The law applicable to the assignment of claims or contracts after the Ordinance of 10 February 2016
First thoughts on conflict-of-laws issues from a French perspective

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Abstract

While the European Commission suggests regional legislative action to complete the conflict-of-laws rules applicable to the assignment of claims and contractual subrogations (COM(2016) 626 final), current events in France provide an incentive to re-examine the international regime of barely litigious day-to-day transactions relating to claims or contracts. In detail, the characterisations and scope of the respectively applicable laws are liable to vary in France with the changes in domestic civil-law rules. Then, in terms of principles, it would be worth thinking again about how to determine the law applicable to the *erga omnes* effectiveness of transfer operations.

1. After the exegesis of the actual text of the French reform of the law of obligations, the time has come to explore its repercussions in the neighbouring disciplines (*inter alia*, business law and private international law). These repercussions were not necessarily contemplated by the authors of the reform and should therefore be considered with caution pending the first interpretations by the courts.

'Operations on obligations' lend themselves particularly well to the exploration to be conducted here in the realm of conflict of laws. Some of these operations are in everyday use in international business practice although they may make imperfect transfers (in which the assignor is not discharged by the effect of the assignment).[1] Their legal certainty, which assumes it is possible to predict the applicable national law, is a primary consideration for operators who would otherwise be dissuaded from using them and who cannot systematically free themselves from the difficulties inherent in conflict of laws by recourse to arbitration.[2]

The exploration undertaken below is limited in its scope. It does not contemplate every transaction involving a transfer of the contractual relationship, but merely the most common voluntary transactions, excluding transfers by operation of law and by novation that will be encountered only incidentally.[3] The assignment of debts shall also be omitted, other than in the final analytical table (see below, III, *in fine*), which should be evidence enough that the new articles 1327 and following of the Civil Code shall be available within reason and as a matter

[1] Apart from the classical books on private international law cited in passing below, see M.-E. Ancel, P. Deumier and M. Laazouzi, *Droit des contrats internationaux*, Sirey, 2017, nos 324 ff; M. Audit, S. Bollée and P. Callé, *Droit du commerce international et des investissements étrangers*, LGDJ, 2nd edn, 2016, nos. 464 ff. See also the recent synthesis by S. Laval, *Le tiers et le contrat. Etude de conflit de lois*, thesis, Larcier, 2016, nos 20 f, 212 f. See also what remains the fundamental book in French by D. Pardoel, *Les conflits de lois en matière de cession de créance*, LGDJ, 1997; M.-N. Jobard-Bachelier, Rép. dr. int., *v°* 'Créances (opérations sur)', 1998.

[2] Arbitration is a possibility, of course, in relations between parties to the obligation assigned or the assignment contract. But it is more difficult to provide for in tri- or multi-party disputes, involving third parties to the legal transactions (multiple assignments of the same claim, conflict between an assignment and an attachment of the claim).

[3] For a broader study, see the reference in footnote 8 below.

of principle *when the debt assigned is governed by French law*. For the two common instances of the assignment of claims and the assignment of contracts, it shall be contemplated how the new rules of French internal law hinge together with the European rules of conflict of laws and, marginally with respect to those rules, with the rules of non-harmonised French private international law.

I – Laws designated by the 'Rome I' Regulation

2. If we ignore for the time being the constraints inherent in the occurrence of insolvency proceedings (see no. 7 below), the starting point in France and in most European Union Member States[4] is Regulation 593/2008 of 17 June 2008 called 'Rome I' (although an earlier accord such as the Unidroit Convention on International Factoring, signed in Ottawa on 28 May 1988, might take precedence in the French courts). The Rome I text applies to international and European transactions alike and lays down the basic rules on disputes concerning voluntary assignments of claims or contracts in civil and commercial matters. Following up on the solutions in the 1980 Convention of Rome and assimilating contractual subrogation to assignment,[5] article 14 of the Rome I Regulation deals with the movement of the obligation atomistically and in its active aspect by submitting it to two paramount rules on connecting factors. Each of these rules – connecting criterion and scope – takes on a rational and logical character.[6] Although incomplete,[7] the system composed by these two rules can be extended universally and forms a reliable starting point from which to reason even when it is uncertain which court might subsequently be seised.[8]

According to the first of the rules, set out by the Rome I Regulation in second place, (art. 14(2)), 'The law governing the assigned (…) claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment (…) can be invoked against the debtor and whether the debtor's obligations have been discharged.' This paramount connecting factor to *the law of the thing transferred* preserves the legal consistency of the obligation[9] and protects the assigned debtor, i.e. the party to the contractual relationship having remained passive with respect to the assignment (here the debtor

[4] Denmark is not concerned.
[5] Without distinguishing between outright assignments and assignments by way of collateral, and also assimilating pledges.
[6] They had been anticipated by French case law: See Paris, 11 Feb. 1969, *D.* 1970. 522, note C. Larroumet.
[7] See, in French, A. Sinay-Cytermann, *in Mélanges Fenet*, 2008, p. 389; in English, for example, T. Hartley, article published *in International and Comparative Law Quarterly*, vol. 60, Jan. 2011, p. 29.
[8] For a general presentation, from a comparative perspective, L. d'Avout, 'La transmission de l'obligation en droit privé', *colloquium A. Bello 2016* (Monterrey, Mexico), ed. C. Larroumet, Panthéon-Assas 2017.
[9] It will be recalled that, in the *Belvédère* precedent of the Cour de cassation, the law applicable to the claim determines the title to it and the possible multiplication of such titles when the claim is held by a trust; see Com. 13 Sep. 2011, no. 10-25.553, *D.* 2011. 2518, note L. d'Avout and N. Borga, 2012. 1228, obs. H. Gaudemet-Tallon, and 2331, obs. S. Bollée; *Rev. crit. DIP* 2011. 870, note J.-P. Rémery; *RTD civ.* 2012. 113, and 116, obs. B. Fages; *RTD com.* 2011. 801, obs. J.-L. Vallens, and 2012. 190, obs. A. Martin-Serf; *RTD eur.* 2012. 522, obs. C. Moille and C. Pellegrini.

of the claim).[10] It operates first ahead of the transfer proper, by determining whether the obligation is transmissible, then after the transfer, by defining the assignor's prerogatives with respect to the assigned debtor and the various defences on which the assigned debtor might rely.[11]

Strictly speaking, article 14(2) of the Rome I Regulation does not apply to the voluntary assignment of a *contract* understood, from the assignor's perspective, as a complex set of rights and obligations united in one and the same *negotium*. Yet this rule should be applied to it by analogy, by switching the term 'contract' for the term 'claim' (and the term 'assigned party' for the term 'debtor'). One of the reasons for this pertains to the meaning of article 12 of the Rome I Regulation which sets out 'the scope of the law applicable' to the contract, of which article 14(2) is a sort of extension.[12] Under article 12 of the Regulation, the law of the contract covers, *inter alia*, the performance of the obligations to which it gives rise and the various ways of extinguishing the said obligations. As such, it can be said in passing, article 12 requires the law of the initial obligation to be applied to the admissibility of novation type operations.[13] It results fairly certainly from article 12 that no transfer of a contract and its components should be possible if contrary to the conceptions of the law of the contract;[14] otherwise the assigned debtor could rely on the law of the contract to require its performance by the assignor, as an initial party to the contract, as if that party had not exited it.

