.<sup>175</sup> This is an aspect of procedural law. But, in light of contract law, enforcing the assigned right can be seen as a situation where the assignee is exercising his right derived from the assignment through the assignor who formerly held that right under the original contract. This is the nature and purpose of an assignment, i.e. passing a beneficial enforceable right from assignor to assignee.<sup>176</sup>

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<sup>171</sup> Atiyah and Smith (n 99) 335.

<sup>172</sup> *Hammond v Messenger* (1838) 9 Sim 327; *Three Rivers DC v Governor and Company of the Bank of England* [1996] QB 292, 308; see also Marshall (n 5) 72–73; Guest (n 62) 62, 97–99.

<sup>173</sup> The Property Act, s 136(1); see also Marshall (n 5) 161–162; Smith (n 16) 265–267.

<sup>174</sup> *Re Westerton* [1919] 2 Ch 104, 113.

<sup>175</sup> *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, 445 (Sir John Pennycuick); See also *Hammond v Messenger* (1893) 9 Sim 327; Smith (n 16) 142–157; Tolhurst (n 37) 68–73.

<sup>176</sup> Furthermore, it has been claimed that ‘[the] enforcement of the assignee’s right is not at odds with privity because what the assignee protects or enforces is its title to the subject right. Thus, assignment is not a true exception to privity.’ *ibid* 62–63.



### 3.3 Property-based rules of assignment

As for its hybrid character, apart from being a contract, an assignment is also considered to be a subject of property. Property law is another part of the rules governing assignment. Legal matters which are based on the property aspect of assignment are analysed in this section. It begins by looking at the notion that assignment is a method of property transfer. The three subsequent topics are: rights of an assignee, proprietary effects of assignment, and priority issues.

#### 3.3.1 Assignment as a method for property-rights transfer

Firstly, it has commonly been said, from a proprietary viewpoint, that assignment involves a transfer of property rights. The word 'transfer' is usually used in a circumstance where one person passes something to another and, as a result, 'the transferee obtains the exact same thing as that once held by the transferor'.<sup>177</sup> In a legal context, transfer is used to describe the conveyance of property. Its scope is not limited to the transfer of tangible things but also covers the transfer of property rights.<sup>178</sup> When a receivable is categorised as property, a right that resides in it is also classified as a property right. Passing it from one to another is within the general idea of transfer. Transferring it by way of assignment has therefore been regarded as a transfer of property rights. It has further been said that the legal concept of transfer requires '[the] extinction of rights' on the one hand and 'the creation and vesting of new but equivalent rights' on the other.<sup>179</sup> An example of this is a contract for the sale of goods.<sup>180</sup> A sale contract is a method of transferring goods, the purpose of which is to transfer ownership

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<sup>177</sup> *ibid* 36.

<sup>178</sup> *ibid*.

<sup>179</sup> *ibid* 37.

<sup>180</sup> See PS Atiyah, J Adams and HL MacQueen, *Atiyah's sale of goods* (12th edn, Pearson/Longman 2010); M Bridge, *The sale of goods* (2nd edn, OUP 2009).

of the goods sold from seller to buyer. As the result of a sale contract, the buyer has a contractual right to demand that the seller deliver the goods or pass the ownership. The thing purported to be delivered is a specific physical object to which a property interest (or ownership) is attached. Generally speaking, assignment is consistent with this concept. It is the case where an assignor's right is extinguished and a new and equivalent right is created and vested in an assignee. Undoubtedly, both sale and assignment comprise an element of transfer.<sup>181</sup>

However, ownership is a property right that resides in identifiable property. In assignment, it is not a property but a contractual right or a right to payment that is transferred. This right must be pursued by a debtor, notwithstanding where the money the debtor uses to make payment comes from. Unlike a sale of goods where it is possible to transfer ownership without delivering its possession, '[all] true assignments of contractual rights require an actual transfer of the right to performance'.<sup>182</sup> This is the thing that an assignee shall receive after an assignment. There is no specific property attached to the assigned right. Ownership in a specific property is not the purpose of assignment. Besides, as a matter of contract, a sale is a contract directly agreed and resulting in relationships between the parties to it, i.e. buyer and seller. A third party is not relevant in this method of transfer. In the context of assignment, by contrast, there must be an assignee. His position can be clarified as a third party to the contract between assignor and debtor.

Assignment does involve a transfer, but the thing which is transferred is not actual property. It is the transfer of the title to a right to payment. This scenario differs from the transfer of tangible property, especially in the case of a future right, a future chose or future property. To illustrate this point, there is another legal doctrine that should be

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<sup>181</sup> Tolhurst (n 37) 36–39.

<sup>182</sup> *ibid* 39.

discussed. It is the maxim *nemo dat quod non habet*. This Latin tag indicates that ‘no one gives what he does not have’. It is a fundamental rule governing a transfer including, of course, an assignment.<sup>183</sup> For a sale of goods, it is necessary to know which goods are being sold and bought in order for their ownership to be transferred. Ownership can only attach to present existing property; principally, the ownership of a non-existing thing cannot be transferred.<sup>184</sup> Under the Sale of Goods Act 1979,<sup>185</sup> goods that have no physical existence, have not yet been manufactured or acquired by the seller are called ‘future goods’. They can be the object of a sale contract. Although, a contract for the present sale of future goods is valid, there can be no passing of property – or ownership – in future goods.<sup>186</sup> Such a contract is treated as an agreement to sell – or transfer – those future goods.<sup>187</sup> It is at this point that the seller cannot give the buyer what he does not have. In the case of assignment, an assignment of future rights will be treated as an agreement to assign.<sup>188</sup> A difference between a sale and an assignment of future things is the way to distinguish how future goods and future rights come into existence. As described by the Sale of Goods Act, future goods are goods which have not yet been manufactured, or acquired by the seller. The emphasis is on physical appearance. Once the goods sold exist, ownership can exist and hence is able to be transferred. The assignment of future rights, by contrast, involves not only the existence but also the enforceability of the rights assigned.<sup>189</sup> It links to a relationship between persons, i.e. debtor and creditor, not a physical thing. A future receivable is a receivable which does not yet exist, and ‘[there] is no legal relationship out of which an

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<sup>183</sup> *ibid* 42.

<sup>184</sup> Lawson and Rudden (n 40) 56–59.

<sup>185</sup> S 5(1); see also Bridge, *The sale of goods* (n 180) 60–62.

<sup>186</sup> *ibid*; *Lunn v Thornton* (1845) 135 ER 587.

<sup>187</sup> The Sale of Goods Act 1979, ss 5(2)–(3).

<sup>188</sup> This assignment must be supported by a consideration for it to be binding. See *Tailby v Official Receiver* (1888) 13 App Cas 523.

<sup>189</sup> Smith (n 16) 28–33.

enforceable right can grow.’<sup>190</sup> As such, assignor and assignee can see no one able to enforce the rights purported to be assigned. The key point of assignment is the importance placed on the contractual relationship expected to be created between the assignor and his debtor in the future. Once this occurs, the assignment will transfer the beneficial interest to the assignee provided that and immediately upon the receivable is sufficiently identifiable as the subject matter of the agreement.<sup>191</sup> Consequently, the assignee will have an enforceable right that can be asserted against the debtor. As always, no physical thing appears and no ownership of a thing is involved.

Furthermore, one of the exceptions to the *nemo dat* rule is granted by the law of assignment.<sup>192</sup> Although, principally, one cannot give what one does not have, it is however possible for someone to assign what he does not have. This is true in the case where the same receivable is assigned by an assignor more than once. After the first assignment, it can be said that the assignor has nothing left to assign. The second assignment should be ineffective and the second assignee should have no right to compete against the first assignee. But that is not the law of assignment. Such circumstance does happen and it leads to a priority dispute among assignees.<sup>193</sup> ‘Without there being an exception to the *nemo dat* rule such [a] priority dispute could not arise; if the first assignment was effective at law, then the assignor would have had nothing to assign to the second assignee.’<sup>194</sup>

Notice of assignment is another issue that must be examined. In receivables financing, there are basically two main types of assignment: one is operated by way of notice, the

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<sup>190</sup> *ibid* 30.

<sup>191</sup> *Holroyd v Marshall* (1862) 10 HLC 191; *Tailby v Official Receiver* (1888) 13 App Cas 523; *Re Wait* [1927] 1 Ch 606, 622; *Syrett v Egerton* [1957] 1 WLR 1130; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74; see also *Guest* (n 62) 103-109; *Smith* (n 16) ch 9.

<sup>192</sup> Other exceptions have been variously made by statute. *Goode and McKendrick* (n 64) 58–59; *Tolhurst* (n 37) 42–43.

<sup>193</sup> *Dearle v Hall* (1828) 3 Russ 1; see also *Sealy and Hooley* (n 1) 1068–1070.

<sup>194</sup> *Tolhurst* (n 37) 42.

other is not.<sup>195</sup> In notification receivables financing, the debtor is given a notice of assignment. Receivables financing can also be conducted on a non-notification basis. From a practical aspect, it has been admitted that this type of assignment is becoming the dominant form of receivables financing, since creditors (assignors) are reluctant to have their arrangements with factors (assignees) disclosed to their debtors with consequent disturbance to their relations.<sup>196</sup> A non-notification assignment is effective, although it is more risky for the assignee than the notification kind. Without a notice, the debtor is, for instance, able to get a good discharge by making payment to the assignor.<sup>197</sup> It is apparent from the provisions of the Receivables Convention that although its effect is heavily involved with the assignee's interest, notifying the debtor is a right, not an obligation.<sup>198</sup> It can be done either by the assignee himself or by the assignor. As notice of assignment is linked to proprietary-based rules, its underlying function is regarded as equivalent to taking possession of property. However, it is obvious that such a function cannot be a reason in the context of a non-notification assignment. No notice is given to affect the so-called ownership or possession of the receivable being assigned. Moreover, giving a notice of assignment to each and every debtor in the case of bulk assignments of receivables is inconvenient, expensive and time-consuming.<sup>199</sup> It is therefore inappropriate to require a notice to be given to the debtor as a method of effecting an outright sale or creating a security interest in receivables.<sup>200</sup> Here again, a proprietary explanation seems to be disconnected from the legal principles and financial practice.

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<sup>195</sup> Goode and McKendrick (n 64) 788–789.

<sup>196</sup> *ibid* 789.

<sup>197</sup> Smith (n 16) 215–216; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 79) 28.

<sup>198</sup> Art 13; see also UNCITRAL (n 149) para 122.

<sup>199</sup> See Oditah, 'Recurrent Issues in Receivables Financing' (n 25).

<sup>200</sup> R Goode, 'Harmonised Modernisation of the Law Governing Secured Transactions: General-Sectorial, Global-Regional-An Overview' (2003) 8 ULR 341.

### 3.3.2 Rights of an assignee

Once an assignment is established as a transfer of property, it follows that an assignee can obtain a proprietary right from the result of assignment. As far as this thesis is concerned, such a notion is not as straightforward as it seems. Considering the legal effects of an assignment more closely, there is another principal doctrine which deserves examination in this context. That is what ‘an assignee, whether statutory or equitable, takes subject to equities’.<sup>201</sup> In other words, the rights of an assignee are subject to equities.<sup>202</sup> This doctrine is consistent with the fundamental idea of assignment which intends to protect the debtor by indicating that the debtor shall not be prejudiced by an assignment.<sup>203</sup> It is part of the principle of debtor protection.<sup>204</sup> It applies even if the assignee is a *bona fide* transferee of receivables for value.<sup>205</sup> Since free assignability entails the debtor’s consent being irrelevant and unnecessary, it is thus appropriate to ensure that he is no worse off.<sup>206</sup> This is one of the concepts of the law of assignment in that it ‘should be committed to free transferability but balanced by respect for the obligor’s legitimate interests’.<sup>207</sup>

As a general principle, the subject to equities doctrine means that ‘the assignee takes subject to any defences which the debtor could have raised against the assignor, and also subject to cross-claims available to the debtor against the assignor’.<sup>208</sup> The extent to which an assignee can be affected by these rules depends upon when the debtor receives

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<sup>201</sup> Marshall (n 5) 181; Guest (n 62) 262; see also *Coles v Jones* (1715) 2 Vern 692; *Ord v White* (1840) 3 Beav 357; *Phipps v Lovegrove* (1871) LR 16 Eq 80, 88 (James LJ).

<sup>202</sup> In *Mangles v Dixon* (1852) HL Cas 702, 731, it was stated that ‘[if] there is one rule more perfectly established in a court of equity than another, it is, that whoever takes an assignment of a chose in action takes it subject to all equities of the person who made that assignment.’ See also *Cockell v Taylor* (1852) 15 Beav 103; *Phipps v Lovegrove* (1871) LR 16 Eq 80.

<sup>203</sup> See Smith (n 16) 355–392.

<sup>204</sup> See Akseli, ‘The principle of debtor protection under the UN Convention on the Assignment of Receivables’ (n 170).

<sup>205</sup> *Graham v Johnson* (1869) LR 8 Eq. 36 (Romily MR); see also Smith (n 16) 371.

<sup>206</sup> McMeel (n 12) 486–488.

<sup>207</sup> *ibid* 488.

<sup>208</sup> Marshall (n 5) 181 and 365–372.

a notice of assignment.<sup>209</sup> However, some defences, such as fraud and misrepresentation<sup>210</sup> or other illegalities which are rooted in the contract generating the receivables assigned itself,<sup>211</sup> are grouped as vitiating equities and affect the existence of enforceability of the assigned receivables.<sup>212</sup> These are defences that shall render contract voidable, thus creating defects in the assignor's rights under the original contract. They can be raised irrespective of the date on which the debtor receives a notice of assignment.<sup>213</sup> Because the assignee cannot acquire a better right than the assignor, when those defective rights are transferred to him he must also be bound by them.<sup>214</sup> As a consequence, he will be unable to enforce the assigned receivables against the debtor to the same extent as the assignor.

Regarding cross-claims, a notice of assignment also has a vital role in drawing the line as to their availability.<sup>215</sup> A cross-claim will be available for a debtor to contest the assignee's rights only if it is incurred before the time of notice. If the debtor is given the notice after a cross-claim accrued due, he may set it off against the assigned receivables. An example is where the debtor has already paid half of the receivables to the assignor before receiving a notice of assignment.<sup>216</sup> However, if the cross-claim accrued due after the notice is given, it cannot be used to set off against the assigned receivables. This is the debtor's rights to set-off, both at law and in equity.<sup>217</sup> As is stated, '[the] right of set-off is subject to this – there is no right of set-off against an assignee of whose

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<sup>209</sup> Smith (n 16) 370–372; see also Akseli, 'The principle of debtor protection under the UN Convention on the Assignment of Receivables' (n 170).

<sup>210</sup> *Graham v Johnson* (1869) LR 8 Eq. 36.

<sup>211</sup> Such as duress or the contract is contrary to public policy; see Guest (n 62) 265–267.

<sup>212</sup> Smith (n 16) 372–374; Guest (n 62) 264–269.

<sup>213</sup> Marshall (n 5) 181–182; Smith (n 16) 372–374.

<sup>214</sup> *ibid*; see also *Phillips v Phillips* 45 ER 1164.

<sup>215</sup> Akseli, 'The principle of debtor protection under the UN Convention on the Assignment of Receivables' (n 170) 516–522.

<sup>216</sup> See Marshall (n 5) 187–191.

<sup>217</sup> See Smith (n 16) 374–384 and 387–392; however, there exist some exceptions, see Akseli, 'The principle of debtor protection under the UN Convention on the Assignment of Receivables' (n 170) 518.

assignment the person claiming to set-off had notice at the time when the [receivable] due to him was contracted'.<sup>218</sup>

According to English law, there are two main sources of the right of set-off outside insolvency: one is contractual, the other is non-contractual.<sup>219</sup> An interesting issue here concerns the former, a contractual set-off. This is the case where the contracting parties make an agreement between them that a payment of money by one person to another may be set off against any cross-claim for which another is liable on some other account.<sup>220</sup> '[The] purpose of a contractual set-off is usually to extend the right beyond that which would be given at law or in equity.'<sup>221</sup> Such agreement will bind an assignee of the creditor's claim on the ground that he cannot acquire rights greater than those of his assignor, prior to the debtor's receipt of the notice.<sup>222</sup> Considering this situation, it is clear that the thing being transferred to the assignee is a contractual right to payment subject to the contractual terms of set-off agreed between debtor and assignor. It is not an absolute piece of property, but rather rights created and limited by the contract.

The final point in this regard concerns a right of the parties to vary the contract creating the receivable assigned. This issue significantly affects the relationship between debtor and assignee. Where a notice of assignment has not yet been given to the debtor, the position is clear. The contract can be modified by the parties to it. After notice, although there is a general rule that the debtor cannot do anything to diminish the rights of the

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<sup>218</sup> *Biggerstaff v Rowatt's Wharf Limited* [1896] 2 Ch 93, 101 (Lindley LJ).

<sup>219</sup> Goode and McKendrick (n 64) 662–663; Smith (n 16) 374–392; also Goode and Gullifer (n 86) ch VII; P Wood, *Law and practice of international finance*, vol. 4 (2nd edn, Thomson/Sweet & Maxwell 2007) 5–8 and 81–83.

As a general principle, non-contractual set-off is divided into independent (or legal, or statutory) set-off and transaction (or equitable) set-off. They are different in that while legal set-off is purely a procedural defence, transaction set-off operates as a substantive defence. See *Stein v Blake* [1996] AC 243, 251 (Lord Hoffman); *Rawson v Samuel* (1841) Cr&Ph 161; *Hanak v Green* [1958] 2 QB 9 (Morris LJ); for statutory set-off, see SR Derham, *The law of set-off* (3rd edn, OUP 2003); the Civil Procedure Acts Repeal Acts 1879, s 2 and the schedule to the Act; the Supreme Court Act 1981, s 49(2).

<sup>220</sup> Goode and McKendrick (n 64) 650; Wood (n 219) 218–221.

<sup>221</sup> Goode and McKendrick (n 64) 650.

<sup>222</sup> Goode and Gullifer (n 86) 288.



assignee,<sup>223</sup> the principle of transfer does not necessarily prevent the assignor and the debtor varying their contract. This general rule applies only to an executed contract. In the case of an executory contract or a contract which has not yet been fully performed, modification or even rescission is allowed, provided that it is done in good faith.<sup>224</sup> This is because assignment does not create privity of contract between assignee and debtor. It is always the assignor who is the party to the original contract generating the assigned receivables. Modifying a contract is an inherent contractual right, or power, of and between the parties to that contract. 'If parties to an executory contract cannot modify it to adjust to altered circumstances because the creditor of the debt obligation decides to assign his expectant entitlement before the entitlement is earned, the result is slavery.'<sup>225</sup> Based on the principle of transfer by which an assignee shall acquire the same right as an assignor, the right to modify the contract remains, even after a notice of assignment is received by the debtor. The assignee must also be bound by this contractual power, whether a result of modification will be detrimental or beneficial to him. The rights of an assignee are therefore subject to contractual modification.<sup>226</sup> If the rights of an assignee are viewed as a piece of property, it is not a definite item. In contrast, it can easily be modified by the contractual power of the parties to the receivables. The concept of transferring ownership in a definite or identifiable piece of property might not be applicable. In contrast, this argument shows and supports the contractual nature of assignment. Here, the rational logic of the contractual principle cannot be overruled

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<sup>223</sup> *Roxburghe v Cox* (1881) LR 17 Ch D 520, 526 (James LJ), where it was stated that 'an assignee of a chose in action, according to my view of the law, takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice'. This applies only to an executed contract. See also *Brice v Bannister* (1878) 3 QBD 569, 577 (Cotton LJ); *The First National Bank of Chicago v The West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The Evelpidis Era)* [1981] 1 Lloyd's Rep 54, 64; *Royal Exchange Assurance v Hope* [1928] Ch 179; Tolhurst (n 37) 416; Smith (n 16) 357–359; Akseli, 'The principle of debtor protection under the UN Convention on the Assignment of Receivables' (n 170) 522–523.

<sup>224</sup> Oditah, *Legal aspects of receivables financing* (n 25) 241–243; Tolhurst (n 37) 416–417.

<sup>225</sup> Oditah, *Legal aspects of receivables financing* (n 25) 242; see also *Brice v Bannister* (1878) 3 QBD 569, 579 (Brett LJ).

<sup>226</sup> Tolhurst (n 37) 416–419.

by the property approach. It is but legislation that is required if one needs to limit or mitigate a harsh or an unwanted result which might affect or compromise the assignee. An instance can be seen in the Receivables Convention where it is imposed that, after notification of assignment, an agreement between assignor and debtor that affects the assignee's rights is ineffective against the assignee.<sup>227</sup> However, in the case where the debtor has not received notification, the result still affirms the principle of transfer. A modification of the original contract is effective against the assignee.<sup>228</sup>

The rights of an assignee are therefore not exactly equivalent to those of an assignor. In fact, they can be more or less. The thing assigned to an assignee is not a definite item of property. It is but an unsettled right comprising controvertible claim against the assignor's debtor. Assignment is the transfer of a contractual right. Through it, an assignee shall receive a contractual right subject to contractual defences, modifications and cross-claims.

### 3.3.3 Proprietary effects

Being established as a right against the world, a property right or a right *in rem* is not a limited right between parties to a contract. Its scope, as opposed to a right *in personam*, extends to a third person. Being seen as a way of transferring property rights, assignment has been proclaimed as generating not only contractual results but also proprietary effects.<sup>229</sup> Apart from property transfer between assignor and assignee, another significant proprietary effect of assignment concerns the relationship between

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<sup>227</sup> Unless the assignee consents to it, or the receivable is not fully earned by performance, and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification; see art 20(2).

<sup>228</sup> See art 20(1) of the Receivables Convention.

<sup>229</sup> See Bridge, 'The proprietary aspects of assignment and choice of law' (n 2); J Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (2010) 6 JIBFL 333; THD Struycken, 'The proprietary aspects of international assignment of debts and the Rome Convention, Article 12' (1998) 3 LMCLQ 345.

assignee and third persons. This is a question of whether rights of the assignee can be asserted against third parties. It consists of the opposability of an assignee's rights against the creditor of the assignor, or against the liquidator or other insolvency representative of the assignor.<sup>230</sup>

Before considering such proprietary effects of assignment, a preliminary issue is how an assignee can make his right received by an assignment contract having the third-party effects. Regarding the property approach, this issue is concerned with the proprietary formalities of an assignment, i.e. a method that creates and perfects proprietary interests in the receivables assigned. This is the legal subject of perfection. It involves how an assignee must complete in order to make his right effective against third parties or, according to a proprietary phrase, against the whole world. In English law, perfection can be achieved by notice of assignment. As it has been declared in *Dearle v Hall*,<sup>231</sup> '[notice] ... is necessary to perfect the title – to give a complete right *in rem*, and not merely a right as against him who conveys his interest'. Under Article 9 of the UCC, perfection of interest against third parties is processed either upon attachment or by notice-filing.<sup>232</sup> By notice-filing, it means a financing statement must be filed to the specified filing office.<sup>233</sup>

Although a notice of assignment is necessary for a statutory assignment under English law,<sup>234</sup> it is not required for an equitable assignment. No form has to be completed to create a so-called proprietary interest in an equitable assignment. Besides, financing against receivables can be done on a non-notification basis. It has also been admitted in *Dearle v Hall* that '[if] you are willing to trust the personal credit of the man, and are

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<sup>230</sup> Bridge, 'The proprietary aspects of assignment and choice of law' (n 2) 687–689.

<sup>231</sup> (1828) 3 Russ 1, 23–24 (Plumer MR).

<sup>232</sup> Respectively ss 9-308, 9-309, and 9-310; see also McCormack, *Secured credit under English and American law* (n 85) 76–79.

<sup>233</sup> Ss 9-501, 9-502.

<sup>234</sup> S 136(1) of the Property Act.

satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary; for against him, the title is perfect without notice'.<sup>235</sup> Furthermore, under the Receivables Convention, there is no rule regarding either the contractual or proprietary formal validity of assignment.<sup>236</sup> To this extent, a conclusion that can be drawn is that using the concept of proprietary rights perfected by the formal validity of proprietary interests, e.g. by a notice of assignment, might not be very helpful. This is because, a real benefit in a receivable is, in the end, linked back to 'the personal credit of the man', i.e. the debtor subject to the assigned receivable. This is the true nature of a receivable comprising the debtor's obligation to make payment. It is always the underlying characteristics of the interests residing in it, even after being transferred by way of assignment.

Although the effectiveness of assignment against third parties may be achieved through the method of perfection, it is doubtful whether this effect of assignment should be classified as a proprietary or property right. A question is whether this effect really falls within the domain of property law. As the research proceeds, some problematic issues have arisen regarding the notion that this effect of assignment is proprietary.

By assignment, the rights of the assignor are passed to the assignee. At a doctrinal level, the rights vested in the assignee shall be equivalent to those formerly vested in the assignor. Considering this doctrine and the proprietary effects more closely, a question is thus, before an assignment is concluded, does an assignor have a property right in a receivable? Can an assignor assert his right in that receivable against the whole world? Or does he only have a personal right against his debtor, and his debtor only? If it is correct that a receivable originating from a contract gives a creditor a right *in personam* enforceable only against his debtor, then why after assignment does the assignee have a

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<sup>235</sup> *Dearle v Hall* (1828) 3 Russ 1, 24 (Plumer MR).

<sup>236</sup> Bazinas (n 149) 284–285.

property right in the same receivable? What source of property right does the assignor transfer to the assignee when originally he holds no property right? In this line of logic, the assignee should receive, and have, only a personal right against the debtor, not a property kind of right. Moreover, if the assignee really does have a property right in the assigned receivable in the same way as the owner of a tangible property, another criticism follows. What if, after the first assignment, the assignee wishes to transfer his assigned right not to other persons, but back to the assignor; by this second assignment, will the assigned right still be regarded as property? In other words, can the assignor transform his personal right into a property right by completing a returning assignment like this? If the answer is yes, a property right could easily be created by individuals through a simple private agreement, notwithstanding the closed lists of properties established by the law of property. Should an account of property law still be subject to the *numerus clausus* principle?

Though this argument might at first seem to be a very theoretical one, and of course it is, the whole point is to demonstrate that the proprietary approach based on property law does not suit the effects of assignment. Conflicting principles and confusing logics are, by contrast, the result of proprietary explanations. As a matter of fact, the hypothetical circumstance whereby an assignee assigns receivables back to an assignor does occur in the practice of factoring businesses. Basically, it depends on the type of factoring agreement that is used. Factoring can be done on a recourse, or non-recourse, basis.<sup>237</sup>

By recourse is meant 'the right of the factor to shift the risk of non-payment of any [receivables] to the client'.<sup>238</sup> If the agreement is recourse factoring, the client (assignor)

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<sup>237</sup> See Beale, et al. (n 78) 291–292; M Bakker, G Udell and L Klapper, 'Financing small and medium-size enterprises with factoring: Global growth and its potential in Eastern Europe' (2004) World Bank Policy Research Working Paper; L Klapper, 'The role of factoring for financing small and medium enterprises' (2006) 30 JBF 3111; G McCormack, 'Personal property security law reform in England and Canada' (2002) 2 JBL 113, 128-132; an example of factoring agreement can be seen in Goode and McKendrick (n 64) 843-876.

<sup>238</sup> Beale, et al. (n 78) 291.

is responsible for buying back from the factor (assignee) a receivable that is not paid for by his customer (debtor). Under such an agreement, the factor thus has recourse if they cannot collect the receivable assigned. But if the factoring agreement is on a non-recourse basis, the factor does not have such recourse. They assume the full risk of non-payment by the client's debtor. From recourse factoring, the theoretical question analysed above can thus arise in practice.

### 3.3.4 Priority

A priority dispute arises where there is more than one competing claim over the same receivables which has been assigned. This matter is also regarded as being in the sphere of proprietary effects of assignment.<sup>239</sup> According to this view, 'priority rules exist for the purpose of determining priority between property interests'<sup>240</sup> and settling the question of who owns the receivables. Where there exist two effective assignments of the same receivables, the situation leads to a priority dispute between successive assignees, i.e. who has better title to the assigned receivables.

Under English law, priorities among competing assignments are governed by the rule in *Dearle v Hall*.<sup>241</sup> This rule is not based on the order in which those assignments were made. Rather, the first limb of the rule is in fact determined by notice of assignment. The assignee who first gives notice to the debtor shall have the prior right, notwithstanding whether he was the first or a subsequent assignee, provided that he acts in good faith. This last condition is the second limb of the rule. It means that the subsequent assignee must, at the time of his assignment, not know of the prior

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<sup>239</sup> Bridge, 'The proprietary aspects of assignment and choice of law' (n 2) 687–689.

<sup>240</sup> Smith (n 16) 415.

<sup>241</sup> (1828) 3 Russ 1; *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group* [1995] 1 WLR 1140; see also Smith (n 16) 432–451; Goode and Gullifer (n 86) 177–178; Goode and McKendrick (n 64) 697 and 793–794.

assignment.<sup>242</sup> As elucidated in the stated case,<sup>243</sup> this rule, which substantially relies upon notification, stems from the idea that in transferring a property one must do everything towards having possession. In the case of a receivable, one must give notice of assignment to the debtor in order to treat the receivable as his property. This is tantamount to possession. By failing to give notice, the first assignee has left the assignor in apparent possession of the beneficial interests in that receivable, and has enabled him to make the second assignment.<sup>244</sup> According to these explanations, the concept of property, i.e. possession, has been applied to establish a rule for a priority dispute.

The present law of assignment has attempted to treat interests in a receivable as if they are property, despite the obvious fact that they are personal. They are in reality not rights to obtain actual possession over a specific property, but to obtain actual payment from a debtor subject to it.<sup>245</sup> By treating interests in a receivable as a personal right, priorities between competing assignments can be regarded as involving the question of who has a prior right to obtain interests in the assigned receivable. It is, in other words, to whom the debtor should make his payment.<sup>246</sup> The rights of competing assignees are attached to the debtor's obligation which derives from the contract generating the receivable plus the effects of the assignment. The debtor's obligation is linked to these two types of contractual arrangements. In determining a priority by notice, the consequence of notice is to give the good-faith assignee, who first his assignment be notified to the debtor, the prior right to receive payment. It is not a reason for taking possession. While other rationales for priority rules can still be found and applied,

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<sup>242</sup> See also *Re Holmes* (1885) 29 Ch D 786 (Cotton LJ); *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460, 468 (Cotton LJ) and 473 (Fry LJ).

<sup>243</sup> 22-25 (Plummer MR).

<sup>244</sup> *Smith* (n 16) 437; *Dearle v Hall* (1828) 3 Russ 1.

<sup>245</sup> This point was also admitted by Plumer MR in *Dearle v Hall* (1828) 3 Russ 1, 22–23.

<sup>246</sup> This approach can be seen in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

considering the interests in a receivable to be a proprietary right is irrelevant, and hence unnecessary.

For bulk assignments of receivables, to notify each and every debtor is viewed by practitioners as impractical.<sup>247</sup> The rule in *Dearle v Hall* which is based on notification ‘has been widely condemned as an unsatisfactory determinant of priorities in the context of receivables financing’;<sup>248</sup> it is ‘wholly unsuited to modern receivables financing’.<sup>249</sup> There exists, therefore, a proposal that other priority rules in relation to receivables financing be considered. For instance, priority should instead be determined by registration.<sup>250</sup> Another alternative is based on Article 9 of the UCC where priority rights are ranked according to priority in time of filing or perfection.<sup>251</sup> It, in other words, depends on a ‘first-to-file’ rule.<sup>252</sup> The assignee who first files a financing statement obtains priority, even though he is not the first assignee.

The rights-based approach does not bar or conflict with a registration system. An explanation of this can be formulated without resorting to the proprietary nature of the issue. A fundamental question that must be asked here is what is the objective of registration? Is it solely about transferring ownership or property rights? Registration does not always reflect property rights, otherwise we would have to have all things registered. Under English property law, a general principle is that various things have different and various ways in reflecting or transferring rights or interests in them. While ownership of goods or money could pass when those goods or money are delivered with an intention to transfer and a transfer of receivables should be notified to the debtor, a

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<sup>247</sup> See Oditah, ‘Recurrent Issues in Receivables Financing’ (n 25).

<sup>248</sup> *ibid* 351–352; McCormack, *Secured credit under English and American law* (n 85) 245.

<sup>249</sup> Goode and Gullifer (n 86) 177.

<sup>250</sup> Law Commission Report on Company Security Interests No 296 (LAW COM No 296, 2005) part 4; Goode and Gullifer (n 86) 178; McCormack, *Secured credit under English and American law* (n 85) 244.

<sup>251</sup> S 9-322; McCormack, *Secured credit under English and American law* (n 85) 242–245.

<sup>252</sup> See *ibid* 79–84 and 242–245.



transfer of ownership in land needs to be registered.<sup>253</sup> Registration is in fact a method of publicising information regarding rights or interests in things, the purpose of which is to preserve and protect legitimate rights of a rightholder and of a third party who may come to get involved.<sup>254</sup> It is intended to ‘prevent the implication of false wealth’ and be ‘a useful safeguard against fraud’.<sup>255</sup> This procedure is not going to change or affect the true legal nature of assignment. Served as a rule for priority determination, the rights-based approach regards registration of an assignment of receivables as the way for an assignee to declare against the public that he obtains the rights over the assigned receivables, and thus to advise anyone who intend to acquire the same rights that they could be subject to his prior status. This is the essence that matters and must be established in the law of assignment. Again, even no property explanation is supplemented, a registration system for the assignments remains consistent with this approach.

### 3.4 Summary remarks

In the present world where a right to claim for payment in a receivable is a financial asset and a form of capital in economic circles, it is essential to ensure that that right is definitely and easily transferable.<sup>256</sup> Based on a remark pointed out in the previous chapter that the true nature of receivables is that of intangible rights, the assignment of receivables shall thus be approached on the basis of transferring rights.

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<sup>253</sup> Lawson and Rudden (n 40) 57; Atiyah, et al. (n 180) 47.

<sup>254</sup> See RJ Smith, *Property law* (6th edn, Pearson Longman 2009) 220; M Dixon, *Modern land law* (9th edn, Routledge 2014) 32-37, where several objectives of registration system are explained, e.g., reflecting rights and interests of things, reducing expense, effort and risk of acquiring things, and mechanism of protecting a third-party’s rights.

<sup>255</sup> Law Commission Consultation Paper No 176: Company Security Interests (LCCP No 176, 2004) para 2.46; Beale, et al. (n 78) 388.

<sup>256</sup> Zweigert and Kötz (n 2) 442.

Taking into consideration the generic meaning of assignment, a clear statement has been made as follows: ‘Probably what is meant is what is generally understood, viz. that [by an assignment] the assignee acquires rights similar to those of the assignor and is put in the same position with reference to those rights as that in which the assignor stood at the time of assignment.’<sup>257</sup> However, from a legal viewpoint, this statement is unlikely to be totally correct. The rights of the assignee can be more or less than those of the assignor. There is no concrete guarantee that the assignee, as a result of assignment, shall stand in the exact same position as the assignor. In stark contrast, things can change depending on a situation that subsequently arises at or after the time of assignment. Several legal rules are formulated in order to deal with such a circumstance that might occur.

Considering the true legal nature of assignment, it has been assumed that ‘the law of assignment involves treating interests as if they were proprietary (i.e. allowing their transfer), even though in reality they are personal’.<sup>258</sup> With a rights-based approach, there is no need for such an assumptive treatment of those interests. In contrast, the assignment shall be treated as a legal institution according to its genuine concepts and consequences. The law on the assignment of receivables shall be explained as it really is, not as a confusing combination of contract and property.

Rather than a combination of property and contract, the methodology proposed by this thesis is a rights-based approach. In this way, an assignment of receivables is regarded as a transfer of beneficial contractual rights or interests from assignor to assignee. The legal effects of assignment, as among assignor, assignee and debtor, or as against third parties, shall be treated as legal relationships deriving from the assignment itself. Assignment is by and of itself a method of transferring rights to payment, not a hybrid of contract and property. For it to be fully and freely developed, the law of assignment

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<sup>257</sup> Marshall (n 5) 34.

<sup>258</sup> Smith (n 16) 415–416.

should be recognised as a special area of law, thus departing from the law of contract and property.

The key result of this is that property rules resulting from the property approach can be distanced or removed from the law of assignment, leaving it as a legal subject having its own rules and reasoning. The rights-based methodology is a direct way to explain and handle the true nature of assignment. It will unite the hybrid legal features of assignment, i.e. contract and property, into a single approach, i.e. rights. There is thus no need to link the rules back to any mandatory domestic rules of property law. As a consequence, it will be possible to formulate conflict-of-law rules on the basis of relationships of rights flowing from an international assignment of receivables as a whole. This subject will be studied in subsequent chapters.

## CHAPTER 4: CONFLICT OF LAWS: A COMPARATIVE STUDY

This chapter will examine conflict-of-law rules in respect of international assignments of receivables. Conflict of laws or choice-of-law rules is a legal mechanism which has been developed in order to find an applicable substantive law in an international scenario. Before finding such a law, a prior matter of conflict-of-law methodologies that must be answered first is that of characterisation (or classification or categorisation). This is the methodology that puts a particular legal issue into a specific legal category where it can be properly dealt with.<sup>1</sup> Conflict of laws in a jurisdiction fundamentally follows the legal classifications used in the context of substantive law. As once observed by Auld LJ in *Macmillan Inc v Bishopsgate Investment Trust plc (No3)*, the process of legal classification in conflict of laws ‘requires a parallel exercise in classification of the relevant rule of law’.<sup>2</sup> The assignment of receivables has been viewed as a hybrid of contract and property. Conflict rules for both contract and property are taken into consideration to deal with an assignment containing international or foreign elements. If a legal issue involving assignment is classified as a contractual matter, conflict-of-law rules based on contract will be applied. Otherwise, if it is categorised as a proprietary matter, it is conflict rules for property that will be referred to. Although an assignment is created by contract, some legal issues flowing from it – such as third-party effects, perfection and priority – are typically regarded as proprietary. As shall be seen, this is the property-contract approach contemporarily employed in various jurisdictions. However, the rights-based approach advanced by this thesis sees the property-contract methodology as one of the complexities in this legal

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<sup>1</sup> TC Hartley, *International commercial litigation: text, cases and materials on private international law* (OUP 2009) 504–505.

<sup>2</sup> [1996] 1 WLR 387, 407.

area. Here, it will also be seen how far such a property-contract approach has been successfully applied.

A comparative legal research methodology is adopted in this chapter. Its purpose is to examine the fundamental principles, underlying reasons and policies of conflict-of-law rules currently employed; hence it compares and contrasts the rules of jurisdictions and relevant international instruments. Comparative conflict of laws has long had an intimate relationship with comparative law.<sup>3</sup> Substantive laws founded in the previous two chapters, i.e. receivables as the object of transfer and assignment which is the method of transfer, will be very useful in offering an in-depth explanation of conflict rules. By making such a comparison, the similarities and differences of those rules will be pointed out. The results of this process will serve as a basic reasoning for further analysis of the current property-contract approach and the proposed rights-based approach.