The other law designated by the Rome I Regulation, the driving force behind the voluntary assignment of the claim or contract, is the one that the parties to the contract of assignment choose freely in principle (art. 3(1) of the Rome I Regulation, when the assignment does not come within the context of a connecting factor by derogation of articles 5 ff).[15] This law, freely chosen, may be wholly independent of the law of the thing assigned and the place of business of the parties to the assignment.[16] To the extent that there is no choice of applicable

[10] 'The fundamental idea is that the contractual transfer of claim must be a legally neutral transaction for the debtor and that his position remains in all points governed by the law that was the source of his obligation', as is brilliantly summarised by M.-E. Ancel, P. Deumier and M. Laazouzi, *op. cit.* (n. 1) no 327.

[11] Illustration, under the Convention of Rome: Civ. 2e, 16 May 2012, no. 11-30.027 (effectiveness against the assigned debtor of the assignment of a claim in French law). It is not entirely certain this law should be applicable, before payment, to resolving the conflict among multiple assignees petitioning the assigned debtor. Alternatively, the law applicable to the effectiveness of the said assignments might prevail (See below, II).

[12] Also reasoning in this way, A.-S. Courdier-Cuisinier, *La cession conventionnelle de contrat en matière internationale*, JDI 2009. Etude 3.

[13] Art. 1329 s. c. civ. (See the table below, III *in fine*).

[14] It is possible to construe in this way: Civ. 1re, 23 Jan. 2007, no 04-16.018, published in *Bull., D.* 2007. 512; *RTD com.* 2007. 625, obs. P. Delebecque (appeal to Cour de cassation for breach of art. 3 Civil Code of decision accepting effectiveness of an assignment under English law, without having sought the relevant provisions of 'the law applicable to the assigned contract'); comp. Civ. 1re, 22 Oct. 2014, no 13-14.653 (assignment of portfolio of insurance contracts), *Rev. crit. DIP* 2015. 389, note S. Corneloup; *RTD eur.* 2015. 348-14, obs. C. Moille.

[15] The rights arising from a contractual assignment of claim are available; litigation deriving therefrom can therefore be the subject of a procedural agreement leading to the application of the French *lex fori* (Civ. 1re, 28 Feb. 2006, no 03-14.058).

[16] Reserving the case in which all connecting factors converge on one and the same country, or on European Union Member States (art. 3(3) and (4), Rome I Regulation).

law under article 3,[17] the connecting factor (art. 4(2)(3), Rome I Regulation) is established by identifying the debtor of the characteristic performance[18] and locating his habitual residence[19] or exceptionally[20] by a case-based logic of location depending on the closest comparative ties,[21] regardless of the law of the assigned claim.[22] Article 14(1) of the Rome I Regulation accords the minimal scope to this law of the contract of assignment of a claim or contract, that may be freely determined by the parties: the relationship between parties to the assignment, the assignor and the assignee.[23] It is essential to observe that *this law does not just govern the validity and effectiveness of obligations between assignor and assignee; it also governs the effects of the assignment between the two*, that is, the way the thing is transferred from one estate to the other (by operation of law, or by performance of the obligations of the parties to the assignment). Recital 38 of the Regulation says so, in order to overcome the differences in technical conceptions of transfer operations in national civil law systems: 'In the context of voluntary assignment, the term "relationship" should make it clear that Article 14(1) also applies to the property aspects of the assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations.'

Although it does not say so explicitly, the Rome I Regulation does not deal generally with conflicts of laws in property law. Pending future amendments such as those suggested by the European Commission,[24] it is logical therefore that the current version of the Regulation should leave aside the question of the effectiveness of voluntary assignment of a claim or contract with regard to others. As just seen, there is a departure from this implied exclusion when it comes to the law applicable to inter-estate transfer *in the relationship between parties to the assignment*.

The Rome I Regulation deals therefore with the validity and effects of the assignment, but in a segmented way, in the triangular relationship among the various parties directly concerned (assignor, assigned debtor and assignee). Setting aside the arrangements for derogations to protect weaker parties, two other principles of connection can be recalled here for memory's sake, that supplement the solutions provided by the two laws designated by the Regulation (or provide exceptions to them):

– the alternative connecting factor of questions of 'formal validity' of the contract, provided for in article 11 of the Regulation and that may lead to the validation, in application of a law other

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[17] For an illustration of the dividing line between choice and non-choice regarding an assignment of corporate rights, see Com. 10 Sep. 2013, no 12-15.930, *D.* 2014. 1967, obs. L. d'Avout; *Rev. sociétés* 2014. 193, note M. Menjucq.

[18] In principle, the assignor of the asset in question (claim or contract); unless the assignor's service was to be consideration for another decisive service of the contractual transaction (e.g. bank credit).

[19] Under the Convention of Rome, see Civ. 1re, 22 Oct. 2014, no 13-14.653, above, note 14.

[20] Opportunely underscoring the ranking of the principle and the defence, see Civ. 1re, 22 Oct. 2014, no 13-14.653, above.

[21] Under the Convention of Rome, see Com. 11 Oct. 2016, no 14.14-418 (an interesting decision in that it excludes consideration of the place of residence of the assigned debtor, a third-party to the assignment, and refuses to take account of solutions arising from the 2001 United Nations Convention, on the ground that it has not come into force).

[22] Unlike the solution in Switzerland (art. 145 LDIP 1987).

[23] Wording: 'The relationship between assignor and assignee under (…) 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.'

[24] Report of 29 Sep. 2016, above.

than that chosen by the parties, of a formally null assignment agreement under the freely chosen law;
– the connecting factor of the overriding mandatory provisions of article 9 of the Regulation, which makes it possible to depart from the rules laid down but must not, of necessity, be invoked for questions excluded from the scope of the harmonised rules of conflict (which is the case of the above-mentioned questions of *erga omnes* effectiveness, for which the conflict-of-law reasoning can be freely conducted in France, see II below).

3. That being recalled, how is the new French law likely to behave in circumstances of an international conflict of laws? That is, when one of the relevant factors of the location (place of business of the parties to the contractual relationship transferred or the act of assignment; law applicable to the contractual relationship transferred) makes it possible to consider applying a foreign body of law that may differ from French regulations.

Lets us first contemplate the *assignment of claim*. The two laws identified – the law of the contract of assignment and the law of the claim assigned – divide the various questions addressed by articles 1321 and following of the Civil Code into two great masses. It is not prohibited to reason here analytically and unilaterally, beginning with the forecasts of French domestic law and probing their behaviour in an international case.[25]

From the French standpoint, the following French rules shall be applicable *when French law has been chosen to govern the contract of assignment*:
– article 1321 of the Civil Code: definition of the type of operation, its ambit and its essential characteristics, except perhaps for the rules relating to transfer of the accessories of the claim;[26]
– essential conditions for the assignment to be formed and valid in ordinary law (art. 1112 f., 1128 f. except for rules on legal capacity); including the formal requirement for a written document under article 1322 of the Civil Code (unless the contract of assignment, which is null in its form under French substantive law, is saved by applying the foreign law designated under art. 11 of the Rome I Regulation, especially the law of the place where the contract was concluded; on the meaning of this formal character, see no. 6 below).
– date the assignment between the parties comes into effect (art. 1323(1)); consistency and performance of the parties' accessory obligations with respect to the delivery of the claim assigned;
– guaranties owed by the assignor (art. 1326); distribution among the parties of the cost of the surcharges arising for the debtor from the assignment (art. 1324 (final paragraph)).