With regard to the chapter's structure, its main content is crafted according to conflict of laws applicable in various jurisdictions. The jurisdictions compared in this thesis comprise England, the European Union and the United States. They are examined respectively in Sections Two to Four. English conflict-of-law rules are studied first as a legal basis of this research, as well as an example of a common-law jurisdiction. They will serve as a basic comparator in this analysis. Next, private international law as developed in the European Union is investigated. This has one of the more advanced levels of uniformity of rules among civil-law and common-law jurisdictions. Subsequently, the functional approach of American law, where the substance of secured transactions has priority over form, is studied as a leading alternative method for this subject matter. But, before examining the laws of those jurisdictions, the first section

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<sup>3</sup> M Reimann 'Comparative Law and Private International Law' in M Reimann and R Zimmermann (eds), *The Oxford handbook of comparative law* (OUP 2008) 1363–1396.

briefly enumerates the general principles of conflict of laws for the assignment of receivables. It also provides further major reasons why those jurisdictions are chosen for study. After that, the legal rules imposed in international instruments, having been formulated as a way to harmonise the rules on this matter from a global perspective, are explored in Section Five. Finally, in Section Six, concluding remarks regarding conflict of laws for this assignment will be purposefully drawn as the outcome of this comparative research.

#### **4.1 Assignment of receivables in the conflict of laws**

For intangible things, an applicable choice-of-law rule could not be stated without some difficulty.<sup>4</sup> Besides the general reason that intangibles cover a wide range of things,<sup>5</sup> a more specific reason concerning the assignment of receivables is largely due to the way these have been treated as a hybrid of contract and property.<sup>6</sup> Being such a hybrid, with both contractual and proprietary characters, a combination of contract and property approaches has been formulated to find an appropriate governing law. For a conflicts lawyer, this is a legal area that brings the autonomous law of contract into collision with the non-autonomous law of property.<sup>7</sup> It is, on the one hand, the law of contract that grants freedom to parties to arrange an assignment in a way they see as fit for themselves. The mutual intention between them is all that matters. They could, subject to legal availability, conclude an assignment contract as either an outright or security

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<sup>4</sup> H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd edn, OUP 2012) 677.

<sup>5</sup> AV Dicey, L Collins, JHC Morris, *Dicey, Morris and Collins on the conflict of laws* (15th edn, Sweet & Maxwell 2012) 1355.

<sup>6</sup> See G Tolhurst, *The assignment of contractual rights* (Hart 2006) 53–62; M Bridge, 'The proprietary aspects of assignment and choice of law' (2009) 125 LQR 671; A Flessner and H Verhagen, *Assignment in European private international law: claims as property and the European Commission's "Rome I Proposal"* (Sellier 2006); HLE Verhagen and SV Dongen, 'Cross-border assignments under Rome I' (2010) JPIL 1.

<sup>7</sup> Bridge (n 6) 677; this matter has been discussed in Chapters 2 and 3.

transfer. The autonomy principle also includes the freedom to choose the law governing their assignment. On the other hand, the law of property limits such freedom. Assignment itself is regarded by property law as a method of transferring property and any rights thereof from one to another. As the assignment creates an effect against a third party, it is thus subject to the mandatory aspects of property law and its conflict rules. It is not within the ambit of party autonomy to choose an applicable law. However, the collision between these two legal areas concerns the question of how far the law ought to extend the scope of freedom of contract into the strict legal sphere of property law, or to what extent the non-autonomous law of property should have a role to play in the context of international assignments and parties' autonomy. This is a problematic concept of the property-contract approach that complicates the conflict-of-law rules for assignment.

For the property-contract approach to work properly in the context of international assignments of receivables, three principal methodologies of conflict of laws need to be clarified.<sup>8</sup> The first methodology concerns the question of classification or characterisation.<sup>9</sup> Is a legal issue flowing from assignment to be classified as contractual or proprietary? What criteria are used to employ such characterisation? Can they provide a definitive result, or not? These enquiries are not free from difficulty for a legal system to respond. On top of this, another fundamental question is which jurisdiction's law will decide such characterisation problems. Principally, it will be the law of the

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<sup>8</sup> See *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387 (Staughton, Auld and Aldous LJ); *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68 (Mance LJ).

<sup>9</sup> See Dicey, et al. (n 5) chs 2 and 22; JJ Fawcett, JM Carruthers and PM North, *Cheshire, North & Fawcett: private international law* (14th edn, OUP 2008) ch 3; for examples of English cases law concerning characterisation problems in this regard, see *In Re Hoyles* [1911] 1 Ch 179; *Republica de Guatemala v Numez* [1927] 1 KB 669; *Perry v Equitable Life Assurance Society of USA* (1929) 45 TLR 468; *Fouad Bishara Jabbour v Custodian of Absentee's Property of State of Israel* [1954] 1 ALL ER 145; also *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

jurisdiction where the trial takes place (*lex fori*) that shall determine this.<sup>10</sup> If answers to those questions can be given with certainty it will lead to the next two collaborative, yet distinct, processes. What is a connecting factor in each classification? What choice of applicable law is adopted, either for a contractual issue or for a proprietary issue? Basically, the law chosen by the parties to the contract governs a contractual matter but, for a proprietary matter, no general rule can yet be formed. The possible connecting factors typically proposed are the *lex situs* of receivables, the law of receivables assigned, the law of assignment, the law of the debtor's location, and the law of the assignor's location.<sup>11</sup> As a comparative study, the following sections focus on the three methodologies having been adopted in each respective jurisdiction, i.e. England, the European Union and the United States, and by relevant international instruments.

## 4.2 England

English conflict of laws for the assignment of receivables is investigated in this section. However, it should be noted at the outset that the English rules have now been substantially replaced by the laws of the European Community, first the Rome Convention and now the Rome I Regulation.<sup>12</sup> These are European conflict rules which will be discussed in the next section. The English conflict rules shall be applicable only where a case falls outside the scope of European law; especially where a legal issue stemming from an assignment is regarded as proprietary, a leading and current

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<sup>10</sup> *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387 (Staughton and Auld LJ); another school of thought favours *lex cause* – that is the appropriate foreign law, see Dicey, et al. (n 5) 40–43.

<sup>11</sup> See BIICL, 'Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person' <[http://ec.europa.eu/justice/civil/files/report\\_assignment\\_en.pdf](http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf)> accessed 9 October 2015.

<sup>12</sup> See A Dickinson, 'European private international law: embracing new horizons or mourning the past' (2005) 1 JPIL 197.



suggestion is that it is not governed by the Rome I Regulation, but by common law.<sup>13</sup>

English common-law rules as they now stand are considered below.

English common law regards an assignment of receivables as a transfer of choses in action. After long historical development, a chose in action – though originating from a contractual relationship – has been advanced as an item of property, and hence transferable.<sup>14</sup> By this advancement, the assignment combines the contract and property aspects of law. The contractual aspect is based on the origin of a receivable which is created by a contract, and a contract of assignment which is a method of transfer. On the proprietary side, it derives from the idea that a receivable is property. To transfer it is to transfer an object of property. Property law, therefore, governs the assignment in addition to contract law. An assignment is analogous to the transfer of a tangible thing. This idea of a substantive law of assignment has taken root in the approach and has had a significant effect on the development of English conflict-of-law rules regulating assignment.

#### **4.2.1 Characterisation**

As a general principle of English law, an assignment contract creates not only rights *in personam* between the contracting parties – assignor and assignee – but also rights *in rem* in relation to the assigned receivables. A distinction between legal matters arising from the contract and the proprietary transfer of ownership must be made in the case of intangibles, in the same manner as for tangible movables. This leads to a problematic

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<sup>13</sup> P Rogerson, *Collier's conflict of laws* (4th edn, CUP 2013) 401–402; R Goode and E McKendrick, *Goode on commercial law* (4th edn, Lexis Nexis 2009) 1238–1242; M Moshinsky, 'The assignment of debts in the conflict of laws' (1992) 108 LQR 591, 613–616.

<sup>14</sup> Having been investigated in Chapter 3, an assignment of choses in action was formerly prohibited on two grounds: the too personal objection deriving from the personal nature of choses in action; the objection of the law on maintenance aiming to protect the debtor. Later, the two objections, however, lost their weight. See OR Marshall, *The assignment of choses in action* (Pitman 1950) 34–65; AP Bell, *Modern law of personal property in England and Ireland* (Butterworths 1989) 361–362.

issue of characterisation, which is the fundamental process of conflict-of-law methodologies. It must be decided before determining which connecting factor will be used and which jurisdiction's substantive laws will be applied.<sup>15</sup> As has been submitted, '[characterisation] is done for the purpose of identifying the [most appropriate] choice of law rule'.<sup>16</sup> Principally in the context of assignment, a question concerning contractual relationships between assignor and assignee shall be governed by the proper law of contract; but if the question at hand concerns the proprietary aspects of an assignment, the applicable law of contract would not apply. It would rather be referred to the appropriate choices of law for a transfer of property, e.g. *lex situs*.<sup>17</sup>

Distinguishing between contract and property is therefore an essential matter that must be properly resolved in advance so that conflict rules can be properly applied. Still, drawing a line between contract and property is in this case not free of difficulty.<sup>18</sup> Operating according to a contractual agreement, the assignment of receivables –by way of either outright transfer or security – is certainly subject to conflict of laws for contracts. English courts regard an assignment as a contract between assignor and assignee. An authority on this point is a statement by Day J in *Lee v Abdy*: '[the] assignment here in question is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be a valid assignment'.<sup>19</sup> An assignment with an international element shall therefore be governed by choice-of-law rules for a contract. However, once receivables have been classified as an item of property there appear to be two main

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<sup>15</sup> Hartley (n 1) 504–505; Rogerson (n 13) 267–275; *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68; see also Dicey, et al. (n 5) ch 2; Fawcett, Carruthers and North (n 9) ch 3.

<sup>16</sup> Rogerson (n 13) 271, where a note approved by Lord Hoffman in *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, 152 was cited. 'The purpose of conflicts taxonomy is to identify the most appropriate law. This meant that one has to look at the substance of the issue rather the formal clothes in which it may be dressed.'

<sup>17</sup> Rogerson (n 13) 377–378; Moshinsky (n 13) 594–595; Goode and McKendrick (n 13) 1238–1242.

<sup>18</sup> See also Moshinsky (n 13) 593–595; Bridge (n 6).

<sup>19</sup> *Lee v Abdy* (1886) 17 QBD 309, 313 (Day J).

reasons that lead straightforwardly to the idea that conflict-of-law rules for property should also be taken into consideration. Those reasons are based on the substantive ground of the law of assignment. They are the property concept of transfer and the effects of assignment against a third party.

Firstly, an assignment of receivables is viewed as a transfer of property from assignor to assignee in accordance with the property concept of transfer. A statement about this concept based on the Supreme Court of Judicature Act 1873, section 25(6), was made in *Fitzroy v Cave*: ‘a debt [or receivable] must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods’.<sup>20</sup> An assignment of intangible things is analogous to a transfer or sale of tangible goods. A subsequent statement developed from this position is that ‘[just] as a contract of sale of goods involves the passing of property in the goods between seller and buyer, so a contract for the assignment of a receivable calls for the property in the receivable to be transferred from assignor to assignee’.<sup>21</sup> For conflict-of-law purposes, a characterisation which can be drawn by analogy from these authorities is that passing rights in a receivable by way of assignment is a matter not merely of the applicable contract law, but also the *lex situs* of the transferred receivable. This is a proprietary matter in the same sense as transferring ownership of a tangible property by a sale contract.<sup>22</sup> Such an analogy is, to a certain extent, reasonably plausible. Property law’s main purpose is to establish who has title over a receivable. After assignment, the receivable assigned will be regarded as the assignee’s property. It will no longer be the assignor’s. One important consequence of

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<sup>20</sup> [1905] 2 KB 364, 373 (Cozens-Hardy LJ); *Glegg v Bromley* [1912] 3 KB 474, 490 (Parker J); *Re Williams* [1917] 1 Ch 1, 8 (Warrington LJ); *Trendtex Trading Corp v Credit Suisse* [1980] QB 629, 673–674; *Three Rivers DC v Bank of England (No.1)* [1996] QB 292; before 1983, it was submitted that an (equitable) assignment of a chose in action passes the beneficial interest. *Jefferies v Day* (1865–66) LR 1QB 372, 374 (Blackburn J).

<sup>21</sup> *Bridge* (n 6) 680–681; the ground that a receivable is regarded as property as well as assigning it is viewed as the transfer of a property interest in a chose in action and is also the reason why English law allows it to be transferred by way of trust. See *Fitzroy v Cave* [1905] 2 KB 364; *Don King Production Inc v Warren* [2000] Ch 291.

<sup>22</sup> *Bridge* (n 6) 680–681; see also *Glencore International AG v Metro Trading Inc* [2001] CLC 1732.

the assignee having title in the assigned receivable is that if the assignor has received payment for that receivable from the debtor he is then bound by the assignment to hold that payment and any proceeds of the assignment for the benefit of the assignee.<sup>23</sup> Another significant outcome can be seen if either assignor or assignee becomes bankrupt. Since this scenario involves the significant question of who is the true owner of the receivable, the answer to which is that the receivable is divisible among his creditors. If the receivable is passed to the assignee, it will be beyond reach of the assignor's creditors.<sup>24</sup>

Secondly, an assignment is regarded as initiating a proprietary effect against a third party. Theoretically, unlike a contract which can only create mutual relationships between the parties to it, the rights in a property do have *erga omnes*, the effect of which is against the world at large. This basic theory clearly paves the way for the application of conflict-of-law rules for property in an assignment in international scenarios. This is because assignment is seen as a way of transferring property rights in receivables from assignor to assignee, and the property rights transferred by way of assignment can be asserted against any third parties who are creditors, liquidators or other insolvency representatives of an assignor.<sup>25</sup> The third-party effect of an assignment is similar to when one sells or transfers tangible property and its ownership to another. It is, at least, for a third person to respect that, after assignment, the assigned receivables no longer belong to the assignor but the assignee. This proprietary effect also links to problems of priority where there is more than one person competing over

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<sup>23</sup> This is the case where the assignment is not notified to the debtor. Tolhurst (n 6) 383; cited *GE Crane Sales Pty Ltd v Commissioner of Taxation* (1971) 126 CLR 177, 183; see also *Barclays Bank plc v Willowbrook International Ltd* [1986] BCLC 45.

<sup>24</sup> The question would be the same even between a judgment creditor and an assignee. Tolhurst (n 6) 171–172; see *Re General Horticultural Co* (1886) 32 Ch D 512; *Badeley v Consolidated Bank* (1888) 38 Ch D 238; *United Bank of Kuwait Plc v Sahib* [1997] Ch 107, 119.

<sup>25</sup> A notice of assignment is adopted by the English law of assignment as a device constituting the third-party effects of an assignment. Under the UCC, art 9, the term which is used to refer to this effect is 'perfection'. It can be done by submitting a financial statement to a specific filing office.

the same receivables. There is, for example, a problem of priority between competing assignees or between an assignee and a third party asserting a competing claim to the receivable assigned.<sup>26</sup> As shall be demonstrated below, this is a legal matter where conflict rules for property have primarily been applied.

#### 4.2.2 Conflict-of-law rules

A general authority on English conflict-of-law rules has been crafted in the well-known Dicey, Morris and Collins textbooks on conflict of laws. Influenced by the developing terminology of European private international law, the English rules which were formerly individualised on the basis of the substantive legal issue of assignment were transformed into a European-like structured set of rules.<sup>27</sup> Before that time the situation was unsettled or, as someone commented, ‘severely undeveloped’.<sup>28</sup> Now, it is submitted that the approach of the common law is very closely structured on the same basis as that of the European Union.<sup>29</sup>

The English conflict-of-law rules regulating assignment are distinguished into two domains: contractual and proprietary. Literally, they can be seen in rule 135.<sup>30</sup> As a general principle, the mutual obligations of assignor and assignee under the voluntary assignment of a right against a debtor, or a receivable, shall be governed by the law

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<sup>26</sup> Bridge (n 6) 687.

<sup>27</sup> The adoption of European private international law has occurred since the Rome Convention was incorporated into English law by the Contracts (Applicable Law) Act 1990 which took effect on 1 April 1991. Now it is Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I) that is applicable.

The original English rules can be seen in AV Dicey and JHC Morris, *Dicey and Morris on the conflict of laws* (10th edn, Stevens 1980) 569–579 and rules 81–84.

<sup>28</sup> M Bridge, ‘English Conflicts Rules for Transfer of Movables: A Contract-based Approach?’ in M Bridge and R Stevens, *Cross-border security and insolvency* (OUP 2004) 139.

<sup>29</sup> Dicey, et al. (n 5) rule 135 and 1358–1362; see also R Stevens, ‘The English Conflict of Laws Rules’ in M Bridge and R Stevens, *Cross-border security and insolvency* (OUP 2004) 213–216.

<sup>30</sup> Dicey, et al. (n 5) 1354–1355.

which applies to the contract between assignor and assignee.<sup>31</sup> The assignability of receivables, the relationship between assignee and debtor, the conditions under which the assignment can be invoked against the debtor and any question as to whether the debtor's obligations have been discharged are indicated as being determined by the law governing the right to which the assignment relates.<sup>32</sup> Despite that, due to limited cases and conflicting literature, the application of the rule is neither clear nor certain.<sup>33</sup> Yet, it continues to apply in a circumstance where the question at hand is beyond the scope of European law. Although it was originally founded by referring to several instances of case law on assignment, it was commented that it can '[reveal] no clear or consistent principles'.<sup>34</sup> This comment is generally correct, especially when dealing with the property aspect of the rule. Before going to the property aspect, some issues about the rules and contractual aspects of assignment must be clarified first.

### **(1) Contractual matters**

Under English rules, the contractual aspect of an assignment of receivables is governed by the conflict-of-law rules for contracts. Like between assignor and assignee, rule 135(1)(a) leads to the law applying to the assignment contract concluded between them. And as between assignee and debtor, the law governing the right to which the assignment relates is imposed by rule 135(1)(b). It points to the proper law of the contract by which the receivables are created.<sup>35</sup> This is where the common-law doctrine of the proper law of contract is applied. According to the proper-law doctrine, where parties to a contract have shown their intention – either expressly or impliedly from the circumstances – as to the law governing the contract, such intention shall determine the proper law of contract, provided that the choice is *bona fide* and legal and the

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<sup>31</sup> Rule 135(1)(a).

<sup>32</sup> Rule 135(1)(b).

<sup>33</sup> Bridge, 'The proprietary aspects of assignment and choice of law' (n 6) 690-692; Moshinsky (n 13) 601; BIIICL (n 11) 346-347; see also Dicey, et al. (n 5) 1354-1372.

<sup>34</sup> AG Guest, *Guest on the law of assignment* (Sweet & Maxwell 2012) 340-341.

<sup>35</sup> *Macmillan Inc v Bishopsgate Investment Trust plc (No.3)* [1996] 1 WLR 387.

application of the chosen law is not contrary to public policy.<sup>36</sup> In a case where no such intention exists, the contract is governed by the system of law with which it has its closest and most real connection.<sup>37</sup>

According to the rule, the validity of an assignment contract between assignor and assignee is governed by the proper law of the assignment.<sup>38</sup> This is directly consistent with the fundamental principles of conflict of law for contracts which is dominated by the principle of party autonomy or freedom of contract. Parties to an assignment contract are principally allowed to choose a governing law in accordance with the proper law of contract doctrine. Its effect shall be affirmed. Also, the question of whether a receivable is capable of transfer is governed by the proper law of the contract creating it.<sup>39</sup> As a matter of law, this question concerns two grounds of non-assignability.<sup>40</sup> The first is whether assignment is prohibited by a rule of law. The second is whether assignment is prohibited by the underlying contract between creditor and debtor. A significant difference between these two is their effects. Whereas the prohibition specified by law prevents property in the receivable being passed from assignor to assignee, contractual prohibition does not have such an effect although it may render the assignment ineffective against the debtor and result in preventing

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<sup>36</sup> Dicey, et al. (n 5) 1777; Fawcett, Carruthers and North (n 9) 666–667; see *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 290; *Re Helbert Wagg & Co Ltd* [1956] Ch 323, 340–346; *The Hollandia* [1983] 1 AC 565, 576; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 61.

In the case of no express selection of choice of law, see *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50; *The Stolt Marmaro* [1985] 2 Lloyd's Rep 428; *The Komninos S* [1991] 1 Lloyd's Rep 370.

<sup>37</sup> Dicey, et al. (n 5) 1777; see *Bonython v Commonwealth of Australia* [1951] AC 201, 219; *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572; *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34; *Monterosso Shipping Ltd v International Transport Workers Federation* [1982] ICR 675; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, 61; Fawcett, Carruthers and North (n 9) 1228; *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387.

<sup>38</sup> Rule 135(1)(a).

<sup>39</sup> Rule 135(1)(b).

<sup>40</sup> Moshinsky (n 13) 595–596.

enforcement by the assignee against the debtor.<sup>41</sup> Still, both of these two grounds refer to the law chosen by the parties to the original contract. It is the proper law for the contract originating the receivable assigned. This approach appears to be a reasonable one, since it attaches the issue of assignability to the origin of the object assigned, i.e. the law that creates it.

## (2) Proprietary matters

Based on the characteristic formula of English conflict-of-law rules,<sup>42</sup> the applicable law for an assignment of receivables is divided into one that governs the mutual relationship between assignor and assignee and another that deals with the relationship relating to debtor. Apparently, no specific rule has been mentioned regarding the proprietary matters of assignment, i.e. its third-party effects and priority problems. Generally, it has been suggested that they shall be governed by either the *lex situs* of the thing assigned or the proper law of the thing assigned.<sup>43</sup> They can be explained as follows.

One of the most important effects of assignment is to transfer the assignor's interests in the thing assigned to the assignee. Its final goal is to make the assignment effective and transfer the property title in a receivable from assignor to assignee. This is where a proprietary effect of an assignment between assignor and assignee is formulated. Using property language, it is a matter of who, between those two persons, owns the receivable or whose is the ownership of the receivable. Initially, it is a question whether an assignor, or an assignee, has taken all the necessary steps to complete an assignment

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<sup>41</sup> See R Goode, 'Inalienable Rights?' (1979) 42 MLR 553; *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All E R 262.

<sup>42</sup> Rule 135.

<sup>43</sup> Rogerson (n 13) 402; see also Mackay of Clashfern (ed), *Halsbury's laws of England*, vol. 8(3) (4th edn reissue, Lexis Nexis 2003) para 411; Goode and McKendrick (n 13) 1240; Moshinsky (n 13); *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.



as a transfer of property.<sup>44</sup> For example, an assignment may be ineffective on the grounds of formal requirement, personal capacity, mistake, fraud and misrepresentation, or because it is an assignment of a future receivable.<sup>45</sup> Though they are issues affecting the proprietary aspects of assignment, no clear explanation exists in the Dicey, Morris and Collins textbooks on conflict of laws, whether they should be governed by *lex situs* or something else. In fact, these matters are legal issues that are subject to the sphere of contract law.<sup>46</sup> Based on rule 135 in particular, since they are matters between assignor and assignee which do not directly concern a debtor, they are then to be decided by reference to the law of assignment. This is of course unless the phrase ‘mutual obligation’ is interpreted to cover only purely contractual aspects of assignment.

Considering some early English cases, it has been admitted that they are confusing and have little if anything to contribute.<sup>47</sup> This is true either when dealing with the proprietary effect of assignment or when drawing a line between the contract and property aspects of assignment. It is also not certain whether *lex situs* was the rule for English conflict of laws. In *Re Queensland Mercantile and Agency Co*,<sup>48</sup> it was concluded that ‘a transfer of property (by assignment), valid according to the law of the place where the property was situated, was not invalidated by anything in the transferor’s personal law’.<sup>49</sup> In contrast, in *Republica de Guatemala v Nunez*,<sup>50</sup> it was not the *lex situs* of the assigned receivable nor the *lex domicilii* (the law of domicile) of the debtor, but the *lex loci actus* (the law of the place where the assignment was executed) and the *lex domicilii* of the assignor and assignee that were held to be

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<sup>44</sup> Bridge, ‘The proprietary aspects of assignment and choice of law’ (n 6) 687–688; Dicey, et al. (n 5) 1356–1357.

<sup>45</sup> Moshinsky (n 13) 596.

<sup>46</sup> See Dicey, et al. (n 5) ch 32.

<sup>47</sup> Bridge, ‘The proprietary aspects of assignment and choice of law’ (n 6) 691; Moshinsky (n 13) 591; see, for example, *William James Le Feuvre v John Sullivan and Anne Sullivan* (1855) 14 ER 389; *Re Queensland Mercantile and Agency Co* [1891] 1 Ch 536 Ch D, affirmed [1892] 1 Ch 219 CA; *Kelly v Selwyn* [1905] 2 Ch 117 Ch D.

<sup>48</sup> [1891] 1 Ch 536 Ch D (North J).

<sup>49</sup> Bridge, ‘The proprietary aspects of assignment and choice of law’ (n 6) 692.

<sup>50</sup> [1927] 1 KB 669; see also *Lowenstein v Allen* [1958] CLY 491.

applicable. Still, this was not a unanimous judgment. 'It is thus difficult to extract any clear propositions of law from the cases.'<sup>51</sup>

As for the legal relationship between debtor and assignee, the proper law of the underlying contract creating the assigned receivable shall apply according to rule 135(1)(b).<sup>52</sup> It governs the question of whether and to what extent the assignee is entitled to enforce the assigned receivable against the debtor, notwithstanding whether that question is seen as a proprietary matter or not. This approach is also consistent with the principle that the legal position of a debtor should not be altered or prejudiced by an assignment, as it is this law that the debtor agreed on in the first place.

Another important proprietary effect of assignment lies in the opposability of the assignee's right over the assigned receivable as against other persons. This is the effectiveness of assignment against third parties and priority issues. With regard to conflict of laws for a third party' effectiveness of assignment, although in a court ruling in an earlier case the *lex situs* approach was adopted,<sup>53</sup> the current textbook from Dicey Morris and Collins does not deal with this problem. It is unclear which of the conflict rules should apply. A suggestion is that so far as it affects a debtor, it may fall under the expression 'the conditions [under] which a [receivable] can be assigned'.<sup>54</sup> Such an expression is, under the present rule, covered by the term 'assignability', which also includes the conditions under which a receivable is assignable. It would thus refer to rule 135(1)(b) where the proper law of the assigned receivable will apply. This law shall decide whether an additional procedure to perfect the effectiveness of an assignment

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<sup>51</sup> Moshinsky (n 13) 601.

<sup>52</sup> See also *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101; *Bankhaus H Aufhauser v Scotboard Limited* [1973] SLT (Notes) 87.

<sup>53</sup> *Re Maudslay, Sons & Field* [1900] 1 Ch 602, 610 (Cozens-Hardy J), where the former view of Mr. Dicey written as rule 141 in the old version of his book on conflict of laws was referred to. It was that '[an] assignment of a movable which cannot be touched, i.e., of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid'.

<sup>54</sup> Moshinsky (n 13) 617, referred to this former expression as it was used at that time. See also Dicey and Morris (n 27) rule 81.

against third parties is required or not, and if it is required, what that procedure is.<sup>55</sup> However, in a case where the requirement is public registration, it should be noted that ‘the court will usually apply its own registration statute as a mandatory rule of the forum’,<sup>56</sup> the issue of choice of law therefore does not matter.

Turning to a priority dispute between competing assignments,<sup>57</sup> there is, as well, no clear position in rule 135. Dicey, Morris and Collins do not deal with this issue in the present textbook. Again, if this issue is of a proprietary kind, it should be ruled by the *lex situs* of the receivable. However, this is not always the case.<sup>58</sup> In previous editions of Dicey and Morris on conflict of laws, there appears to be a conflict-of-law rule for the priority issue. It is but the proper law of the receivable, which means that it is the law of the contract creating the assigned receivable that is chosen.<sup>59</sup> Some comments are made to support its application.<sup>60</sup> Despite its disappearance from the leading textbook, the law of receivables has still gained strong support in England. This is shown in a paper published by the Financial Markets Law Committee (‘FMLC’). By emphasising the important principle of debtor protection, the FMLC has indicated that ‘it is important for a debtor to know whom to pay the required sum in order to discharge the debt’, and ‘[to] get to this point it is important that he knows who owns the debt and that, in turn,

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<sup>55</sup> This process is sometimes referred to as perfection. There are, for example, notification and registration. Moshinsky (n 13) 616–618; Goode and McKendrick (n 13) ch 24; *Dearle v Hall* (1828) 3 Russ 1; *Foster v Cockerell* (1835) 6 ER 1508; *Re Dallas* [1904] 2 Ch 385; still, there appear to be some curious opinions suggesting that notice to the debtor is not required to make an equitable assignment effective against third parties. Tolhurst (n 6) 77–78; however, see *Re City Assurance Co Ltd* [1926] Ch 191, 215 and 220; CA Ong, ‘Notice in equitable assignment of choses in action: divergence in the common law and its impact’ (2002) 18 JCL 107; for other methods such control and possession, see the Guide; C Walsh, ‘Security Interests in Receivables’ in H Eidenmüller and EM Kieninger, *The future of secured credit in Europe* (De Gruyter 2008) 324–327.

<sup>56</sup> Moshinsky (n 13) 617.

<sup>57</sup> See *Dearle v Hall* (1828) 3 Russ 1; also Goode and McKendrick (n 13) 689–696; M Smith, *Law of assignment: the creation and transfer of choses in action* (OUP 2007) ch 15.

<sup>58</sup> Rogerson (n 13) 404.

<sup>59</sup> ‘The priority of competing assignments of a debt or other intangible thing is governed by the proper law of the debt or the law governing the creation of the thing’. Dicey and Morris (n 27) rule 83; see also BILCL (n 11) 358–359.

<sup>60</sup> Dicey, et al. (n 5) 1362; Fawcett, Carruthers and North (n 9) 1234–1235; *William James Le Feuvre v John Sullivan and Anne Sullivan* (1855) 14 ER 389.

he is capable of answering the question of the priority of competing assignments of debt and capable of identifying the law governing that question'.<sup>61</sup> The law of the contract creating the assigned receivable is a choice that fulfils this concern.

From an academic viewpoint, this is a controversial topic of debates: some support the application of *lex situs*, others the law of the assigned receivable. There also exists a suggestion of the assignor's place of business.<sup>62</sup> No consensus can reasonably be identified. It is here once again that one cannot find a firm position of the English courts by investigating cases hinging on this matter. For instance, in *William James Le Feuvre v John Sullivan and Anne Sullivan*,<sup>63</sup> although English law was held to govern the problem of priority between two assignments of a life insurance, it was submitted that 'it is not clear from the case on what basis English law applied'.<sup>64</sup> It might be because it was the proper law of the insurance contract or, as someone suggested but another disagreed, it would have been decided under the *lex situs* of the receivable which was also England.<sup>65</sup> The idea of *lex situs* was once approached in the first instance in *Re Queensland Mercantile and Agency Co*<sup>66</sup> to determine the priority issue between competing assignments. However, in the Court of Appeal, the issue was instead treated as a matter of the recognition of a foreign arrestment proceeding.<sup>67</sup> No clear position could be extracted for its choice-of-law rule. Another priority dispute was brought before the Court in *Kelly v Selwyn*.<sup>68</sup> But again, this case cannot serve as a convincing authority since the proper law and the *lex situs* of the trust fund assigned and the law of the forum administering the fund coincided.

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<sup>61</sup> FMLC, *Issue121: Suggestions for Amendments to Articles 7 and 13* (Financial Markets Law Committee, October 2006) 5.

<sup>62</sup> BIICL (n 11) 359.

<sup>63</sup> (1855) 14 ER 389.

<sup>64</sup> Bridge, 'The proprietary aspects of assignment and choice of law' (n 6) 691.

<sup>65</sup> See respectively Moshinsky (n 13) 622; Bridge, 'The proprietary aspects of assignment and choice of law' (n 6) 691.

<sup>66</sup> [1891] 1 Ch 536 Ch D; [1892] 1 Ch 219 CA.

<sup>67</sup> Moshinsky (n 13) 623; Bridge, 'The proprietary aspects of assignment and choice of law' (n 6) 691–692.

<sup>68</sup> [1905] 2 Ch 117 Ch D.

### (3) *Situs of receivables*

In order to find an applicable law for an item of property, the *situs* of that property has to be found, since it is the law of a country where a thing is situate (*lex situs*) that shall determine its nature and govern any rights connected with it.<sup>69</sup> This is a necessary method for either immovable or tangible movable things.<sup>70</sup> Such an approach has also been applied to find a governing law for intangibles and their proprietary aspect. One of the purposes of establishing this artificial locality is also to make them transferable by way of assignment.<sup>71</sup> According to Dicey, Morris and Collins, the *situs* of choses in action ‘generally are situate in the country where they are properly recoverable or can be enforced’.<sup>72</sup> For receivables, they shall be regarded as situate in the country where the debtor resides. A test by which the location of a debt or a receivable can be decided is elucidated by Atkin J in *New York life Insurance Co v Public Trustee* as follows:

‘[The] test in respect of simple contracts was: Where was the debtor residing?... [The] reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt.’<sup>73</sup>

The *situs* of intangible things, therefore, depends on where the debtor resides. This rule has been used to find an applicable law for a legal issue involving a receivable, such as a right to recover a loan or money due under an insurance policy.<sup>74</sup> Though this is a

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<sup>69</sup> Dicey, et al. (n 5) rule 128.

<sup>70</sup> *ibid* rules 132–133; Fawcett, Carruthers and North (n 9) chs 28–29.

<sup>71</sup> Dicey and Morris (n 27) 569.

<sup>72</sup> Dicey, et al. (n 5) rule 129(1); Mackay of Clashfern (n 43) para 410.

<sup>73</sup> [1924] 2 Ch 101, 119; see also *Swiss Bank Corp v Boehmische Industriale Bank* [1923] 1 KB 673; *Alloway v Phillips* [1980] 1 WLR 888; *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] STC 728, 732–733.

<sup>74</sup> *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323; *New York life Insurance Co v Public Trustee* [1924] 2 Ch 101; *Fouad Bishara Jabbour v Custodian of Absentee’s Property of State of Israel* [1954] 1 ALL ER 145.

general rule, it is not universal.<sup>75</sup> The residence of a debtor is an essential element in deciding the *situs* of a receivable,<sup>76</sup> but it is not a decisive factor. Choosing the place of residence seems reasonable for it is a place where a writ can be served, an action can be brought and a subsequent judgment can be enforced against the debtor as, presumably, his assets are located there. However, it is not certain where the *situs* of a receivable is in the case of a debtor whose residences exist in two or more countries. On this difficulty, a suggestion is that the receivable should situate in the county where 'it is required to be paid by an express or implied provision of the contract or, if there is no such provision, where it would be paid according to the ordinary course of business'.<sup>77</sup> Still, the application of this rule is not clear in a case where a country in which the receivable may be payable is not that of the residence of the debtor.<sup>78</sup>

The reference to the *lex situs* of a receivable has been strongly contended to be illogical, unnecessary and misleading.<sup>79</sup> A receivable or chose in action, 'being in effect a mere right to recover by action, has no actual local existence'.<sup>80</sup> *Lex situs* is nothing but a preliminary consequence of the analogical method by which lawyers attempt to bring intangibles into the ambit of tangibles, notwithstanding their dissimilarities. Despite doing that, the *lex situs* rule actually only serves as a starting point for other connecting factors to be considered. It has no real force in the end. It is actually other connecting factors that are applied and which lead to a governing law.

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<sup>75</sup> Fawcett, Carruthers and North (n 9) 1226.

<sup>76</sup> *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323, 343.

<sup>77</sup> *Fouad Bishara Jabbour v Custodian of Absentee's Property of State of Israel* [1954] 1 ALL ER 145, 152; *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352, 378–380.

<sup>78</sup> Fawcett, Carruthers and North (n 9) 1226.

<sup>79</sup> P Rogerson, 'The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary and Misleading' (1990) 49 CLJ 441.

<sup>80</sup> Mackay of Clashfern (ed), *Halsbury's laws of England*, vol. 13 (5th edn, Lexis Nexis 2009) para 2; see also Mackay of Clashfern, *Halsbury's laws of England* (n 43) para 410.

In addition, a judgment conflicting with the *lex situs* rule was made in *Brooks Associates Inc v Basu*.<sup>81</sup> It was held in this case that a debt due from a bank (the debtor) could be attached in England, even though the head office of that bank which served as the debtor's residence was in Scotland. Furthermore, on some occasions, authorities have rejected application of the law of the *situs*. The former view preferring *lex situs* was changed and revised to favour instead the proper law of the receivable or the law governing the creation of the receivable.<sup>82</sup> After the Rome Convention came into force, the English courts went further than rejecting the law of the *situs* of the assigned receivable. They apply instead a contractual approach.<sup>83</sup> A dispute which involves the validity of an assignment and its effects on a third party has been characterised as a contractual issue. It has subsequently been decided by the law governing the contract giving rise to the receivable assigned. Since it is based on the European rules, this case will be investigated in detail in the following section.

### 4.3 Europe

Despite its diversity, the principal foundation of the law of obligations among European civil law is basically moulded by the Roman law tradition – *ius commune*.<sup>84</sup> In a similar way to English common law where a right to a contractual claim used to be regarded as non-transferable, an original principle of the European legal system was that 'a contract

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<sup>81</sup> [1983] QB 220.

<sup>82</sup> *Re Anziani* [1930] 1 Ch 407; *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387, 401; see also AV Dicey, L Collins and JHC Morris, *Dicey and Morris on the conflict of laws* (11th edn, Stevens 1987) rule 123.

<sup>83</sup> *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

<sup>84</sup> R Zimmermann, *The law of obligations: Roman foundations of the civilian tradition* (Juta 1990); JM Smits, 'Diversity of Contract Law and European Internal Market' in JM Smits, *The need for a European contract law: empirical and legal perspectives* (Europa Law 2005); see also R Zimmermann, 'Roman Law and European Legal Unity' in AS Hartkamp and C von Bar, *Towards a European civil code* (2nd rev. and expanded edn, Ars Aequi Libri 1998); P Stein, *Roman law in European history* (OUP 1999); JH Merryman, *The civil law tradition: an introduction to the legal systems of Europe and Latin America* (SUP 2007); D Heirbaut and ME Storme, 'The historical evolution of European private Law' in C Twigg-Flesner, *The Cambridge companion to European Union private law* (OUP 2010).

right was something so highly personal as to be inseparable from the actual relationship between creditor and debtor'.<sup>85</sup> As time went by, this legal principle changed, a contractual claim could now be assigned.<sup>86</sup> It is recognised in most – if not all – of Europe that contractual rights are transferable by way of assignment.<sup>87</sup> This recognition can be seen in the advanced harmonisation of European contract law. Concrete evidence appears where the fundamental principles of law of assignment have been declared both in the Principles of European Contract Law ('PECL')<sup>88</sup> and in the Draft Common Frame of Reference for European Private Law ('DCFR').<sup>89</sup> As the result of an assignment, the general submission is that 'the new creditor takes the place of the old and can enforce the right against the debtor in just the same way'.<sup>90</sup> In a case where an assignment is conducted internationally, a problem of conflict of laws arises as to, among the laws of connected jurisdictions, which one will be the most appropriate law governing the assignment.

As far as this thesis is concerned, European private international law on contractual obligations also covers assignment. It has been unified since 1980 by the Rome Convention,<sup>91</sup> and subsequently by its successor, the Rome I Regulation.<sup>92</sup> Conflict rules in both instruments are studied in this section. Firstly, the section will explore the fundamental principles of those rules. Secondly, the issue of characterisation will be

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<sup>85</sup> H Kötz and A Flessner, *European contract law* (Clarendon Press 1997) 264; Zimmermann (n 84) 58–59 and 66–67.