However, still from the French standpoint, a number of other points addressed by the new regulations will not actually come under French law *unless it governs the claim transferred*. It is a question in detail of:
– the assignability of the claim: the presumption of assignability that is practically posited by article 1321 of the Civil Code within the limit of the case of the *intuitu personae* stipulation (art. 1321(3)) has no cause to apply as regards a claim governed by a foreign law; it is in principle for the law applicable to the thing transferred to positively authorize the principle of an assignment, the nullity of such assignment being otherwise incurred for non-performance or absence of objectively possible effect;

[25] A reverse characterisation, as it were, starting from internal law to see in which international category it is liable to be placed.
[26] The accessories of the claim should in some circumstances be the subject of specific reasoning; see M.-N. Jobard-Bachelier, prec., at no 49 and see also below, para. 4.

– the specific authorisation of the assignment by the debtor, when the claim is unassignable (debtor's consent, fate of any vitiated consent);[27]
– the effectiveness of the assignment against the assigned debtor – article 1324(1) of the Civil Code – including the forms of 'acknowledgement' (unless, on this latter point, French law takes account of the specific means in force in the foreign country where the debtor is based and from where the debtor acts);[28]
– the effectiveness of exceptions against the assignee (art. 1324(2));
– possibly, the reimbursement of extra charges engendered by the assignment (end of art. 1324 Civil Code);
– the discharge by payment to the assignor or assignee (see esp. new art. 1342-3 Civil Code).[29] The acts expected of the debtor before payment should in particular come under the law of the claim assigned.[30]

Unless the law of the contract of assignment and the law governing the claim assigned are joined contractually, the splitting of the assignment of claim operation under two separate laws – which is quite significant, as can be seen – cannot easily be avoided. Contrary to what is suggested by the French "Dailly" provision on the assignment of business claims, it is inconsistent with the provisions of the Rome I Regulation to seek to make effective against the assigned debtor an assignment of claim by receipt ('bordereau') in violation of the means required by the law governing the assigned claim (art. L. 313-27 Monetary and Financial Code).[31] This point will be raised again here, when addressing the effectiveness of the same assignments with regard to third parties.

4. What now of the *assignment of contract*? Here again the questions addressed have to be divided under two paramount rules on connecting factors: the law chosen to govern the assignment agreement and the law governing the contract assigned.

The French law arising from order no. 2016-131 of 10 February 2016 ensures *the international assignability as a matter of principle of agreements governed by French law* and validates contractual clauses in them authorising their assignment in advance (new art. 1216 Civil Code). It protects the assigned debtor subsequently when the assignment comes into effect: defences may be set up as in new article 1216-2 of the Civil Code if the contract assigned

[27] *A contrario*, assigning an unassignable foreign-law claim under French law will require obtaining consent pursuant to the competent foreign law, which will make it possible to satisfy the requirement of art. 1321 *in fine* Civil Code.
[28] Cf. art. 12(2) Rome I Regulation.
[29] It could besides be considered that the text applies too as an overriding mandatory provision to the payment of a foreign debt made in France.
[30] It may be wondered whether a professional debtor should check the validity of the assignment, under the foreign law applicable, before discharge to the assignee. On a question of the kind, the law of the claim assigned would define action implying consideration of the content of the law of the contract of assignment or some other law (e.g. law applicable to formal validity).
[31] This difficulty has already been emphasised (see D. Bureau, RDC 2004. 445). Art. L. 313-27 c. mon. fin. must be set aside in a French court insofar as its provisions would produce an effect that is incompatible with the provision of the Rome I Regulation (see also, reserving the term 'overriding mandatory provision' to the meaning of the Regulation, B. Audit and L. d'Avout, *Droit international privé*, 7th edn, no. 864; M. Audit, S. Bollée and P. Callé, op. cit., no 466).

is governed by French law; the assigned debtor may ask the assignor to perform the agreement for so long as he has not consented to any discharge under new article 1216-1.[32]

Conversely, whether or not a foreign-law contract can be assigned will depend on an appraisal made depending on the law governing the contract (law of the thing assigned, see no. 2 above). The same will apply for the validity of early consent clauses to the assignment of such a contract and for the ways the assignment will take effect with respect to the assigned debtor. The protection of the assigned debtor when the assignment of the contract takes effect will in principle be dictated by the law applicable to the contract assigned: conditions and effects of consent to assignment.[33]

In principle, the formal validity of the assignment of the contract (written form under article 1216 of the Civil Code) will depend on the law applicable to the assignment agreement. In this way, French law will apply to the assignment agreement if the parties to the agreement have freely chosen it to this end; a nullity under the French law chosen[34] could even so be covered, *inter partes*, if the assignment is made abroad in accordance with the lenient standards of the alternatively applicable foreign law (art. 11, Rome I Regulation).

The effect of the assignment of contract on collateral or guaranties ensuring the performance of the contractual obligations should be determined by appropriate reasoning depending on the law applicable to the real or personal guaranties in question. It is debatable, then, to consider that the application of article 1216-3 of the Civil Code further to assignment of a contract under French law would entail automatic effects on associated legal instruments subject to foreign laws.[35]

In matters of assignment of contract, the breakdown between the law of the thing assigned and the law of the vector of the assignment is, by and large, the same for assignment of claims. This is logical enough since the two basic connecting factors provided for by the Rome I Regulation are identically applicable to the two transactions considered and relate to clearly separate functions: on the one side, the intangibility of the substance of contractual relationships assigned and protection of the party assigned; on the other side the integrity of the personal and proprietary relationships arising from the assignment agreement.

The distinctive character of the foundations of these rules and the bilateral relations to which they apply allow, now as before, their dissociated interplay in the concrete case; for as much, of course, as one accepts the idea of variability in the effectiveness of assignments in

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[32] Which is problematic. The rule on maintaining the assignor in the agreement after the assignment, unless expressly given discharge, is contrary to the practice and expectations of business people. It should be possible to set aside the rule in advance in agreements that include early authorisation to assign.

[33] To consider that, when the assignment is subject to French law, this law can provide for the voluntary accession of the assigned debtor to the instrument and discharge the assignor under the terms of the law governing the contract, would make the transaction much like a novation. Now, in novation by change of debtor, the law applicable to the new contract is powerless to extinguish the novated contract, which is still governed by its proper law. This is why it seems sounder to consider that the assigned debtor's authorisation or consent, conditions and effects, should as a matter of principle come under the law applicable to the contract assigned.

[34] Contract assignment under an arbitration clause might even be made in international matters under French law so long as any formal validity was waived. This could be done without prejudice to the rules applicable to the effective character of the assignment in particular *vis-à-vis* third parties.

[35] It would seem more suitable to consider collateral on the contrary as a separate thing and to determine, independently, the laws applicable to its transfer in an international context.

relations between the parties to the obligation transferred and the assignment agreement (which is already the case in internal law, disregarding any conflict of laws).

Let us now turn to the question of whether the assignment is effective *vis-à-vis* third parties, which is often held to be the essential point.