<sup>86</sup> *ibid* 64–67.

<sup>87</sup> For example, France (arts 1689–1691 of the French Civil Code), Germany (s 398 of the German Civil Code), Spain (arts 1526–1527 of the Spanish Civil Code), Switzerland (art 164 of the Swiss Civil Code, Part Five), the Netherlands (art 3:83 of the Dutch Civil Code), and England (e.g. s 136 of the Law of Property Act 1925); see also H Beale, *Cases, materials and text on contract law* (2nd edn, Hart 2010) ch 28, and JHM van Erp and B Akkermans, *Cases, materials and text on national, supranational and international property law* (Hart 2012) ch 4; EM Kieninger and M Graziadei, *Security rights in movable property in European private law* (OUP 2004) e.g. case 12; HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009).

<sup>88</sup> Part III, ch 11.

<sup>89</sup> Book III, ch 5, s I.

<sup>90</sup> Kötz and Flessner (n 85) 265.

<sup>91</sup> The Rome Convention applies to contracts concluded on or after 1 April 1991 and prior to 17 December 2009. See also Dickinson (n 12).

<sup>92</sup> The Rome I Regulation applies to contracts concluded on or after 17 December 2009.



examined. Contractual and proprietary aspects based on the application of European conflict rules will be scrutinised. Finally, the proposed conflict-of-law rules relating to this matter, being written into the drafting process of the Rome I Regulation, will be discussed.

#### **4.3.1 Conflict-of-law rules**

For the purposes of establishing the uniformity of private international law on assignment,<sup>93</sup> a legal set of conflict-of-law rules involving the law applicable to the voluntary assignment of rights was firstly written into Article 12 of the Rome Convention. The article itself comprised two paragraphs: the first one dealt with the mutual obligations of assignor and assignee; the second the relationships between assignee and debtor. While the former was governed by the law of the contract between assignor and assignee, the latter was ruled by the law of the contract creating the rights assigned. Although the Rome Convention has been replaced by a European community instrument, its terminology and rules have been incorporated into its successor. At present, the European rules of private international law regulating assignment are in Article 14 of the Rome I Regulation. It 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*

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<sup>93</sup> See also IF Fletcher, *Conflict of laws and European Community law: with special reference to the Community Conventions on private international law* (North-Holland Publishing 1982) 147–150.

*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, transfer of claims by way of security and pledges or other security rights over claims.*

At first glance, it can be seen that both the Rome Convention and the Rome I Regulation adopt the same basic terminology. That is by way of setting out two distinct conflict-of-law rules based on dividing situations into two distinct relationships which serve to identify two distinct applicable laws. The two dividing relationships are: firstly, between assignor and assignee; secondly, between assignee and debtor. The relationship between assignor and assignee is governed by the proper law of assignment. In the case of the relationship between assignee and debtor, the proper law of the assigned receivables is applied. In general, the rules contained in both instruments are similar in their cores.

Nevertheless, there are some differences between the two which deserve more attention. The first point concerns the wording of the object of assignment. While Article 12 uses the word 'right', Article 14 uses the word 'claim'. By this change, it is claimed that 'the word "claim" would seem to bring it even closer to the concept of a chose in action in English law'.<sup>94</sup> However, the claim must be an intangible thing – such as a receivable. It is also clear that the rules relate to the assignment of rights or claims against a debtor in the sense that they do not include a transfer of obligations or liabilities. Secondly, in contrast with Article 12 of the Rome Convention, Article 14(3) of the Rome I

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<sup>94</sup> Guest (n 34) 349.

Regulation ensures that assignment by way of security is within the scope of this article as well as assignment by way of sale or outright transfer.

The final and perhaps the most important difference between the Rome Convention and the Rome I Regulation concerns proprietary matters of assignment. Basically, both instruments, as per their official names, are only concerned with contractual obligations.<sup>95</sup> They are not expected to govern any proprietary matters. At the time of the Rome Convention, it can be seen from its scope, Article 1(1), as also illustrated by the Official Report, that the Convention shall concern only the law applicable to contractual obligations.<sup>96</sup> Property rights are not covered by its provisions. As a consequence, Article 12 shall govern only contractual aspects of assignment. Considering the content of Article 12(1), the phrase ‘mutual obligations’ restricts itself to the contractual effects of assignment, hence this excludes proprietary effects between assignor and assignee. Although there is no similar expression in Article 12(2), interpreting it to govern other proprietary effects of assignment might seem irrational as it goes beyond the generic scope of the Convention. These proprietary effects also include matters of competing assignments that should fall outside the article.<sup>97</sup> Despite that, there exist at least two dissenting opinions indicating that Article 12 is not limited merely to contractual aspects of assignment; other aspects, between assignor and assignee or against other third parties, should also be covered, though they might be characterised as proprietary.<sup>98</sup> The only conclusion which can be drawn at this stage is

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<sup>95</sup> Respectively, the 1980 Convention on the Law Applicable to Contractual Obligations and Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I).

<sup>96</sup> M Giuliano and P Lagarde, ‘Report on the Convention on the law applicable to contractual obligations. Official Journal C 282, 31 October 1980’ (1980) 10; for an opposite position, see Sigman and Kieninger (n 87) 46–50.

<sup>97</sup> Bridge, ‘English Conflicts Rules for Transfer of Movables: A Contract-based Approach?’ (n 28) 142.

<sup>98</sup> See the opinion of the Dutch Supreme Court (*Hoge Raad*) in *Brandsma qq v Hansa Chemie AG*, 16 May 1997 in THD Struycken and R Stevens, ‘Assignment and the Rome Convention’ (2001) 118 LQR 15, and that of the English Court of Appeal in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

that it is uncertain whether proprietary aspects of assignment are totally excluded from the text of Article 12 or not.

When the Rome I Regulation was drafted, a further clearer response to this problem – in part, if not in full – was made. According to recital 38, the position now is that Article 14(1) of the Regulation applies to some aspects of assignment even though those aspects might be treated as proprietary in character in some countries.<sup>99</sup> Still, the implications of this recital are limited to proprietary matters between assignor and assignee. They do not extend to proprietary matters regarding third-party effects of assignment or priority disputes.<sup>100</sup> This conclusion is supported by the review clause endorsed by Article 27(2) of the Regulation itself. It is stated that a proposal to amend the Regulation involving those two matters shall be submitted at a later time. Evidence of this can also be found in the drafting process of the Regulation where the rules regarding third parties and priority were omitted from its final text. It is therefore reasonable to assume that the proprietary aspects of assignment regarding third parties and priority issues do not fall within the scope of the present rules of the European regulation; thus every member state is free to apply its own laws.<sup>101</sup> Compared with the Rome Convention, this point seems to be sufficiently clarified.

Nevertheless, however the European rules are interpreted, there remains a legal problem which has never been properly clarified, even after three decades: What is the most appropriate conflict-of-law rule for the proprietary effects of assignment? If there is no applicable European rule, national courts must turn to rely on their own methodologies and subsequently their own conflict-of-law rules to answer this question. This means

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<sup>99</sup> Beale, et al. (n 4) 678.

<sup>100</sup> R Fentiman, 'Assignment and Rome I: towards a principled solution' (2010) 4 LFM 405, 407.

<sup>101</sup> Hartley (n 1) 744; P van der Grinten, 'Article 14 Rome I: A Political Perspective' in R Westrik and J van der Weide, *Party autonomy in international property law* (Sellier 2011) 163; FG Alférez, 'Assignment of Claims in the Rome I Regulation: Article 14' in F Ferrari and S Leible, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier 2009) 234–235; P Kiesselbach, 'The assignment of debts: which law applies to the question who has the better proprietary right to an assigned debt?' (2011) 26 BJBFL 544.

that either the same or different approaches are used, e.g. the *Raiffeisen* case in the English court or the *Hansa* case in the Dutch court may still be applicable. Differing characterisations and various conflict-of-law rules leading to a different governing law are, in turn, a foreseeable outcome. The final goal of both the Rome Convention and the Rome I Regulation, that strive for uniformity of conflict of laws in Europe, might not be fully achievable. This problem is thus a gigantic lacuna of European private international law which has been waiting for quite a long time to be properly filled.

A further point in this regard is that although there exists no clear position on conflict-of-law rules, there do exist some clues on the Europeanisation of substantive law on this matter. According to the PECL, Part III, a priority dispute between successive assignments of the same claim will, in principle, be determined by the first-to-notify-the-debtor rule if, at the time of a later assignment, the assignee under that assignment neither knew nor ought to have known of the earlier assignment.<sup>102</sup> The assignee's interest in the assigned claim is protected against creditors of the assignor.<sup>103</sup> The same priority rule is also adopted in Book III of the DCFR.<sup>104</sup> The rules in these two documents do therefore, when compared, differ from the filing system laid down in the UCC Article 9 or that suggested by the Receivables Convention in which priority rules based on registration are recommended. They, by contrast, rely on notifying the debtor.<sup>105</sup>

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<sup>102</sup> Arts 11:401 (1)–(2) of the PECL.

<sup>103</sup> Arts 11:401 (3)–(4) of the PECL.

<sup>104</sup> Art III. 5:121; C von Bar and EM Clive, *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)* (OUP 2010) 1074–1075.

<sup>105</sup> A Flessner, 'Security Interests in Receivables – A European Perspective' in H Eidenmüller and EM Kieninger, *The future of secured credit in Europe* (De Gruyter 2008) 339–340.

### 4.3.2 Characterisation difficulties

Although assignment is conventionally seen as a hybrid of contract and property, drawing a clear line between contractual and proprietary matters is not always easy. It is a legal problem of characterisation as to whether a legal issue at hand is contractual or proprietary. This is a fundamental legal methodology for conflict of laws which seeks to divide a legal issue into a separate category, and thus be governed by a particular set of conflict-of-law rules.<sup>106</sup> Here, it is conflict of laws for contract, otherwise property.<sup>107</sup> Considering that this characteristic problem lies in the application of European laws, an autonomous or community-wide methodology should be taken into account instead of any approach used in one member state.<sup>108</sup> Authoritatively, it was announced that the Rome Convention would not apply to proprietary issues.<sup>109</sup> However, if an issue is not characterised as proprietary, but contractual, it would then be subject to the scope of the Convention. An excellent example of this point is the well-known English court case, *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*.<sup>110</sup>

The dispute in this case concerned a rival attempt to obtain the benefit of the proceeds of claims arising under an English insurance policy for the vessel Mount I. The insurance had been taken out by a Dubai company, *Five Star General Trading LLC* (*Five Star*), that was the owner of the vessel, with a French insurer. Having purchased Mount I, *Five Star* obtained a loan from an Austrian bank, *Raiffeisen Zentralbank Oesterreich AG* (*RZB*). *Five Star* insured the vessel with the insurer and assigned that insurance to *RZB* to support and secure the loan. The deed of assignment was entered into in London and expressly made subject to English law. A notice of assignment in favour of *RZB* was also duly signed by *Five Star*. After that, Mount I collided with

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<sup>106</sup> Hartley (n 1) 504–505.

<sup>107</sup> See *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

<sup>108</sup> Rogerson, *Collier's conflict of laws* (n 13) 274–275.

<sup>109</sup> Giuliano and Lagarde (n 96).

<sup>110</sup> EWCA Civ 68.

another vessel, ICL Vikraman, in the Malacca Straits. The owners of cargo on board ICL Vikraman brought proceedings against *Five Star* in Malaysia on the basis that Mount I was responsible for the collision. They had Mount I impounded by a Malaysian court order and obtained a provisional attachment of the insurance proceeds issued by a French court.

In the proceeding before the English court, *RZB* claimed that the proceeds of the insurance were validly assigned to them and a notice of the assignment was given to the insurers. The validity of the assignment was to be based on English law as the proper law of assignment. *RZB*, as the assignee, thus had the right to sue the insurers. This was a contractual aspect of assignment concerning the right of the assignee against the debtor. It should therefore have been subject to the law of the insurance contract according to Article 12(2) of the Rome Convention. But the cargo owners, as the appellants in the case, argued that the notice of assignment was neither valid nor binding on them. They claimed that the validity of the notice with respect to them, as a third party of the assignment, was a proprietary matter. It had to be governed by French law which was the law of *lex situs* of the receivables and the law of the country of domicile of the insurer. Under French law, an assignment is not binding on a third party unless a notice of assignment is served on the debtor by a bailiff. This process had never been followed in this case.

The issue raised for consideration therefore was whether the assignment made by *Five Star* (assignor) to *RZB* (assignee) of the insurance claims against the insurer (debtor) could take effect against the cargo owners (third parties) or not. In terms of conflict of laws applicable at the time of the case, a preliminary problem involved the scope of the Rome Convention, in particular Article 12. The problem was that if the issue was characterised as proprietary because it involved the third-party effect of assignment, it

should be regarded as being outside the scope of the Convention. Otherwise, if it was a contractual issue, it should fall within the ambit of Article 12.

To find the most appropriate law governing the issue of the case, in his judgment, Mance LJ made a reference to the common-law methodology of conflict of laws which was formerly identified by Staughton LJ in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*.<sup>111</sup> The methodology was stated as follows:

[At] common law, the identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue ... The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England.<sup>112</sup>

Hence the issue in question was characterised as not being proprietary, but contractual. It was expressed as an initial impression that ‘the case fits readily into a contractual, and less readily into a proprietary, slot’.<sup>113</sup> There appear to be three stages in the reasoning given for such a characteristic approach. Firstly, it is a fundamental legal idea based on the principle of party autonomy that parties are free to choose and decide accordingly a person they are going to contract with. It is possible for them to change or modify their contractual terms. They are even able to revoke all their agreed contractual relations and make a new contract with a third party. Such freedom of contract also includes novation and assignment. This leads to the second stage. That principle applies in a case where there is an assignment contract purporting to transfer from an assignor to an assignee a

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<sup>111</sup> [1996] 1 WLR 387, 391–392.

<sup>112</sup> *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, para 26.

<sup>113</sup> *ibid* para 34.



right under an original contract. It raises the questions of whether a contractual right from the original contract exists and whether it has been assigned. They are essentially contractual. Thirdly, as a result of assignment, the issues of whether the assignee obtains the assigned right and whether he can enforce that right against the debtor of the original contract are also essentially contractual. The latter issue works in a similar way to the question of whether a debtor must pay the assignee rather than the assignor in order to get a good discharge. This again, in the expression of Mance LJ, ‘falls readily under the same contractual umbrella’.<sup>114</sup>

For the application scope of the Rome Convention, Article 12, Mance LJ provided his logical reasoning based on the text of the article itself.<sup>115</sup> Two steps can be extracted from this reasoning: firstly, dividing the governing scope between paragraph 1 and paragraph 2 of Article 12; and secondly, determining whether a particular issue addressed in the case falls within the scope of these paragraphs or not. The legal methodology that is used to draw a line between those two paragraphs is the relationship between specific persons. It is clear that Article 12(1) regulates the position between assignor and assignee. A legal issue between assignee and debtor is therefore beyond its application scope. Consequently, the real problem is how far Article 12(2) can be interpreted. From the language of Article 12(2), this article governs various legal aspects of assignment as between assignee and debtor, e.g. the issue of the assignability of a receivable, the relationship between assignee and debtor, the conditions under which an assignment can be invoked against a debtor and the question of whether the debtor's obligations have been discharged. According to this categorisation, it covers the question of whether, as a result of assignment, the debtor must pay the assignee or not. If giving notice of assignment is also a problem leading to the final answer to such a question, it shall therefore be subject to Article 12(2), as it is one of ‘the conditions

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<sup>114</sup> *ibid.*

<sup>115</sup> *ibid* para 43.

under which the assignment can be invoked as against the debtor'. It is, in other words, not a proprietary aspect of assignment. This issue cannot be regarded as being outside the scope of the Rome Convention. By contrast, it is covered by the very words of the Convention itself.

The outcome of the characterisation process was that Article 12(2) of the Rome Convention applied to the dispute. The effect, as between *Five Star*, *RZB* and the insurer, fell to be determined by reference to English law. Under it, the assignment was found to be valid as an equitable assignment. The notice given to the insurers was effective. No process according to French law needed to be complied with. *RZB*, as the assignee, became entitled to the proceeds of the insurance. The insurer, as the debtor, was thus bound to pay *RZB* rather than *Five Star* or their creditors.<sup>116</sup>

After the *Raiffeisen* case, it was commented that the approach adopted by the court was surprisingly striking, since it departed from the former treatment of English law of assignment under which such a dispute would be regarded as a proprietary matter.<sup>117</sup> In comparison with other cases decided by other European countries' courts, a clear conclusion on characterising the contractual and proprietary aspects of an assignment cannot be drawn. Instances can be derived from the following cases which are also mentioned in *Raiffeisen*. Firstly, the German Supreme Court made a judgment on 26 November 1990<sup>118</sup> stating that the proprietary aspect of a voluntary assignment would be decided under German law by the law of the assigned receivable. This law also reflected the conflict rules laid down in Article 12(2) of the Rome Convention and accorded with the outcome of the English case. Moreover, prior to this case, in a

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<sup>116</sup> *ibid* paras 81 and 83.

<sup>117</sup> Beale, et al. (n 4) 683; see *Fitzroy v Cave* [1905] 2 KB 364, 373; *Trendtex Trading Corp v Credit Suisse* [1982] AC 679; *Glegg v Bromley* [1912] 3 KB 474, 490; *Three Rivers DC v Governor and Company of the Bank of England* [1996] QB 292.

<sup>118</sup> Cited in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, para 50.

priority dispute between successive assignments that was considered by the German Supreme Court on 20 June 1990, it was held that such a dispute should also be determined by the law governing the assigned claim.<sup>119</sup> Another famous case came before the Dutch Supreme Court (*Hoge Raad*), namely, *Brandsma qq v Hansa Chemie AG*.<sup>120</sup> An application of Article 12 of the Rome Convention was made in this case. The issue arose as to which law governed the question of who owned a receivable. In the Court's view, Article 12 determines what is necessary to transfer a receivable in such a way as to have effect against third parties. However, it was not Article 12(2) but 12(1) that was held to be applicable. Based on the principle of party autonomy, it is the law chosen by the parties to the assignment that will determine the effects of assignment, even against third parties. Refusing to apply Article 12(1) was considered by the Court to render this article otiose or superfluous.<sup>121</sup>

### 4.3.3 The proposed rule

Desiring to solve the disharmony among European members, another attempt which must be taken into account regarding conflict-of-law rules and the proprietary effects of assignment is the earlier proposal of the Rome I Regulation. Though it is not adopted in the final text of the Regulation, it seems to be one of the most popular suggestions supported by scholars, hence it deserves attention. The proposed choice-of-law rule was written into the Commission's proposal for the Rome I Regulation being drafted at that time. Set out as paragraph 3 of Article 13 at that time, it reads thus:

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<sup>119</sup> Judgment of 20 June 1990, cited in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, para 49; See also L Steffens, 'The New Rule on the Assignment of Rights in Rome I – The Solution to All Our Proprietary Problems? Determination of the Conflict of Laws Rule in Respect of the Proprietary Aspects of Assignment' (2006) 14 ERPL 543, 555–557.

<sup>120</sup> Dated 16 May 1997; see the details in THD Struycken, 'The proprietary aspects of international assignment of debts and the Rome Convention, Article 12' (1998) 3 LMCLQ 345.

<sup>121</sup> This argument was unconvincing in the opinion of Mance LJ in the *Raiffeisen* case. *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ. 68, paras 51–52.

3. *The question whether the assignment or subrogation may be relied upon against third parties shall be governed by the law of the country in which the assignor or the author of the subrogation has his habitual residence at the material time.*<sup>122</sup>

The conflict-of-law rule that was laid down to govern third-party effects of an assignment is the law of the country of the assignor's habitual residence. In the commentary section, it was noted that: '[paragraph 3] introduces a new conflict rule relating to the possibility of pleading an assignment of a claim against a third party recommended by the great majority of respondents, which was also adopted in [the Receivables Convention]'.<sup>123</sup> In addition, if such a paragraph was adopted it would be consistent with the conflict rule recommended by the Guide.<sup>124</sup>

Many good reasons behind the preference for this rule were given.<sup>125</sup> The main one is that the law of the assignor's residence leads to legal certainty. It is easily ascertainable by third parties. This single conflict rule can govern the third-party effects of assignment and priority issues, even in a case of bulk assignments. Each court will apply the same law, hence preventing forum shopping. Despite all these advantages, the proposed rule is not adopted in the present text of the Rome I Regulation. From a political viewpoint, it was noted by a Dutch negotiator that although the law of the assignor's habitual place of residence was supported by a majority, neither the United Kingdom nor the Netherlands agreed to it.<sup>126</sup> While the former preferred the law of assigned claims, the latter pushed for the principle of party autonomy to be accepted. It was remarked that both of these countries regarded the location of the assignor as 'the

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<sup>122</sup> Commission of the European Communities, *Proposal for a Regulation on the Law Applicable to Contractual Obligation (Rome I)* (COM (2005) 650 Final) 19.

<sup>123</sup> *ibid* 8; for a comparison between the proposal and the Receivables Convention, see EM Kieninger and HC Sigman, 'The Rome-I proposed Regulation and the assignment of receivables' (2006) 1 ELF 1.

<sup>124</sup> Chapter X.

<sup>125</sup> See Steffens (n 119) 568–569.

<sup>126</sup> van der Grinten (n 101) 145–163.

worst possible choice of law rule for proprietary aspects of an assignment, more particularly the third party effects and priority thereof'.<sup>127</sup> With this disagreement, a compromise could not be reached. The result was that neither conflict rules for third-party effects of, nor priority disputes connected with, assignment could be imposed by the Rome I Regulation. It is only a review clause of Article 27(2) that could be written in as a compromise.

In England, the Financial Markets Law Committee ('FMLC') strongly criticized a law hinging on the assignor's habitual place of residence.<sup>128</sup> Firstly, this choice would override the principle of party autonomy by which the parties that have created rights purported to assign should have a right to choose the law to govern the issues indicated in the proposed paragraph 3.<sup>129</sup> Secondly, this proposed rule would not be a good choice if the need to protect a debtor is considered. In contrast, a negative impact on the debtor might occur if the law of the assignor's habitual place of residence tells the debtor not to pay the assignee whereas, under the law of the contract creating the receivable assigned, the debtor would have to pay. Another argument is that either the law of the assigned receivable or the law of *lex situs* lets the debtor know to whom he must pay, but under the proposed law the debtor would not be able to see who the true rightholder of the assigned receivable is. Along the same lines, the law of the assignor's habitual place of residence is considered by the Netherlands to be an unsatisfactory choice. There is only the principle of party autonomy that has been strongly proposed, since it would create flexibility for a transnational assignment by permitting the parties to choose the most

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<sup>127</sup> *ibid* 156–157; Flessner and Verhagen (n 6) 19.

<sup>128</sup> FMLC, *Issue 121: Legal Assessment of the Conversion of the Rome convention to a Community Instrument and the Provisions of the proposed Rome I Regulations* (Financial Markets Law Committee, April 2006); FMLC, *Issue 121: Suggestions for Amendments to Articles 7 and 13* (n 61); FMLC, *Issue 137: Response to the November 2009 Ministry of Justice Discussion Paper on the effectiveness of an assignment or subrogation of a claim against third parties* (Financial Markets Law Committee, March 2010); see also J Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (2010) 6 JIBFL 333; Walsh (n 55) 333–334.

<sup>129</sup> A Dickinson, 'The Law Applicable To Contracts – Uncertainty On The Horizon?' (2006) 21 JIBFL 171.

appropriate applicable law between them. This flexibility would not be possible if a rigid rule stating the law of the assignor's habitual place of residence was accepted. Another point which has been made by the Dutch to support their choice is that their financial industries have been able to profit from the law of assignment ever since the *Hansa* case.<sup>130</sup> And this could ease the concern that the parties in practice could abuse their freedom, as the Netherlands has not experienced it.<sup>131</sup>

In addition to the above counterargument, adding additional choice-of-law rules as paragraph 3 proposed could cause further confusion as to what would remain a legal issue under this new rule. What would be its application scope in comparison to the rule of Article 14(2) as the law now stands? Since it could lead to two different governing laws, conflicting decisions might be the result. An example is the question of who owns the receivable in a priority dispute which should be subject to the proposed paragraph 3; this matter could, from another angle, be seen as a question of whom the debtor must pay to have his debt discharged, which should be subject to Article 14(2).<sup>132</sup> Such a confusing outcome is undesirable. The proposed rule appears to undermine legal certainty.<sup>133</sup> Hence no consensus position could be reached at the drafting stage of the Rome I Regulation.

Recorded in Article 27(2) as a matter of political compromise,<sup>134</sup> the effectiveness of assignment against third parties and the priority of an assigned claim over the right of another person have been left open for further revision in the future. The current situation is that there is still no agreement among member states of the European Union. To comply with Article 27(2), the latest concrete development has been advanced in a

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<sup>130</sup> *Brandsma qq v Hansa Chemie AG*, the Dutch Supreme Court (*Hoge Raad*), 16 May 1997; see van der Grinten (n 101) 155.

<sup>131</sup> Flessner and Verhagen (n 6) 32; BIICL (n 11) 276 and 386.

<sup>132</sup> R Stevens, 'Choosing the Right Approach for European Law Making' in H Eidenmüller and EM Kieninger, *The future of secured credit in Europe* (De Gruyter 2008) 93–95.

<sup>133</sup> See also Dickinson, 'The Law Applicable To Contracts – Uncertainty On The Horizon?' (n 129).

<sup>134</sup> Fentiman (n 100) 405–406.

report by the British Institute of International and Comparative Law ('BIICL').<sup>135</sup> After detailed research and lengthy analysis of this topic, several recommendations were made. Three possible connecting factors which have been suggested are: the law applicable to the contract between assignor and assignee, the law applicable to the assigned claim and the law of the assignor's location (habitual residence).<sup>136</sup> However, a general conclusion is that no solution is perfect.<sup>137</sup> There is therefore no clear position regarding conflict-of-law rules for either third-party effects or priority issues. As the FMLC correctly pointed out,<sup>138</sup> these are matters that need more time, and perhaps more compromise solutions need to be considered and developed in order for there to be harmony throughout the European Union.

#### 4.4 The United States

In the United States, the UCC provides a uniform law to govern commercial transactions in general. Article 9, in particular, governs secured transactions.<sup>139</sup> This article is formulated from various theoretical approaches, namely party autonomy, state interest and consumer protection in addition to influence from the powerful financial business sector. Its core foundation, as far as this research is concerned, will be considered first. Subsequently, its choice-of-law rules regarding the assignment of receivables in international contexts will be examined in subsequent sections.

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<sup>135</sup> BIICL (n 11).

<sup>136</sup> *ibid* 384–400.

<sup>137</sup> *ibid* 402.

<sup>138</sup> FMLC, *Issue121: Legal Assessment of the Conversion of the Rome convention to a Community Instrument and the Provisions of the proposed Rome I Regulations* (n 128) 21; see also Stevens, 'Choosing the Right Approach for European Law Making' (n 132) 96–101.

<sup>139</sup> The UCC, art 9: secured transactions (2010).

#### 4.4.1 General principles

Article 9 of the UCC deals with a secured transaction that intends to create, for a creditor, a security interest in a debtor's asset. The expression 'security interest' is generally defined in Article 1, Section 1-201(b)(35), as an interest in personal property which secures payment or performance of an obligation. On basic principles, one of the most remarkable features of Article 9 is the functional approach.<sup>140</sup> It is an approach that is based on the idea of 'substance over form', or 'functional rather than formal'.<sup>141</sup> A primary goal of this approach is to lay down legal rules that facilitate financing secured transactions rather than regulating them. By providing certainty, predictability and flexibility, 'the rules are based on practicality rather than theory, formulated with a view to the needs of [the] marketplace'.<sup>142</sup> A security interest is created by contract, i.e. a security agreement.<sup>143</sup> There is no language requirement.<sup>144</sup> A purpose to create or provide for a security interest is all that matters. Article 9 governs a wide range of secured transactions where money debts are secured by personal property.<sup>145</sup> Many kinds of personal property that can be used as security, alongside many transactions that can serve the same security purpose, are embraced under one roof. If they perform the

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<sup>140</sup> For a detailed comparison of the US functional approach and the English approach, see M Bridge, 'How Far is Article 9 Exportable – The English Experience' (1996) 27 CBLJ 196; G McCormack, *Secured credit under English and American law* (OUP 2004) 1, where it is noted that 'the US approach is functional whereas the English approach is pragmatic'. This is because, unlike in the US, under English law 'transactions that serve the same economic ends are often visited with different legal consequences'.

<sup>141</sup> G Gilmore, *Security interests in personal property*, vol. I (Little, Brown 1965) 290; see also M Bridge, RA Macdonald, RL Simmonds and C Walsh, 'Formalism, Functionalism, and Understanding the Law of Secured Transactions' (1998) 44 McGill LJ 567, 569–577; McCormack (n 140) 64–68.

<sup>142</sup> HC Sigman, 'Security in movables in the United States – Uniform Commercial Code Article 9: a basis for comparison' in EM Kieninger and M Graziadei, *Security rights in movable property in European private law* (OUP 2004) 55.

<sup>143</sup> Ss 9-102(a)(73) and 9-201.

<sup>144</sup> Sigman (n 142) 64.

<sup>145</sup> G Gilmore, 'Secured Transactions Article of the Commercial Code, The' (1951) 16 LCP 27, 27; see also Gilmore, *Security interests in personal property* (n 141) 290; FK Beutel, 'The Proposed Uniform Commercial Code as a Problem in Codification' (1951) 16 LCP 141, 159.



same economic function, Article 9 shall apply to them – regardless of their title, language or form.<sup>146</sup>

Receivables, although this term is not used in Article 9, are categorised as rights to payment as referred to in Section 9-109(a)(3) under the heading of ‘a sale of accounts, chattel papers, payment intangibles, and promissory notes’.<sup>147</sup> Since receivables which are not evidenced by chattel papers or instruments mostly take the form of accounts, a broad definition of ‘account’ is instead provided in Section 9-102(a)(2).<sup>148</sup> By definition, the general meaning is a right to payment of a monetary obligation which can arise from a variety of transactions, e.g. a contract for the sale of goods or services. Another term this research is concerned with is ‘payment intangibles’ as defined in Section 9-102(a)(61). This term means a general intangible under which the account debtor’s principal obligation is a monetary one, such as a loan. The assignment of all these receivables or rights to payment just mentioned is therefore subject to Article 9.<sup>149</sup>

The assignment of receivables can be conducted by way of either outright purchase or security transfer – such as being collateral security for a loan. Article 9 governs both types of assignment.<sup>150</sup> Assignment by way of security falls directly within the scope of Article 9, since it is a secured transaction that creates a security interest in receivables assigned. Resulting from the definition of ‘security interest’ in Section 1-201(b)(35), outright assignments or sales of receivables are also covered by Article 9 even though,

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<sup>146</sup> S 9-109(a); see also Sigman (n 142) 56–58.

<sup>147</sup> See also DJ Rapson, ‘Receivables Financing under Revised Article 9’ (1999) 73 Am Bankr LJ 133; PF Coogan and NL Gordon, ‘Effect of the Uniform Commercial Code upon Receivables Financing – Some Answers and Some Unresolved Problems’ (1962) 76 Harv L Rev 1529.

<sup>148</sup> Coogan and Gordon (n 147) 1535–1536; Rapson (n 147) 133–136.

<sup>149</sup> See also NB Cohen and WH Henning, ‘Freedom of Contract vs. Free Alienability: An Old Struggle Emerges in a New Context’ (2010) 46 Gonz L Rev 353; for certain transactions that are excluded from the scope of art 9, see s 9-109(d).

<sup>150</sup> Gilmore, *Security interests in personal property* (n 141) 334; RH Nowka, *Mastering Secured Transactions: UCC Article 9* (Carolina Academic Press 2009) 12–13 and 16; and Cohen and Henning (n 149) 356–357.

strictly speaking, they are not assignments that secure an obligation.<sup>151</sup> But they are artificially treated as if they are. This is because outright assignments in the factoring business are basically counted as a method of lending, which is a financing arrangement.<sup>152</sup> '[Loans] and sales of receivables differ in form, they usually do not differ too much in substance.'<sup>153</sup> In a functional approach where substance wins over form, both types of assignment are under the same set of rules. Subjecting them to the same legal regime also avoids the characterisation difficulty between outright and security transfers. As was remarked, commercial financing against an 'account' has often been conducted so that the distinction between a security transfer and a sale is blurred.<sup>154</sup> Whether a sale transaction is intended as security or not, it comes into the scope of this article.

Nevertheless, some criticisms have been made of this terminology. By comparison with English law where a line between an absolute assignment and a security assignment has been drawn,<sup>155</sup> combining them brings complexity to outright sales of receivables transactions and factoring businesses since the parties to these transactions also have obligations under the legal rules – such as filing – the purpose of which is, in essence, to deal with security transfers.<sup>156</sup> This increases the transaction costs for an outright assignment unnecessarily. Despite this combination, differences between the two still exist in Article 9 itself when it comes to the level of legal consequences and the

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<sup>151</sup> Unlike an assignment by way of security, after an outright sale the assignor does not retain any interest in the collateral, e.g. account, sold. See s 9-318.

<sup>152</sup> See Bridge, et al. (n 141) 580; McCormack (n 140) 237.

<sup>153</sup> Coogan and Gordon (n 147) 1532.

<sup>154</sup> Official Comment of the UCC art 9, cited in Bridge, et al. (n 141) 582; SL Harris, 'How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters (with C Mooney, Jr)' (1999) 74 Chi-Kent L Rev 1357, 1369; Coogan and Gordon (n 147) 1532–1533; this is also the case in English law, see *Orion Finance Ltd v Crown Financial Management Ltd* [1996] BCC 621, 622 (Millett LJ); McCormack (n 140) 55.

<sup>155</sup> The former is a legal assignment subject to s 136(1) of the Property Act; the latter is an equitable assignment under English common law. See also M Bridge, 'The Scope and Limits of Security Interests' in H Eidenmüller and EM Kieninger, *The future of secured credit in Europe* (De Gruyter 2008) 206–208.

<sup>156</sup> See McCormack (n 140) ch 7.

enforcement of each transaction.<sup>157</sup> Unlike a secured transaction, a seller who has sold a receivable does not retain any interest in that receivable.<sup>158</sup> The distinction between the two is still of profound significance in practice.<sup>159</sup> No true achievement is reached by avoiding such difference. The only persuasive justification for including these two methods of transfer within Article 9, as has been submitted, is that they both fall within the general regulatory objectives underlying Article 9's perfection and priority framework.<sup>160</sup>

#### **4.4.2 Conflict of laws**

##### **(1) The Rules**

Besides its substantive aspect, choice of laws for assignments of receivables is also crafted in the UCC. At the beginning, the principle of freedom of choice is generally accepted. According to Article 1, Section 1-301, parties to an international transaction are entitled to choose an applicable law to govern their rights and obligations arising from a transaction between them.<sup>161</sup> That law shall be applied whether the transaction bears a relation to the state or country of the law chosen, or not.

Turning to Article 9's choice-of-law rules that are used to determine the law governing the transfer of a security interest in receivables, they are set out in Sections 9-301 to 9-307. The baseline rule is the law of the state in which the debtor is located. Legal

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<sup>157</sup> Bridge, et al. (n 141) 582.

<sup>158</sup> S 9-318; Nowka (n 150) 14.

<sup>159</sup> Such as securitisation, accounting, taxation and insolvency in which distinguishing between a true sale and security transfers of receivables does matter; for instance, asset securitisation operates by way of the true sale of receivables as it needs to make the transfer absolute to eliminate the assignor's residual right in the receivables, avoid the risk of the assignor's bankruptcy and create a bankruptcy-remote transaction. See McCormack (n 140) 238–239 and 245–246; G McCormack, 'Rewriting the English law of personal property securities and Article 9 of the US Uniform Commercial Code' (2003) 24 *Company Lawyer* 69; Bridge, et al. (n 141) 580–587.

<sup>160</sup> *ibid* 583; McCormack, *Secured credit under English and American law* (n 140) 242–245.

<sup>161</sup> The term 'international transaction' is defined in s 1-301(a)(2) as 'a transaction that bears a reasonable relation to a country other than the United States'; for an exception to this principle, see ss 1-301(d) and (e) to (g). See also the Restatement (Second) of Conflict of laws, s 187.

matters covered by these sections are perfection and priority. They are subject matter that the parties to an assignment contract cannot agree on. If an agreement exists to the contrary, it will be inoperative and overridden by the rules of Article 9. The governing law concerning perfection and priority issues shall principally be decided by the rules specified by the law, not by an agreement the parties might have concluded. This is the result of Section 1-301(g)(8). This underlying policy holds because these issues have legal effects on third parties, and so the two parties agreeing by contract to a result which would alter the rights of third parties cannot be granted.<sup>162</sup> At this point, there are two legal terms that need to be considered: perfection and priority.<sup>163</sup> The term ‘perfection’ refers to the rules that must be adhered to to make a security interest effective against a claim by a person other than the debtor, i.e. a third party. By the word ‘priority’, it means the rules that will be applied to resolve a problem of competing claims to the same collateral. Although it might not always be the case, a priority issue normally links back to the effect of perfection or non-perfection of the security interest in question.<sup>164</sup>

In order to ensure that a security interest can be invoked not only against the debtor but also against third parties, that security interest need to be perfected according to the rules set out in Article 9.<sup>165</sup> The perfection of a security interest can be achieved by satisfying one of three methods: filing a financing statement, possession or control.<sup>166</sup> They are, in principal, processes of publicising a security interest. Among them, it is

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<sup>162</sup> SJ Burnham, ‘Language of Revised Article 9, The’ (2010) 46 *Gonz L Rev* 215, 218–219; E Warren, ‘Making Policy with Imperfect Information: The Article 9 Full Priority Debates’ (1996) 82 *Cornell L Rev* 1373, 1375.

<sup>163</sup> See also HC Sigman, ‘Perfection and Priority of Security Rights’ in H Eidenmüller and EM Kieninger, *The future of secured credit in Europe* (De Gruyter 2008) 143–165.

<sup>164</sup> Nowka (n 150) 215–217; Sigman, ‘Perfection and Priority of Security Rights’ (n 163) 143–165.

<sup>165</sup> In the case where a security interest is automatically perfected, there are no other steps that need to be taken. Generally, perfection of this security interest will happen instantly at the time the collateral is attached. See ss 9-309 and 9-203.

<sup>166</sup> Which one of these methods is required depends on the type of collateral. Perfection by control can be used only for investment property, deposit accounts, letter-of-credit rights and electronic chattel papers. Possession is a perfection method that is available only for tangible assets, such as negotiable instruments, goods, money or tangible chattel papers. See respectively ss 9-313 and 9-314.

filing that is the most common technique for most types of collateral, including assignments of receivables or rights to payment.<sup>167</sup> Based on Section 9-310, a financing statement must be filed to perfect all security interests. The filing system of a financing statement is established as a public record. The system is primarily formulated as a simple and inexpensive mechanism that serves as an accessible database of information that suffices to tell a creditor about a security interest in an asset of an identified debtor.<sup>168</sup> Regarding priority problems which may arise when there are two or more competing claims of security interest over the same collateral, the concept of perfection also has a significant effect on the way a priority dispute is decided. The rule can be found in Section 9-322, which states that the secured party that is the first to file or perfect prevails for this entitles him to gain a priority rank over competing claims.<sup>169</sup> This rule is based on the time of filing or perfection, ‘not the sequence of the creation of the competing security interests’.<sup>170</sup> As such, a creditor who needs to ensure that his rights in collateral prevail over those of third parties, a necessary step that needs to be taken is to be the first one to file a financing statement to a designated public office. And, this is the stage where choice-of-law rules come in to the picture.