II – Effectiveness of the transaction *vis-à-vis* third parties

5. Classical private international law adds a third connecting factor rule to the law of the thing assigned and the law of the vector of the assignment, that of its third-party effects, that can be used to decide certain conflicts among third parties relating to the title to the claim or contract at issue.[36] This connecting factor is not of the same order as the first two. This connecting factor of third-party effectiveness is relevant in relations between the assignee and any third party other than the assigned debtor and supplements the ordinary connecting factors; it caps them or is superimposed on them so as to give wider effect to an assignment, that is valid and in principle effective *vis-à-vis* third parties to the agreement who rely on or may rely on a competing right incompatible with the asset assigned. This third connecting factor, which should have been included in the Rome I Regulation had English jurists not objected,[37] is not laid down by positive European law (apart from certain specific solutions arising from sectorial harmonized law).[38] Apart from in matters of insolvency, when it is covered by European Union law (see no. 7 below), France is therefore free to fix this connecting factor as it sees fit; to determine the connecting criterion (geographical: assigned debtor or assignor's place of residence, legal and ancillary: law of the thing assigned, law of the contract of assignment) and the operating method (unilateral connection of mandatory domestic rules, as "overriding mandatory provisions", or bilateral connection) or even purely and simply waive them all. The very wide diversity of solutions practised abroad[39] means no single connecting factor or method of reasoning can be presented as being obviously preferable to any other.

From a French perspective, the end of the mandatory form required for notification of assignments in internal law (see no. 6 below) could favour the adoption in the form of an *international substantive rule* of a principle of outright third-party effects of any valid assignment and of resolution of conflicts of attribution by means of the *prior tempore, potior jure* (first in time, first in right and rank) principle. However, this non-conflicting method would only be straightforward and exclusive at first sight. True, the French principle of giving precedence to the earliest acquired right could be made universal, even when the rights in conflict were formed under separate national laws. But this would then mean dating each acquisition by application of the rules in force in the legal system under which the right was

[36] See the synthetic and comparative presentation in L. d'Avout, *Sur les solutions du conflit de lois en droit des biens*, (Economica 2006) nos 81 ff.

[37] Art. 13(3) Proposal for Rome I Regulation published by the Commission in 2005: 'The question whether the assignment or subrogation may be relied on 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.'

[38] See for example art. 9, Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements (transposition: art. L. 211-39 Monetary and Financial Code).

[39] For a compact presentation in French see, apart from the reference in note 36, D. Bureau and H. Muir Watt, *Droit international privé*, t. II, 3rd edn., PUF, 2014, no 681; see also in English, H. Verhaegen and S. van Dongen, 'Cross-border assignments under Rome 1', *Journal of Private International Law*, vol. 6-1, 2010, 1s. *Adde* the German discussions in the *Deutscher Rat*: H. J. Sonnenberger, *Rev. crit. DIP* 2012. 676.

constituted,[40] which might throw up subordinate conflicts of laws. Notice that, in such a system dispensing with any specific connection of questions of third-party effects or notification, the assignments made under French law would come out quite well, because under French law rules they are valid *erga omnes* at the date they are constituted.[41] But it is more than likely that this method of handling disputes as to rank or title to the object assigned would not be followed every time the dispute arises abroad, before a court in a country whose internal law dissociates the date the assignment agreement takes effect between the parties and the date the transfer becomes effective *vis-à-vis* third parties. Outside of disputed cases, the reliability of this form of reasoning that makes the French principle of outright effectiveness of assignments universal and combines it with the *prior tempore* rule is therefore not ensured in all circumstances.

Before the 2016 reform, the *erga omnes* effectiveness of assignments of claim was appraised in France in accordance with *the law of the place of residence of the assigned debtor*.[42] The very reason for this connection was closely dependent on the well-known formal notification rule of article 1690 of the Civil Code (notification to the debtor, acceptance by officially recorded instruments; measures to be taken with the assigned debtor) and generalising the solution in the belief that foreign laws would technically be configured in similar terms. The revocation of this formal notification for the assignment of claims – a major innovation of the reform and the high point of a gradual modernisation of civil law in the light of business requirements – could provide the opportunity for France from now on to assert the pre-eminence of the *connection of questions of effectiveness to the law of the place where the assignor has his place of business*, as significantly recommended by the 2001 United Nations Convention on the assignment of receivables in international trade,[43] that has not come into force and that should have been taken up by the Rome I Regulation according to the drafts published in 2005.[44] Only the law designated by this connection is known (or liable to be known) to all those wanting to take possession of the thing assigned,[45] unsecured creditors of the assignor applying for enforcement with respect to the assigned debtor and assigns with a special right over the thing assigned. The place of business of the assignor[46] therefore expresses the centre of gravity of the legal location better than the place of business of the assigned debtor which, besides, is not

[40] On this point see D. Pardoel, (n. 1), no 606.

[41] Such a non-conflicting principle of settlement of conflicts, which can be contemplated when the dispute arises before a French court, could sink into unreality if the legal dispute took place abroad. The failing with outright third-party effects is also that it calls for compensation in terms of protection of appearances, on the side of the solvent debtor and even on the side of the assignee acquiring the claim in good faith.

[42] Usually construed in this sense, Paris, 26 March 1986, *D.* 1986. 374, 2nd esp., note M. Vasseur; *Rev. crit. DIP* 1987. 351 note M.-N. Jobard-Bachellier; et ant., reasoning in terms of overriding mandatory provisions, 27 sept. 1984, *D.* 1985. Somm. 178, obs. B. Audit; *JDI* 1985. 664, note P. Diener.

[43] Art. 22, 30 UN Convention, 12 Dec. 2001 on assignment of receivables in international trade, not in force.

[44] See n. 37.

[45] Except perhaps in one case: multiple assignment of the claim by the assignor; dispute between an assignee and the sub-purchaser of the other assignee (the sub-purchaser not necessarily knowing the country in which the initial assignor had his place of business). In this case, the conflict should, to my mind, be settled at the level of the primordial assignments (allowing a single holder of the claim to be determined, by application of the law on the place of business of the assignor); the sub-purchaser *a non domino* then being referred back to the situation of its author (*nemo plus juris*), unless it is attempted to rely on a rule of *bona fide* acquisition.

[46] When there is a single assignor and his place of business can be easily identified.

necessarily known at the time of the assignments and the constitution of the competing rights.[47] As for the abstract connection via the law applicable to the thing assigned,[48] it too may not necessarily be known by the assignee individually when he has acquired non individualised claims in bulk. To foster, lastly, the legal connection to the law governing the assignment would be tantamount to consecrating the material principle of outright third-party effects of valid legal instruments set out above whenever such is the solution defended by the law applicable to the earliest dated assignment. Yet this solution may appear imbalanced in the event of multiple assignments of the same claim under different laws, because it consists in raising against the second acquirer, having relied on a given legal system, the specific consequences of a foreign legislative system, unknown to him and having enabled the first acquisition. Rationally, the principle of connection to the law of the assignment contract should only therefore come into play in the hypothesis that competing rights have all been acquired or constituted by application of one and the same law.

It is of course always possible to process the formal notification of the assignment under the remaining mandatory rules. But this might lead to case by case solutions whereas concrete solutions would remain explicable by one or other of the polyvalent principles of connection presented so far.