A very important thing to do before filing such a financing statement is to decide which state’s filing system governs a particular security interest. Choice of laws is needed for a secured party to consult, since it is ‘a pointer as to where to file’.<sup>171</sup> Section 9-301(1) provides choice-of-law rules applicable to the perfection and priority of a security interest. It determines which state’s law governs the perfection and priority of a security

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<sup>167</sup> Sigman, ‘Perfection and Priority of Security Rights’ (n 163) 148, where it has been noted that this filing method is compatible with registering a notice regime under the Guide, recommendation 32; see also McCormack, *Secured credit under English and American law* (n 140) 76-79; G McCormack ‘Notice filing versus transaction filing - a comparison of the English and U.S. law of security interests’ (2002) *Insolvency Lawyer* 166.

<sup>168</sup> Sigman, ‘Perfection and Priority of Security Rights’ (n 163) 151–152.

<sup>169</sup> Art 9 also states detailed priority rules that specify outcomes for particular competitions between conflicting security interests in the same collateral. See ss 9-317 to 9-339.

<sup>170</sup> Sigman ‘Security in movables in the United States – Uniform Commercial Code Article 9: a basis for comparison’ (n 142) 73; McCormack, *Secured credit under English and American law* (n 140) 79-84.

<sup>171</sup> *ibid* 68; see also s 9-501.

interest. The rule is that perfection and priority issues shall be governed by the ‘local law’ of the jurisdiction where the ‘debtor’ is located. In the context of an assignment, the term ‘debtor’ refers to an assignor.<sup>172</sup> By ‘local law’, it means the substantive law of that jurisdiction, exclusive of its conflict-of-law rules.<sup>173</sup> In other words, it is the law of the assignor’s location that shall be applied to determine perfection and priority issues of an assignment. On the plus side, the law of the assignor’s location which leads to the assignor’s place of business has created predictability as it provides a single point of reference.<sup>174</sup> In contrast to the *lex situs* of receivables or the law of the location of the debtor, of which there can be more than one, there is only one assignor; hence there is one single location to seek and one single law to comply with. It reduces the need to register or perfect the assignment in other jurisdictions. In this way, legal certainty can be achieved since these are mandatory choice-of-law regulations that work alongside mandatory rules of perfection and priority.

Nevertheless, such legal certainty depends on how the location of the assignor is decided. A legal rule for determining a debtor or an assignor’s location is specified in Section 9-307. If the debtor is an individual, it is the principal residence that is set as his location.<sup>175</sup> However, if the debtor is an organisation<sup>176</sup> – e.g. a partnership or a corporation – the location is its principal place of business.<sup>177</sup> If there is more than one place of business, the debtor is considered to be located in the jurisdiction of its chief executive office.<sup>178</sup> The expressions ‘place of business’ and ‘chief executive office’ are further described, respectively, as ‘a place where a debtor conducts its affairs’ and ‘a place from which a debtor manages the main part of its operations; a place where

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<sup>172</sup> S 9-102(a)(28).

<sup>173</sup> Official Comment of the UCC, in Nowka (n 150) 217.

<sup>174</sup> NO Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (Routledge 2011) 258.

<sup>175</sup> S 9-307(b)(1).

<sup>176</sup> Ss 1-201(b)(25) and (27).

<sup>177</sup> S 9-307(b)(2).

<sup>178</sup> S 9-307(b)(3).

persons dealing with a debtor would normally look for credit information'.<sup>179</sup> However, if a debtor is a registered organisation organised under the law of a state of the United States, its location is not determined by the residual rule. It is, instead, placed in the state under whose law the debtor is incorporated.<sup>180</sup>

## (2) Remarks

In spite of laying down comprehensive rules, the choice-of-law provisions of the UCC Article 9 which shall apply to an international assignment of receivables are not entirely perfect. Some controversy continues. Some relevant remarks are made here.

The first remark concerns the original foundation of Article 9. Originally, Article 9 was primarily concerned with domestic or multi-state secured transactions.<sup>181</sup> Its core purpose was to let all types of personal property be available as security and bring them into being under not several separate statutes but one.<sup>182</sup> One of the primary aims of this idea is to unify substantive law and to make the law of the United States uniform.<sup>183</sup> Transactions having an international element were an afterthought.<sup>184</sup> Although there were some rules on choice of laws in the former version of Article 9, it was not until the 1999 revision that choice-of-law rules for international secured transactions were paid attention to. Persuasive reasons at that time were increasing transnational business, a dramatic increase in globalisation credit and the growing importance of intangible assets financing – especially against receivables.<sup>185</sup> Despite this, even after the latest amendment in 2010, dissatisfaction has still been expressed with Article 9's choice-of-

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<sup>179</sup> S 9-307(a); the Official Comment of the UCC, in Nowka (n 150) 222–223; see also PF Coogan, 'New UCC Article 9, The' (1972) 86 Harv L Rev 477, 550–552.

<sup>180</sup> S 9-307(e).

<sup>181</sup> NB Cohen and EE Smith, 'International Secured Transactions and Revised UCC Article 9' (1999) 74 Chi-Kent L Rev 1191, 1191.

<sup>182</sup> Gilmore, *Security interests in personal property* (n 141) 288-294.

<sup>183</sup> S 1-103(a)(3); see also H Kuhn, 'Multi-State and International Secured Transactions Under Revised Article 9 of the Uniform Commercial Code' (1999) 40 Va J Int'l L 1009, 1016.

<sup>184</sup> K Kettering, 'Harmonizing Choice of Law in Article 9 with Emerging International Norms' (2011) 46 Gonz L Rev 235, 238.

<sup>185</sup> Kuhn (n 183) 1016; Cohen and Smith (n 181) 1191.

law rules and more substantial revision has been called for.<sup>186</sup> Resulting from this development, Article 9 does not draw a distinction between the rules of domestic and international secured transactions. By contrast, the rules applicable to international transactions have been blended with those that apply to the interstate kind. A point to note here is that, unlike international instruments whose fundamental elements are designed for international transactions in a global scheme so that conflict of laws is always potentially an issue, the UCC Article 9 is just an attempt to regulate domestic transactions and so its conflict rules cannot be regarded as a good comprehensive model for international activities.

Legal problems of characterisation are the second point concerned herein. To apply Article 9's choice-of-law rules, a legal issue that must be determined first is the question of whether a transaction at issue can be characterised as a secured transaction under Article 9 or not. If the answer is no, that issue is beyond the reach of the article. To decide this question, a prior problem is which jurisdiction's law shall govern such a characterisation issue. Although it might be claimed that the scope of Article 9 is broad, this in fact leads to the question of how far its reach will extend.<sup>187</sup> This is the problem on which Article 9 is silent, hence there is no clear answer. It will depend instead on the characterisation methodology of each single state. As a result, this can cause uncertainty in an international scenario for which a foreign law might have a different view contrasting with that of the American methodology. The uniform application of Article 9 is not guaranteed. Additionally, there is no clear position on how to distinguish between assignment by way of security and outright sale, nor about the law pursuant to

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<sup>186</sup> Kettering (n 184).

<sup>187</sup> M Bridge, 'The Scope and Limits of Security Interests' (n 155) 197–199; also Bridge, et al. (n 141).



which this matter will be decided. This could result in a disharmonious outcome, even within the United States itself.<sup>188</sup>

Another remark concerns the substantive scope of Article 9's choice-of-law rules. It is limited to 'perfection, the effect of perfection or non-perfection, and the priority of a security interest'.<sup>189</sup> No choice of laws has been laid down to clarify what is the governing law for others legal issues, such as the validity of security agreements or assignment contracts, the relationship between assignor and assignee and the rights of assignee against a debtor. This is particularly noticeable when a comparison is made to Article 14 of the Rome I Regulation. It is unclear whether these uncodified matters refer to the law chosen by the parties to a contract according to Section 1-301 or not.<sup>190</sup> This again might result from the original purpose of the UCC, i.e. aiming to codify legal rules within the United States, not globally.

The fourth remark concerns choice-of-law rules. By the same contentiousness advanced in the European context, adopting the law of the assignor's location does have some flaws, specifically where an international assignment of receivables is being considered.<sup>191</sup> In the context of Article 9, other difficulties and unpleasant outcomes, in addition to the choice of laws, are as follows. With regard to a foreign debtor whose location is outside the United States, an exception to the baseline rule of the law of habitual residence is laid down in Section 9-307(c), the result of which enormously limits the applicable scope of the residual rule based on Section 9-307(b). Under (c), the law of the habitual residence of a foreign debtor applies only if 'a debtor's residence, place of business, or chief executive, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a non-possessory

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<sup>188</sup> See Kettering (n 184); Nowka (n 150) 12–14 and 131–132.

<sup>189</sup> S 9-301.

<sup>190</sup> See Kuhn (n 183) 1017–1019.

<sup>191</sup> See Section 4.3.3; also Coogan (n 179) 550–552 and 555–558.

security interest to be made generally in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral'. It can simply be said that the law of the foreign debtor's location will apply only if the law of the country where the debtor is located has a rule of public filing equivalent to that of Article 9. It is very doubtful that this requirement can be satisfied.<sup>192</sup> If the foreign law in question does not qualify, the debtor is instead deemed to be located in the District of Columbia. Then, the foreign law will be inapplicable. The filing system of the UCC Article 9, which is an important factor of perfection and priority rules, shall thus apply, even if the debtor is not located in the United States. Furthermore, the rule of Section 9-307(c) has a direct consequence in terms of finding and ascertaining a country whose law governs perfection and priority matters.<sup>193</sup> It points to an answer that specifies the place a secured party has to file a financial statement to perfect his security transaction. To do so, investigating relevant foreign laws is required. The secured party also needs to ascertain whether such foreign law has a public filing system comparable to Article 9 or not. This procedure is of course costly, yet leaving room for error.<sup>194</sup> As a negative consequence, it increases the cost of and creates uncertainty for international secured transactions including assignments of receivables.

#### **4.5 International instruments**

Legal movement on laws of assignment has also occurred and been driven by international organisations. This movement can be regarded as a role model for harmonised legal rules. It inevitably has great influence on the consideration of

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<sup>192</sup> Kuhn (n 183) 1039–1040 and 1046–1064.

<sup>193</sup> S 9-301.

<sup>194</sup> Cohen and Smith (n 181) 13–14.

emerging legal rules of either a country or a region. In this section, there are four international instruments that will be investigated in turn. Those are the Factoring Convention, the Principles, the Receivables Convention and the Guide. As will be analysed below, while the first two only provide substantive rules for assignment of receivables, the other two also provide conflict-of-law rules for this matter.

#### **4.5.1 UNIDROIT Convention on International Factoring 1988**

Factoring is a vehicle used to illustrate a method of receivables financing.<sup>195</sup> It commonly consists of an assignment to a factor from a creditor of receivables originating from goods and services supplied by the creditor to others. For international factoring, an international instrument that should be mentioned is the UNIDROIT Convention on International Factoring 1988 ('Factoring Convention') that came into force on 1 May 1995. It is a substantive convention.<sup>196</sup> It only applies to factoring contracts arising out of international sales of goods contracts in which the factor (assignee) performs at least two of these functions: financing a supplier (assignor), maintaining an account, collecting receivables or providing protection against default in payment by a debtor.<sup>197</sup> In conjunction with this, notice of the assignment must be given to the debtor.<sup>198</sup>

The Factoring Convention does not cover every aspect of assignment.<sup>199</sup> It only deals with some substantive legal issues, e.g. rights and obligations between factors and suppliers, and issues involving subsequent assignment.<sup>200</sup> Priority rules and conflict of

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<sup>195</sup> See Section 3.1.2(2); Goode and McKendrick (n 13) 789; also N Ruddy, S Mills and N Davidson, *Salinger on factoring* (4th edn, Sweet & Maxwell 2006).

<sup>196</sup> See *ibid* 313–317.

<sup>197</sup> Arts 1(2)(a) to (b).

<sup>198</sup> Art 1(2)(c).

<sup>199</sup> Ruddy, Mills and Davidson (n 195) 317.

<sup>200</sup> See also Beale, et al. (n 4) 738.

laws were omitted from the drafting process. This was mainly because of their extreme complexity, hence they were considered to be too difficult to formulate, by way of either substance or choice of laws. Earlier in the drafting procedure, an attempt was made to propose the law of the place where the supplier has his principal place of business as the governing law for a priority dispute between a factor and any third party,<sup>201</sup> but this was rejected. This was due to the wide variations in rules between countries,<sup>202</sup> so no satisfactory solution could be reached. Incorporating a compromise solution might also have prevented the acceptance of uniform rules by a number of states that were not convinced. It was decided with regret by the committee that this matter must be left open.<sup>203</sup> Though not perfect, the Factoring Convention is considered to comprise ‘important early steps in the direction of modern secured credit law’<sup>204</sup> and ‘the first step towards eventual harmonisation in the assignment of receivables’.<sup>205</sup> As for the choice of laws, ‘[it] may depend upon the forum in which any conflict may be heard’.<sup>206</sup> It leads to the application of conflict of laws of the court hearing the case.

#### **4.5.2 UNIDROIT Principles of International Commercial Contracts 2010**

The UNIDROIT Principles of International Commercial Contracts (‘Principles’) were first published in 1994. Their core purpose is to set forth general rules for international commercial contracts.<sup>207</sup> It was not until completion of the second edition in 2004 that legal principles concerning the assignment of rights were laid down in

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<sup>201</sup> See UNIDROIT, *Study LVIII-Doc. 10* (1982) 4.

<sup>202</sup> See UNIDROIT, *Study LVIII-Doc. 1* (1976).

<sup>203</sup> UNIDROIT, *Study LVIII-Doc. 33* (1987) 6; see also UNIDROIT, *Study LVIII-Doc. 6* (1979); UNIDROIT, *Study LVIII-Doc. 13* (1982).

<sup>204</sup> HL Buxbaum, ‘Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform’ (2003) 8 ULR 321.

<sup>205</sup> Akseli (n 174) 7; MR Alexander, ‘Towards Unification and Predictability: The International Factoring Convention’ (1988) 27 Colum J Transnat’l L 353, 385.

<sup>206</sup> F Salinger, ‘International factoring and conflicts of law’ (2007) 1 LFMR 7, 8.

<sup>207</sup> See the Preamble of the Principles.

Articles 9.1.1–9.1.15.<sup>208</sup> The rule remained unchanged under the current 2010 version, which is the third edition of the Principles.<sup>209</sup> The Principles consist of various substantive rules for a law of assignment. Legal issues flowing from an assignment among assignor, assignee and debtor or against third parties are dealt with. They do, however, contain no conflict-of-law rules. The underlying reason which can be derived from the Principles itself is that its primary aim is to create a uniform set of substantive rules applying either directly or impliedly to an international commercial contract. It will be applied when the parties have agreed that their contract will be governed by the Principles. Additionally, it may be used as general legal principles or *lex mercatoria*, or even as a tool for the interpretation and supplementation of domestic or international law.<sup>210</sup> Using conflict of laws which has a function to point to a substantive law might not be able to serve this kind of target.

However, to the extent of this research, there are some interesting points that should be advanced. Firstly, the expression ‘assignment of a right’ is defined as including either outright or security transfer.<sup>211</sup> Apart from assignments of monetary rights, it also covers, for example, partial assignments, assignments of future rights and bulk assignments.<sup>212</sup> Secondly, assignment can be formed by an agreement between assignor and assignee, notwithstanding a non-assignment clause in the original contract creating a right purported to be assigned.<sup>213</sup> Thirdly, regarding the debtor’s position, a notice of assignment to the debtor is adopted in order to make an assignment effective against him. Unless and until receiving the notice, the debtor can get a good discharge by

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<sup>208</sup> See the developments of these rules in the series of preparatory works on the Principles at <<http://www.unidroit.org/preparatory-work-principles-1994>> accessed 9 October 2015.

<sup>209</sup> See S Vogenauer and J Kleinheisterkamp, *Commentary on the UNIDROIT principles of international commercial contracts (PICC)* (OUP 2009).

<sup>210</sup> See the Preamble of the Principles.

<sup>211</sup> Art 9.1.1, though it does not cover transfers of instruments, art 9.1.2.

<sup>212</sup> Arts 9.1.4 to 9.1.6; see also MJ Bonell, ‘UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law’ (2004) 9 ULR 5, 24–25.

<sup>213</sup> Arts 9.1.7 and 9.1.9.

paying the assignor; only after receiving notice does he have to pay the assignee.<sup>214</sup> The debtor also holds a right to assert against the assignee all defences that could be asserted against the assignor. This includes the right of set-off available against the assignor up to the time of being notified.<sup>215</sup> Fourthly, the Principles also imposes rules for successive assignments. Priority is given to the assignee who is the first to give notice of his assignment to a debtor.<sup>216</sup> Nevertheless, it is regrettable that the Principles do not provide any rules regarding competing disputes between assignee and creditors or insolvency representatives of the assignor. As this is a significant point in practice, ‘the complete absence of such [rules] leads to a significant decrease in the practical value of [the Principles]’.<sup>217</sup> By virtue of legal policy, it has been commented that since this issue involves proprietary rights, it should be governed by the mandatory rules of the otherwise applicable law.<sup>218</sup> This is therefore another instrument that pushes this problematic issue back to the law of the forum.

#### **4.5.3 UN Convention on the Assignment of Receivables in International Trade**

##### **2001**

Desiring to establish a more modernised set of laws relating to an assignment of receivables, the United Nations Convention on the Assignment of Receivables in International Trade (‘Receivables Convention’) was completed in 2001.<sup>219</sup> Although the major content of the Convention codifies substantive rules of assignment of receivable – or contractual right to payment of a monetary sum – within its application scope,

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<sup>214</sup> Art 9.1.10.

<sup>215</sup> Art 9.1.13.

<sup>216</sup> Art 9.1.11.

<sup>217</sup> Vogenauer and Kleinheisterkamp (n 209) 972.

<sup>218</sup> Comment 4 to art 9.1.1; see also Bonell (n 212) 25.

<sup>219</sup> Yet, it has not entered into force. See the preamble of the Receivables Convention; NO Akseli, ‘The utility and efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit’ in NO Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (CUP 2013).

conflict-of-law rules are also laid down in order to deal with a number of issues left outside the law.<sup>220</sup> In general, the Convention covers both an outright assignment of receivables and an assignment the result of which creates security rights in receivables.<sup>221</sup> This is the same approach as that adopted by the UCC Article 9.

Chapter V, Articles 26–32, of the Receivables Convention sets out autonomous conflict-of-laws rules concerning various issues of the assignment of receivables. This is an independent section of conflict rules for matters that are not settled elsewhere in the Convention. And it may apply independently of any territorial link with a State party to the Convention.<sup>222</sup> In the case of a priority dispute among competing rights over the same receivables, an applicable law is also found in Article 22. So far as this research is concerned, the conflict rules contained in the Receivables Convention can be categorised and illustrated as follows.

### **(1) Law applicable to the relationship between assignor and assignee**

Article 28 of the Receivables Convention sets out choice-of-law rules to deal with mutual rights and obligations between assignor and assignee. Along the same lines as Article 14(1) of the Rome I Regulation, it is the principle of party autonomy that is accredited. The law chosen by assignor and assignee shall govern the relations flowing from their assignment contract. In the absence of such a law, the applicable law is the law of the state with which the assignment contract is most closely connected. Such freedom of choice is subject to mandatory rules of the law of the forum state or a third state with which the matters are closely connected.<sup>223</sup>

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<sup>220</sup> See respectively arts 1, 2, 4 and 26(b); SV Bazinas, 'Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade' (2001) 9 Tul J Int'l & Comp L 259, 288; SV Bazinas, 'Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade' (2003) 11 Tul J Int'l & Comp L 275, 297–298.

<sup>221</sup> Art 2(a); UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (UN Publication 2004) para 7.

<sup>222</sup> *ibid* para 54.

<sup>223</sup> See art 31.

Still, Article 28 only covers the purely contractual aspect of a contract of assignment.<sup>224</sup> General examples are provided, including ‘the conclusion and substantive validity, the interpretation of its terms, the assignee’s obligation to pay the price or to render the promised credit, the existence and effect of representations as to the validity and enforceability of the [receivable]’.<sup>225</sup> It could be said, to put in another way, that Article 28 does not govern the proprietary aspects of assignment.<sup>226</sup> This is because the proper law of contract was considered by the working group of the Convention, when being drafted, to be an inappropriate governing law for the transfer of property rights.<sup>227</sup>

## **(2) Law applicable to the relationship between assignee and debtor**

As between assignee and debtor, most legal issues are covered by the substantive laws of the Receivables Convention. There are however certain issues, such as the question of when a right of set-off is available to the debtor under Article 18, or a question relating to the effect of anti-assignment clauses, to which Articles 9 and 10 do not apply, that fall within the application of Article 29’s conflict rules.<sup>228</sup> The law adopted in this article is the law that governs the original contract from which the assigned receivables arise. This approach is akin to Article 14(2) of the Rome I Regulation.

## **(3) Law applicable to the proprietary aspect of assignment**

The Receivables Convention focuses not only on the contractual but also the proprietary aspect of an assignment of receivables. Regarding the proprietary aspect of assignment,

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<sup>224</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (A/CN.9/470) para 191; Bazinas, ‘Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade’ (n 220) 288.

<sup>225</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (n 224) para 191.

<sup>226</sup> *ibid*; Bazinas, ‘Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade’ (n 220) 288; C Walsh, ‘Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade’ (2001) 106 *Dick L Rev* 159, 186–191.

<sup>227</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (n 224) para 191.

<sup>228</sup> UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 221) para 58.



there are two content items that will be considered. The first one concerns the law applicable to the proprietary effects of assignment, either between the parties or against other third parties. The second one is about the law applicable to a priority dispute.

Neither a specific rule nor a clear position exists regarding the proprietary aspect of assignment between assignee and assignor, which is a question of whether and how assignment transfers property titles or creates security rights over assigned receivables and what law governs these issues. In a similar manner, no special rule is directly codified for legal issues concerning third-party effects of assignment. On this point, it was commented that such proprietary aspects are, to a large extent, dealt with in the various substantive provisions of the Receivables Convention.<sup>229</sup> As ‘assignment’ is, by definition, explained as a transfer of property in the form of receivables.<sup>230</sup> Also, it has been considered that the issues relating to the proprietary aspects of assignment actually refer to the law governing a priority issue.<sup>231</sup> Article 5(g) defines the word ‘priority’ as follows:

*“Priority” means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied.*

Considering this definition, the meaning of priority is broad enough to capture the property rules of transfer and their effectiveness either *inter parties* or against third

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<sup>229</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (n 224) para 191.

<sup>230</sup> Art 2(a); UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 221) para 7.

<sup>231</sup> See Walsh, ‘Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade’ (n 226) 188–189.

parties,<sup>232</sup> as well as to govern priority matters. It covers the question of whether a requirement to vest a property title in the assigned receivables to the assignee has been completed and whether the assignment can take effect against third parties, i.e. a creditor or insolvency administrator of the assignor and subsequent assignees. Another consequence resulting from the definition of priority is that the Convention's priority rules also govern the problem of characterisation of an assignment, i.e. whether it is a secured transaction and whether the nature of the right in the assigned receivables is personal or proprietary, insofar as it is relevant to the priority dispute.<sup>233</sup>

By recognising the priority rules of different legal systems, the priority rules imposed by the Receivables Convention are not substantive but relate to conflict of laws.<sup>234</sup> The Convention does not determine priority, it merely indicates which nation's law will determine such problems.<sup>235</sup> These conflict rules are in Articles 22 and 30.<sup>236</sup> The definition of priority serves the purposes of both articles. The proprietary effects of assignment, especially when they arise in the context of a priority dispute, are subject to the same law as that governing the priority issue.<sup>237</sup> That is the law of the assignor's location, which is defined as the assignor's place of business or his habitual

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<sup>232</sup> *ibid* 189.

<sup>233</sup> HC Sigman and EE Smith, 'Toward Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade' (2002) 57 *Bus Law* 727, 746–747 and 754–755.

<sup>234</sup> Still, there exist substantive rules on priority disputes in s I of the annex to the Receivables Convention for states to opt into if they so wish. The optional priority rules are principally based on registration. See art 42; Akseli, 'The utility and efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit' (n 219) 205–213.

<sup>235</sup> The reason, as submitted, is because: firstly, the Working Group drafting the Convention was unable to agree on a substantive priority rule; and secondly, uncertain impacts on both domestic and international assignment of receivables would be created if a convention substantive priority rule was inconsistent with domestic priority rules of some nations. See NB Cohen, 'Internationalizing the Law of Secured Credit: Perspectives from the US Experience' (1999) 20 *U Pa J Int'l Econ L* 423, 438–441.

<sup>236</sup> Art 30 applies to transactions that are not within the ambit of art 22 due to lack of territorial connection. See art 26; UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 221) para 54; Akseli, 'The utility and efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit' (n 219) 213; R Broude and B Markell, 'The Priority Provisions of the UNCITRAL Convention on the Assignment of Receivables in International Trade' (2002) 11 *International Insolvency Review* 121.

<sup>237</sup> Walsh, 'Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade' (n 226) 189.

residence.<sup>238</sup> Subject to the public policy of a forum and any priority agreement between assignees, the law of the state where the assignor is located shall decide the priority of the right of the assignee to the assigned receivables over the right of the competing claimant.<sup>239</sup> In this regard, Article 5(m) provides the meaning for ‘competing claimant’ including other assignees, a creditor of the assignor or an insolvency administrator.

#### **4.5.4 UNCITRAL Legislative Guide on Secured Transactions 2007**

The UNCITRAL Legislative Guide on Secured Transactions (‘Guide’) was completed in 2007. Its purpose is to assist states in developing modern, efficient and effective secured transaction law harmoniously.<sup>240</sup> A functional approach is used to allow the Guide to encompass all transactions that perform security purposes.<sup>241</sup> Although the main context of the Guide involves substantive rules, conflict of laws is also considered as a necessary tool to harmonise the laws of secured transactions.

Conflict-of-law rules are proclaimed in Chapter X of the Guide. For purely contractual obligations arising from an assignment, it is suggested that it is appropriate to subject them to the law chosen by the parties. However, the property aspect of secured transactions is considered to be outside the domain of the freedom of contract. The law of the location of the assignor is proposed as the principal conflict rule for creation, third-party effectiveness and priority of a security right over intangible assets.<sup>242</sup> By way of summary, on the conflict-of-law rules regulating assignments of receivables, the

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<sup>238</sup> See arts 22 and 30; also art 5(h) for the identification of location.

<sup>239</sup> Arts 22 and 25, respectively; for proceeds of receivables, see art 24.

<sup>240</sup> See G McCormack, *Secured Credit and the Harmonisation of Law: The UNCITRAL Experience* (Edward Elgar 2011); G McCormack, ‘Secured transactions law reform, UNCITRAL and the export of foreign legal models’ in NO Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (CUP 2013).

<sup>241</sup> Recommendation 8; SV Bazinas, ‘The utility and efficacy of the UNCITRAL Legislative Guide on Secured Transactions’ in NO Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (CUP 2013).

<sup>242</sup> The Guide, recommendation 208.

Guide recommends the same approach as that adopted by the Receivables Convention.<sup>243</sup>

#### 4.6 Summary remarks

Considering conflict-of-law rules for the assignment of receivables, either applicable in various jurisdictions or laid down in relevant international instruments, as compared in this chapter, there are four major points that can be remarked on.

Firstly, all conflict-of-law rules are founded on the basis of two substantive areas of law: property and contract. Receivables are classified as intangible property subject to property law. An assignment is created by a contract between assignor and assignee according to the substance of contract law. The main purpose of an assignment is to transfer a proprietary title to receivables, either outright or by way of security, from assignor to assignee. While contractual conflict-of-law rules govern the contractual side of assignment, assignment as a transfer of proprietary title brings proprietary conflict-of-law rules into operation. This principle is accepted, especially when the effects of assignment are seen as being able to constitute *erga omnes* against third parties. Contractual rules are regarded as either unable or inappropriate to cover these effects. This fundamental methodology of the property-contract approach can be read from the conflict-of-law rules imposed by all the sets of laws being compared.

The property-contract approach, however, leads to the second point that this thesis intends to raise. That is such an approach results in a characterisation problem which is difficult to solve with certainty. A leading example is shown in the *Raiffeisen* case.

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<sup>243</sup> See M Deschamps, 'Conflict-of-Laws Rules for Security Rights: What Should be the Best Rule?' in H Eidenmüller and EM Kieninger, *The future of secured credit in Europe* (De Gruyter 2008) 292–293; Bazinas, 'The utility and efficacy of the UNCITRAL Legislative Guide on Secured Transactions' (n 240) 159–166.

While the question was formerly regarded as a proprietary matter, it was decided in this case that it was a contractual one. Furthermore, disharmony in the application of conflict-of-law rules under the property-contract approach also exists among European countries. This problem cannot be resolved if there remains a need to draw a line between contract and property in the assignment of receivables, despite the fact that it is a contractual transfer of contractual rights.

The third point concerns the connecting factors of conflict-of-law rules. Via the property-contract approach, the connecting factors are separated into two categories: property and contract. These, accordingly, are applied to the proprietary and contractual issues of assignment. The difficulty is not on the contractual side, where the freedom of parties to choose a governing law is dominant, but on proprietary issues, i.e. the effectiveness of assignment against third parties and priority disputes. Although the law of assignment or the law of contract creating the receivables assigned is preferred by some countries, the law of the assignor's location or habitual residence seems to be the most favoured choice in the current trend. The latter has been adopted by international instruments as well as the UCC Article 9. It is also one of the sound conflict rules proposed by the BIICL in the context of European jurisdiction.

Finally, there are two different viewpoints that can be derived from the core legal foundations and underlying policies between the rules of Europe, including England, and those of the United States. Realising these would be very significant if the law of the assignor's location is to be accepted, for their consequences should not be underestimated. The first aspect is about the functional and formal approaches used in the law of secured transactions. From the desire to unify the law of secured transactions across American states and encompass all types of personal property to be available as security, the functional approach has been adopted in the UCC Article 9. The scope of this legislation is thus very broad. It includes any kind of transaction that intends to

create or provide for a security interest. Compared to the formal approach where secured transactions are principally divided based on their form and given name, e.g. outright sale, mortgage or charge, each transaction is subject to a separate set of law. Adopting the functional approach in a jurisdiction where the formal approach is well-established would cause chaos and might be impossible on a global scale. 'It encourages the disregard of well-entrenched doctrinal legal difference separating different forms of legal transactions.'<sup>244</sup> No certainty or clarity would likely be reached without further difficulty via the catch-all approach of American functionalism.<sup>245</sup>

Perfection, the third-party effectiveness of assignment and priority rules are another viewpoint to be considered. Based on the UCC Article 9, filing a financial statement to an appropriate state's filing office is the key to perfecting a security interest over receivables, the result of which is to obtain a prior right in a ranking problem, according to the first-to-file rule. Nevertheless, this method will only work effectively if the filing system is formulated in the relevant jurisdiction. Article 9's filing system may work well in a multi-state context, but not in an international scenario where other jurisdictions have no compatible filing system. It will be much more costly if such a system has to be established and maintained in each and every single country universally.<sup>246</sup> Set-up costs and operating expenses are inevitable. In this line of reasoning, Article 9's choice of the assignor's location which operates closely with the filing system is unlikely to lead to uniform results in international secured transactions.

Leaving this matter to be decided by conflict of laws would therefore be much more

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<sup>244</sup> Bridge, 'The Scope and Limits of Security Interests' (n 155) 197.

<sup>245</sup> See Bridge, et al. (n 141) 574, where it has been stated that 'Functional analysis has not, however, produced clarity. On the contrary, there is a surprising level of confusion on the very question that a functionalist definition of "security" was designed to answer, i.e. what is the essence of a security interest?'

<sup>246</sup> A position supporting this analysis has been made, e.g. by a German scholar and particularly in terms of German secured transactions law. HJ Lwowski, "'Quit" Creation of Security Interests or Filing' in H Eidenmüller and EM Kieninger, *The future of secured credit in Europe* (De Gruyter 2008) 174–179; it is also an analysis used in the case of a registration requirement. Bridge, 'The Scope and Limits of Security Interests' (n 155) 188; however, for opposition to this opinion, see Sigman, 'Perfection and Priority of Security Rights' (n 163) 157–159.

appropriate. Attempting to find a better approach and more appropriate conflict-of-law rules, as seen in the European context – though a unitary harmonised approach has not yet been developed – still remains the preferred route to find a more effective solution.

## CHAPTER 5: CONFLICT OF LAWS: AN ANALYSIS

To consider the assignment of receivables as a legal mechanism of transfer, it basically entails a triangular relation among assignor, assignee and debtor. Between assignor and assignee, this is a contractual relationship created by an assignment contract. As the result of an assignment, receivables originating from the contractual relationship between assignor and debtor are transferred to the assignee. The legal issues arising from this triangular relation are categorised as contractual, and hence governed by the conflict-of-law rules for contract. Yet, this is not the end of the matter. Assignment is treated as a hybrid of contract and property.<sup>1</sup> Besides *inter partes*, the assignment has *erga omnes* or proprietary effects for the broader public. It is seen as a method of transferring title to receivables in a similar manner to transferring ownership of tangible property. Other persons outside the triangular relation are also taken into consideration. By other persons, it means third parties that are not the assignor, assignee or debtor. They are, for example, subsequent assignees, creditors and insolvency representatives of the assignor. Legal matters, first described as contractual, become the subject of property. Assignment is thus also regulated by property law and conflict-of-law rules for property. As analysed in the previous chapter, this is the property-contract approach contemporarily adopted by the conflict of laws relating to assignment in various countries and in relevant international instruments.<sup>2</sup> However, it is not the methodology that this thesis proposes.

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<sup>1</sup> A Flessner and H Verhagen, *Assignment in European private international law: claims as property and the European Commission's "Rome I Proposal"* (Sellier 2006) 2–4; M Bridge, 'The proprietary aspects of assignment and choice of law' (2009) 125 LQR 671, 677–678; K Zweigert and H Kötz, *Introduction to comparative law* (T Weir tr, 3rd rev. edn, Clarendon Press 1998) ch 33.

<sup>2</sup> See BIICL, 'Study on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person' <[http://ec.europa.eu/justice/civil/files/report\\_assignment\\_en.pdf](http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf)> accessed 9 October 2015.



As advanced in this thesis, an assignment of receivables is, in substance, a transfer of rights to claim for monetary payment. It is a method whereby rights to payment in receivables claimable against a debtor or debtors are assigned from an assignor to an assignee. It serves as a mechanism that provides and supports the free flow of this kind of intangible and marketable assets. Treating it as a transfer of rights, not as a combination of contract and property, suits it best. In the rights-based approach proposed by this thesis, assignment is handled according to its real nature. Assignment in an international case shall be treated as an international transfer of a right to payment. Conflict-of-law rules for assignment shall be formulated on this foundation, not on the property-contract mix. As will be demonstrated, difficulties and confusion, especially involving characterisation, resulting from the conflict rules based on the property-contract approach shall be resolved.

The purpose of this chapter is to reveal the logical scope, limits and necessity for a property-contract approach to assignment, as well as the interaction between property and contract in conflict of laws. This will also reveal the strengths and flaws of the connecting factors of the conflict rules for assignment. Another aim is to demonstrate what the conflict-of-law rules developed by a rights-based approach are. In doing so, the main methodology will compare and contrast conflict-of-law rules between those based on the property-contract approach and those created by the rights-based approach. The structure of this chapter is therefore divided into two main parts. The first analyses the property-contract approach. The second illustrates the rights-based approach, its application and analysis which are formulated by using hypothetical legal questions that might arise in legal practice. A discussion of the underlying principles and reasons for which the two approaches are established, including their pros and cons, is spread over both parts. Finally, the chapter ends with a summary of this study.

## 5.1 Property-contract approach

Conflict of laws principally follows on from the ground of substantive law's understanding and classification of legal categories.<sup>3</sup> A problem substantively regarded as contractual is governed by conflict of laws for contract. A problem substantively regarded as proprietary is determined by conflict of laws for property.<sup>4</sup> As a general notion, receivables – though originating from a contract – are not regarded as merely contractual rights to payment but also items of property. The assignment of receivables – though formed by a contract – is treated as not only a contractual relationship but also an assignment itself.<sup>5</sup> By the latter is meant a method for transferring proprietary rights in an intangible thing from assignor to assignee; likewise, a sale contract is to transfer the ownership of a tangible property from seller to buyer.

Regarding the conflict-of-law rules regulating an international assignment of receivables, the property-contract approach adheres to the notion that assignment is a hybrid of contract and property. The legal issues arising from assignment are categorised into contract and property. Principally, the legal issues concerning the proprietary effects of assignment between assignor and assignee, the effectiveness of assignment against third parties and priority problems are classified as proprietary, whereas other legal issues – such as assignment contracts, the relationship between assignor and assignee, and the effects of assignment against a debtor – are classified as

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<sup>3</sup> See TC Hartley, *International commercial litigation: text, cases and materials on private international law* (OUP 2009) 504–505; P Rogerson, *Collier's conflict of laws* (4th edn, CUP 2013) 267–275; *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 (Lord Hoffmann); also M Reimann 'Comparative Law and Private International Law' in M Reimann and R Zimmermann (eds), *The Oxford handbook of comparative law* (OUP 2008); FC von Savigny and WA Guthrie, *Private International Law. A treatise on the conflict of laws, and the limits of their operation in respect of place and time* (T. & T. Clark 1869).

<sup>4</sup> *Re Hoyles* [1911] 1 Ch 179 CA; *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68; see also AV Dicey, L Collins, JHC Morris, *Dicey, Morris and Collins on the conflict of laws* (15th edn, Sweet & Maxwell 2012) 1282–1285, 1893–1897 and 1354–1369.

<sup>5</sup> TC Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (2011) 60 ICLQ 29, 31; HLE Verhagen and SV Dongen, 'Cross-border assignments under Rome I' (2010) JPIL 1, 2–3.

contractual. Conflict of laws under this approach, therefore, comprises both property and contract rules. But first, to make the property-contract methodology work properly, an unavoidable problem concerns the characterisation of the contractual and proprietary nature of assignment.<sup>6</sup> This is a preliminary matter that needs to be settled before considering conflict-of-law rules. The characterisation matter is discussed in the following section. After that, possible conflict-of-law rules for contractual and proprietary matters are clarified in the second section.

### 5.1.1 Characterisation difficulties

Based on the property-contract approach, a preliminary matter that must be decided before choosing an appropriate choice-of-law rule concerns the problem of characterisation.<sup>7</sup> Is a legal matter arising out of an assignment of receivables in question contractual or proprietary?<sup>8</sup> As observed by Auld LJ in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*, solving this characterisation problem requires ‘a parallel exercise in classification of the relevant rule of law’.<sup>9</sup> Once this problem is decided, the answer will point to an appropriate conflict-of-law rule that will subsequently lead to an appropriate substantive law governing that matter. However, characterising legal matters flowing from assignment is a consequential difficulty.<sup>10</sup> While some matters can be characterised clearly enough, others are not straightforward.