6. After this general presentation of the various possible forms of reasoning, let us look at the identity of the mechanism of effectiveness chosen by the new French general law on assignments of claims and contracts and how it may behave in the event of conflicts of laws.

As concerns *assignment of contract*, it is remarkable that the succinct rules of new articles 1216 to 1216-3 of the Civil Code do not deal with the date the transaction takes effect with respect to third parties. This omission probably arises from the fact that, unlike claims that can be attached and sometimes mobilised several times over, conflicts over title to contract are statistically few. In the litigious hypotheses where the question might arise, it seems that the natural solution would be to apply to the assignment of contract, by way of analogy or by amplifying interpretation, the solutions *inter alia* common to the assignment of claim (art. 1323(2) Civil Code) and to novation by change of creditor (art. 1333(2); binding character on the date of the instrument; proof by any means of the date if it is contested). If two positions have been constituted by application of French law as to a single contract or a part thereof and prove incompatible, French law can decide between the holders of these positions, unless the foreign law of the assignor's place of residence lays down, for either of those positions, an additional measure of notification.[49] When irreconcilable positions are constituted under the different laws, French law should be recognised as applicable, when the assignor is resident in France and should then be able to assert the effectiveness *vis-à-vis* third parties of the first assignment to the benefit of the assignee wherever his place of business. However, the fact that only one of the assignments under consideration comes under French law, or that the written

[47] On this point see ultimately S. Laval, (n. 2), nos. 19 ff; and before P. Lagarde, 'Retour sur la loi applicable à l'opposabilité des transferts conventionnels de créances', *Mélanges J. Béguin*, LexisNexis, 2005, p. 415; M. Bridge, 'The proprietary aspects of assignment and choice of law', 125 *Law Quarterly Review*, 2009, 671.

[48] This connection seems to be preferred by M. Audit, S. Bollée and P. Callé, *Droit du commerce international des investissements*, LGDJ, 2nd edn, 2016, no. 466, note 65: 'logically (…), it should also be considered that the law of the assigned claim also applies to the question of third party effects of the claim other than against the assigned debtor himself'.

[49] Which measure might be considered in its capacity as an overriding mandatory provision and should in principle be applied on the grounds of the close tie with the litigious situation.

document of the assignment is drawn up in France,[50] or that the agreement assigned is made under French law, should less readily suffice to afford the same certainty when the assignor is resident abroad, if the rules for conflicts of laws are construed differently in the country of the place of business.[51] The assignor, as the holder of the title to dispose of his property,[52] is the pivot point of the transfer operation; he alone is known to all the third parties potentially interested in challenging the assignment of the contract.[53]

In the case of the *assignment of claim*, the rule – inspired by the so-called 'Dailly' provision already taken up with regard to pledges on claims (art. 2361 Code civil) – is formulated in these terms by new articles 1323 and 1325:

– 'In the case of successive assignment of rights, competition between the assignees is resolved in favour of the first in time' (art. 1325, first part of the sentence);

– 'As between the parties the transfer of the right takes effect at the date of the act. It can be set up against third parties from that moment' (art. 1323(1) first two sentences).

This date of the instrument, which determines its effectiveness, is not necessarily manifested through the writing that constitutes a valid assignment in French law. As proof of this, no rule in the Civil Code requires the affixing of a date on the formal medium in question, unlike what the Dailly assignment regulations provide for.[54] The arrangement on the third-party effectiveness of assignments of claim in ordinary law is therefore an avatar of the Dailly provision, but a degenerate avatar as it is less precise. In civil law relations or in mixed relations between a professional and a civil law party,[55] the dating of the assignment of claim in ordinary law will be dependent on the type of medium used. If a private deed, the commonest case, it will probably be necessary to apply the rule of new article 1377 on acquisition of a definite date. Failing any definite date, proof of the dating of the assignment may be adduced by any means and will be incumbent on the assignee, says article 1323(2) *in fine*.

Two different interpretations could be proposed for this new arrangement of internal civil law. By the first interpretation, French law has seemingly abolished all formal notification and returned to the principle of outright third-party effects of legal situations as of the date they are formed. This first interpretation is authorized by the letter of the afore-cited texts, disconnecting the dating attributing priority in time of the written document, a formal condition for the assignment to be valid. But this interpretation could be thwarted by an opposing analysis,

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[50] The use of a French form (officially recorded instrument or private deed) may count as evidence of the certain date under French law. The date of assignment will thus be fixed; but there is no guarantee that this date will also be deemed, with respect to third parties, as the date the inter-estate transfer took place.

[51] Think of an assignment made by way of collateral and to be registered by way of notification to a third party. See, similarly with respect to the outcome, S. Corneloup, *La publicité des situations juridiques*, thesis, LGDJ, 2003, no 345–349.

[52] See the promotion, with respect to the attachable character of claims, of connection of the 'power of disposal' of the attached debtor over his claim at the place of residence of the said attached debtor, in G. S. Höck, 'Saisie de compte et de créance transfrontalière. Plaidoyer pour le rattachement au pouvoir de disposition du débiteur', *Rev. crit. DIP* 2006. 301, esp. p. 320 ff. cf. the general discussion of the law applicable to the exercise of the power to dispose, L. d'Avout, *Rép. dr. int.*, v "Biens", 2009, no 92-96 (law of the thing assigned, superseded by potential mandatory rules on public notice).

[53] Except perhaps under the assumption, which is rare, of the originating *bona fide* acquisition of the claim occurring for the benefit of a sub-acquirer; see note 45.

[54] Art. L. 313-25(2) and L. 313-27 Code monétaire et financière.

[55] We refer to the rules of evidence applicable in mixed cases, see art. L. 110-3 Code of Commerce.

that is not contrary to the letter of the new law and may be considered consistent with its spirit. By this second interpretation, which is constructive, the French lawmaker has implicitly resorted to the requirement of a written document (formal condition for the validity of the act of assignment) and of the dated instrument (for the act to be effective with respect to third parties) as the lawmaker did elsewhere in civil and commercial law. By this interpretation, behind the *formalism as to validity* there lies a *formalism as to notification or order* of assignments:[56] the formal written document allows the transaction to be dated and so ensures it is fully effective in property terms outside of the mandatory relationship alone between assignor and assignee. In crossborder cases, the stakes of these two opposing interpretations should be reduced (in any event, it can be provisionally hoped so). In both cases, it is very likely that article 1325 of the Civil Code, settling the conflict between third-party acquirers of one and the same claim, is a super-mandatory rule of French law, a sort of 'overriding mandatory provision'[57] ensuring the certainty of local transactions and the settlement of conflicting property claims between absolute third parties. This text would therefore be applicable not in any event of conflict arising in the French courts but when the function of the texts requires its application for sure; especially when the most part of the transactions in question may be significantly located in France. This will be the case, in this author's opinion, when the *assignor* has his principal place of business in France (or when, being secondarily based in France, the assignor has contracted with the two assignees from his French place of business). It will not be the case, however, when the assigned debtor is based in France and the competing assignments of claim arose abroad under foreign laws. The debtor is not the fulcrum of the transaction (or at least is no longer so since the confinement of the formal requirements of art. 1690 Civil Code); only his property forms the basis for performance by equivalence with the thing assigned and that property may be scattered worldwide. It shall be recalled besides that the assigned party is protected, in the event of a double mobilisation, by specific rules on questions such as that of the discharge by payments (see no. 2 above). When only the assigned debtor is resident in France, or his attachable property is located there, the applicability of French law for settling the dispute as to attribution of the claim brought before the French court therefore appears to be fortuitous and so unwarranted whenever the assignments are not all effected under French law, with the assignor being resident abroad. It can therefore be taken, non exclusively, that the rule of new article 1325 of the Civil Code, settling conflicting assignments, is certainly and mainly applicable when the assignor is resident in France.[58] It remains to be determined whether the means of dating in article 1323 and further those of the written document of article 1322 of the Civil Code share the same nature and same parameters of international applicability. By the first interpretation identified (reformed French law supposedly proclaims the outright binding character of legal instruments of transfer, without formal requirements as to third-party-effectiveness), only article 1323 would be part of the

[56] For an analysis, in comparative perspective (especially with Swiss law) of such mixed formal arrangements of validity/notification, see D. Pardoel (n. 2) nos 417 ff, esp. 425. In French internal law, M. F. Chénedé says of the reform that 'this new formalism as to validity is not just offset but also to a large extent commanded by the alleviating of the formal requirements as to notification/public notices' (*Le nouveau droit des obligations et des contrats, Consolidations–Innovations–Perspectives*, Dalloz, 2016, no 42–71).

[57] In the broadest sense of the term which is not that used by the Rome I Regulation (art. 9).

[58] By making the rule bilateral and so designating the foreign law in the event of the assignor being resident abroad, the consultation of the foreign law could lead either to an observation of no conflict of laws (the foreign law being identical to the French *lex fori)* or to a *renvoi* to the French *lex fori* or to a third system of law if the system of the country considered practices other rules of conflict of laws.

implementation of article 1325 in international instances. Thus the foreign assignee having acquired the claim first, *without having a written document*, could prevail against the French assignee with a written document; he would prevail by proving his earlier right by any means under article 1323 alone, setting aside the rule as to form of article 1322 (the validity and effectiveness in principle of his acquisition being appraised in accordance with the law governing the contract of assignment). By the second interpretation, on the other hand (the written document, that may be dated, would be a new form of priority/effectiveness requirement by which to decide on competiting assignments), article 1322 could also be construed as an overriding mandatory provision and so contribute to the solution of the conflict of laws: without a written document (art. 1322), dated or capable of being dated (art. 1323), the assignee would be unable to prevail under article 1325 of the Civil Code, even though the foreign law applicable to the conditions as to form and substance of his title of acquisition asserted the acquisition was effective. The protectionism inherent in this second solution should probably dissuade its too ready use in crossborder cases; at any rate within the European area. In international matters, it would be better, in this author's opinion, not to amplify the effects of formal validity (written document) to make it produce an effect of priority when one of the rights considered has been validly constituted abroad under a foreign law.[59]

7. The solutions just suggested should be tempered in consideration of the procedural or jurisdictional factor.

What has just been indicated about the possible international behaviour of the new French regulation and the principles of resolution of conflicts in the event of competing and incompatible laws on the thing assigned applies on the assumption that a French court is seised of the matter; apart perhaps from the case of insolvency proceedings brought in France mobilising particular rules as to the effectiveness and ranking of systems of law.

Should a foreign court have to hear these difficulties for example further to the attachment by a third person made in the country of residence of the assigned debtor, the solutions might be thwarted by application of conceptions specific to the foreign country in matters of conflicts of laws. In particular, the dispute arising from the confrontation of an attachment made under the foreign *lex fori* and an assignment of claim made at the French head office of the assignor might be resolved not by application of the objective law of jurisdiction described above (law of the assignor) but by application of the procedural law of the foreign court seised. This last solution is not ideal, the application of the *lex fori* to authentic substantive questions being a stopgap solution. Unless the application of the *lex fori* leads to no true conflict with the law that we consider competent by priority – which will be the case if the dispute as to attribution of the claim is resolved by application of the *prior tempore* principle practised by the French law of the assignor's place of business –, it will have to be argued before the foreign court seised that the law of the country of the assignor's place of business is in a better position

[59] This concluding sentence is a matter of expediency. It does not claim to deny it is technically possible to treat the formal character of the written document in internal law as mixed formalism of validity and effectiveness and in private international law as an overriding mandatory provision as to notification, sanctioned by the ineffective character of an acquisition made abroad. Under the Rome I Regulation, the characterisation as 'overriding mandatory provision' should be carefully justified (see by analogy *Com*. 14 Nov. 2004, no 00-17.978, *D.* 2005. 1198 and 1192, obs. P. Courbe; *Rev. crit. DIP* 2005.55, note P. Lagarde; *RTD civ.* 2004. 353, obs. R. Perrot; *RTD com.* 2004. 845, obs. P. Delebecque; *RDC* 2004. 1059, obs. D. Bureau).

to settle the competing claims and in particular to appraise the effectiveness of an act of disposition made, with respect to the claim, before the date the attachment took effect.[60]

The opening of insolvency proceedings against the assignor[61] may still modify the solutions and spark a dispute between the assignee of the claim (or contract) and the other creditors of the assignor. In non unified French private international law on bankruptcy, it is usually considered that the mandatory rules for the protection of creditors under the law of the state in which proceedings are brought (*lex fori concursus*) are added to and do not replace the rules ordinarily applicable to the validity and effectiveness of individual private situations.[62] In other words, following this majority opinion, it could be considered that an assignment of claim (or contract) occurring under a foreign law is binding on the insolvency procedure and its organs, if, being valid and effective in ordinary law, the assignment is additionally consistent with the requirements of bankruptcy law. The effectiveness of the assignment, ascertained in accordance with the law of the contract of assignment and by application of the principles of notification and ranking of the law of the country where the assignor is based, will in principle therefore be preserved in the assignor's bankruptcy; save it being for the assignee to abide by the rules incumbent on him once the procedure is begun. European law on international insolvency could lead in certain circumstances to different solutions. It sometimes attributes a geographical location to intangible rights, in particular to claims belonging or having belonged to the insolvent person or entity, in order to exempt them from constraining effects of procedure for the benefit of the third-party assignee or collateral holder. The fairly familiar article 5 of Regulation 1346/2000 of 29 May 2000 (now art. 8 in the recast 'insolvency proceedings' regulation 2015/848, 25 May 2015) provides in particular that 'The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible (…) assets (…) belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. The rights referred to (…) mean: (…) (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of guarantee (…)'. Not all assignments are concerned, just those made by way of guarantee.[63] For them, even so, the application of the regulation might modify the solutions of the conflict of laws as to their validity and the actual effectiveness of the assignment if one were to rely on the assertions of recital 25 (now recital 68): 'There is a particular need for a special reference diverging from the law of the opening State in the case of rights *in rem*, since such rights are of considerable importance for the granting of credit. *The basis, validity and extent of rights in rem should therefore normally be determined according to the lex situs* and not be affected by the opening of insolvency proceedings.' The interpretation of the wording of article 5 (now art. 8) of the regulation is still not certain, in the case law of the European Court of Justice.[64] What is certain,

[60] This reasoning does not presuppose that the claim in question is technically located in the country where the assignor is resident.