On the contractual side, a receivable originates from a contract. An assignment is also formed by a contract. The former is a contract between creditor and debtor, the latter is a contract between assignor and assignee. Substantive legal issues arising from these

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<sup>6</sup> An example of a characterisation problem can be seen in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68; see also Bridge (n 1).

<sup>7</sup> Dicey, et al. (n 4) 38–43.

<sup>8</sup> Bridge (n 1) 681–687.

<sup>9</sup> [1996] 1 WLR 387, 407.

<sup>10</sup> See Bridge (n 1).

two contractual relationships are certainly contractual matters. Thus they will be governed by the conflict-of-law rules for a contract. Digging deeper into these legal issues, they are as follows:

- (a) Assignability of receivables;
- (b) Problems concerning a non-assignment clause;
- (c) Relationship between creditor (assignor) and debtor;
- (d) The requirements or conditions that a party to a contract of assignment needs to fulfil in general in order to make an assignment contractually effective or valid in the eyes of the law. This issue can be subdivided into:
  - (d1) the capacity of parties to contract;
  - (d2) formation of the contract;
  - (d3) form of the contract;
- (e) Relationship between assignor and assignee.

Other legal issues that can be stated on the contractual side, though some difficulties in a purely contractual explanation might be found, are:

- (f) Relationship between assignee and debtor;
- (g) Notice of assignment.

On the proprietary side, receivables are regarded as an object of property in which proprietary rights reside. An assignment is not only a contract, but also a way to transfer property rights in receivables, the consequence of which is invocable against third parties. Legal issues resulting from these proprietary aspects are categorised not as contractual but property-related. Legal issues typically referred to as proprietary can be described as follows:

- (h) Proprietary transfer between assignor and assignee;

- (i) Notice of assignment;
- (j) Third-party effects of assignment or, in other words, an assignee's rights against creditors or insolvency representatives of the assignor;
- (k) Priority.

To analyse the property-contract approach, the question at this stage is what criteria are employed to distinguish the legal issues set out above into contractual and proprietary. As this research examines, while some issues are distinguishable others appear confusing.

It is straightforward and certain that legal issues concerning contractual relations between parties to the contracts – either for assignment or from which assigned receivables originates – are categorised as contractual and so subject to the law of contract. For the original contract creating the assigned receivables, the legal issues concern questions of (a) assignability of receivables, (b) a non-assignment clause, and (c) relationship between creditor and debtor. The assignability of receivables is a legal matter that assures the legal existence of the receivables purported to be assigned. It depends on the law that governs the contract generating them.<sup>11</sup> A non-assignment clause is a contractual clause agreed by parties to the contract creating the assigned receivables which is also the contract that imposes the contractual relations on them. They are therefore based on the contract of the assigned receivables, hence they are governed by contract law.<sup>12</sup>

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<sup>11</sup> Besides personal contracts, such as employment contracts and contracts involving personal confidence, where the parties are an essential element, the issue of the assignability of receivables also involves the public policy of a country. In England, for instance, public salaries or pensions and rights to payment arising from divorce proceedings cannot be assigned. There is a statutory prohibition or limitation on assignment. See E Peel and GH Treitel, *The law of contract* (13th edn, Sweet & Maxwell 2011) 737–738 and 742–743; M Smith, *Law of assignment: the creation and transfer of choses in action* (OUP 2007) 314–318 and 337–340; AG Guest, *Guest on the law of assignment* (Sweet & Maxwell 2012) 147–165.

<sup>12</sup> For the issue of non-assignment clauses, there exists a range of literature supporting the overriding of a non-assignment clause, the result of which is to render such contractual prohibition ineffective. See

In the case of an assignment contract, the legal issues include questions of general legal processes and requirements, if any, to make the contract legally effective (d). They are the formation (d2), and form or other formal validities (d3) – e.g. writing, notification or registration – of the assignment contract.<sup>13</sup> The relationship resulting from the assignment as between assignor and assignee (e) is also the result of the contract. These issues are thus governed by the law of the assignment contract. An exception which is generally specified is the capacity of a party to enter into a contract (d1). For instance, under the Rome I Regulation, legal questions involving status or legal capacity are excluded.<sup>14</sup> Also, there is no rule regarding personal capacity in the Receivables Convention. This matter is left to the national choice of laws.<sup>15</sup> The reason is because legal capacity – such as that of a minor to make a contract – is not regarded as a purely contractual matter, but the legal status of a person.<sup>16</sup> Such matter should be determined by looking at a connecting factor linking to that person which shall lead to a personal law, rather than by the law of the contract. Taking an example from English law, the capacity of an individual to enter into a contract is governed by the law of his domicile or residence, or the law of the country with which the contract is most closely connected, e.g. the *lex loci actus* or the proper law of the contract.<sup>17</sup> In the case of a

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the Factoring Convention, art 6(1); the Receivables Convention, art 9; the UCC art 9, ss 9-406(d) and 9-408(a); also R Goode, 'Contractual prohibitions against assignment' (2009) 3 LMCLQ 300; NO Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' (2009) 7 JBL 650.

<sup>13</sup> See s 136(1) of the Property Act, under which a legal assignment must be in writing and a notice of assignment must be sent to the debtor.

<sup>14</sup> Arts 1(2)(a) and (f); this is also the case in the Rome Convention, see arts 1(2)(a) and (e); also JJ Fawcett, JM Carruthers and PM North, *Cheshire, North & Fawcett: private international law* (14th edn, OUP 2008) 681–682.

<sup>15</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (A/CN.9/470) para 80; SV Bazinas, 'Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade' (2001) 9 Tul J Int'l & Comp L 259, 288; this is because this matter largely depends on the public policy of a state and whether a limitation on the capacity of making an assignment of receivables should be imposed or not. See the Guide, paras 13 and 34–35.

<sup>16</sup> Dicey, et al. (n 4) 1866.

<sup>17</sup> *ibid* rule 228; *Lee v Abdy* (1886) 17 QBD 309, 312; however, it is uncertain which choice of rules is preferred more by English courts. See e.g. *Copper v Cooper* (1888) 13 App Cas 88; *Bodley Head Ltd v Flegon* [1972] 1 WLR 680; Fawcett, Carruthers and North (n 14) 750–751; Smith (n 11) 609-610; Rogerson (n 3) 320–321 and 400-401.

corporation, its capacity is governed both by its constitution, which refers to the law of the place of incorporation, and by the law of the country which governs the contract.<sup>18</sup>

Assignment also creates a kind of relation between assignee and debtor as indicated in (f), though there is no direct contractual contact between them. While the debtor is a party to the contract creating the assigned receivables, the assignee can be seen as a stranger to it. But, as a result of assignment, the assignee can become a person who has a right under the original contract between the original creditor and debtor. This is the reason why assignment is regarded as an exception to the privity of contract doctrine.<sup>19</sup> Before an assignment, a debtor holds his contractual obligation to pay his creditor, and only his creditor. After assignment, the scenario is changed. On one side, the creditor's right to payment has been transferred to an assignee. As a result, the debtor will, subject to certain conditions, receive a good discharge only by making payment to the assignee.<sup>20</sup> On the other side, the assignee does – possibly under some requirements – have the right to force the debtor to make such payment.<sup>21</sup> This is, after all, the main purpose and outcome of an assignment contract. The relation so created between assignee and debtor is an effect granted by the law of assignment. This is, of course, not a contractual kind of relationship as there is no contract between them. Perhaps a proprietary explanation is more plausible in this context. From a property viewpoint, an effect of assignment is to transfer the ownership of receivables from assignor to assignee (h).<sup>22</sup> This is why the rights of an assignee can go beyond a typical contractual reason and against a debtor subject to the assigned receivables. Despite this explanation,

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<sup>18</sup> Dicey, et al. (n 4) rule 175; Rogerson (n 3) 320.

<sup>19</sup> Bridge (n 1) 681; J Chitty and H Beale, *Chitty on contracts* (30th edn, Sweet & Maxwell: Thomson Reuters 2008) paras 18-003 and 18-077; RM Merkin, *Privity of contract: the impact of the Contracts (Rights of Third Parties) Act 1999* (LLP 2000) 21 and 39–41.

<sup>20</sup> Smith (n 11) 362–363; *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430; *Stocks v Dobson* (1853) 4 ER 411.

<sup>21</sup> G Tolhurst, *The assignment of contractual rights* (Hart 2006) 391 and 397; Guest (n 11) 61–62 and 97; Peel and Treitel (n 11) 712.

<sup>22</sup> AP Bell, *Modern law of personal property in England and Ireland* (Butterworths 1989) 4–5.

there exist conflicts in the methodology of the law of assignment under the property-contract approach. This is because the true nature of receivables as well as assignment is contractual generating and transferring contractual rights to payment in the receivables assigned.<sup>23</sup> They do not have any proprietary character. It is therefore not correct to see, or better to explain, them otherwise. If receivables really are treated as property, then assigning them from one party to another would result in a proprietary transfer from transferer to transferee. Between assignor and assignee, such proprietary transfer resulting from an assignment contract would have of the character property. This should be governed not by contractual rules but by proprietary ones. In spite of this basic background, the proprietary effect of assignment between assignor and assignee is not currently regulated by the *lex situs* of the assigned receivables or any conflict rules for property.<sup>24</sup> In the European context, it is, by contrast, governed by the law of the assignment contract. An example for this is in the Rome I Regulation, Article 14(1) and recital 38,<sup>25</sup> under which the law of assignment shall apply to the property aspects of assignment as between assignor and assignee.

When it comes to the issue of a notice of assignment, the underlying reasons of the property-contract approach are less clear. As stated under headings (g) and (i), explanations exist in terms of both contractual and proprietary perspectives.<sup>26</sup> Giving a debtor notice is the way to bring the debtor into the effectual result of the assignment. Contractually, its purpose is to tell the debtor that he will only be able to get a good

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<sup>23</sup> WW Cook, 'The Alienability of Choses in Action' (1916) 29 Harv L Rev 816, 819.

<sup>24</sup> See M Moshinsky, 'The assignment of debts in the conflict of laws' (1992) 108 LQR 591, 624, where it was suggested that 'the *lex situs* of a debt should in general govern the transfer of property in a debt between the assignor and the assignee'.

<sup>25</sup> "In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations...".

<sup>26</sup> Bridge (n 1) 688–689.



discharge by making a payment to the assignee.<sup>27</sup> After receiving notice, the debtor must account to the assignee. 'He cannot deal inconsistently with the assigned interest, for instance by making payment to the assignor.'<sup>28</sup> If he does pay the assignor he does so at his peril, since he must pay again to the assignee.<sup>29</sup> This is the contractual result of a notice. However, if the purpose of the notice requirement is to establish that 'the [receivable] assigned no longer falls with the patrimony of the assignor',<sup>30</sup> or to announce to the world at large that the receivable falls within the proprietary power of the assignee, this will support the proprietary character of the notice of assignment. In *Dearle v Hall*,<sup>31</sup> it was remarked that notice is necessary to perfect a title, the result of which is to give complete rights *in rem* and *erga omnes* effects against the world. But, it has also been stated that notice is not always necessary if the assignee is willing to trust his contractual relationship with the assignor.<sup>32</sup> Considering also the Receivables Convention, a legal rule on notification is not compelled, nor is a link to either a contractual or a proprietary explanation given.<sup>33</sup> Thus far, it is uncertain what the purpose of notification really is under the property-contract approach.

Regarding the other two issues, the third-party effectiveness of assignment (j) and priority (k), they are classified as proprietary effects of assignment. The foundation of this is that it is possible for an assignee to invoke his rights under an assignment contract against other third parties, i.e. creditors of the assignor and liquidators or other insolvency representatives of the assignor. The contractual sphere is principally limited only to relationships among parties to a contract or persons who agreed to it. Once a

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<sup>27</sup> *Stocks v Dobson* (1853) 4 ER 411; *Brice v Bannister* (1878) 3 QBD 569; *Walter & Sullivan Ltd v J Murphy & Son Ltd* [1955] 2 QB 584, 588; *Deposit Protection Board v Dalia* [1994] 2 AC 367, 381; Smith (n 11) 362-363.

<sup>28</sup> *Deposit Protection Board v Dalia* [1994] 2 AC 367, 381 (Simon Brown LJ).

<sup>29</sup> *Walter & Sullivan Ltd v J Murphy & Son Ltd* [1955] 2 QB 584, 588.

<sup>30</sup> Bridge (n 1) 689.

<sup>31</sup> (1828) 3 Russ 1, 23-24 (Plumer MR).

<sup>32</sup> *ibid* 24.

<sup>33</sup> SV Bazinas, 'Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade' (2003) 11 Tul J Int'l & Comp L 275, 284-285.

legal action can affect other third persons, such effect cannot be categorised as contractual. It is, by contrast, an *erga omnes* of the proprietary feature by which the public have to respect an owner's proprietary right, i.e. ownership, in the thing.<sup>34</sup> This is also to protect the owner's interest in that thing if other persons attempt to override it. In a case where the same receivables have been assigned more than once, an assignee can also assert his rights to compete with other assignees. This is a priority dispute, the outcome of which substantively depends on the applicable priority rule. Take for example the leading decision in *Dearle v Hall*,<sup>35</sup> the priority of competing assignments was determined by the date upon which notice of assignment of receivables was received by the debtor, and not by the principle of first in time is first in right and rank. The underlying reason for this is because a notice of assignment is required to complete the property title of an assignee in a receivable which is intangible. By way of comparison, it is equivalent to taking possession of a tangible property.<sup>36</sup> If the assignee fails to give such notice, his right is not perfected against a subsequent assignee who does not know of the prior assignment but does give notice of his assignment to the debtor. The notice thus performs a proprietary function and so is a priority factor.

### 5.1.2 Possible conflict-of-law rules

The property-contract approach ascertains that the law of assignment is a legal area where contract and property collide with and also invade each other. Rather, it makes this complex area of law far more complicated as drawing a clear line between them is not easy. This complication arises not only in the context of substantive law, but also in conflict of laws. According to the legal characterisation, a legal issue flowing from an

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<sup>34</sup> See *Dearle v Hall* (1828) 3 Russ 1; Bell (n 22) 4–5; Bridge (n 1); J Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (2010) 6 JIBFL 333.

<sup>35</sup> (1828) 3 Russ 1; see also J de Lacy, 'Reflections on the Ambit of the Rule in *Dearle v. Hall* and the Priority of Personal Property Assignments-Part One' (1999) 28 Anglo-Am L Rev. 87.

<sup>36</sup> *Dearle v Hall* (1828) 3 Russ 1, 22–24 (Plumer MR).

assignment of receivables is governed by either conflict of laws for contract or conflict of laws for property. In this section, the conflict-of-law rules based on the property-contract approach is criticised. Initially, the difficulty is not in the contractual but the proprietary aspects of assignment.

### **(1) Contractual matters**

Regarding contractual matters, either arising from a contract of assignment or involving a contract creating receivables assigned, they are less troublesome. Principally, they shall be decided by reference to the law of the contract. The doctrine of party autonomy is widely and firmly established in this context. The law chosen by the contracting parties is recognised by law and enforceable by a court hearing a dispute over a contract. In the case of an assignment contract, it is the law of assignment. Examples of this rule can be extracted from various sources of conflict of laws for contract, in general. It applies of course to assignment, in particular. The Rome I Regulation, Article 14(1), indicates that the law that applies to the contract between assignor and assignee shall govern the relationship between them. To find that applicable law, Article 3, under which the applicability of freedom of choice is guaranteed, must be consulted. According to this rule, a contract for the assignment of receivables shall be governed by the law chosen by the parties to it. Under the Receivables Convention, the same principle is imposed by Article 28. The mutual rights and obligations of assignor and assignee arising from their agreement are governed by the law chosen by them. From a national perspective, both the United States and England affirm the parties' freedom to choose a law governing their contract. They can respectively be found in Section 1-301 of the UCC and Dicey, Morris and Collins on the proper law of contract.<sup>37</sup> The English proper law of contract is a conflict of laws' fundamental principle by which the parties to an assignment contract are entitled to decide on and select what law is to apply. The

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<sup>37</sup> Dicey, et al. (n 4) 1777–1779 and rule 222.

selected law shall be applicable, provided the intention to choose such law is *bona fide* and legal.<sup>38</sup> Subject to Section 1-301 of the UCC, parties to an international assignment contract are able to choose a governing law, notwithstanding whether the assignment relates to the state or country of the law chosen or not.

Limitations or exceptions to the party-autonomy principle should also be mentioned. They are typically based on a country's general public policy and, if any, legislation. According to the Rome I Regulation, the non-derogable provisions of a country – previously called 'mandatory rules' in the Rome Convention<sup>39</sup> – will apply if all the relevant elements are located in that country.<sup>40</sup> In a case where all relevant elements are located in a member state, the parties' choice of law does not affect the application of provisions of European Community law which cannot be derogated from by agreement.<sup>41</sup> It has also been declared in the English case that an intention of the parties to select a law of contract can be affirmative if 'there is no reason for avoiding the choice on the ground of public policy'.<sup>42</sup> Also, under the UCC, the choice of law is ineffective if the application of that law would be contrary to a fundamental policy of the state or country whose law, according to the United States' conflict-of-laws principles, would govern in the absence of such choice.<sup>43</sup>

## **(2) Proprietary matters**

To choose an appropriate conflict-of-law rule for a proprietary matter arising from an assignment of receivables is much more complicated than for the contractual kind. Various connecting factors rooted in the property-contract approach are submitted.

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<sup>38</sup> *ibid* 1798–1801; see *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 299; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583, 603; *R v International Trustee* [1937] AC 500, 529; also BRAW Wright, *Legal Essays and Addresses* (The University Press 1939) 164.

<sup>39</sup> Art 3(3); Dicey, et al. (n 4) 1801–1802 and rule 224.

<sup>40</sup> Art 3(3); Rogerson (n 3) 306–307.

<sup>41</sup> Art 3(4); Rogerson (n 3) 307.

<sup>42</sup> *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 290 (Lord Wright); Dicey, et al. (n 4) rule 224

<sup>43</sup> The UCC art 9, ss 1-301 (f), (d) and (g).

Various conflict-of-law rules are proposed. Debating choices and conflicting reasons appears to be unavoidable. In this research, there are five connecting factors that will be analysed. These are *situs* of receivables, debtor's location, assignor's location, assigned claim, and assignment contract. Academically, some choices have gained support whereas others have been ignored.<sup>44</sup> Despite such controversy, some of them have been seen in current application in some jurisdictions.<sup>45</sup>

### (2.1) Law of *situs* of receivables

Having been regarded as property, a connecting factor commonly used for a tangible thing has found its way into use for an intangible thing. This connecting factor is the *situs* or physical location of a property. It is formed as a main choice of conflict-of-law rules for a tangible property – either movable or immovable. As an intangible is categorised as movable property for the purpose of conflict of laws, such a conflict rule is subsequently extended to apply to intangible things, including receivables.<sup>46</sup> The *lex situs* or the law of a country where a receivable is situate has been employed in traditional English conflict of laws as a governing law for proprietary matters of assignment.<sup>47</sup> To find the law of a country where a receivable is located, a preliminary issue is to find the location of a receivable despite the fact, in reality, no physical location exists.<sup>48</sup> Once the receivable can be placed in one country, that country's substantive law can become the applicable law.

This methodology might seem reasonable if one considers that it is based on the ground that an intangible thing should be subject to the same connecting factors and choice-of-law rules as those governing tangible things. The rationale for applying *lex situs* to

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<sup>44</sup> See BIICL (n 2) part 5.3.

<sup>45</sup> See *ibid* part 4.

<sup>46</sup> Dicey, et al. (n 4) 1282 and 1287, respectively; and BIICL (n 2) part 4.4.L.

<sup>47</sup> Dicey, et al. (n 4) rules 128–129; BIICL (n 2) 337; Rogerson (n 3) 398–399 and 404; Moshinsky (n 24).

<sup>48</sup> See *Lee v Abdy* (1886) 17 QBD 309, 312.

intangible things is the claim that ‘the *situs* is an objective and easily ascertainable’.<sup>49</sup> Third parties might reasonably find it and be able to ascertain who has the title of a property. Plus, ‘the country of *situs* has control over the property and a judgment in conflict with the *lex situs* will often be ineffective’.<sup>50</sup> This is convincing if the property with which it is dealing is land or some other tangible kind as the *situs* is attached to the place where it has its actual physical existence. But, in terms of receivables, ‘there is no universal agreement on where a receivable is located’.<sup>51</sup> To find the *situs* of receivables is thus not so easily ascertainable.

*Lex situs* is strikingly incompatible with the true nature of receivables. Unlike tangible objects, receivables have no actual physical existence and hence no physical location that one can look for. In fact, they are intangible rights to payment which are rights *in personam*. They are rights against persons who are debtors in position. Searching for the location of a receivable depends upon an assumption of where it could likely stand. Because there is no physical locality, when the *lex situs* is referred to by implication, in the end, it does not direct to any location of a receivable but instead to the location of a person, the debtor. Under English common law, a statement posed in rule 129(1) of Dicey, Morris and Collins on the conflict of laws is that ‘choses in action generally are situate in the country where they are properly recoverable or can be enforced’.<sup>52</sup> By this, in the case of a receivable, it means the country where the debtor resides.<sup>53</sup> This foundation does not match the *lex situs* rule applying to a tangible property where its location depends on where the property itself is situate. The real methodology involves, by contrast, using one connecting factor to lead to another one. The former is *lex situs*

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<sup>49</sup> Dicey, et al. (n 4) 1287.

<sup>50</sup> *ibid.*

<sup>51</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade (Addendum)* (A/CN.9/489/Add.1) para 30.

<sup>52</sup> Dicey, et al. (n 4) 1286, cited *New York life Insurance Co v Public Trustee* [1924] 2 Ch 101, 109; *Alloway v Phillips* [1980] 1 WLR 888; *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] STC 728; see also Rogerson (n 3) 398–399.

<sup>53</sup> Dicey, et al. (n 4) 1288.

and the latter is the location of debtor. Strictly speaking, this is not a location, even in an artificial way, of a receivable. It is, in fact, a personal factor of a debtor. For the reasons of recovery and enforcement of a receivable, though it is important but it does not really concern the *situs* of the receivable. It concerns rather the debtor who has an obligatory duty to pay. Adopting the *situs* as a conflict-of-law rule has therefore been considered ‘illogical, unnecessary and misleading’.<sup>54</sup> Furthermore, finding the location of receivables in practice is not always easy, particularly in the cases of assignments of future receivables and bulk assignments. In the former, the *lex situs* is unidentifiable as the receivables do not yet exist. In the latter, many laws based on the *lex situs* of each receivable are constituted and this results in complexity of the transaction if the assignee needs to comply with them all.<sup>55</sup> The reasons for *lex situs* are therefore unconvincing and impractical in this context.

## (2.2) Law of the debtor’s location

The location of a debtor subjected to an assigned receivable is another connecting factor which has been used in dealing with an international assignment of receivables. Besides being based on *lex situs*’s terminology, it is also a distinctive connecting factor by itself. In English common law, the debtor’s location is a conflict-of-law rule that has resulted from an explanation of the *lex situs* of the receivable. According to rule 129(1) of Dicey, Morris and Collins, a receivable is supposed to situate in the country where the debtor resides. This location is considered to be a place where the receivable is properly recoverable or can be enforced, since it is there where the courts generally have jurisdiction over the debtor, and the creditor can bring a legal action to enforce

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<sup>54</sup> P Rogerson, ‘The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary and Misleading’ (1990) 49 CLJ 441; see also Section 4.2.2(3).

<sup>55</sup> NO Akseli, ‘The utility and efficacy of the UN Convention on the Assignment of Receivables and the Facilitation of Credit’ in NO Akseli (ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (CUP 2013) 206.

payment.<sup>56</sup> However, this rationality has no connection with the location of a receivable. On the contrary, it is directed to the location of person who is a debtor. This is the real underlying logic for which the debtor's residence has been chosen as the *situs* of receivable. An explanation was given in *Commissioner of Stamps v Hope*: 'a [receivable], being merely a chose in action – money to be recovered from the debtor and nothing more – could have no other local existence than the personal residence of the debtor, where assets to satisfy it would presumably be'.<sup>57</sup> The law of the debtor's location is thus not a connecting factor based on the *situs* of a thing, but of a person.

Some difficulties also follow this personal connecting factor. The debtor's location may not always be easily ascertainable, particularly in the time of modern business activities where a commercial debtor tends to have more than one place of business. In a case where a debtor has residences in more than one country, a problem is which place will serve as his actual location. The rule of debtor's location needs to be clarified at this point. For example, under English law, a receivable's *situs* in this circumstance is decided as the place where the receivable would be paid in the ordinary course of business.<sup>58</sup> Moreover, this rule must be supplemented if the debtor is a corporation conducting businesses by having branches in many countries. For instance, in the case of a bank account held by a transnational bank, the decisions of the English courts have

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<sup>56</sup> This is an assumption based on the judicial power theory that might not always be true. A court may have jurisdiction over a debtor on many grounds, such as a choice of court agreement or in a case of contract the court of the place of performance, notwithstanding the residence of the debtor. See *Kwok v Estate Duty Commissioners* [1988] 1 WLR 1037 (Lord Oliver); Rogerson, 'The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary and Misleading' (n 54) 443–444, where it was pointed out that the receivable will be located at the residence of the debtor if he has only one place of residence, regardless of where else the receivable is expressed to be payable or enforceable.

<sup>57</sup> [1891] AC 476, 481 (Lord Fields); see also Rogerson, 'The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary and Misleading' (n 54) 442–443.

<sup>58</sup> *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] STC 728; see Rogerson, *Collier's conflict of laws* (n 3) 399.



been that the *situs* of the account locates at the bank's branch where the account is held.<sup>59</sup>

Another difficulty of the debtor's location and *lex situs* that also leads to the same indication – the residence of the debtor – is that a debtor's residence can change, from time to time, from country to country. It moves with the debtor. It is subject to the debtor's decision alone, and hence is unpredictable.<sup>60</sup> Further criteria are needed in order to determine which location is the decisive one. This has to be decided at a particular point in time, and perhaps every time a dispute arises over a particular receivable and debtor. Further complications are, as a consequence, added.

Moreover, the reasons why a debtor's location is considered to be a place where a receivable can be recoverable or enforceable might not always be well-established. This is because a debtor's residence is also the place where his assets are might not always be true. It is only a plausible assumption. The place where a debtor's assets are situated can be different from the debtor's residence. There might exist a situation that the debtor either has no assets in his country of residence or has many assets elsewhere. In a situation where a debtor resides in one country but his property is in another, bringing a legal action before a court of the former might not guarantee that a receivable will be recovered or a judgment can be enforced. Without any property in the country of the debtor's residence, enforcing such payment in that country seems unlikely to be useful since the creditor is unlikely to get any proceeds in the end. In a case where a debtor's assets are away from his residence, there is no explanation of why the place of assets is not submitted as the *situs* of the receivable or the debtor's location, although it is here where the receivable could be payable. Besides, a receivable may be enforceable in

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<sup>59</sup> *R v Lovitt* [1912] AC 212; *Re Russian Bank for Foreign Trade* [1924] 2 Ch 101; *Rossano v Manufacturers' Life Insurance Co.* [1963] 2 QB 352.

<sup>60</sup> Rogerson, *Collier's conflict of laws* (n 3) 399.

many places if the debtor has companies which are resident in many countries.<sup>61</sup>

Specifying the debtor's location by reason of enforcement is therefore not so persuasive.

As recently noted by the BIICL, the residence of a debtor is no longer a viable option for the connecting factor for proprietary effects of international assignments of receivables.<sup>62</sup> In contrast, it has been submitted that three connecting factors – law of assignor's location, law of assigned claim, and law of assignment – are viable solutions. They will be analysed accordingly.

### (2.3) Law of assignor's location

This is a connecting factor which has been considered by some scholars to be the best solution for the cross-border assignment of receivables.<sup>63</sup> It also gained majority support from European delegations and was incorporated into the European Commission's proposal for the Rome I Regulation, drafted in 2005.<sup>64</sup> Additionally, this factor has been adopted as the conflict-of-law rule for the proprietary effects of assignment, both by the Receivables Convention and the Guide.<sup>65</sup> So far, the assignor's location seems to be the most popular choice for the proprietary aspect of assignment.<sup>66</sup> But it has also been criticised as being 'the worst possible solution for receivables based cross-border transactions'.<sup>67</sup>

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<sup>61</sup> *ibid.*

<sup>62</sup> FG Alférez, 'Assignment of claims in the Rome I Regulation: Article 14' in F Ferrari and S Leible, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier 2009) 245–246; BIICL (n 2) 384, where it has been stated that in addition to the law of the debtor's location, the law of the place of assignment and the law of forum are regarded as non-viable options.

<sup>63</sup> HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009) 60; see also Flessner and Verhagen (n 1) ch IV.

<sup>64</sup> Proposed art 13(3).

<sup>65</sup> Respectively, arts 22 and 30 and recommendation 208.

<sup>66</sup> See also Moshinsky (n 24); THD Struycken, 'The proprietary aspects of international assignment of debts and the Rome Convention, Article 12' (1998) 3 LMCLQ 345; R Fentiman, 'Assignment and Rome I: towards a principled solution' (2010) 4 LFM 405; NO Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (Routledge 2011) ch 8.

<sup>67</sup> Flessner and Verhagen (n 1) 19; see also R Verhagen, 'A new conflict rule for securitization and other cross-border assignments: a potential threat from Europe' Institute for Law and Finance, Johann Wolfgang, Goethe-Universität, Frankfurt, Working Paper 04/2006, 3; P van der Grinten, 'Article 14 Rome I: A Political Perspective' in R Westrik and J van der Weide, *Party autonomy in international property law*

The location of an assignor, who is a creditor of assigned claims, is – as has been claimed – easily visible.<sup>68</sup> It can be determined by all third parties. Any detrimental effects on them are unlikely to be manipulated by parties to an assignment. Having said that, if this reason is only a convincing one, it is along the same lines as the law of debtor's residence. A choice between a debtor's location and an assignor's location could not be made.

In terms of the assignment of bulk receivables, the choice of an assignor's location seems to have some advantages.<sup>69</sup> It points to a single law for all receivables purported to be assigned. It suits financiers for whom it is unnecessary to examine each individual receivable. By leading to a single law, this connecting factor is also able to solve a priority dispute straightforwardly. It depends solely on the location of the assignor, regardless of the law of each assignment which probably leads to a different substantive law. The result is legal certainty and predictability for relevant people. This is a good resolution and a solid outcome. Additionally, for the assignment of future receivables where other connecting factors such as the law of assigned receivables cannot be known at the time of a contract for assignment, the law of the assignor's location can be well ascertained. With this merit, the law of the assignor's location is therefore, in terms of financial practice, the one most favoured by the factoring industry.<sup>70</sup> This is because it brings an assignor's portfolio of receivables owed by different debtors, each of which

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(Sellier 2011) 145–163; FMLC, *Issue 121: Legal Assessment of the Conversion of the Rome convention to a Community Instrument and the Provisions of the proposed Rome I Regulations* (Financial Markets Law Committee, April 2006); FMLC, *Issue 121: Suggestions for Amendments to Articles 7 and 13* (Financial Markets Law Committee, October 2006); FMLC, *Issue 137: Response to the November 2009 Ministry of Justice Discussion Paper on the effectiveness of an assignment or subrogation of a claim against third parties* (Financial Markets Law Committee, March 2010).

<sup>68</sup> Sigman and Kieninger (n 63) 60–61.

<sup>69</sup> Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 66) 258; Sigman and Kieninger (n 63) 61; Fentiman (n 66) 409; Alférez (n 62) 238–242; BIICL (n 2) 394–396.

<sup>70</sup> Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 51–52; BIICL (n 2) 394; see also F Salinger, 'International factoring and conflicts of law' (2007) 1 LFM 7.

might have its own applicable law, into a single system of law.<sup>71</sup> This choice also responds to the need of a factor to know in advance the law that shall determine the effectiveness of his rights against debtors and other third persons, and the priority problem between him and other assignees.<sup>72</sup>

Nevertheless, trying to specify the physical location of an assignor has some drawbacks. It might not be easily visible in every case. These drawbacks are comparable to those that apply to a debtor's residence. The term 'location' needs more clarity. Based on the Receivables Convention, for instance, the rules for identifying a person's location are defined in Article 5(h). The general rule is that a person is located in the country where he has his place of business. If there is more than one place, the central administration shall be referred to.<sup>73</sup> If a person does not have a place of business, reference shall be made to the habitual residence of that person. The meaning of 'location' stated in the Guide is also in this manner.<sup>74</sup> Whatever definition is specified, either a place of business or a habitual residence, it is however subject to an assignor's self-determination. It can be changed as time goes by. A time factor must therefore be imposed in order to decide what is an assignor's location at the relevant material point in time of each assignment. Another problem arises if an assignor has more than one place of residence, business or branch. Which place will be the ultimate choice, and under what rules? Uncertainty still underpins the application of an assignor's location since it largely depends upon the factual situation of each individual assignor.

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<sup>71</sup> J Perkins, 'A question of priorities: choice of law and proprietary aspects of the assignment of debts' (2008) 2 LFM 238, 239–240; Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (n 34) 335.

<sup>72</sup> See Salinger (n 70), where *Cofacredit SA v Clive Morris & Mora UK Ltd (In Liquidation)* [2006] EWHC 363 is provided as an example of this concern.

<sup>73</sup> By the central administration is meant, in other terms, the principal place of business or the main centre of interests. UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (UN Publication 2004) para 19.

<sup>74</sup> Recommendation 219.

Considering this choice further, if the law of the assignor's location were to be adopted, for example, according to the original proposal of the Rome I Regulation, it would mean that the third connecting factor hinges on legal issues arising from assignment.<sup>75</sup> And more connecting factors means further complication. The difficulties of characterisation for those legal issues and each factor will unavoidably be additional. And this will increase the transaction costs, hence it is an unpleasant option.<sup>76</sup> The result of such disadvantages, perhaps equal to the advantages, is that the law of assignor's location did not secure its place in the final text of the Rome I Regulation. Also, the Receivables Convention which upholds this conflict rule has not as yet, according to its present status, come into force.<sup>77</sup>

#### (2.4) Law of assigned receivables

Assignment is a method of transferring from assignor to assignee receivables which are claims against a debtor. These claims originate from a contractual relationship between assignor and debtor. If there are no such contractual claims, there can be no assignment. The law governing the contract creating assigned receivables, or the law of assigned claims, will have a vital role to play in the triangular relations between assignor, assignee and debtor. It is this law that gives birth to the object of the assignment. There is a strong theoretical ground for adopting this link as a primary connecting factor. Some concrete evidence can also be seen. Under the Rome I Regulation, the law of assigned receivables is already the law governing legal issues between assignee and debtor,<sup>78</sup> It has also been supported by the Financial Markets Law Committee ('FMLC')

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<sup>75</sup> See Section 4.3.3.

<sup>76</sup> Alférez (n 62) 242–243; Verhagen (n 67) 8–9; A Dickinson, 'The Law Applicable To Contracts – Uncertainty On The Horizon?' (2006) 21 JIBFL 171; BIIICL (n 2) 396–398.

<sup>77</sup> <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2001Convention\\_receivables\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables_status.html)> accessed 9 October 2015.

<sup>78</sup> Art 14(2).

and the United Kingdom to govern proprietary effects of assignment.<sup>79</sup> This choice was also adopted by the Supreme Court of Germany when deciding cases involving a proprietary effect of assignment and a priority dispute between successive assignments.<sup>80</sup>

On the positive side,<sup>81</sup> the law of assigned receivables is consistent with the principle of party autonomy. It upholds the freedom of parties to choose an applicable law for the effectiveness of an assignment against third parties. As this is also the law of the underlying contract regulating the debtor's obligations, using it to govern proprietary effects of assignment will not hinder the debtor. If other conflict rules – e.g. the law of the assignor's habitual residence – are to be applied instead, the debtor's legal position under the original contract might not be properly protected. Additionally, the law of assigned claims gives the debtor the capacity to know with certainty who owns the receivables and whom he has to pay to get a good discharge. The principle of debtor protection is the core argument made by the FMLC in order to reject the law of the assignor's habitual residence, and to support the law of the assigned claim.<sup>82</sup> Still, as far as the Rome I Regulation is concerned, this argument has been contested as an exaggerated one.<sup>83</sup> This is because the debtor receives such protection by the rule in Article 14(2) under which the debtor's obligations, including how to discharge the receivables, shall be decided by the law governing those obligations. However, if this connecting factor is to be accepted, it must correspond with Article 14(2). A good result is that legal issues concerning either the debtor or third parties would be under the same

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<sup>79</sup> See FMLC, *Issue121: Legal Assessment of the Conversion of the Rome convention to a Community Instrument and the Provisions of the proposed Rome I Regulations* (n 67); FMLC, *Issue121: Suggestions for Amendments to Articles 7 and 13* (n 67); Bridge (n 1) 673–675; van der Grinten (n 67).

<sup>80</sup> See Section 4.3.2; L Steffens, 'The New Rule on the Assignment of Rights in Rome I – The Solution to All Our Proprietary Problems? Determination of the Conflict of Laws Rule in Respect of the Proprietary Aspects of Assignment' (2006) 14 ERPL 543, 555–561.

<sup>81</sup> FMLC, *Issue 121: Legal Assessment of the Conversion of the Rome convention to a Community Instrument and the Provisions of the proposed Rome I Regulations* (n 67) 20–21; Alférez (n 62) 244; BIICL (n 2) 390–391.

<sup>82</sup> FMLC, *Issue121: Suggestions for Amendments to Articles 7 and 13* (n 67) 5–6.

<sup>83</sup> Bridge (n 1) 674–675.

law and the problem of characterisation would be avoided. Furthermore, unlike choosing one's location as a connecting factor, the law of receivables is unlikely to change.<sup>84</sup> It does not solely depend on, for instance, an assignor's decision.

From a practical perspective, unlike the factoring sector, the law of assigned claims is preferred by the securitisation industry.<sup>85</sup> Although these two types of financial business mainly focus on bulk assignments of receivables, there exist some significant differences between them.<sup>86</sup> As opposed to factoring,<sup>87</sup> doing due diligence on the assigned receivables under the applicable law of each individual receivable is necessary for securitisation. Its purpose is to consider and obtain an appropriate credit rating for securities subsequently issued.<sup>88</sup> Not doing so would adversely impact on such ratings. Adding the law of the assignor's location would add further costs to securitisation, for it requires another legal investigation based on this law.<sup>89</sup> Moreover, if the assignor's location were enforced, in cases where the assignor changes his place of business or habitual residence, this 'would make it impossible to give the kind of clean legal opinions on which the rating of the issued securities depends'.<sup>90</sup> The law applicable to the receivables is therefore a better option here.

The law of assigned receivables has, nevertheless, some negative aspects.<sup>91</sup> Perhaps, the biggest flaw is its inappropriateness for factoring markets where a bundle of receivables

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<sup>84</sup> BIICL (n 2) 390

<sup>85</sup> Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 51–52; BIICL (n 2) 388–391.

<sup>86</sup> Perkins, 'A question of priorities: choice of law and proprietary aspects of the assignment of debts' (n 71) 241–242.

<sup>87</sup> An explanation from the factoring industry is that 'assignees or factors are usually willing to do [their business] without due diligence on the underlying receivables. They account for this by discounting the receivables as collateral to spread the risk.' *ibid* 241–242.