[61] For insolvency procedures against the assigned, questions of title shall be similar to these occurring in the individual forced performance procedure presented above.

[62] See for example D. Bureau and H. Muir Watt, (n 39), nos 1985 ff; B. Audit and L. d'Avout, (n. 31), nos 1134–1135 (French law); M. Audit, S. Bollée and P. Callé, (n. 1), nos 778 ff.

[63] See for example recently L. d'Avout, 'L'efficacité internationale des garanties mobilières', in C. Larroumet (ed.), *L'évolution des garanties mobilières dans les droits français et latino-américains*, Panthéon-Assas 2016, p. 111 f.

[64] See ECJ 5 July 2012, case C-527/10, ERSTE Bank Hungary, esp. pts 41-42, D. 2012. 2331, obs. L. d'Avout; *Rev. crit. DIP* 2014. 145, note C. Chalas; comp. 16 April 2015, case. C-557/13, Lutz, *D.* 2015. 2105, note R. Dammann and A.-M. Dang, 2031, obs. L. d'Avout, and 2016.

though, is the location (or '*situs*') of the claim assigned; this location, which may be decisive for the effectiveness of the assignment (fiduciary), being fixed in 'the Member State within the territory of which the third party required to meet the claims has the centre of its main interests' (former art. 2, g, (iii); now art. 2 (9) (viii) in the recast regulation). Depending on the interpretation that will be made of the meaning and the scope of the location of the claim assigned, one might possibly be led, in the event of application of the insolvency regulation, to appraise the *erga omnes* effectiveness of the assignment… according to the law of the country where the assigned debtor and not the assignor is based. This would be an unfortunate instance of going back to the drawing board in conflict of laws solutions![65]

It is as of now established that if we are to construct a reliable system of assignment of claims (or contracts) where conflicts of law are involved, allowance must be made for the peculiarities specific to the various proceedings that may raise the question of the effectiveness of an earlier assignment. Whatever these proceedings are, the constraints inherent in the law of the thing assigned will be irremovable, other than exceptionally;[66] they must be observed in advance in international assignment transactions. Nor will it be easy to get around the constraints inherent in notification depending on the country in which the assignor is resident or those relating to his possible insolvency and the insolvency proceedings that may be opened in this country in particular. Finally the only parameter generally available to the parties is that of the choice of law applicable to the act of assignment. In this area the judicious choice is not necessarily that in favour of the law best known to the parties or that which apparently is the most effective and the swiftest. It may also be the designation of a law avoiding pointless fragmentation of the applicable law, for example the designation of that previously applicable to certain aspects of the transaction and appearing in a position of strength (as the law of the assignor may quite often be, and exceptionally that of the assigned debtor).[67]

III – Final remarks (and analytical table)

8. Staying riveted to the voluntary transfer of claims or contracts on an individual basis, it shall finally be observed that the general solutions of conflicts of laws that have just been discussed in relation to the French reform text do not exclude particular solutions, taking especially the form of derogatory overriding mandatory provisions by application of harmonised European regulations on conflicts of laws. This may be the case, familiar in French law, of the claim made unassignable or unavailable by application of a law regime not necessarily correlated with that applicable to the claim being considered (art. 13-1 L. no 75-1334, 31 Dec. 1975 on subcontracting).[68] In a business context, conversely, one could imagine a claim stipulated as unassignable under a law A that law B of the country of the place of business of the creditor

1045, obs. H. Gaudemet-Tallon; *Rev. sociétés* 2015. 551, obs. L. C. Henry; *RTD com.* 2015. 383, and 755, obs. J.-L. Vallens; 26 oct. 2016, case C-195/15, Senior Home, *D.* 2016. 2212.

[65] See no. 5 above.

[66] As an example of an exception, the assignment of a professional claim for the purposes of refinancing when the claim was unassignable, in the relations between the assignor and assignee. See the case emphasised in no. 8 below.

[67] On this point, see for example, in the non contentious perspective, L. d'Avout, thesis (quoted above note 36) no 478, contemplating the management of conflicts of overriding mandatory provisions as to notification/public notices.

[68] See most recently, Com. 27 avr. 2011, no 09-13.524, *D.* 2011. 1277, obs. X. Delpech, 1654, note Y.-E. Le Bos, 2434, obs. L. d'Avout, and 2012. 1228, obs. H. Gaudemet-Tallon; *RDI* 2011. 618, obs. H. périnet-Marquet; *Rev. crit. DIP* 2011. 624, rapp. A. Maitrepierre, and 659, note M.-E. Ancel; *RTD com.* 2012. 214, obs. P. Delebecque; et ant., 19 Dec 2006, no 04-18.888.

would necessarily make assignable to promote the refinancing of professionals.[69] These specific configurations of the conflict of laws may be dealt with by the combined use of general connections and the *ad hoc* unilateral connection mechanism of super-mandatory rules or overriding provisions.

Faced with this complexity, which is not imaginary, should it be regretted that in France the arrangement for the international applicability of the Dailly statute, benefitting credit establishments based in France in a particular way, is not generalised? Under article L. 313-27 of the monetary and financial code 'The assignment [by receipt…] takes effect between the parties and *becomes binding on third parties at the date affixed on the receipt upon remittance*, regardless of the date of creation, maturity or payability of claims, *without need for any other formality, whatever the law applicable to the claims and the law of the debtors' country of residence*.[70] (…) Remittance of the receipt entails as of right the transfer of collateral, guarantees and accessories attached to each claim, including mortgage collateral, and its third-party effectiveness without need for further formality'.[71] This text, of which it has been said that it risked being partly incompatible with the Rome I Regulation in the event it contradicted the solutions affirmed by the law of the claim assigned that protect the assigned debtor (see no. 3 above *in fine*), is not in a position to protect its users against either the procedural risk of non-recognition in the foreign country where the assigned debtor of the Dailly assignment considered effective in France is based,[72] or the intervention of a law other than French law for the ranking of competing rights over one and the same claim.

It is not enough in international matters to unilaterally proclaim the outright effectiveness, without notification, in a transfer operation for it to be effectively performed with respect to all and in any forum that may have knowledge of it. Even with special arrangements such as article L. 313-25 cited above, a general knowledge of the articulation of conflicting laws remains useful in the course of litigation and ahead of it.

9. In practice, legal techniques other than assignment can be used to transfer an obligation or its economic equivalent between estates. Universal transfers of the 'merger' type come to mind, in relation to which a recent decision of the European Court of Justice addresses the problem of the governing system of law when the law applicable to the merger differs from the law

[69] See for example art. L.442-6, II, (c), Code of Commerce; the 1988 Ottawa Convention on factoring (art. 6) and 2001 United Nations Convention on assignment of receivables (not in force) provide for a similar prohibition. On the transfer of unavailable claims, see also in another context ECJ 12 Feb 2015, case C-396/13, Sähköalojen, *D.* 2016. 336, obs. N. Joubert, and 1045, obs. H. Gaudemet-Tallon; *Dr. soc.* 2015. 234, étude J.-P. Lhernould; *Rev. crit. DIP* 2015. 680, note S. Corneloup; *RTD eur.* 2016. 368, obs. F. Benoît-Rohmer.