<sup>88</sup> See also P Wood, *Law and practice of international finance* (University edn, Sweet & Maxwell 2008) chs 28–29; J Benjamin, *Financial law* (OUP 2007) ch 18.

<sup>89</sup> Perkins, 'A question of priorities: choice of law and proprietary aspects of the assignment of debts' (n 71) 241–242.

<sup>90</sup> *ibid* 241.

<sup>91</sup> Alférez (n 62) 244–245; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 66) 263–265; BIICL (n 2) 391–393.

is assigned. Each one of them might be governed by a different law. Finding and applying each individual law for every single receivable would be impractical and perhaps unfeasible. Another drawback of this choice is that it is not suitable for the assignment of a future receivable. In this case, it is a receivable that is expected to be generated by a contract that has not yet been concluded. The applicable law is thus indeterminable until the receivable purported to be assigned comes into existence. Until that time, this connecting factor will cause legal uncertainty.

From a third party's viewpoint, there is a further debate that must be entered into. Although the law of assigned receivables is more stable in character than that of the assignor's location, this does not mean that it cannot be changed. It has been remarked that the parties to assigned receivables can choose and change the applicable law.<sup>92</sup> This would render third parties subject to the choices made by contracting parties, which they cannot control. It might have an adverse effect on their rights.<sup>93</sup> However, this is again an arguable point. And it is not only the law of assigned claims that faces this kind of problem. It can also occur if the location of the assignor is applied. The fundamental ground is because the assignor's location is nowadays trumped by the freedom to choose a location or an establishment – by this, it means either a habitual residence or a place of business.<sup>94</sup> Broadly speaking, anything can change over time. The argument that third parties would be prejudiced by change is thus neither decisive nor convincing.

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<sup>92</sup> *ibid* 392–393.

<sup>93</sup> The Rome I Regulation solves this concern by stating in art 3(2) that any change in the law to be applied that is made after the conclusion of the contract shall not adversely affect the rights of third parties.

<sup>94</sup> Freedom of establishment is guaranteed by art 49 of the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union; see R Schütze, *An Introduction to European Law* (2nd edn, CUP 2015) 279–283; Poz, 'Rechtskeuze in het international zakenrecht' *Nederlands International Privaatrecht* 2001, cited in A Flessner, 'Choice of Law in International Property Law – New Encouragement from Europe' in R Westrik and J van der Weide, *Party autonomy in international property law* (Sellier 2011) 13–14.



## (2.5) Law of assignment

Moving on to another possible rule, the law of assignment is one of the most viable and favoured connecting factors for international assignments of receivables.<sup>95</sup> From a theoretical viewpoint, this connecting factor departs from the property approach to assignment. It is closer to the contract one. The law of assignment encourages the application of the party-autonomy principle.<sup>96</sup> It enables parties to an assignment to choose an applicable law to govern both contractual and proprietary aspects of an assignment. As a result, the chosen law shall govern the legal issues both between the contracting parties and those concerning third parties. But its great flexibility prompts a controversial debate. In Europe, this choice-of-law rule is adopted in practice and has strong support from the Netherlands.<sup>97</sup> The leading case is *Brandsma qq v Hansa Chemie AG* where the Dutch Supreme Court (*Hoge Raad*) determined the proprietary effect of assignment against third parties by reference to the law of the assignment contract.<sup>98</sup>

Although the principle of party autonomy is generally accepted, this position is only solid within contract areas. It is not the case when it comes to the property domain. Property rights are *erga omnes*. They can affect any third persons, and third persons must respect the owner's property rights. Contractual rights, however, do not have those effects. They create only rights *inter partes*. It follows that the law chosen by the contracting parties should govern only the contractual relationships between them. It should not be able to be extended in its scope toward third persons. To affect third persons, other law based on the property approach should be called upon. Still, as discussed earlier, the property approach which is fundamentally based on the *lex situs*

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<sup>95</sup> BIICL (n 2) 385-389; Verhagen (n 67) 10-11; Alférez (n 62) 236-238.

<sup>96</sup> See Flessner and Verhagen (n 1) ch II; H Verhagen, 'Party Autonomy and Assignment' in R Westrik and J van der Weide, *Party autonomy in international property law* (Sellier 2011).

<sup>97</sup> See BIICL (n 2); van der Grinten (n 67).

<sup>98</sup> Dated 16 May 1997; see the details in Struycken (n 66).

rule brings more problems than benefits. Its basic principle is inconsistent with the true legal nature of receivables, which are contractual rights. It is thus declared a non-viable option and likely to be abandoned.<sup>99</sup> Using the law of assignment, by contrast, will subject both contractual and proprietary aspects of assignment to a single law. The problem of characterisation could be avoided.

With regard to third parties' arguments, the counterargument is on the same basis as that of the law of assigned receivables. Freedom of choice causes a similar result to freedom of location. They both involve a personal right to choose what one thinks fit for oneself. The difference in this context is that the freedom to choose a governing law of contract is a matter of agreement between the contracting parties, i.e. assignor and assignee, whereas the freedom to choose a location is exclusively the decision of one person, i.e. the assignor or debtor. It is therefore not a strong ground for arguing that adopting the law of assignment would cause any more severe consequences for third parties' rights than those resulting from the law of the assignor's location.

On top of that, a theoretical question which has been raised is why third parties should receive special weighty concern in this area of law.<sup>100</sup> For a solvent estate, an assignor is able to dispose or transfer his property or receivables freely, though it might adversely affect his financial position and perhaps result in an unpleasant effect for his general creditors. An unsecured creditor is not granted any special treatment because he has no particular interest in any specific property of the assignor. It is not the creditor's property. The primary purpose of choosing a law for an assignment contract is to govern the relationship between assignor and assignee. It does not direct to a specific creditor. Whatever effects might or might not ensue for a creditor's position are merely a byproduct of the law chosen. If assignment really creates some severe impacts on the

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<sup>99</sup> BIIICL (n 2) 384.

<sup>100</sup> Flessner and Verhagen (n 1) 22–27 and 59–60.

financial status of the assignor at a time when he faces financial difficulties and subsequently becomes insolvent, principally, this is not within the scope of the law of assignment. It is but a legal problem subject to insolvency law. It is here that the creditor will receive highly weighty concern through legal measures of insolvency law.<sup>101</sup>

Considering financial practices further, the law of assignment could apply to assignments of future receivables and bulk assignments. It performs as well as the law of the assignor's location. Adopting this choice, which is based on party autonomy, permits each business sector to choose the most suitable applicable law for its specific needs, hence avoiding specific sectoral conflict-of-law rules and characterisation complexities.<sup>102</sup> It could therefore put an end to the controversial debate about the preferred choice of the factoring and securitisation industries.

Allowing the freedom to choose an applicable law to govern all legal aspects of assignment is, however, not perfect. Some complications deriving from the law of assignment could exist.<sup>103</sup> Firstly, this connecting factor principally depends upon a mutual intention, either expressed or implied, of the parties to a contract, i.e. assignor and assignee. In the absence of such an intention or if a choice of law has not been agreed, an extra rule needs to be imposed. It could lead to the application of a specific conflict-of-law rule which would be a default or rigid rule. The flexibility of party autonomy would be disregarded.<sup>104</sup> Secondly, another difficulty could arise if a priority dispute among competing assignees is decided by the law of assignment, since in this situation there is more than one assignment and each one is possibly subject to a

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<sup>101</sup> Such as a voidable preference, see s 239 of the Insolvency Act 1986; also R Goode and E McKendrick, *Goode on commercial law* (4th edn, Lexis Nexis 2009) 915–920.

<sup>102</sup> BIICL (n 2) 386.

<sup>103</sup> Alférez (n 62) 237–238; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 66) 265–267; BIICL (n 2) 386–387.

<sup>104</sup> An example of this principle can be seen in art 3 of the Rome I Regulation.

different choice of law. One law might lead to a result that differs from others. It is therefore difficult – or perhaps impossible – to ascertain a priority position if a single law cannot be found.<sup>105</sup> A solution to this must therefore be formulated if the law of assignment is to be applied effectively. For instance, as has been suggested, the law of subsequent assignment should determine not only the validity of that assignment, but also the assignee's position in respect of competing prior assignees.<sup>106</sup>

## **5.2 Rights-based approach**

The rights-based approach proposed by this thesis offers a new perspective on and a new approach to conflict of laws relating to the assignment of receivables. It is not based on the characteristic proposition between contract and property having been applied by the property-contract approach. It is, by contrast, found in the substantive basis of the true legal nature of assignment, i.e. a transfer of rights. As such, conflict-of-law rules under the rights-based approach shall treat an assignment of receivables in an international context as an international transfer of rights.

This section is divided into two main headings. The first will set up the general principles of the rights-based approach. It will include a comparative discussion of the rights-based approach and the property-contract approach. The second heading will consider conflict-of-law rules developed by the rights-based approach. Hypothetical legal questions regarding legal issues arising out of assignment will be studied in order to illustrate this approach thoroughly.

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<sup>105</sup> Alférez (n 62) 238; Bridge (n 1) 696–697.

<sup>106</sup> See Flessner and Verhagen (n 1) 32–36.

### 5.2.1 General principles

Receivables are intangibles. They fundamentally and significantly differ from tangible things, either movable or immovable. They have no physical existence. Their true natures are intangible rights or interests recognised by law. They are rights to claim for monetary payments resulting from contractual transactions. Regarded also as choses in action under the law, it was remarked more than a hundred years ago that they are:

...mere claims to have things (in the primary [or physical] sense) which others possess, or upon things, which others possess, or to have things or services rendered by others. They are claims which may be satisfied by acquiescence therein, but which, if disputed, can only be enforced by going to law. They are incorporeal because one who has only a claim has no thing (in the primary [or physical] sense) which he can keep safe for himself; he can only look to law for security, that is, he has a mere right.<sup>107</sup>

From a substantive view of the rights-based approach, the assignment of receivables is all about transferring, from assignor to assignee, contractual rights to payment that the assignor has against a debtor.<sup>108</sup> All the legal issues surrounding assignment involve the rights so assigned. For example, what is the content of rights in receivables that are assigned from assignor to assignee? To what extent can an assignee assert or enforce his rights in the assigned receivables against a debtor? And to what extent can an assignee invoke his right in the assigned receivables against third parties? Under the property-contract approach, these issues are regarded as either contractual or proprietary. The rights-based approach sees the purpose of

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<sup>107</sup> TC Williams, 'Property Things in Action and Copyright' (1895) 11 LQR 223, 226; also cited by Rogerson, *Collier's conflict of laws* (n 3) 454; See Smith (n 11) 24–26, where there exists a statement that '[a] chose in action is a right or interest recognised by English private law'; F Oditah, *Legal aspects of receivables financing* (Sweet & Maxwell 1991) 19–32.

<sup>108</sup> See Smith (n 11) 359–363, where transfer of the debtor's obligation to perform from the assignor to the assignee is one of the consequences and effects of an assignment; Tolhurst (n 21) 32–33; also Oditah (n 107) ch 2.

assignment being to create both internal and external effects for relevant persons. Legal issues arising out of assignment do not affect only assignor, assignee and debtor, but also third parties. To deal with them in terms of the rights-based approach, consideration must be given to these various aspects of rights that are generated among the relationships of those persons. In this way, they can be divided into three categories: (1) rights between assignor and assignee; (2) rights against debtor; (3) rights against third parties. While the first two are internal effects of assignment, the last one is an external type affecting persons outside the triangular relationship of assignment.

To illustrate the rights-based approach, a comparison to the property-contract approach must be made. A considerable difference between the property-contract approach and the rights-based approach exists in the characterisation of the assignment of receivables. While the former approaches it as a legal combination of contract and property, the latter approaches it as a unique method of transferring contractual rights. As described in the previous section,<sup>109</sup> the property-contract approach regards assignment as a hybrid of contract and property. Receivables are generated by contractual relations. They are however seen as items of property. An assignment is a contract. But it is regarded as creating proprietary effects, among assignor, assignee and debtor or even against third parties.<sup>110</sup> This is not consistent with the true legal nature of assignment. Due to this misconception, the property-contract approach is followed by characterisation difficulties between the contractual and proprietary character of assignment. To find an applicable law for assignment, one must first identify whether a legal issue arising from assignment relates to contract or property. However good the attempts to draw a line between these two legal categories, it has never been made clear. No one can guarantee

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<sup>109</sup> Section 5.1.

<sup>110</sup> See Verhagen and Dongen (n 5) 20, where it has been said that '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'.

with certainty either its result or its choice-of-law rules.<sup>111</sup> *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*<sup>112</sup> is a leading example. In this case a contractual, rather than a proprietary, approach was used to find an applicable law for a legal question once regarded as a proprietary aspect of assignment. After the case, an overview submission has been made that '[for] some purposes it may be necessary to view assignment as primarily involving an issue of contract rather than property, e.g. for private international law purposes'.<sup>113</sup>

The foundation of the rights-based approach is truly rooted in the difficulties and complexities that the property-contract approach produces. Via a proposition of the rights-based approach, where the assignment of receivables is treated as a transfer of rights, no line between contractual and proprietary character needs to be drawn. Legal issues flowing from assignment are not seen as a combination of contract and property. As an outstanding consequence, there is no characterisation problem between contract and property and no need for the legal issue of assignment first to be characterised as to whether it is a contractual or proprietary problem. It is, on the contrary, all about rights. It is a right to payment that is assigned, and thus it raises various legal issues surrounding that right. Characterisation difficulties and complexities resulting from the property-contract approach will be eliminated for the most part, if not completely.

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<sup>111</sup> See Bridge (n 1); Alférez (n 62); THD Struycken and R Stevens, 'Assignment and the Rome Convention' (2001) 118 LQR 15; Perkins, 'A question of priorities: choice of law and proprietary aspects of the assignment of debts' (n 71); Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (n 34); Fentiman (n 66); Verhagen and Dongen (n 5); Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5); BIIICL (n 2) 384.

<sup>112</sup> [2001] EWCA Civ 68.

<sup>113</sup> Tolhurst (n 21) 53 at n 122, which is also cited in Bridge (n 1) 675 at n 29.

### 5.2.2 Proposed conflict-of-law rules

In the rights-based approach, conflict of laws regulating an international assignment of receivables is about choosing a connecting factor and a subsequent governing law for a transfer of contractual rights to payment. It is not about characterising contract and property and choosing a governing law accordingly. There is no need to resort to proprietary conflict rules – such as *lex situs* – for an assignment to be dealt with. To find an appropriate applicable law for an assignment, the legal issues flowing from it are characterised on the basis of rights to the assignment and the relations between relevant persons either within or outside the triangular relationship. These persons are assignor, assignee, debtor and third parties such as creditors or insolvency representatives of the assignor. The details and rationality of conflict-of-law rules are classified into three different divisions. Principally, legal issues between assignor and assignee shall be governed by the law of assignment. Legal matters concerning a debtor shall be decided by the law of receivables assigned. Legal matters that affect third parties shall be determined by the law of rights that relates to them.

To elaborate conflict-of-law rules advanced by the rights-based approach in a much more detailed way, the legal questions arising out of an international assignment of receivables will be asked, analysed and answered. Hypothetical legal questions that might arise out of the assignment will be formulated. Various aspects concerning the triangular relationship between assignor or creditor (C), assignee (A) and debtor (D), as well as the effect of assignment on other third parties (T), will be considered. These will cover, using the words of the property-contract approach, both contractual and proprietary aspects of assignment. Outcomes of the rights-based approach will also be compared and contrasted with those that are likely to emerge from the property-contract approach.



### **(1) Relationship of rights between assignor and assignee**

An assignment of receivables is a contract between assignor and assignee.<sup>114</sup> It results in a contractual relationship comprising either rights and, if any, obligations between them. This is the *inter partes* or internal effect of assignment.<sup>115</sup> A legal issue flowing from this relation in an international circumstance needs to have a conflict rule to identify an appropriate governing law. By comparison to the property-contract approach, most of the issues are on the contractual side of assignment.

Using the rights-based approach, the legal issues in this context are as follows:

- (a) The requirements or conditions that a party to a contract of assignment needs to fulfil in general in order to make the assignment contractually effective or valid in the eyes of the law. This issue can be subdivided into:
  - (a1) the capacity of the parties to enter into the contract;
  - (a2) formation of the contract;
  - (a3) form of the contract;
- (b) Relationship between assignor and assignee;
- (c) Proprietary transfer between assignor and assignee.

Firstly, assignment is a transaction between persons, either natural or legal. It is a contract created by mutual agreement of the parties to it. The first legal matter is whether the parties, i.e. C and A, have the legal capacity to make such an assignment. This, the issue (a1), is a question of the legal status and capacity of either a natural or a legal person, which is not part of this research. As explained earlier, this issue is excluded from the scope of both the Rome I Regulation and the Receivables

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<sup>114</sup> *Wright v Wright* (1750) 22 ER 1111, 1112, where it has been stated that '[an] assignment always operates by way of agreement or contract'.

<sup>115</sup> See Tolhurst (n 21) ch 8.

Convention.<sup>116</sup> But, for the sake of completeness, the issue of capacity shall, in principle, refer to the law of person, e.g. the law of domicile or habitual residence.<sup>117</sup> Other suggestions are the law of the place of contracting and the proper law of contract.<sup>118</sup> Under English case law, for instance, it has been concluded that there is a lack of clarity.<sup>119</sup> The problem of capacity is decided either by the law of domicile or the law of the place where the contract is made.<sup>120</sup>

Secondly, for an assignment contract to be made effectively, legal questions regarding the formation and form of the contract – (a2) and (a3) – have to be considered. Rights and obligations between C and A are formulated by a contract of assignment, the purpose of which is to assign receivables from the former to the latter.<sup>121</sup> It is their mutual consent that makes the assignment happens. Such intention to assign is an essential element of the assignment to be created.<sup>122</sup> It is therefore the law of the assignment contract or the law that shall govern the contract between these two parties, C and A, that is the most appropriate choice-of-law rule.<sup>123</sup> This rule, which is based on the principle of party autonomy or freedom of contract, links to the mutual intention of the parties to the contract. According to the principle of party autonomy, C and A have a right to choose and agree on an applicable law. In principle, it is the law that is chosen by C and A, either expressly or impliedly, that shall be the governing law.<sup>124</sup> Suppose C concludes an assignment contract to transfer receivables to A, and the law of country X

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<sup>116</sup> See Section 5.1.1; the Rome I Regulation, arts 2(a) and (f); UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (n 15) para 80.

<sup>117</sup> See Rogerson, *Collier's conflict of laws* (n 3) 320–321; Dicey, et al. (n 4) rule 228.

<sup>118</sup> Fawcett, Carruthers and North (n 14) 1231–1232; Smith (n 11) 609–610; Rogerson, *Collier's conflict of laws* (n 3) 401.

<sup>119</sup> *ibid* 400.

<sup>120</sup> As these two laws coincide, there was thus no need to make a final decision. See *Lee v Abdy* (1886) 17 QBD 309; *Republic de Guatemala v Nunez* [1927] 1 KB 669 (CA).

<sup>121</sup> *Wright v Wright* (1750) 22 ER 1111, 1112; Smith (n 11) 356; Peel and Treitel (n 11) 712; E McKendrick, *Contract law: text, cases, and materials* (4th edn, OUP 2010) 338; Bridge (n 1) 681.

<sup>122</sup> Peel and Treitel (n 11) 720; Tolhurst (n 21) 32 and 44; Smith (n 11) 190–202.

<sup>123</sup> Dicey, et al. (n 4) rule 135(1)(a); art 14(1) of the Rome I Regulation.

<sup>124</sup> Dicey, et al. (n 4) rules 126(1)(a) and 202; arts 14(1) and 3 of the Rome I Regulation; Rogerson, *Collier's conflict of laws* (n 3) 302–305.

is chosen as the governing law. It is certain that, between C and A, the law of country X as the law of assignment shall govern contractual problems that might arise from the assignment contract, i.e. its formation, form and other validity.<sup>125</sup> For example, in case there is any doubt whether an assignment is done by way of outright sale or security, it is also the law of the assignment contract that shall decide this. This is because this issue substantially involves the construction of an assignment contract which depends upon the real intention of the contracting parties.<sup>126</sup> Additionally, if there exists a problem over there being any particular form of assignment contract that needs to be complied with, this issue shall be determined by reference to the law of the assignment contract.<sup>127</sup> It is this law that shall answer as to the validity – not only materially and legally, but also formally – of the assignment contract in question.<sup>128</sup> The nature of all these questions is contractual, its applicable law shall thus be the law of the assignment contract.

Thirdly, with regard to the legal effects of assignment between assignor and assignee, these are issues (b) and (c). As between C and A, the result of an assignment contract is a relationship between them. According to the property-contract approach, two kinds of relationship are created. One is contractual, the other proprietary.<sup>129</sup> But, in terms of the rights-based approach, there is only one type of relation. That is a transfer of rights in

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<sup>125</sup> *ibid* 396–397; Goode and McKendrick (n 101) 1239–1240.

<sup>126</sup> Tolhurst (n 21) 44–49; *Manchester, Sheffield and Lincolnshire Railway Co v North Central Wagon Co* (1888) 13 App Cas 554, 568 (Lord Macnaghten); *Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* [1992] BCLC 609, 615–616 (Lord Wilberforce); see also Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 66) 29–30; Peel and Treitel (n 11) 716–717; for the law of European Union, see art 14(3) of the Rome I Regulation.

<sup>127</sup> Such formality includes, for example, making the assignment contract in writing, or providing a notification of the assignment to debtor. See s 136 of the Property Act.

<sup>128</sup> Rogerson, *Collier's conflict of laws* (n 3) 402; see arts 10–12 of the Rome I Regulation where, according to art 11, another choice of conflict-of-law rules regulating formal validity is the law of the place of contracting; also art 27 of the Receivables Convention.

<sup>129</sup> Apart from being a contract, an assignment is also seen by the property-contract approach as an assignment itself. By this it means an assignment that has the effect of transferring property and proprietary rights in that property from one person to another. See Section 5.1; Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 31; Verhagen and Dongen (n 5) 2–3.

the receivables assigned. Potential legal problems concerning the legal effects of the transfer can be found as follows. Suppose an assignment contract has been made by C and A; the first question in this regard is about its legal effects between them. It is obvious that this is a contractual transaction resulting in a contractual relationship binding C and A. That relationship shall be according to the terms of the contract.<sup>130</sup> A difficult problem is the proprietary effects of the assignment. Using the words of the property-contract approach, this refers to the transfer of an item of property and also property rights from C to A.<sup>131</sup> Considering this issue as proprietary, it should thus be governed by conflict-of-law rules for property, like *lex situs* of receivables assigned.<sup>132</sup> However, this is not the current rule, especially in the context of European private international law. Subject to the Rome I Regulation, a clear statement is provided by recital 38, in that Article 14(1) which leads to the law of the assignment contract applies also to the property aspect of an assignment as between C and A.<sup>133</sup> Such recital has been posed despite the principle that this is a proprietary issue in character, the result of which is that it should fall outside the scope of the Regulation.<sup>134</sup> The property effect between C and A is, thus, regulated by the contract rule. This is one of the conflicting principles and rules in the law under the property-contract approach. According to the rights-based approach, a logical explanation is straightforward. Assignment is the transfer of a contractual right to payment. It is not property or a property right that is assigned. The question of who, in proprietary terms if it must be referred, owns that property is in fact a question of who, between C and A, has the real right to receive the payment. After an assignment contract, such right is transferred from C to A. This is

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<sup>130</sup> Tolhurst (n 21) 383.

<sup>131</sup> *ibid* 35–39 and 53–62; Flessner and Verhagen (n 1) 2–4.

<sup>132</sup> Goode and McKendrick (n 101) 1240.

<sup>133</sup> Recital 38 of the Rome I Regulation states that '[in] the context of voluntary assignment, the term "relationship" should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations'.

<sup>134</sup> Goode and McKendrick (n 101) 1240; Fentiman (n 66) 406–407; see *Brandsma qq v Hansa Chemie AG*, the Dutch Supreme Court (*Hoge Raad*), 16 May 1997.

simply the purpose and result of assignment. To consider a governing law for the legal problems concerning the effects of assignment, resorting to the assignment contract which is the source of such effects is unavoidable. These effects are all matters between C and A who are the parties to the assignment contract. Making a decision on the choice-of-law rules for these matters is thus not a difficult thing to do. It can only be the law of the assignment contract that shall govern them. It shall include the effectiveness of the assignment between C and A, notwithstanding whether it is contractual or proprietary.<sup>135</sup>

However, there cannot be an assignment if there is no object to be assigned.<sup>136</sup> Receivables or the object of assignment are another essential element of an assignment contract. However, a receivable is in itself a consequence of another contract. It is in substance a right to receive a payment subject to a contract.<sup>137</sup> The contract that originates the receivable purported to be assigned is the contract between C and D. In this consideration, there are thus two related choices of law: the law of the assignment contract and the law of the original contract creating the assigned receivable. Before making the most appropriate choice, legal questions concerning the object of assignment must be considered. Suppose C and A intend to make an assignment contract to transfer receivables that D is subject to, then, legal problems focusing on the receivables need to be investigated. More importantly, what will be the governing law for those problems? A fundamental problem concerns the legal existence of the receivables. If the original contract creating the assigned receivables is not effectively

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<sup>135</sup> See art 14(1) and recital 38 of the Rome I Regulation, where the law of assignment has also been indicated as an applicable law for the proprietary effect of assignment as between assignor and assignee; also Fentiman (n 66) 406–407; *Brandsma qq v Hansa Chemie AG*, the Dutch Supreme Court (*Hoge Raad*), 16 May 1997; art 28 of the Receivables Convention; this development is contrary to the principle of the property-contract approach where such a matter would be categorised as proprietary and governed by proprietary choice-of-law rules. Rogerson, *Collier's conflict of laws* (n 3) 397; Goode and McKendrick (n 101) 1240–1241.

<sup>136</sup> Tolhurst (n 21) 53–62 and 122; Smith (n 11) 202–203; Guest (n 11) 32; this is the case of existing or present receivables. In the case of future receivables, or receivables that arise after the conclusion of the assignment contract, see the discussion in Chapter 6, Section 6.2.1(1).

<sup>137</sup> Tolhurst (n 21) 122.

made, there will be no receivables to be assigned. If the receivables have any legal issues as to their invalidity, such as the original contract being voidable on the grounds of fraud, misrepresentation, non-discourse, duress, undue influence or any other illegalities,<sup>138</sup> it could constitute a defence that D is entitled to raise against A. This could be posted as the invalidity of the contract creating the receivables, the consequence of which could affect the enforceability of the receivables. It might lead to a result contrary to A's expectations, in that D has no obligation to pay and A has no right to be paid.<sup>139</sup> Another concern regarding receivables as the object of assignment is their legal status. The receivables purported to be assigned could, at the time of the assignment, be existing receivables or future receivables. This depends upon whether there exists a contract that originates the receivables C intends to assign to A or not.<sup>140</sup> If there are no problems with the legal existence or status of the receivables, the next concern that C and A have to consider is their assignability. On one side, the question is whether the receivables resulting from the relationship between C and D are legally prohibited from being transferred or not. Examples of this can be found in English law where personal obligations, public salaries, pensions and rights to payment arising from divorce proceedings are not transferable.<sup>141</sup> On the other side, this concern involves whether there is a contractual term in the contract between C and D that prohibits assignment of the receivables. If C assigns the receivables contrary to a non-assignment clause, it is a matter of a governing substantive law as to whether such assignment will

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<sup>138</sup> Guest (n 11) 265–267; Smith (n 11) 372–374.

<sup>139</sup> Guest (n 11) 264–269.

<sup>140</sup> *ibid* 103–109; Smith (n 11) 247–251; Tolhurst (n 21) 376–378; Peel and Treitel (n 11) 724; also *Holroyd v Marshall* (1862) 10 HLC 191; *Tailby v Officer Receiver* (1888) 13 App Cas 523; arts 8(1), 2 and 5(b) of the Receivables Convention.

<sup>141</sup> See, for instance, Social Security Administration Act 1992 s 187; Pension Schemes Act 1993 s 159; Pensions Act 1995 s 91; *Re Mirams* [1891] 1 QB 594, where an assignment of the salary of a public officer is held to be void as being against public policy; *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, where a contract for personal services is non-assignable; also Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' (n 12); Peel and Treitel (n 11) 737–738 and 742–743; Smith (n 11) 337–340 and 314–318; Guest (n 11) 147–165.

be invalidated or not.<sup>142</sup> It is the issue of a non-assignment clause written into the original contract creating the receivables assigned. To find a governing substantive law for questions relating to the object of assignment, there is just one important factor in common which is also the nub of the problem. That is, they all focus on the receivables. This is the main reason why the law that creates the receivables purported to be assigned is the most appropriate applicable law. All of the questions in this context are about how the relationships between persons who become involved with the assigned receivables, i.e. rights to receive payment, should be legally managed and regulated. It is not merely about the relationship between two parties to the assignment, but directly involves the receivables that one wants to transfer. This point includes legal matters that are subject to the law C and A are unable to agree between themselves. They, by contrast, have to accept them as they are concluded by C and D. And this includes the applicable law.

## **(2) Relationship of rights relating to the debtor**

As opposed to the property-contract approach where receivables are seen as an item of property,<sup>143</sup> the rights-based approach regards receivables as contractual rights or claims that must be asserted against a person who is subject to that right and has a contractual obligation to make payment. That person is a debtor or debtors. The purpose of a contract for the assignment of receivables is to make a transfer of those rights effective against both the debtor and third parties. In relation to the debtor, the rights assigned are contractual rights to payment claimable only against him.<sup>144</sup> To achieve the purpose of an assignment for which an assignee shall obtain a benefit of the right assigned, any receivables transferred by way of assignment must affect the debtor subject to those

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<sup>142</sup> See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (Lord Browne-Wilkinson); Guest (n 11) 135–147; Smith (n 11) 340–354; Tolhurst (n 21) 246–278; also Goode, ‘Contractual prohibitions against assignment’ (n 12); Akseli, ‘Contractual prohibitions on assignment of receivables: an English and UN perspective’ (n 12); the Receivables Convention, art 9(1).

<sup>143</sup> See Section 5.1.

<sup>144</sup> See Oditah (n 107) ch 2.

receivables. It is inevitable that this must happen to the debtor who has a contractual obligation to pay. This effect is basically that the debtor will pay for the benefit of the assignee instead of the assignor. The assignment therefore results in not only purely *inter partes* effects between assignor and assignee, but also effects on the debtor. Considering this point from a property-contract perspective, no clear distinction can be made as to whether the effects on the debtor relate to the contractual or proprietary aspects of assignment.<sup>145</sup> In terms of the rights-based approach, it is a quasi-internal effect of the assignment that extends beyond the scope of the contractual relations between assignor and assignee. This is not a proprietary effect of the assignment, but a triangular relation resulting from it. Put simply, it is the way assignment is. The rights-based approach concentrates on the object of assignment and the person subject to it. These are, respectively, the receivables and the debtor. It is contractual, not proprietary, based rules that play a significant part in this context.<sup>146</sup>

Legal issues arising from assignment in relation to the debtor can be listed as:

- (d) Assignability of receivables;
- (e) Problems concerning a non-assignment clause;
- (f) Notice of assignment;
- (g) Relationship between creditor (assignor) and debtor;
- (h) Relationship between assignee and debtor.

With regard to receivables, they are contractual rights to payment formed by a contract between C and D. Hence they shall, in terms of conflict-of-law principles, be governed

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<sup>145</sup> See also R Goode, 'Assignment Clauses in International Contracts' (2002) IBLJ 389; Guest (n 11) 62–63 and 386–466; Smith (n 11) ch 13; Bridge (n 1).

<sup>146</sup> See Tolhurst (n 21) 53–62 and ch 8(d); Guest (n 11) 1 and ch 7; Oditah (n 107) 32; Smith (n 11) ch 13; M Bridge, L Gullifer, G McMeel and S Worthington, *The law of personal property* (Sweet & Maxwell 2013) chs 27–28.



by the law of the contract creating them.<sup>147</sup> This is the law that grants them legal appearance and guarantees their legal effectiveness. Without such law, they will have no existence and will not be able to become the object of assignment. The underlying reason is that receivables are not property in a real sense. Right to payments created by contracts which are validly made in the eyes of the governing law are their only essential elements. Once those rights to payment are assigned, it is this law that shall be maintained to attach to them and follow their transfer. This is so as continuously to ascertain their legal existence. It is therefore the law of the contract that gives birth to those receivables – or, in other terms, the law of the receivables assigned, or the law of the obligations, or the law of the claims – that shall apply to legal issues concerning their substance.<sup>148</sup> This of course includes issues of assignability (d).

Regarding the debtor – the person subject to the receivables purported to be assigned – there are other legal issues that have to be considered. From a debtor's viewpoint, there are three distinguishable aspects he is concerned with. For conflict-of-laws purposes, each individual aspect can lead to a separate set of legal questions. Those three aspects are debtor and assignment, debtor and assignor, and debtor and assignee.

#### (2.1) Debtor and assignment

After an assignment has been concluded by C and A, a principal concern in the eyes of D is what impact it is likely to have on him. One important question is to whom D has to pay his debts under the receivables in order to get a good discharge. The notice of assignment given to D, issue (f), is a vital matter in this context. Taking English law as an example, as long as D has not been given notice he can fulfil his obligation by

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<sup>147</sup> See Dicey, et al. (n 4) ch 32; Rogerson, *Collier's conflict of laws* (n 3) ch 10; the Rome I Regulation, arts 3 and 14(1).

<sup>148</sup> Moshinsky (n 24) 595–596; Dicey, et al. (n 4) rule 135(1)(b); Rogerson, *Collier's conflict of laws* (n 3) 403–404; art 14(2) of the Rome I Regulation.

paying C.<sup>149</sup> After receiving notice, D can only get a good discharge by paying A. Another problem here concerns a non-assignment clause (e). If there is such a clause in the original contract, a question is whether its effect will allow D to ignore the assignment. Under the Receivables Convention, an assignment is effective between C and A irrespective of a non-assignment clause.<sup>150</sup> Although C may be liable for the breach of such a clause according to the law governing the contract, D cannot invoke violation of the non-assignment clause against A.<sup>151</sup> Under English law, the effect of a non-assignment clause is a question of the construction of the contract.<sup>152</sup> Its effect depends on how the non-assignment clause is framed by the original contract creating the receivables purported to be assigned. A non-assignment can either: firstly, not invalidate the assignment between C and A but only give rise to a claim by D against C for damages for breach of the prohibition clause; secondly, only invalidate the assignment so as to entitle D to pay the receivables to C but not impact on the sole relation made between C and A; thirdly, preclude C not only from assigning the receivables to A but also agreeing to account to A for the benefits of the original contract received from D; or fourthly, constitute a defence entitling D to terminate the original contract, refuse to make payment and claim for damages.<sup>153</sup>

## (2.2) Debtor and assignor

As for the legal issues between D and C, (g), it is certain that their relations are formed and remain based on the original contract creating the receivables. After assignment, however, further legal problems arise. Firstly, if A decides to make the assignment

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<sup>149</sup> Smith (n 11) 359–363; see *Deposit Protection Board v Dalia* [1994] 2 AC 367, 381 (Simon Brown LJ); art 17 of the Receivables Convention.

<sup>150</sup> Art 9(1).

<sup>151</sup> Art 9(2) of the Receivables Convention; UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 73) paras 27–28.

<sup>152</sup> R Goode, 'Inalienable Rights?' (1979) 42 MLR 553; Smith (n 11) 340–354.

<sup>153</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 104–105 (Lord Browne-Wilkinson).

notwithstanding the non-assignment clause specified in the original contract concluded with D, a question between C and D is if there be any consequences from doing this. According to the Receivables Convention, the question of whether D is able to ask C to answer for any liability or any remedy for a breach of contract is subject to the applicable law of the original contract.<sup>154</sup> Under English law, for example, the answer depends on the construction of the non-assignment clause. It could generally be said that D will have a right to claim damages for such a breach of contract from C.<sup>155</sup>

The next series of legal questions is about the extent to which the relationship between C and D is impacted upon by the assignment. Basically, it is certain that the relationship between C and D remains based on the original contract creating the receivables assigned.<sup>156</sup> The question, however, concerns the scope of their remaining rights and obligations under that contract. One issue is the right to modify the contract, particularly if such modification might have some negative impacts on A's rights. Considering the Receivables Convention, this issue is covered based on the factor of notification of the assignment. If a modification is concluded before notice, it will be effective against A.<sup>157</sup> By contrast, if the modification is concluded after notice, it will be ineffective – unless A consents to it, or the receivables are not fully earned by performance and either modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.<sup>158</sup> Another issue is to what extent will D be able to obtain a good discharge by paying C. The answer, again, depends on notice of the assignment. According to the Receivables Convention, D is entitled to be discharged by paying C in accordance with the original contract until he

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<sup>154</sup> Art 9.

<sup>155</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 104–105 (Lord Browne-Wilkinson); Smith (n 11) 340–354.

<sup>156</sup> Guest (n 11) 382–383.

<sup>157</sup> Art 20(1).

<sup>158</sup> Art 20(2); UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 73) para 45.

receives notice. After receiving notice, D is only discharged by paying A or as otherwise instructed.<sup>159</sup> Under English law, notice of assignment is also a decisive factor both for the problem of modifying and the question of D's right to pay C. As a general rule, it is proclaimed that 'after notice of the assignment, [D] cannot do anything to diminish the rights of [A]'.<sup>160</sup> After notice, D can neither continue to pay C nor vary the original contract to the detriment of A. Leaving the reason for notice aside, the underlying reason for this rule is because A is taking the receivables – i.e. the contractual right to receive a payment – which are vulnerable to rights and obligations under the contract creating them. This vulnerability includes the modification of that contract.<sup>161</sup> Notice of assignment is thus a way to balance the interests of D and A.

### (2.3) Debtor and assignee

More complicated legal questions concern the legal status of D and A, (h) above. A principal legal issue affecting A and D as a result of assignment is the enforceability of the assigned receivables. According to the rights-based approach, this is not a proprietary effect of assignment. It is a relationship of rights resulting from the assignment of receivables. This relationship is based on and links the assignment contract and the assigned receivables.

From A's perspective, the question is how and to what extent A can obtain or enforce the assigned receivables against D. In terms of substantive law, A certainly has a right to receive payment and any proceeds thereof from the receivables assigned to him.<sup>162</sup> A's rights are based on the extent of the assigned receivables and the obligations

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<sup>159</sup> Arts 17(1)–(2); UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 73) para 37.

<sup>160</sup> Tolhurst (n 21) 416; Smith (n 11) 375–359; see also *Roxburghe v Cox* (1881) LR 17 Ch D 520, 526; *Brice v Bannister* (1878) 3 QBD 569, 577; *The First National Bank of Chicago v The West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) (The EVELPIDIS ERA)* [1981] 1 Lloyd's Rep 54, 64.

<sup>161</sup> Tolhurst (n 21) 416–419.

<sup>162</sup> See art 14 of the Receivables Convention.

promised by D to C.<sup>163</sup> Another problem here is the method of enforcing A's rights. Under English law, for instance, in a case of legal assignment A can bring a legal action against D under his own name.<sup>164</sup> In the case of an equitable assignment, however, taking C as a joinder of A seems to be a procedural requirement.<sup>165</sup> In terms of conflict of laws, this enforcement problem depends on the governing procedural law. It is, as a matter of mandatory principle, subject to *lex fori* or the law of the court hearing the case.<sup>166</sup> It is therefore outside the scope of choosing otherwise.

Turning to D's perspective, a substantial question concerns D's legal position with respect to A. Apart from D's right to be discharged from the receivables previously discussed in (2.1), here it is about D's rights to a legal defence against A. These are the right to defence and the right to set-off. While allowing such an assignment and its impact on a debtor, it is at the same time that the principle of debtor protection is established.<sup>167</sup> This is to prevent such a debtor from a severe effect that might result from the assignment. Considering the Receivables Convention, D is entitled to raise against A all the defences and rights of set-off arising from the original contract that D could have raised in a claim against C.<sup>168</sup> Any other right of set-off could also be raised, provided that it is available at the time that a notice of assignment is received by D.<sup>169</sup> This position is, in general, similar to that of the English law of assignment where the

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<sup>163</sup> Tolhurst (n 21) 390–391.

<sup>164</sup> *ibid* 391; Guest (n 11) 61–62.

<sup>165</sup> Tolhurst (n 21) 397–402; Guest (n 11) 97–99.

<sup>166</sup> Hartley, *International commercial litigation: text, cases and materials on private international law* (n 3) 505.

<sup>167</sup> *Mulkerrins v PricewaterhouseCoopers* [2003] 1 WLR 1937, 1941–1942; G McMeel, 'The modern law of assignment: public policy and contractual restrictions on transferability' (2004) 1 LMCLQ 483, 486–488; NO Akseli, 'The principle of debtor protection under the UN Convention on the Assignment of Receivables' in S Kroll and LA Mistelis (eds), *International Arbitration and International Commercial Law: Synergy* (2011).

<sup>168</sup> Art 18(1).

<sup>169</sup> Art 18(2).

principle is that A's right is subject to equities.<sup>170</sup> According to this principle, D shall not be prejudiced by assignment. A will not be entitled to anything more than C first held. This principle also includes D's rights to defence and set-off.<sup>171</sup>

Considering (2.1), (2.2) and (2.3), investigated above, an additional problem is what the governing law is for each and every one of those legal matters. Focusing on the debtor subject to the object of assignment is the significant factor that all these problems have in common. They all involve, in various points, the debtor's rights and obligations residing in the receivables assigned. They have their roots in the original contract creating the assigned receivables. Choosing the law of receivables assigned to govern them is reasonable. This choice matches with the present rule adopted by the property-contract approach. It is the law that is imposed by both the Rome I Regulation and the Receivables Convention.<sup>172</sup> Moreover, this choice reasonably stands alongside and supports the principle of debtor protection.<sup>173</sup> Since an assignment can effectively be made by C and A without requiring D's consent,<sup>174</sup> forcing him to be subject to other laws might be seen as an unfair circumstance, particularly if the assignment is made on a non-notification basis where D might have no chance to know about the assignment.<sup>175</sup> For D to be suitably protected, standing by the law that creates the assigned receivables as the applicable law for these legal issues is an appropriate position. It offers a balance between the free assignability of receivables and protection

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<sup>170</sup> Peel and Treitel (n 11) 730; Tolhurst (n 21) ch 8(d); Smith (n 11) ch 13E; Guest (n 11) ch 7; for English cases law, see *Mangles v Dixon* (1852) 3 HLC 702, 731; *Phillips v Phillips* (1861) 45 ER 1164, 1166; *Phipps v Lovegrove* (1871) LR 16 Eq 80, 88.

<sup>171</sup> See *Roxburghe v Cox* (1881) LR 17 Ch D 520, 526 (James LJ); *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93; also Smith (n 11) 365–392; Tolhurst (n 21) 426–466.

<sup>172</sup> Respectively art 14(2) and art 29; for English common law, see Dicey, et al. (n 4) rule 135(1)(b).

<sup>173</sup> FMLC, *Issue121: Suggestions for Amendments to Articles 7 and 13* (n 67).

<sup>174</sup> *Mulkerrins v PricewaterhouseCoopers* [2003] 1 WLR 1937 (Lord Millet); *Southway Group Ltd v Wolff and Wolff* [1991] 28 ConLR 109 (Bingham LJ).

<sup>175</sup> Goode and McKendrick (n 101) 788-789; Smith (n 11) 215–218; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 66) 28.

of the debtor's legitimate rights.<sup>176</sup> This reasoning supports applying the law of the assigned receivables to legal relations as they affect D with either C or A.

Additionally, there exists a rationality which should be noted here regarding notice of assignment. Subject to the property-contract consideration, the notice requirement can be regarded as either contractual or proprietary in character.<sup>177</sup> No clear conflict-of-law rules can be set. Considering the rights-based approach where a proprietary aspect is no longer in the picture, the notice of assignment shall be regarded as contractual in character. It is an additional tool for transferring rights to payment by way of assignment. The result of notice is to affect D's legal position in connection with the receivables assigned.<sup>178</sup> The law of the assigned receivables is therefore the law that shall govern any legal matters regarding notice of assignment, e.g. whether it is legally required and what its legal effects are. It is this law that will give a debtor, in advance, background knowledge as to whether there will be a possibility that he will receive notice if an assignment is agreed, hence providing him with proper legal protection regarding his obligations.

### **(3) Relationship of rights against third parties**

The assignment of receivables creates also legal effects against third parties who are not parties to the assignment contract nor the debtor of the assigned claims. They are, for example, creditors of the assignor.<sup>179</sup> This is probably the most complicated legal aspect of assignment. According to the property-contract approach, this is where a contractual assignment of contractual receivables will be regarded as a transfer of items of property, hence being able to constitute proprietary effects *erga omnes*, the result of which is

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<sup>176</sup> McMeel (n 167) 486–488.

<sup>177</sup> Bridge (n 1) 688–689; *Dearle v Hall* (1823) 3 Russ 1, 23–24 (Plumer MR).

<sup>178</sup> Smith (n 11) 215; Bazinas, 'Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade' (n 15); UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (n 15) para 130; UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 73) paras 37.

<sup>179</sup> Guest (n 11) ch 5.

beyond the reach of the contractual domain of assignment.<sup>180</sup> This aspect is regarded by the property-contract approach as a proprietary effect of assignment.<sup>181</sup> Considering the rights-based approach, an argument to be made to the contrary is that there is no need for this effect of assignment to be resorted to for such proprietary establishment. Its logic can reasonably be found from contractual explanations on the basis of rights transferring. On this principle, the third-party effects of an assignment are the external effects of this method of transfer. For an assignment to achieve its goals, it is inevitable that the effectiveness of assignment against third parties must be established. It is for an assignee's rights, which have been intentionally and voluntarily assigned by an assignor, to be protected against any invocation of third persons, and to obtain the benefit of the receivables assigned. Rights against third parties are therefore to serve and to protect the main concept and purpose of the assignment, i.e. transferring rights effectively.<sup>182</sup>

The most challenging and problematic point of the conflict of laws regulating the assignment of receivables lie in this section. Unlike the previous two sections which limit their scope internally within the triangular relationship,<sup>183</sup> this aspect is where assignment has an external effect on the world at large. Legal issues in this context are as follows:

- (i) Third-party effects of assignment or, in other words, the assignee's rights against creditors or insolvency representatives of the assignor;
- (j) Priority.

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<sup>180</sup> See Bridge (n 1); Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (n 34); Struycken (n 65); G McCormack, *Secured credit under English and American law* (OUP 2004); *Dearle v Hall* (1828) 3 Russ 1 (Plummer MR).

<sup>181</sup> See Section 5.1; also *Dearle v Hall* (1828) 3 Russ 1; Bell (n 22) 4–5; Bridge (n 1); Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (n 34); Alférez (n 62).

<sup>182</sup> Tolhurst (n 21) 32-33; Guest (n 11) 1.

<sup>183</sup> Sections 5.2.2(1) and 5.2.2(2).



### (3.1) Effectiveness of assignment against third parties

Third parties (T) are, in principle, persons whose rights might be in conflict with the rights of A. They are, for example, creditors and insolvency representatives of C. The question of conflict of laws regarding the third-party effectiveness of assignment, (i), concerns what law shall decide whether the assignment concluded by A with C can affect T and whether A can assert his rights against T or not. According to the property-contract approach, this is a problem of distinguishing between the contractual and proprietary aspects of assignment. This is a problem of characterisation which is not easy to resolve with certainty.<sup>184</sup> It is the idea of *erga omnes* effects based on a proprietary or *in rem* right in a tangible property that is employed to offer an explanation of this effect.<sup>185</sup> The property-contract approach sees rights in assigned receivables as property rights capable of affecting anybody.<sup>186</sup> Conflict-of-law rules based on property, such as the *lex situs* of receivables and the law of a debtor's location, are thus taken into consideration. An example of this can controversially be extracted from English common law, before the arrival of European rules.<sup>187</sup> However, these two choices do not go along with the true legal nature of assignment. Later, they are strongly contested, hence they are not a viable solution at the present time.<sup>188</sup>

The rights-based approach does not see it that way. An assignment of receivables is by its very nature a transfer of contractual rights to payment, and not of property. Recognising the effectiveness of transferring the right to payment from C to A as the main purpose of an assignment, it is necessary that those rights which are assigned to A

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<sup>184</sup> See Dicey, et al. (n 4) 1355; Bridge (n 1); JM Carruthers, *The transfer of property in the conflict of laws: choice of law rules concerning Inter Vivos transfers of property* (OUP 2005) ch 6; Fawcett, Carruthers and North (n 14) 1226–1240; Bridge, et al. (n 146) 732–735; Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5).

<sup>185</sup> Tolhurst (n 21) 54–56; Fentiman (n 66) 406–409; Bridge (n 1); Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (n 34); Struycken (n 66).

<sup>186</sup> Smith (n 11) 415 and 425.

<sup>187</sup> Bridge (n 1) 691–692; Moshinsky (n 24) 591–601; Dicey, et al. (n 4) rule 129(1).

<sup>188</sup> Rogerson, 'The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary and Misleading' (n 54) 453–460; BIICL (n 2) 384.

must be vested in him effectively. He must be able to assert – against not only C but also T – that he holds the right to receive payment in the receivables assigned.<sup>189</sup> Legal protection for A’s rights has to be granted. The law needs to ensure that, on one side, A will be able to obtain the benefit of the receivables assigned to him and, on the other side, that no one else will seize or snatch it from him. Otherwise, the aim of the assignment cannot be reached. Third-party effects of assignment are indeed created by the substantive law of assignment to affirm and protect A’s rights.<sup>190</sup> In this way, the extent of A’s rights is expandable against T. This issue basically concerns the external validity of assignment. From A’s viewpoint, a question is how to make an assignment effective against T, whether any special or additional methods are required in order for him to constitute or ensure such effects. From T’s perspective, a question is the extent to which A’s rights can effectively be invoked against him. In the rights-based approach, it is the law that grants those rights to A that shall govern the matter. The next question is what is the law of the rights?

An important question prior to choosing an applicable law is where those rights come from. What is their most appropriate connecting factor that shall point to the most appropriate governing law? Based on the rights-based approach, to choose a governing law is to choose the law that governs those rights. As a matter of principle, A’s rights substantially link to the law of the assigned rights plus the legal effects created by the law of assignment. It is not merely the results of the law creating the assigned rights that constitute third-party effects by themselves. Merely contractual receivables cannot have such *erga omnes* consequences. Third-party effects are, in fact, consequential outcomes

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<sup>189</sup> Smith (n 11) 359–365; Tolhurst (n 21) 386–407; Bridge, et al. (n 146) 755–758.

<sup>190</sup> This is also true, to certain extent, even under the contemporary property-contract approach. See Guest (n 11) ch 5; Smith (n 11) ch 15; Oditah (n 107) ch 6.

of the substantive law of assignment.<sup>191</sup> Its purpose is to guarantee the external effects of assignment and to serve as one of the final goals of assignment. It is thus the law of the assignment contract that shall be the conflict-of-law rule governing this matter.<sup>192</sup> Assume that T, a creditor of C, wants to attach receivables or claims that C has over D, but the receivables have already been assigned by C to A. The question in terms of conflict of laws is which law shall determine whether A has acquired the right over those receivables, the result of which can be invoked against T. The same question also occurs where C goes bankrupt and T is instead his insolvency representative.<sup>193</sup> In the rights-based approach, this is a legal problem of whether A has taken every necessary step to make his rights assertable against T, or whether T holds an overriding right against A.<sup>194</sup> The question also arises as to whom between A and T is entitled to the receivables. The fundamental issue concerns the effectiveness of A's rights resulting from the assignment against T. It must be said that this is an effect originated by the substantive law of assignment. It is neither the law of the receivables, nor the law of C's location that grants A's rights against T.

The method of the rights-based approach corresponds to the contractual approach adopted by Mance LJ in the *Raiffeisen* case.<sup>195</sup> The difference is that Mance LJ considers this problem of whom D has to pay according to the law of receivables, though it is the same as the law of assignment. This is correct, but only in terms of D's obligations to A. It does not seem to be so when the problem concerns A and T.<sup>196</sup> The rights-based approach gives weight to the law of assignment since this is the law that

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<sup>191</sup> See Guest (n 11) ch 5; Bridge (n 1); Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (n 34); Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5).

<sup>192</sup> This proposed rule is along the same lines as Dutch conflict of laws. It is one of the solutions suggested by BIIICL. Struycken (n 66); BIIICL (n 2) 385–389 and part 4.4.H.

<sup>193</sup> Alférez (n 62) 233; Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 47–49.

<sup>194</sup> *ibid* 46–49; Bridge (n 1) 687–689.

<sup>195</sup> *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

<sup>196</sup> See Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 44–47.

stands at the core of the dispute between A's rights and T who tries to override them. If no assignment contract exists, there will be no such dispute. Additionally, the outcome of the rights-based approach corresponds to the decision of the Dutch Supreme Court in the *Hansa* case.<sup>197</sup> In this case, the law of assignment was decided on to govern the validity of an assignment, even against a third party, i.e. the liquidator of C.<sup>198</sup> But from T's perspective, the law of the assignment contract is not foreseeable until the contract has been concluded. And to know exactly what that law is, he has to resort to the assignment which is a bilateral relationship between A and C. It might therefore seem inconvenient for T to be subject to this law.<sup>199</sup> However, an account must be given of the underlying reason for this choice rather than an individual's concern. The foundation of the legal questions involving T is the external legitimacy of an assignment of receivables which generates external effects against third persons. Such effects cannot occur without resorting to and relying on the law that applies to the assignment. This is the core substance of this matter, hence it is a weighty foundation for the chosen conflict-of-law rule.<sup>200</sup> Selecting otherwise would thus be sensible.

### (3.2) Priority issues

Turning to priority issues, (j), this occurs when there is more than one assignment. To decide these issues, the problem in the conflict of laws is what law shall determine which assignees competing over assignments will have a better right over assigned receivables. If the property-contract approach is considered, this problem is again characterised as a proprietary aspect of assignment as it concerns the proprietary rights of an assignee against others.<sup>201</sup> In the rights-based approach, the method to choose a governing law for this dispute comes from the same methodology as that for third-party

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<sup>197</sup> *Brandsma qq v Hansa Chemie AG*, Judgment of 16 May 1997 in Struycken (n 66).

<sup>198</sup> Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 42–44; Struycken (n 66).

<sup>199</sup> *BIICL* (n 2) 385–389.

<sup>200</sup> See also Flessner and Verhagen (n 1) ch II.

<sup>201</sup> See Section 5.1.

effectiveness of an assignment. But, in this circumstance, there are two or more assignment contracts and each contract can be subject to a different choice of laws. There can thus be more than one substantive law of assignment to consider. However, the correct question is not how many laws of assignment there are. It is a question of what law shall decide whether the existence of a competing assignment over the same rights residing in the same receivables is possible and what the legal consequences of this are. Assignment is a method of transferring receivables by way of a contract. However many assignment contracts are made for the same receivables, each and every assignment contract is required to comply with a governing substantive law. Certainly, a prior assignment as well as a subsequent one cannot be made if there is no act or consent of C. From C's perspective, the question at the beginning is the legal possibility of subsequently making another assignment to another assignee (A2), after already assigning the same receivables to the first assignee (A1). To put it differently, does C, after the first assignment, still hold the right to assign? According to English law, for example, an assignment of receivables is considered as an exception to the property rule of *nemo dat quod non habet*, or no one gives what he does not have.<sup>202</sup> This is the reason why C can make a second assignment, despite the fact that after the first assignment he should not have anything left to assign. This is an issue of the assignability of receivables. A preliminary answer to the choice-of-law rule for the priority dispute is thus rather obvious, it is the law of the right assigned – not the law of the assignment – that should regulate this matter. It could be said that, in reverse, if this law does prohibit a second or subsequent assignment, a priority dispute will not arise.

Considering also the core substantive question of a priority dispute, it is the question of who, among competing assignees, has a prior right to receive payment for the receivables assigned. What is the legal rule that will be applied to answer this question?

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<sup>202</sup> Goode and McKendrick (n 101) 58-59; Tolhurst (n 21) 42–43.

In terms of conflict of laws, the key question is what is the governing law of the dispute. The rights-based approach classes the priority issue not as a proprietary matter but as a matter of an assignee's right to receive payment subject to the assigned receivables. This is a dispute among the assignees' rights, i.e. between A1 and A2, who has a better right?<sup>203</sup> This question is all about the assignee's right to be entitled to the interests assigned to him. These interests are the receivables which are the object of competing assignments. The law of the receivables or the law that creates the assigned receivables is the common core of this question. It is the law that governs the assigned receivables which are originally the source of the assignor's rights and the debtor's obligations and subsequently constitute the interests assigned to the assignees. It is the law that grants the assignor's right to make a subsequent assignment. It is also the law that every assignment relates to and every assignee shares in common, thus being able to provide a single answer to the question of which assignee has a prior right. It is therefore appropriate and fair to prioritise this problem to be decided by reference to this law.<sup>204</sup>

An example of this choice-of-law rule can be seen in a judgment made by the German Supreme Court (*Bundesgerichtshof*).<sup>205</sup> Based on the facts of the case, C assigned his claim to payment under a shipbuilding contract twice: first, to a supplier (A1); and then to a bank (A2). Regarding the priority issue as one of the proprietary aspects of the assignment, the Court held that the question of whom, between A1 and A2, would obtain priority over the assigned claim was governed by the law applicable to the right to which the assignment relates. This means the law of the assigned receivables. Despite

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<sup>203</sup> Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 49–51 and 54; Bridge (n 1) 687 and 689.

<sup>204</sup> This proposed rule matches one of the solutions suggested by BIICL. It is also applied and preferred by German courts and the United Kingdom. BIICL (n 2) pts 4.4.E and L; FMLC, *Issue 121: Legal Assessment of the Conversion of the Rome convention to a Community Instrument and the Provisions of the proposed Rome I Regulations* (n 67); FMLC, *Issue 121: Suggestions for Amendments to Articles 7 and 13* (n 67).

<sup>205</sup> Judgment of 20 June 1990 in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, para 49; Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (n 5) 51; BIICL (n 2) part 4.4.E; Steffens (n 80) 555–557.

the difference in approach, the decision of this case corresponds to the law proposed by the rights-based approach. Again, this is a sign demonstrating that treating an assignment as the transfer of a right to payment as its true nature does not affect the outcome of the case. The proprietary regime of the property-contract approach to conflict-of-law rules for assignment tends to make things more complicated and, as such, may not be so desirable.

### **5.3 Summary remarks**

As a general principle, the assignment of receivables is a contract purporting to transfer the right to payments against a debtor from creditor, or assignor, to assignee. It creates not only a triangular relationship among these three persons, but also has external effects invocable against third parties. This is the true legal nature and function of assignment. It is not a hybrid of contract and property. The choice-of-law rules suggested by the property-contract approach do not reflect the true legal nature of assignment. As a matter of substantive law, the rights-based approach establishes that, firstly, the gist of receivables is contractual rights to monetary payment as originated by the contract between assignor and debtor. They are contractual rights against specific persons, and not proprietary rights in specific property against the whole world. Secondly, the assignment of receivables is a transfer of those contractual rights. The result of such assignment creates three legal relationships of rights: rights between assignor and assignee, rights against debtor, and rights against third parties. As a matter of conflict of laws, conflict-of-law rules based on the rights-based approach are developed on the ground of the substantive legal nature of assignment. They are proposed on the basis of the relationships of rights arising from assignment. In the

rights-based approach, the legal issues flowing from the assignment of receivables have four main categories, and each category is governed by the following laws:

- The relationship between assignor and assignee, by the law of assignment;
- The relationship between assignee and debtor, or between assignor and debtor,

by the law that creates the assigned receivables;

- The relationship of assignee and third parties, by the law of assignment;
- Priority issues, by the law that creates the assigned receivables.

Considering also the hypothetical questions about assignment, the result this methodology achieves confirms the proposed choices for governing laws. Contract or property is not the right question and not the most appropriate way of treating an assignment. Focusing on the real substance of the legal problems arising out of assignment is more appropriate. No characterisation problem between contractual and proprietary matter arises. It leads straightforwardly to the most appropriate connecting factor, conflict-of-laws rules and solutions. This can effectively be reached via the rights-based approach, and not by the property-contract approach. To support this remark, more analysis of the rights-based approach is conducted in the next chapter.



## **CHAPTER 6: RETHINKING CONFLICT OF LAWS FOR THE ASSIGNMENT OF RECEIVABLES: THE RIGHTS-BASED APPROACH**

After considering, in the previous chapters, legal principles and explanations by way of a comparison between the property-contract approach and the rights-based approach to conflict of laws relating to the assignment of receivables, the analysis of this subject continues. The main focus in this chapter is on the rights-based approach to conflict of laws for assignment. Here, it is analysed in terms of both legal principles and legal practice. The effects or impacts that might arise from legal theories and in financial practice if this approach is to be adopted are examined. Its aim is to consider the role of conflict-of-law rules in an international context and to evaluate the advantages and disadvantages, if any, of rules based on a rights-based approach. As a consequence, it will demonstrate and provide supporting reasons why the rights-based approach should be applied to assignment, instead of the property-contract one.

To rethink conflict of laws for the assignment of receivables, this chapter is structured as three parts. The first part is an analysis of legal principles based on the rights-based approach. The second is a practical analysis of the rights-based approach. The final part draws a conclusion to the chapter.

### **6.1 Legal-principles perspective**

In terms of legal principles, the rights-based approach establishes that an assignment of receivables is a transfer of rights. By rights, it covers both the contractual and proprietary rights categorised by the property-contract approach. The rights-based approach responds to the real and substantive legal nature of assignment. It is a way to harmonise and modernise the law of assignment. Conflict-of-law rules based on the

rights-based approach can manage legal issues flowing from assignment with no characterisation difficulties between contract and property. These positive propositions are explained below.

### **6.1.1 Rights-based approach to substantive law on the assignment of receivables**

#### **(1) The rights-based approach is consistent with the legal nature of assignment**

The assignment of receivables is a method for transferring contractual rights to payments claimable against a debtor from assignor to assignee. The result of such assignment is a bundle of rights which creates both internal and external effects for relevant persons. While the internal effect is a consequence of the contractual ties between assignor, assignee and debtor, the external one which affects third persons is a special result of the law of assignment. Receivables which are the object of assignment are contractual rights or interests recognised by law and enforceable by legal action.<sup>1</sup> From a theoretical viewpoint, a receivable is an interest in a contract and not in a property.<sup>2</sup> It is a contractual right originated by a contract between creditor and debtor. Its legal existence depends upon the legal validity of such contract. Without this acknowledgement, there is no right to transfer, and hence no assignment can be formulated. Considering the legal substance of a receivable, its legal nature is nothing but a relationship involving a contractual right between persons. According to Kelsen,<sup>3</sup> this right of a creditor is merely an obligation on the other individual or individuals, i.e. a debtor or debtors. This right, in terms of a legal relationship, is merely a reflection of this obligation. ‘The “subject” in this relationship is only the obligated individual

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<sup>1</sup> M Smith, *Law of assignment: the creation and transfer of choses in action* (OUP 2007) 24–26; see also G Tolhurst, *The assignment of contractual rights* (Hart 2006) 122; TC Williams, ‘Property Things in Action and Copyright’ (1895) 11 LQR 223, 226.

<sup>2</sup> JE Penner, *The idea of property in law* (OUP 1997) 49–52.

<sup>3</sup> H Kelsen and M Knight, *Pure theory of law* (University of California Press 1967) 127.

[debtor] – the one who can violate or fulfil the obligation by his behaviour.’<sup>4</sup> It is a claim that must be asserted against a debtor, if necessary by legal action. This is a reason to explain where the English words, chose in action, come from.<sup>5</sup> A receivable is a thing that cannot be possessed. It is indeed a legally recognised right of action which ‘can only be claimed or enforced by legal action and not by taking physical possession’.<sup>6</sup>

Assigning a receivable is therefore a transfer of such rights in receivables from creditor to assignee. Assignment is a contractual method whereby the interests which are monetary payments subject to the original contract originating the receivables are transferred.<sup>7</sup> The legal recognition and existence of the assigned receivables are passed from assignor to assignee. The interest the assignee receives must conform to the legal obligations of the debtor. This is where the logic of the principle of debtor protection, or the English doctrine that the right of an assignee is subject to equities, lies.<sup>8</sup> Assignment, in this view, creates a legal interaction between debtor and assignee.

Regarding the third-party effects of assignment and the priority issue, explanations can be formed against this background. Receivables are legally protected contractual interests. As has been expressed, ‘the right of a creditor is his interests protected by the

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<sup>4</sup> *ibid*; see also WN Hohfeld, ‘Fundamental legal conceptions as applied in judicial reasoning’ (1917) 26 Yale LJ 710.

<sup>5</sup> See OR Marshall, *The assignment of choses in action* (Pitman 1950) ch 1; Smith (n 1) 16–18; AG Guest, *Guest on the law of assignment* (Sweet & Maxwell 2012) 11; LS Sealy and RJ Hooley, *Commercial law: Text, cases, and materials* (OUP 2009) 931–933.

<sup>6</sup> *Torkington v Magee* [1920] 2 KB 427, 430; see also *Colonial Bank v Whinney* [1885] 30 Ch D 261, 285; WS Holdsworth, ‘The History of the Treatment of "Choses" in Action by the Common Law’ (1920) 33 Harv L Rev 997.

<sup>7</sup> J Hall, *Comparative law and social theory* (LSUP 1963) 712.

<sup>8</sup> See NO Akseli, ‘The principle of debtor protection under the UN Convention on the Assignment of Receivables’ in S Kroll and LA Mistelis (eds), *International Arbitration and International Commercial Law: Synergy* (2011); also art 15 of the Receivables Convention; SV Bazinas, ‘Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade’ (2001) 9 Tul J Int'l & Comp L 259, 266 and 278–279; SV Bazinas, ‘Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade’ (2003) 11 Tul J Int'l & Comp L 275, 290.

legal obligation of the debtor'.<sup>9</sup> After assignment, an assignee shall receive the contractual interest formerly being in the assignor's reach. Its result is that legally protected contractual interests are transferred to the assignee. Firstly, on the same principle as for the assignor, the assignee's rights are interests which are protected by a legal obligation of the debtor. This is one of the internal effects relating to the original contract originating the assigned receivables. Secondly, the law of assignment also provides the assignee with further legal protection. His rights, if perfectly formed, shall be good against a third person such as a creditor of the assignor.<sup>10</sup> That is to say, after assignment, the title to the contractual interests no longer belongs to the assignor, hence beyond reach of his creditor, since it has been transferred to the assignee. This is outright assignment. In the case of a security assignment, the title to the contractual interests is not transferred but is used as security to give the assignee a priority right over the receivables.<sup>11</sup> As a result of assignment, the assignee acquires legal protection against anyone who attempts to override or compete with his rights. If an attempt made by a third party to contest the assignee's rights is not successful, the contractual interests over the receivables shall be securely within the assignee's reach. Decisions on the assignee's rights and their effectiveness against a third party are subject to the substantive law of assignment.<sup>12</sup> It is not the concept of property ownership, but a legal process with reasoning provided by the law of assignment.<sup>13</sup> It is not a proprietary explanation under property law that needs to be established to serve as a descriptive

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<sup>9</sup> Kelsen and Knight (n 3) 133.

<sup>10</sup> By perfectly formed, it refers to an additional step, if any, that needs to be taken to perfect the interest in the assigned receivable to make it enforceable against third parties. This step varies among legal systems. It can, for example, be notification, registration or filing. R Goode and L Gullifer, *Goode on legal problems of credit and security* (Sweet & Maxwell 2008) 107–112; NO Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (Routledge 2011) 162 and 172–198.

<sup>11</sup> F Oditah, *Legal aspects of receivables financing* (Sweet & Maxwell 1991) 32–35; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 10) 29–31; Sealy and Hooley (n 5) ch 23.

<sup>12</sup> See *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68; *Dearle v Hall* (1828) 3 Russ 1.

<sup>13</sup> See Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 10) ch 5.

taxonomy for the third-party effectiveness of assignment and the priority problem. By contrast, it is, on the one hand, the law of assignment that gives and guarantees such effectiveness and, on the other, the law of assigned rights that makes competing assignments possible.<sup>14</sup> Theoretically, the underlying purpose is to guard a legally protected contractual interest of the assignee. And this is one of the main functions of the law of assignment.

## **(2) The rights-based approach is a way to modernise and harmonise the law of assignment**

Considering an assignment of receivables as a transfer of contractual rights to payment according to its true legal nature creates an opportunity to modernise and harmonise this complex area of law once and for all. On a legal foundation, it is widely accepted that assignment is the transfer of a contractual right. Evidence of this can be seen in various transnational instruments, the purpose of which is to promote the modernisation and harmonisation of laws on assignment. In Europe, assignment is referred to by the PECL as the assignment by agreement of a right to performance (or claim) under a contract.<sup>15</sup> By the same token, under the DCFR, the term assignment of rights is used to deal with the assignment, by a contract, of a right to performance of an obligation.<sup>16</sup> Applying these established principles with reference to receivables, rights to performance are rights to the payment of receivables.<sup>17</sup> A similar foundation can also be found in an international context. The Principles use the term assignment of rights as a basis for defining and developing legal rules for the transfer by agreement from assignor to assignee of the assignor's right to payment of a monetary sum (or receivable) from an

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<sup>14</sup> Discussed in Chapter 5, Section 5.2.2(3).

<sup>15</sup> Part III, ch 11, s 1, art 11:101(1) and s 2, art 11:201(1).

<sup>16</sup> Book III, ch 5, s I, arts 5: 101-5: 102.

<sup>17</sup> See BS Markesinis, *Comparative law in the courtroom and classroom the story of the last thirty-five years*, vol. 2 (Hart 2003) 1011–1017.

obligor (or debtor).<sup>18</sup> This foundation is in line with the rule adopted in international conventions such as the Factoring Convention and the Receivables Convention.<sup>19</sup> The wording might be slightly different, but the meaning is the same. They all refer to the transfer of a right to payment of a monetary obligation.

However, it is regrettable that most of these conventions and instruments do not address anything concerning the most problematic field of assignment, i.e. the legal issues regarding the third-party effectiveness of assignment and priority. There is a clear impression of incompleteness linked to them, hence decreasing the principal solution and its practical value.<sup>20</sup> The difficulty in regulating these issues is largely due to the fact that they are classified as proprietary.<sup>21</sup> At this stage, a foundation under the property-contract approach that assignment is the transfer of property cannot be harmonisingly established at an international level. Property law elements in legal jurisdictions comprise different models and various mandatory rules. They present themselves as a harmonisation obstacle to the law of assignment.<sup>22</sup> It is not an easy task to make the property law of a jurisdiction consistent enough to support international assignment. The attempts to promote international modernisation and harmonisation of the law of assignment are, in principle, forced to end here.<sup>23</sup>

The rights-based approach proposes a different methodology. The foundation that assignment is a transfer of rights is not only a definition of assignment but its true nature. This shall not remain merely an opening statement for the law of assignment like

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<sup>18</sup> Ch 9, s 1, art 9.1.1.

<sup>19</sup> See, respectively, art 1 and art 2(a).

<sup>20</sup> M McConville and WH Chui, *Research methods for law* (EUP 2007) 972.

<sup>21</sup> TC Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (2011) 60 ICLQ 29; J Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (2010) 6 JIBFL 333; M Bridge, 'The proprietary aspects of assignment and choice of law' (2009) 125 LQR 671; M Moshinsky, 'The assignment of debts in the conflict of laws' (1992) 108 LQR 591.

<sup>22</sup> G Samuel, 'English Private Law in the Context of the Codes' in M van Hoecke and F Ost, *The harmonisation of European private law* (Hart 2000) 52–58; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 10) ch 2.

<sup>23</sup> See, for instance, P van der Grinten, 'Article 14 Rome I: A Political Perspective' in R Westrik and J van der Weide, *Party autonomy in international property law* (Sellier 2011) 145–163.

the conventions and instruments mentioned. The substantive aspects of assignment shall be classified as a transfer of rights all the way through, even when facing legal matters concerning the assignee's rights against third parties, i.e. the third-party effectiveness of assignment and priority issues. In the rights-based approach, it does not matter whether these matters are contractual or proprietary. The important thing is to have the assignee's rights against third parties established and recognised in a legal system.<sup>24</sup> This means a significant legal framework that shall support international assignments of receivables. Rights against third parties are one of the classes of rights between persons who are assignees and third parties, like an assignor's creditors and other assignees of the same receivables. They shall be treated as such, which is a departure from being seen as proprietary matters under traditional property law.

The rights-based approach brings the law of assignment into a single approach in light of the relationship of rights resulting from assignment. It creates a common methodology for the law of assignment, hence bridging the lacuna in the law of jurisdiction, the cause of which comes from the proprietary aspects of assignment, i.e. third-party effectiveness and priority issues.<sup>25</sup> By taking a substantial stand on the ground of contract law, the harmonisation of which has already made far more progress than the property area,<sup>26</sup> the rights-based approach grants an opportunity to make the law of assignment harmonisable. As a consequence, it shall support the availability of credit by way of adequately accommodating the assignment of receivables in an

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<sup>24</sup> See NB Cohen, 'Internationalizing the Law of Secured Credit: Perspectives from the US Experience' (1999) 20 U Pa J Int'l Econ L 423, 430–431.

<sup>25</sup> Buxbaum HL, 'Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform' (2003) 8 ULR 321; Goode R, 'Harmonised Modernisation of the Law Governing Secured Transactions: General-Sectorial, Global-Regional – An Overview' (2003) 8 ULR 341.

<sup>26</sup> Bridge (n 21) 688; Samuel (n 22) 52; E McKendrick, 'Harmonisation of European Contract Law: The State We Are In' in S Vogenauer and S Weatherill, *The harmonisation of European contract law: implications for European private law, business and legal practice* (Hart 2006) 5–29.

international context.<sup>27</sup> The rights-based approach is the way to achieve this ultimate goal.

## **6.1.2 Rights-based approach to conflict of laws for the assignment of receivables**

### **(1) The rights-based approach is a way to solve the characterisation difficulties of assignment**

Characterisation is part of the conflict of law's legal methodology. Its function is to classify and allocate a question raised by the facts of a given case to an appropriate juridical concept or legal category.<sup>28</sup> The object of this process is to reveal relevant conflict-of-law rules.<sup>29</sup> In applying it, the property-contract approach requires a question raised by the assignment of receivables to be classified as either contract or property.<sup>30</sup> This application leads to further complications where a clear answer cannot be provided since a line between contract and property cannot be clearly drawn. Uncertainty in characterising the legal issues arising out of the assignment is thus a negative outcome. A leading and concrete example can be seen in the debate surrounding the decision of Mance LJ in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*.<sup>31</sup> It is here that a legal question of assignment formerly regarded as proprietary was recharacterised as being within the contractual category.<sup>32</sup> That question involves the validity of an assignment and the right of an assignee as it affects a third party – creditor of the assignor. A consequence of the property-contract approach is that no one can

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<sup>27</sup> See Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 10) ch 2; NO Akseli, 'International harmonisation of credit and security laws: the way forward' in M Andenas and CB Andersen, *The theory and practice of harmonisation* (Edward Elgar 2012) 553–557.

<sup>28</sup> *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 WLR 387; see also AV Dicey, L Collins, JHC Morris, *Dicey, Morris and Collins on the conflict of laws* (15th edn, Sweet & Maxwell 2012) 38–43; JJ Fawcett, JM Carruthers and PM North, *Cheshire, North & Fawcett: private international law* (14th edn, OUP 2008) 41–50; P Rogerson, *Collier's conflict of laws* (4th edn, CUP 2013) 267–277.

<sup>29</sup> Fawcett, Carruthers and North (n 28) 42.

<sup>30</sup> See Dicey, et al. (n 28) 1356–1357; Bridge (n 21).

<sup>31</sup> [2001] EWCA Civ 68.

<sup>32</sup> Bridge (n 21) 678–681 and 687–692.



predict how a court will proceed in the future. Will it be contract or property rules that will be applied by a court hearing a case? Will it be similar to or different from the understanding of the parties to an assignment? This creates a recharacterisation risk in conflict of laws.<sup>33</sup> As has been submitted, ‘rules are important [in] so far as they help you to predict what judges will do. That is their importance.’<sup>34</sup> So, what function and purpose does the rule of characterisation serve if it is neither certain nor predictable.

Aiming to resolve such complication and create certainty and predictability, the rights-based approach proposes fully to unite the contractual and proprietary character of assignment as the transfer of a contractual right to payment. An assignment of receivables is all along a transfer of intangible rights. It is not a hybrid of contract and property. The things transferred by way of assignment are only legal existences, and hence only capable of legal movement.<sup>35</sup> Their legal existence is a contractual right to payment, and their legal movement is an assignment. This is not a physical movement of physical property. Legal issues flowing from assignment direct towards and gather around the transfer of contractual rights, not a combination of contractual and proprietary rights. This is the core concept of the rights-based approach. In it, any questions flowing from assignment shall be combined and classified as a problem of transferring a contractual right to payment, the effectiveness of which is capable of affecting not only contracting parties but also related third persons. This is a new legal concept of assignment which is based on the true legal nature of assignment itself. Characterisation between contract and property is unnecessary here. The difficulties arising from it shall be disappeared. The rights-based approach is therefore a

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<sup>33</sup> See Rogerson (n 28) 267–277; J Benjamin, *Financial law* (OUP 2007) 134–135; J Benjamin, ‘Recharacterisation risk and conflict of laws’ (1997) 12 *BJIBFL* 513.

<sup>34</sup> KN Llewellyn, *The bramble bush: on our law and its study* (Oceana Publications 1960) 14; also cited in HLA Hart, J Raz and PA Bulloch, *The concept of law* (3rd edn, OUP 2012) 139.

<sup>35</sup> RH Graveson, *Conflict of laws: private international law* (7th edn, Sweet & Maxwell 1974) 469–470; JM Carruthers, *The transfer of property in the conflict of laws: choice of law rules concerning Inter Vivos transfers of property* (OUP 2005) 144.

methodology that solves the characterisation complexities of conflict of law relating to assignment.

**(2) The rights-based approach is appropriate for legal problems arising out of assignment**

Conflict of laws functions as a legal methodology to find an appropriate governing law for an international transaction. Technically, it imposes a connecting factor found by a natural connection between a factual situation and a particular system of law.<sup>36</sup> A connecting factor, in other words, functions as a signpost when resolving a conflict of laws by pointing to an appropriate substantive law. For an international assignment of receivables, the rights-based approach is a new way of imposing a connecting factor and justifying it based on the true legal nature of assignment.

The rights-based approach regards an assignment as the transfer of contractual rights to payment against a person (debtor) from one person (assignor or creditor) to another person (assignee). A legal issue resulting from assignment shall be categorised based on the relationship of relevant persons and the receivables assigned. This process shall determine whether that legal issue is an internal or external effect of the assignment. All that someone facing a legal issue of assignment has to do is identify it as a legal relationship of rights between relevant persons. A connecting factor is established accordingly. This method shall reveal a connection between the factual situation of a particular case and a particular governing law.

For the internal effects of assignment, problems concerning the validity of an assignment, as between assignor and assignee, shall be governed by the law of the assignment contract. Since this is the law that transfers receivables from the former to the latter, it shall decide legal issues arising out of the relationship between them. Problems that relate to the relationship between assignor and debtor shall be resolved by

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<sup>36</sup> Fawcett, Carruthers and North (n 28) 42; see also Dicey, et al. (n 28) 33–36; Rogerson (n 28) 266–267.

reference to the law of the contract between them. If the legal problem concerns an assignee's rights against a debtor, a connecting factor that these two persons have in common and that links them together is the law of the contract that creates the assigned receivables. The legal issue between them shall thus be determined by this law.

For external effects of assignment that concern legal problems regarding the third-party effectiveness of assignment and priority issues, an appropriate connecting factor draws on the interaction between relevant persons. The effectiveness of assignment against a third party, such as a creditor of the assignor, is created by the law that grants the external validity of the assignment. It is this law that results in a conflicting connection between the assignee and third parties. The law of the assignment contract shall thus be the applicable law. In the case of a priority question among competing assignees, there is only one factor that links them all together. That is the assigned receivables. In the rights-based approach, it is the law of the assigned receivables that shall apply to a question of who will have a prior right over the receivables assigned to them. This law shall answer a priority problem among the assignees.

If the property-contract approach is considered, the legal issues arising from assignment must be first classified into property and contract categories. A connecting factor is found in each category. For instance, a proprietary issue would be decided by the law of *lex situs* of the assigned receivables, or the law of the debtor's or assignor's location, or even by the law of assignment; a contractual issue, by contrast, would be decided by the law of the assigned receivables or the law of assignment.<sup>37</sup> Here again is where this approach largely relies on the characterisation of property and contract methodology.

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<sup>37</sup> See Carruthers (n 35) ch 6; Dicey, et al. (n 28) rule 135; Fawcett, Carruthers and North (n 28) ch 30; Rogerson (n 28) 396–405; THD Struycken, 'The proprietary aspects of international assignment of debts and the Rome Convention, Article 12' (1998) 3 LMCLQ 345; Bridge (n 21); Hartley (n 21); BIICL, 'Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person' <[http://ec.europa.eu/justice/civil/files/report\\_assignment\\_en.pdf](http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf)> accessed 9 October 2015.

The result of this, as analysed under the previous heading,<sup>38</sup> creates further difficulties in the conflict-of-law rules regulating assignment. In contrast, characterising the legal matters of an assignment by identifying a legal relationship between relevant persons provides a clear and certain answer. It eliminates the characterisation difficulties resulting from the property-contract approach. This method is also in line with the true legal nature of assignment which is the transfer of a right against a person from one person to another, which as a result has a legal effect on a third party. The rights-based approach is therefore more appropriate for delivering an applicable law for a legal problem of an assignment rather than one that characterises it into proprietary and contractual matters. It points to the law of the assignment contract and the law of the assigned receivables which are the same laws currently applicable, for example, under the Rome I Regulation, Article 14. All that needs to be done is to ascertain that these choice-of-law rules could govern every aspect of assignment, notwithstanding that that aspect might be classified as proprietary by a member state's law. To apply this approach in the context of European Union, only a clear indication based on the rights-based approach has to be added on.

## **6.2 Legal-practice perspective**

In terms of legal practice, the rights-based approach is one that sees the assignment of receivables in the overall picture of the circulation of a right to payment which is an asset in financial practice. It responds to both financial transactions and financial businesses in which the law of assignment of receivables is utilised. Both an assignment of future receivables and bulk assignments of receivables can operate through this approach. Business practices are not undermined but clarified and supported by the rights-based approach. The positive prospects are examined below.

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<sup>38</sup> Section 6.1.2(1).

## 6.2.1 Rights-based approach to receivables financing transactions

### (1) The rights-based approach can deal with the assignment of future receivables

The term ‘future receivable’ is generally defined by the Receivables Convention as ‘a receivable that arises after conclusion of the contract of assignment’.<sup>39</sup> Article 8 of this Convention seeks to ensure that an assignment is not ineffective merely on the ground that it is an assignment of future receivables. The underlying policy is to set aside the legal limitations that a jurisdiction might have with respect to the assignability of future receivables.<sup>40</sup> Allowing the assignment of future receivables varies among jurisdictions. If it is permitted, its governing rules still vary among those jurisdictions. The fundamental ground of this problem lies in the approach a jurisdiction uses to deal with this type of receivable. A problematic approach is that of property-contract. As a matter of property law, the effectiveness of an assignment of future receivables is not recognised by all legal systems.<sup>41</sup> This is simply because ‘future property cannot be assigned for the simple reason that there is nothing to assign’.<sup>42</sup> For instance, while English law regards it in equity as an agreement to assign which must be supported by consideration, German law generally allows it, but the situation in France and the Netherlands seems to be somewhat unclear.<sup>43</sup>

Subject to the rights-based approach, an assignment of future receivables is an assignment of future rights to claim for payment. Compared with the property-contract

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<sup>39</sup> Art 5(b).

<sup>40</sup> UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (UN Publication 2004) para 26.

<sup>41</sup> UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (A/CN.9/470) para 83.

<sup>42</sup> M Bridge, ‘England and Wales’ in HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009) 153.

<sup>43</sup> See, respectively, *ibid* 153–156; JK Rakob, ‘Germany’ 98–102, J Leavy, ‘France’ 125–127 and S Timmermann and M Veder, ‘Netherlands’ 203–204 in HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009); also BIICL (n 37) part 4.4.

approach, it is not a future property that is assigned. The object that is assigned is, by contrast, a right to payment under a contract expected to be made and claimable in the future. This differs from a present right to future performance, in that the former is based on a contract not yet concluded whereas the latter comes from an already concluded contract. Future rights are, in other words, an expectancy that is purported to be assigned.<sup>44</sup> Strictly speaking, under the rights-based approach, an assignment of a future receivable is a transaction whereby an assignor promises to assign his future rights to an assignee. As a result, it creates an assignor's obligation to uphold such promise for an assignee's rights under the assignment contract. Legally speaking, it is not a mere hope that is purported to be assigned. The assignor is bound by the assignment to perform an act that shall result in the receivables purported to be assigned being assigned. The future rights of the assignor are, as a matter of fact, grounded in his current going-concern business which subsequently becomes his present obligation bond by the assignment contract. Without such business, this legal topic could not have been raised. Considering the assignee's part in terms of contractual practice, this is what the assignee bargains for and so agrees to the future turn of events. Here is where and why the assignment contract is made before the conclusion of the contract creating receivables. In this line of reasoning, a purported present assignment of sufficiently identifiable future rights to payment shall therefore be treated as an agreement to assign. This is not an assignment of what one does not yet have but a method whereby one can agree to assign what one will acquire in the future. By being sufficiently identifiable, it means that those receivables can be identified as receivables to which the assignment relates at the time of conclusion of the original contract.<sup>45</sup> As long as the scope of receivables is agreed between assignor and assignee, and the assignment contract is

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<sup>44</sup> See Smith (n 1) 28–34; Oditha (n 11) 27–32; Bridge, 'England and Wales' (n 42) 153–154.

<sup>45</sup> See art 8 of the Receivables Convention; also UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 40) para 26.

linked to it, the assignment of future receivables shall be effective.<sup>46</sup> It shall be given automatic effect as soon as the future rights come into existence. This explanation is consistent with the English legal system, but without referring to the proprietary part.<sup>47</sup> It is an approach to future receivables assignment that can be adopted in jurisdictions, notwithstanding their mandatory property rules.

Regarding conflict of laws for the assignment of future receivables, the legal questions which must be asked in order to find a governing law are: firstly, how a receivable is considered to be a future one; secondly, whether a future receivable may be assigned; and thirdly, are there any requirements to make the assignment effective. According to the rights-based approach, where a legal question is considered based on the legal relation of rights between persons, an applicable law for each of those legal questions is as follows. For the first question of what a future receivable is and the second question of assignability, it is unavoidable to state that they involve a contractual relationship that will be formed in the future between an assignor and his debtor. Since they concern the legal existence of the receivable, they shall be governed by the law of the contract creating it. This choice, as has been claimed, might lead to a problem in a situation where a contract creating such a receivable has not yet been concluded, as determining its governing law might be improbable.<sup>48</sup> However, this concern is not always the case, nor the real problem. As a matter of practice, the assignment of a future receivable is a transaction that is based on an ongoing relationship of the assignor's business, which is foreseeable to a certain extent. As a matter of law, a typical requirement is that that future receivable to which the assignment relates must, at least, be sufficiently

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<sup>46</sup> See the Guide, para 105; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 10) 140–146.

<sup>47</sup> See M Bridge, L Gullifer, G McMeel and S Worthington, *The law of personal property* (Sweet & Maxwell 2013) 786; *Holroyd v Marshall* (1862) 10 HLC 191; *Tailby v Official Receiver* (1888) 13 App Cas 523; Oditah (n 11) 27–32; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 10) 141–142; Guest (n 5) 6–10; Sealy and Hooley (n 5) 1028–1033.

<sup>48</sup> BIICL (n 37) 391.

identifiable once it arises.<sup>49</sup> A future receivable purported to be assigned as well as its applicable law is therefore not insufficiently unforeseeable. They will be revealed with certainty when that receivable comes into existence. After the conclusion of an assignment contract, the assignor is bound by it. One of his implied obligations is to conclude a contract that will bring the future receivable purported to be assigned into legal existence. If not, he must answer to the assignee. From the assignee's viewpoint, this is what he transacts for. It is the risk he knows in advance, yet consents to bear. Moreover, according to the freedom of contract principle, there is no prohibition if the assignor and the assignee will contract a term agreeing in advance that when the assignor concludes a contract with his debtor what the choice of an applicable law will be. Sending legal matters concerning the assignment of a future receivable to be decided by any other law is thus not really a way out. Finally, for the third question about any requirements for the assignment of future receivables, this is a question that directs to the legal relationship between assignor and assignee. It also covers the consequences of assignment with regard to the assignee's rights and third parties. As such, they shall be decided by reference to: for the requirements and the third-party effectiveness of assignment, the law of the assignment contract; and for priority issues, the law of the contract originating the receivables assigned.

If a future receivable is to be assigned, it is impossible to deny that it shall depend on the law that creates the receivable and the law of the assignment contract. Contrary to this, choosing the law of the assignor's location, as is frequently suggested by the property-contract approach, might be useful in this regard,<sup>50</sup> but it is unsound and inconsistent with the legal logic of the substantive law of assignment. It seems that this choice is particularly relied on at the end if other choices look unpleasant and is done

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<sup>49</sup> See the legal requirement for an assignment of future receivables imposed by the Receivables Convention, art 8; various national reports in HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009); BIICL (n 37) part 4.4.

<sup>50</sup> Sigman and Kieninger (n 49) 61; BIICL (n 37) 395.



solely to please financial practices such as factoring.<sup>51</sup> It does not represent the true legal relations surrounding the assignment, nor answer all the questions relating to it. The problems of assignment will remain unsolved. It is therefore not easy to reach wide acceptance. The rights-based approach reasonably ensures that an assignment of future receivables is legally effective. With some resolvable difficulties, it supports future receivables financing in practice. Additionally, by applying the rights-based approach, it leads to a choice that does not differ from the case of an assignment of existing receivables. Distinctive treatment will not be required. Consistency and the uniformity of conflict-of-law rules regulating the assignment shall be a foreseeable outcome.

## **(2) The rights-based approach can cope with bulk assignments of receivables**

The assignment of a single receivable can be simply conducted in general but, in financial practices, receivables are often traded in bulk, as when loans are securitised, or consumer receivables are sold to a factor.<sup>52</sup> Bulk assignments of receivables are a transaction whereby two or more separate receivables, either existing or future, are put together in one assignment.<sup>53</sup> This is a situation where bundled receivables are transferred. Article 8 of the Receivables Convention is imposed to ensure that an assignment is not ineffective merely on the ground that it is an assignment of more than one receivable. In the same manner as for future receivables, this is because the effectiveness of bulk assignments, as a matter of property law, is not recognised in all legal systems. The policy behind the Convention is to promote the validity of the assignment of bundled receivables.<sup>54</sup>

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<sup>51</sup> *ibid* 394.

<sup>52</sup> R Fentiman, 'Trading Debts Across Borders: A European Solution?' (2010) 17 *IJGLS* 245, 264.

<sup>53</sup> Hartley (n 21) 53; see art 8 of the Receivables Convention; also UNCITRAL, *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade* (n 40) paras 3 and 26.

<sup>54</sup> *ibid*; UNCITRAL, *Receivables Financing: Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade* (n 41) paras 83–84.

In the rights-based approach, the assignment of bundled receivables is a transfer of a bundle of contractual rights to monetary payment against debtors from assignor to assignee. It does not concern any physical property of the assignor, but the rights originating from various contracts carried out through his business activities. The assignment contract in this circumstance functions as a master agreement that ties up receivables originating from different contractual relationships and transfers them altogether. The rule of law for this transaction can be established on the basis of contractual understanding, practice and law, irrespective of any counter area of proprietary kind. The following legal effects of bulk assignments of receivables shall, as a result, be in line with the assignment of a single receivable. A special additional attention on this matter should be recognised, but special distinctive treatment is superfluous. As the latter might result in unnecessary complexities between a single receivable assignment and bulk assignments, it is therefore not recommended.

Besides the substantive aspect, one of the greatest difficulties regarding bulk assignments of receivables in the international scenario concerns their applicable law. Unlike the property-contract approach where the law of the assignor's location has typically been suggested as a special rule for bulk assignments departing from a single assignment, the rights-based methodology points to the same treatment for these two types of assignment. The law of the contract originating the assigned receivables is the origin of the legal existence of those receivables. Functioning as a master agreement that ties up the assigned receivables, the assignment contract is a source that creates legal relationships not only between assignor and assignee, but also in respect of the debtors subject to those receivables and other third parties. For the relationship between assignor and assignee and the relationship of the assignee and third parties, it is therefore the law of the assignment contract that shall govern. For the relationship between assignee and debtors, as well as priority issues, they shall be governed by the

law of the assigned receivables. According to this, bringing conflict-of-law rules for bulk assignments into line with those for the assignment of a single receivable may be feasible.

As has been commented, '[the assignor's local law] has little or no connection with the relationship between an assignee and a third party to the assignment. The only justification for applying [it] is therefore that no other law can appropriately govern bulk assignments'.<sup>55</sup> For a similar reason to that in the case of the assignment of future receivables, no legal foundation nor reasoning can be firmly established apart from a good end result that a choice might lead to. Such an outcome is however unlikely to be achieved. Increasing the transaction costs of a market practice is indicated as a negative aspect of this choice.<sup>56</sup> It requires an assignee to make an enquiry regarding this law in addition to the law of the contract originating the receivables. An additional burden will certainly increase transaction costs. Setting up a specific conflict-of-law rule in a particular market sector might be needed to limit the application of the assignor's local law. A further complication could thus result in some difficulty in characterising financial practice in a specific sector.

Furthermore, the value of an assigned receivable is based on its enforceability against a debtor. To evaluate such value and ascertain such enforceability, examining each receivable including its governing law is significant and unavoidable. 'The expectation of enforceability means that any diligent assignee will examine the law governing the contract creating each bundled [receivable].'<sup>57</sup> Taking Article 14(2) of the Rome I Regulation as an example, such enforceability is indeed a legal matter of the assignability of a receivable which is already subject to the law of the contract creating it. An argument against the law of assigned receivables, i.e. that it is impractical for an

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<sup>55</sup> R Fentiman, 'Assignment and Rome I: towards a principled solution' (2010) 4 LFM 405, 409.

<sup>56</sup> *ibid* 409–410.

<sup>57</sup> Fentiman, 'Trading Debts Across Borders: A European Solution?' (n 52) 266.

assignee to investigate the law of each receivable, might not be so appealing.<sup>58</sup> In case any risk of non-enforcement exists, it is usually mitigated by market practices.<sup>59</sup> Such mitigation is based on a business model of bulk assignments conducted by an assignee. It will be demonstrated by a contractual term agreed with an assignor in their contract of assignment. As has been remarked, ‘the assignee takes the risk of non-enforcement onto its books and prices the assignment accordingly. The value of the transaction consists not in the enforceability of [each receivable] but in the profit derived from the [bulk assignments].’<sup>60</sup>

In the context of bulk assignments, it is the law of the assigned receivables and the law of the assignment contract that are the main concern. In contrast, proposing different connecting factors for single and bundled assignments is misleading and inappropriate.<sup>61</sup> The future complexity of financial practice will be the result if a third kind of conflict-of-law rules is chosen to govern the proprietary aspect of assignment in addition to those two.<sup>62</sup> Another practical reason for a rights-based approach which leads to the law of assignment is to create flexibility in an assignment transaction. It avoids the need for a specific sectoral rule in a financial industry. Each business sector can mould its own choice of law which is considered to be the one best-suited to the sector’s needs.<sup>63</sup> For example, the law chosen in a factoring business could coincide with the law enforced at the assignor’s location. This is normally the case as it is the choice that seems to be most favoured by this sector.<sup>64</sup> The rights-based approach is therefore an attempt reasonably intending to support bulk assignments of receivables in the real financial practice of relevant financial sectors.

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<sup>58</sup> BIICL (n 37) 391–392.

<sup>59</sup> Such as in factoring where the two-factor model is structured and in securitisation where obtaining the highest credit rating and the highest price for issued securities backed by receivables is a priority. Fentiman, ‘Assignment and Rome I: towards a principled solution’ (n 55) 409–410.

<sup>60</sup> Fentiman, ‘Trading Debts Across Borders: A European Solution?’ (n 52) 267.

<sup>61</sup> *ibid* 265–266.

<sup>62</sup> BIICL (n 37) 397–398.

<sup>63</sup> *ibid* 385–386.

<sup>64</sup> *ibid* 386.

## **6.2.2 Rights-based approach to receivables financing businesses**

### **(1) The rights-based approach does not impair receivables financing businesses**

The rights-based approach does affect the law of assignment but does not impair receivables financing practice. So as future receivables and bulk assignments can be effectively transferred, assignment, either outright or security, can be processed normally through the rights-based approach. The thing that this approach has a great impact on is the legal perspectives of the substantive law of assignment. Whereas the property-contract approach separates the law of assignment into contractual and proprietary, the rights-based approach does not require that. Via the latter, the law of assignment is united as a legal rule for transferring rights to payment. Valuable interests in rights to payment can be effectively transferred by way of sale or used as security.<sup>65</sup> Outright assignment is a contract whereby rights to receive payment from a debtor under a receivable are transferred outright from assignor to assignee. It is not ownership of property but rights to receive payment that are assigned. After assignment, the assignee shall become entitled to those rights in place of the assignor. Assignment by way of security is not a contract in which property is used as collateral. It is contractual rights to receive payment under an assigned receivable that are provided as security. This is, in economic terms, a process whereby money is exchanged for money.<sup>66</sup> Contractual rights to payment in receivables are changed to become a sale price or a security benefit by way of assignment. In the rights-based approach, this business can still be carried out in the same manner. Adopting it does not cause any harm to current

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<sup>65</sup> See Oditah (n 11) chs 4-5.

<sup>66</sup> *ibid* 33–34.

financing activities against receivables. On the contrary, as shall be enlarged under the next heading, it supports such activities, especially on a global scale.

## **(2) The rights-based approach facilitates receivables financing businesses**

Recognising the assignment of receivables as the free flow of contractual rights to payment facilitating receivables financing businesses – such as factoring, invoice discounting and securitisation – is the main object and outcome of the rights-based approach. The law of assignment as well as conflict-of-law rules shall serve as a legal foundation for these business operations in international contexts.<sup>67</sup> The more that laws are clear and certain, the more that businesses run smoothly and soundly.

Consider factoring as an example, this is a business where finance is raised against receivables. Its legal foundation is based on the substantive law of assignment. An assignor who holds original rights to payment in receivables concludes an assignment, namely a factoring contract, to transfer these rights to an assignee, or a factor. The factor is a purchaser of receivables from an assignor, typically called the client.<sup>68</sup> From a financial perspective, factoring is a type of supplier financing which is explicitly linked to the value of accounts receivable.<sup>69</sup> As has been submitted, ‘[the] legal and judicial environment may also play a critical role in determining the success of factoring’.<sup>70</sup> Substantially, this concerns a key question of whether that legal and judicial environment has a law that recognises the factoring business. In terms of international factoring, an account of the conflict-of-law rules of that legal and judicial system must also be given. The legal validity and enforcement of a factoring transaction

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<sup>67</sup> See R Goode and E McKendrick, *Goode on commercial law* (4th edn, Lexis Nexis 2009) 787–791; Oditah (n 11) 32–35; Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (n 10) 28–31; Bridge, et al. (n 47) 197.

<sup>68</sup> N Ruddy, S Mills and N Davidson, *Salinger on factoring* (4th edn, Sweet & Maxwell 2006) 1–5.

<sup>69</sup> L Klapper, ‘The role of factoring for financing small and medium enterprises’ (2005) World Bank Policy Research Working Paper, 1–6.

<sup>70</sup> *ibid* 10.

lies in the law governing the factoring contract, i.e. the law of the assignment.<sup>71</sup> The value of accounts receivable is connected to the original contracts creating the assigned receivables,<sup>72</sup> and hence the governing law, i.e. the law of the receivables. Credit information on all debtors subject to receivables assigned is another important element of the success of the factoring business.<sup>73</sup> The assessment of receivables in this financial activity is again consistent with the reason developed by the rights-based approach that the law of the assigned receivables cannot be ignored. Even if any other law is chosen to govern the third-party effectiveness of assignment and priority issues, investigating the law of the assigned receivables is still vital. The former does not negate the importance of the latter.<sup>74</sup> Adding another law, such as the law of the assignor's location, will in turn result in a further burden on a person involved in the business. And higher transaction costs will, of course, be a consequence. Factoring businesses would be impaired by this add-on. By contrast, the business practice matches the proposal of the rights-based approach. According to it, it is the law that governs the assignment contract that shall decide legal issues arising out of the assignment, and the law that creates the assigned receivables that shall determine the legal issues relating to them. The law of the assigned receivables shall be examined both for measuring the financial value and examining the legal existence of those receivables at the same time. No further practical complications or transaction costs will be added on. Maintaining the operation of the factoring facility is thus a positive outcome.

For invoice discounting, which is a bulk funding facility, its business model is basically similar to that of factoring, except the condition that individual invoice details are not

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<sup>71</sup> See F Salinger, 'International factoring and conflicts of law' (2007) 1 LFM 7, which states that apart from the law of the assignment contract, there are two laws that a factor should consult, i.e. the law of the factored receivables and the law of the country of the debtor. However, the law of the country of the debtor seems not to be a viable option currently. BIICL (n 37) 384.

<sup>72</sup> See H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd edn, OUP 2012) 275.

<sup>73</sup> Klapper (n 69) 11.

<sup>74</sup> Fentiman, 'Trading Debts Across Borders: A European Solution?' (n 52) 266–267.

known to a funder.<sup>75</sup> Here, the substantive law of assignment functions as a legal foundation of the business transaction. It shall thus benefit from the rights-based approach in the same way that factoring does. By the same token, in the case of securitisation, the substantive law of assignment serves as a basic legal formula for this financial activity. ‘Outright assignment is the necessary first step in the true sale securitisation [of receivables].’<sup>76</sup> Examining and applying the choice of law for the assignment contract and the law for the assigned receivables is therefore essential, and hence inevitable. Based on the rights-based approach, receivables shall be treated as a freely flowing financial asset. Facilitating all these financial techniques at the international level is a practical consequence of this approach.

In contrast, if the property-contract approach is considered, laws of assignment must be divided into contractual and proprietary categories. The contractual category which is largely based on freedom of contract can be handled without much difficulty. But whenever a financial practice encounters the proprietary side of the law, this is where such freedom is limited. A relevant legal issue – such as notification, registration of assignment or notice filing – will have to be decided according to an applicable mandatory rule of property law, which might vary across countries. To know the applicable law depends on the conflict-of-law rules regulating this matter, which also varies across countries.<sup>77</sup> The law of *lex situs* of receivables, the law of the assignor’s location or the law of assigned receivables are all proposed to deal with the proprietary aspects of assignment. Yet, no general solution can be found via the property-contract approach.<sup>78</sup> It thus creates difficulties for financial businesses dealing with receivables assignment.

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<sup>75</sup> BIICL (n 37) 74.

<sup>76</sup> Bridge, et al. (n 47) 197; Beale, et al. (n 72) 301–302; Odith (n 11) 34–35.

<sup>77</sup> See also BIICL (n 37) part 4.4.

<sup>78</sup> *ibid* 406.



### 6.3 Summary remarks

It is a correct philosophy, in terms of both legal and practical perspectives, to say that '[receivables] financing cannot be viewed in isolation but must be seen in the context of a life cycle of assets'.<sup>79</sup> What the rights-based approach proposes is, for substantive purposes, to treat the assignment of receivables according to its true legal nature and systemise it as such, according to its real financial cycle. For conflict-of-law purposes, this is to treat an assignment in international circumstances as an international transfer of contractual rights to payment. The legal issues arising from it shall be characterised and decided based on this methodology. As analytically indicated in this chapter, the main foundation and its consequence is this.

The rights-based approach is consistent with the true legal nature of the assignment of receivables. It proposes rules, for both substantive aspects and conflict of laws, which are consistent with the true legal nature of assignment. In terms of legal theory, it offers a fundamental legal understanding and principle with the possibility of eliminating or limiting legal characterisation problems and other difficulties resulting from assignment. Unlike the property-contract approach where some obstacles are likely to be encountered, under the rules of the rights-based approach there is no need to distinguish between contractual and proprietary issues arising from assignment. They shall all be regarded as involving the contractual transfer of contractual rights to payment. Without any mandatory rule of property law being involved, assignment shall be treated on the basis of contract law. It subsequently creates a chance to harmonise the substantive laws of assignment at the international level. In terms of legal practice, the rights-based approach is appropriate for typical financial transactions based on assignment which include the assignment of future receivables and bulk assignments. This approach facilitates financial businesses, such as factoring and invoice discounting,

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<sup>79</sup> Goode and Gullifer (n 10) 96.

the operations of which benefit from the law of assignment. What the rights-based approach can also achieve is unifying the different legal approaches of contract and property, which vary across countries, into a single one. It shall subsequently serve, support and promote the growth of receivables financing activities and their development into a single broad market practice as a whole.

## CHAPTER 7: CONCLUSION

This thesis offers a new analytical explanation for conflict of laws relating to the assignment of receivables. It criticises the property-contract approach that divides laws of assignment and conflict-of-law rules into proprietary and contractual categories. Instead, it proposes a rights-based approach that sees assignment as the transfer of rights and establishes conflict-of-law rules on this basis. Conflict-of-law rules are generally based on and developed from an understanding of relevant substantive laws.<sup>1</sup> By analysing substantive laws of assignment and conflict of laws relating to assignment in international scenarios, the principal outcome of the thesis can be concluded as follows.

From the substantive aspect of the assignment of receivables, its true legal nature is the transfer of contractual rights to monetary payment against a debtor from assignor to assignee. Receivables which are the object of assignment are, according to their legal classification, intangible things.<sup>2</sup> Their basic features are those of contracts, not property. They are created by contractual relations between debtor and creditor. Rights embodied in them are *in personam* and so must and can be asserted only against the debtor. They are not rights *in rem* in a specific property. Based on English legal terminology, they are choses in action which are things or rights that can be enforced by legal action.<sup>3</sup> Although they contain value in themselves and are regarded as financial assets, they are but contractual rights claimable against the debtor. They are not property in a creditor's hands. Once receivables are transferred by way of assignment, they are contractual rights to payment, not property, that are assigned. Assignment is a

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<sup>1</sup> *Macmillan Inc v Bishopsgate Investment Trust plc (No3)* [1996] 1 WLR 387, 407.

<sup>2</sup> F Lawson and B Rudden, *The law of property* (3rd rev edn, OUP 2002) 29; B McFarlane, *The structure of property law* (Hart 2008) 7–8; R Goode and L Gullifer, *Goode on legal problems of credit and security* (Sweet & Maxwell 2008) 96; M Smith, *Law of assignment: the creation and transfer of choses in action* (OUP 2007) ch 2

<sup>3</sup> R Goode and E McKendrick, *Goode on commercial law* (4th edn, Lexis Nexis 2009) 28–30; OR Marshall, *The assignment of choses in action* (Pitman 1950) 5–8; *Torkington v Magee* [1920] 2 KB 427, 430.

method of transferring contractual rights or interests, or choses in action, that is recognised by law.<sup>4</sup> It is a contract concluded between creditor or assignor and assignee. An assignment has contractual preliminary results in a triangular relationship between creditor, assignee and debtor. Legal issues arising from an assignment can be divided based on each relationship in that triangle. This is the result of the substantive laws of assignment in conjunction with the law of contract creating the receivables assigned.

However, this is not the end of the matter. There are also other legal effects that flow from assignment. These effects are the effectiveness of assignment against third parties and priority problems. They are typically regarded by the property-contract approach as proprietary issues of assignment.<sup>5</sup> According to the rights-based approach, by contrast, the effectiveness of assignment against third parties and priority problems are not proprietary issues separate from the law of assignment. They are another kind of legal effects resulting from the law of assignment itself. For the third-party effectiveness of an assignment, this is established by the law of assignment through an additional method being imposed, the purpose of which is to secure the assignee's rights. Thus the assignee has to follow that method if he needs his rights to be effective against third parties. That method may be, for example, notifying the debtor.<sup>6</sup> For priority issues, this is a problem between competing assignees where the same receivables have been assigned more than once. Under English law, for instance, priority is given to the assignee who is the first to notify the debtor, if at the time of the assignment he does not

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<sup>4</sup> AG Guest, *Guest on the law of assignment* (Sweet & Maxwell 2012) 1; AP Bell, *Modern law of personal property in England and Ireland* (Butterworths 1989) 361; Marshall (n 3) 34–35; Smith (n 2) ch 7; F Oditah, *Legal aspects of receivables financing* (Sweet & Maxwell 1991) 32–34.

<sup>5</sup> M Bridge, 'The proprietary aspects of assignment and choice of law' (2009) 125 LQR 671; J Perkins, 'Proprietary issues arising from the assignment of debts: a new rule?' (2010) 6 JIBFL 333; THD Struycken, 'The proprietary aspects of international assignment of debts and the Rome Convention, Article 12' (1998) 3 LMCLQ 345; Smith (n 2) 415.

<sup>6</sup> NO Akseli, *International secured transactions law: facilitation of credit and international conventions and instruments* (Routledge 2011) ch 5; see *Dearle v Hall* (1828) 3 Russ 1; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

know of the prior assignment.<sup>7</sup> The rights-based approach regards a priority problem not as a question of who owns receivables but who has a better right in them. This question again depends on the substantive laws of assignment and the law of assigned receivables. No property right needs to be considered. No proprietary explanation needs to be given.

From the conflict-of-laws aspect, to choose a governing law for an international assignment of receivables is to choose a law governing an international transfer of contractual rights to monetary payment. Conflict-of-law rules under the rights-based approach are structured based on this principle. Unlike the property-contract approach, legal issues arising out of assignment are not characterised into proprietary and contractual categories.<sup>8</sup> They all are seen as a special set of legal issues flowing from an assignment of rights. Both proprietary and contractual issues are united. Characterisation difficulties between property and contract are, as a consequence, resolved. The methodology the rights-based approach adopts is to classify those legal issues into a class of legal relationships between relevant persons, i.e. the relationship of rights between assignor and assignee, rights relating to a debtor and rights against third parties.

A comparative study shows that conflict-of-law rules in a jurisdiction follow the legal classifications used in the substantive laws of assignment. They are all based on the property-contract approach. Both in England and Europe, legal issues arising out of an assignment of receivables are divided into contractual and proprietary. Conflict-of-law rules are applied accordingly. While the contractual aspect is principally governed by

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<sup>7</sup> See *Dearle v Hall* (1828) 3 Russ 1.

<sup>8</sup> For the property-contract approach, see M Moshinsky, 'The assignment of debts in the conflict of laws' (1992) 108 LQR 591; Bridge (n 5); Struycken (n 5); A Flessner and H Verhagen, *Assignment in European private international law: claims as property and the European Commission's "Rome I Proposal"* (Sellier 2006); G Tolhurst, *The assignment of contractual rights* (Hart 2006) 53; L Steffens, 'The New Rule on the Assignment of Rights in Rome I-The Solution to All Our Proprietary Problems? Determination of the Conflict of Laws Rule in Respect of the Proprietary Aspects of Assignment' (2006) 14 ERPL 543; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

the law of the assignment contract, there have been developments that attempt to reveal an appropriate way of governing the proprietary aspect, e.g. the third-party effectiveness of assignment and priority disputes. The possibilities range from the *lex situs* of receivables, the law of the debtor's location and the law of the assignor's location to the law of the assigned receivables and the law of assignment.<sup>9</sup> This causes characterisation difficulties and uncertainty in applying the law, as happened in the *Raiffeisen* and the *Hansa* cases.<sup>10</sup> Though the law of the assignor's location is preferred by international instruments, there seems to be no universal acceptance. The Receivables Convention which adopts this choice has not yet come into force, and this choice has only been written as an optional rule in the Guide.<sup>11</sup> In the European context, a proposal for the law of the assignor's location was not accepted by the Rome I Regulation.<sup>12</sup> The law of the assignor's location is also the rule under the UCC Article 9.<sup>13</sup> However, it is based on a mandatory, multi-state filing system and it is far from clear how this or a compatible system could be developed on a global scale. Additionally, characterisation difficulties between proprietary and contractual issues still remain problematic, and no solution has been offered by American law.

Considering conflict of laws under the property-contract approach, although discussions and studies have been conducted, there is as yet no clear nor certain answer.<sup>14</sup> Although several typical choices have been recommended and their advantages and disadvantages have been thoroughly analysed, a recent conclusion is that no general solution is

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<sup>9</sup> BIIICL, 'Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person' <[http://ec.europa.eu/justice/civil/files/report\\_assignment\\_en.pdf](http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf)> accessed 9 October 2015, part 5.3.

<sup>10</sup> *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68 and *Brandsma qq v Hansa Chemie AG*, the Dutch Supreme Court (*Hoge Raad*), 16 May 1997.

<sup>11</sup> Respectively, arts 22 and 30 and recommendation 208.

<sup>12</sup> Commission of the European Communities, *Proposal for a Regulation on the Law Applicable to Contractual Obligation (Rome I)* (COM (2005) 650 Final) 19.

<sup>13</sup> S 9-301(1).

<sup>14</sup> See Bridge (n 5); HC Sigman and EM Kieninger, *Cross-Border Security over Receivables* (Sellier 2009); Akseli (n 6) ch 8; R Fentiman, 'Assignment and Rome I: towards a principled solution' (2010) 4 LFM 405; TC Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation' (2011) 60 ICLQ 29.

perfect.<sup>15</sup> As critically analysed by this thesis, the fundamental difficulty of the problem lies in the legal concept of assignment under the property-contract approach itself. It leads to difficulties in pointing to an appropriate choice of applicable law. Characterising the legal matters of assignment into contract and property cannot be done with certainty. Different legal classifications among legal jurisdictions result in different perspectives on the legal issues arising from assignment, and hence differences in choices-of-law rules.<sup>16</sup> By reestablishing the understanding of substantive laws of assignment as a special method of transferring rights, and not as a hybrid method with the legal nature of both contract and property as the property-contract approach generally claims, the rights-based approach advances a rule for each category of the legal relationship of rights arising out of assignment. Firstly, the relationship between assignor and assignee is governed by the law of assignment. Secondly, the relationship between assignor and debtor as well as between debtor and assignee are decided by reference to the law of the assigned receivables. Thirdly, the law of assignment also governs the relationship between assignee and third parties. Finally, the law of the assigned receivables is also applicable to priority problems.

The thesis demonstrates that it is the rights-based approach that is consistent with the true legal nature of the assignment of receivables. Considering the law of assignment and its conflict-of-law rules in this way makes this subject clearer, more understandable and more organised. This is true not only in terms of legal principles, but also in terms of legal practice. By regarding assignment as a transfer of contractual rights, the rights-based approach creates an opportunity to harmonise conflict-of-law rules across jurisdictions. This can be achieved without resorting to the diversification of property law across jurisdictions. The obstacle arising from proprietary terminology and

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<sup>15</sup> BIICL (n 9) 402.

<sup>16</sup> See *ibid* part 4; also *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68; *Brandsma qq v Hansa Chemie AG*, the Dutch Supreme Court (*Hoge Raad*), 16 May 1997 in *Struycken* (n 5); *Steffens* (n 8).

methodology is overcome. Characterisation of the proprietary and contractual matters of assignment is irrelevant. Its difficulties are revealed.

For receivables financing, the rights-based approach can cope with both the assignment of future receivables and bulk assignments of receivables. A future receivable is seen as a contractual right to monetary payment under a contract that is expected to be concluded in the future. It is, in other words, a future contractual right of an assignor against his debtor which is based on the assignor's business activities. An assignment of future receivables, if sufficiently identifiable as receivables to which the assignment relates, is treated as an agreement to assign.<sup>17</sup> The legal issues affecting this transaction, if relevant to the future receivables purported to be assigned, are governed by the law of the contract creating those future receivables. Other issues, such as the legal requirements of assignment, refer to the law of the assignment contract. In the case of bulk assignments, the rights-based approach can account for them thoroughly. It treats them as a transaction whereby a bundle of contractual rights is transferred by a single master contract of assignment. Subject to this, rules applicable to bulk assignments are compatible with those applied to an assignment of a single receivable. Those rules are, for the relationships between assignor and assignee as well as between assignee and third parties, the law of the assignment contract, and for the relationships between assignor or assignee and debtor as well as priority issues, the law of the receivables. The rights-based approach emphasises, in theory, on the examination of each receivable in the bulk as it is inevitable to realise its governing contract law. It stresses, in practice, the orientation of financial market models where a risk of non-payment of a single receivable is mitigated by contract and bulk-receivables pricing.<sup>18</sup> This is where the

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<sup>17</sup> See Oditah (n 4) 27–32; Guest (n 4) 6–10; Akseli (n 6) 140–146; M Bridge, L Gullifer, G McMeel and S Worthington, *The law of personal property* (Sweet & Maxwell 2013) 786; art 8 of the Receivables Convention; the Guide, para 105.

<sup>18</sup> See R Fentiman, 'Trading Debts Across Borders: A European Solution?' (2010) 17 IJGLS 245, 264 and 267; Hartley (n 14) 53; art 8 of the Receivables Convention; UNCITRAL, *Explanatory note by the*



market practice meets the legal principles with consistency. Without requiring any changes to the nature of business practice, the rights-based approach is therefore not an obstacle to the free flow of receivables. It does, on the contrary, facilitate financing practices against receivables on the basis of their real legal nature.

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