[70] This wording is to avoid interference of overriding mandatory provisions on notification/public notices of the country of residence of the assigned debtor. The article would thus come in as a (French) overriding mandatory provision countering any such foreign provision (see *Rép. dr. int.*, v 'Biens', no 96 *in fine*).

[71] Emphasis added. A similar type of conflicts mechanism governs the contribution of a claim to a securitisation vehicle (art. L. 214-168 Code monétaire et financier).

[72] The effectiveness of the Dailly provision is, in my opinion, practically dependent on the assigned debtor and/or assignor being resident in France, because it is there that the assignment proclaimed internationally effective will be performed by force in kind or by equivalent. Without such similar locations, the constraints of notification arising from foreign laws should be considered by the assigning French bank by way of precaution.

applicable to the obligation affected.[73] Non transfer operations such as novation or delegation also come to mind. When performed as part of a contract or on the basis of a pre-existing contract such operations raise problems of *dépeçage* in private international law analogous to those encountered in matters of assignment. That is, better than any ready recipe, it is a reflection on the *foundations* of the rules of connection and on the foundations of internal rules, which are decisive factors in the conflict of laws, that can be used to customize reliable operations in a cross-border context.

Below, for didactic purposes and to invite readers to pursue these initial analyses further, is an illustrated view of the title of paramount applicability of the new rules in an international context. The rules on the assignment of claims and contracts are supplemented by rules on the assignment of debts (which are very largely dependent on the law of the debt assigned) and, by way of comparison, certain rules applicable to economic transfers based on constitutive legal transactions.

Analytical table of the international applicability of French law in the perspective of the matter being brought before a French or European court

Colour code:
Applicable if French law is chosen to govern the transfer (or constitutive) operation
Applicable if French law is applicable to the initial contractual relationship
Applicable as a super-mandatory rule outside the scope of the Rome I regulation
French law applicable on some other ground (as the law applicable to the securities or to joint and several obligations)
No colour: doubt
Comments added

Title IV - The General Regime of Obligations. Chapter 2 – Transactions relating to Obligations
Section 1 - Assignment of Rights arising from Obligations

Article 1321
Assignment of rights is a contract by which the creditor (the assignor) transfers, whether or not for value, the whole or part of his rights against the assignment debtor to a third party (the assignee).
It may concern one or more rights, present or future, ascertained or ascertainable.
It extends to the ancillary rights of the right that is assigned *(unless vetoed by the law applicable to the said ancillary rights).*
The consent of the debtor is not required unless the right was stipulated to be non-assignable.

Article 1322
An assignment of rights must be effected in writing, on pain of nullity.
Nullity of the contract of assignment could be covered, inter partes*, by application of one of the laws designated by article 11 of the Rome I regulation. It remains to be determined whether the written document is also formal notification, combined with articles 1323 and 1325 of the Civil Code.*

Article 1323
As between the parties the transfer of the right takes effect at the date of the act.

[73] ECJ 7 April 2016, case C-483/14, KA Finanz, *D.* 2016. 1404, note J. Chacornac, and 2025, obs. L. d'Avout.

It can be set up against third parties from that moment. In the event of challenge, burden of proof of the date of the assignment rests on the assignee, who may establish it by any means of proof.
However, the transfer of a future right takes effect only on the day when it comes into existence, as between the parties as well as against third parties.
(This sentence should be applicable to assignments governed by French law; but the prior transfer of future rights under the foreign law applicable to the said rights is open to discussion).

Article 1324
Unless the debtor has already agreed to it, the assignment may be set up against him only if it has been notified to him or he has acknowledged it.
The debtor may set up against the assignee defences inherent in the debt itself, such as nullity, the defence of non-performance, termination or the right to set-off of related debts. He may also set up defences which arose from the relations with the assignor before the assignment became enforceable against him, such as the grant of a deferral, the release of a debt, or the set-off of debts which are not related.
The assignor and assignee are jointly and severally liable for any additional costs arising from the assignment which the debtor did not have to advance. Subject to any contractual term to the contrary, the burden of these costs lies on the assignee.
(The non highlighted sentence could be applicable both when French law is chosen to govern the assignment and when French law is applicable to the claim assigned).

Article 1325
In the case of successive assignees of rights, competition between the assignees is resolved in favour of the first in time, who has a right of recourse against the one in whose favour the debtor would have tendered satisfaction.
(The inapplicability of the second clause of the sentence should be related to that of the first clause, when characterised as 'in rem' or under the Rome II regulation).

Article 1326
A person who assigns a right for value guarantees the existence of the right and of its ancillary rights unless the assignee took it at his own risk or knew of the uncertain character of the right. He is not answerable for the solvency of the debtor unless he has undertaken to be so, and then only up to the value of the sum he was able to obtain for the assignment.
When the assignor has guaranteed the solvency of the debtor, the guarantee extends only to his current solvency; it may be extended to his solvency when the right falls due, but only if the assignor has expressly so specified.

Section 2 - Assignment of Debts

Article 1327
A debtor may assign his debt to another person with the agreement of the creditor.

Article 1327-1
If the creditor gave his agreement to the assignment in advance, or [and] if he has not taken part in the assignment, he may find it set up against him, or may take advantage of it himself, only from the day when he was notified of it, or once he has acknowledged it.

Article 1327-2
If the creditor expressly so agrees, the original debtor is discharged for the future. Otherwise, and subject to any contractual term to the contrary, he is bound jointly and severally to pay the debt.
(Such consent might possibly be given under a law other than that applicable to the debt assigned.)

Article 1328
The substituted debtor, and the original debtor if he remains liable, may set up against the creditor defences inherent in the debt, such as nullity, the defence of non-performance, termination of the right to set off related debts. Each may also set up defences which are personal to him.

Article 1328-1
Where the original debtor is not discharged by the creditor, any securities remain in place. Where the original debtor is discharged, securities given by third parties remain binding only if they agree.
(What of the distinction between ancillary and non-ancillary securities?)
If the original debtor is discharged, any joint and several co-debtors remain liable to the extent which remains after deduction of the share of the original debtor who has been discharged.

Title III - The Sources of Obligations. Chapter 4 - The Effects of Contracts
Section 4 - Assignment of Contract

Article 1216
A contracting party, the assignor, may assign his status as party to the contract to a third party, the assignee, with the agreement of his own contractual partner, the person subject to assignment.

This agreement may be given in advance, notably in a contract concluded between the future assignor and person subject to assignment when the contract concluded between the assignor and the assignee is notified to him or when he acknowledges it.
An assignment must be established in writing, on pain of nullity.
Comment: nullity could be overcome if the assignment were concluded outside France (See Rome I regulation art. 11)

Article 1216-1

If the person subject to assignment has expressly consented to it, assignment of contract discharges the assignor for the future.

One might hesitate to apply French law to the assignment contract. But the natural solution is indeed to make the principle and the effects of the consent of the person subject to assignment subject to the law of the assigned contract (See note 33 above).

In its absence, and subject to any term to the contrary, the assignor is liable jointly and severally to the performance of the contract.

(Remark: date the transfer become effective against third parties? Date of the instrument probably Art. 1323(2), by analogy or art. 1333(2), by analogy)

Article 1216-2

The assignee may set up against the person subject to assignment the defences inherent in the debt itself, such as nullity, the defence of non-performance, termination or the right to set off related debts. He cannot set up against him defences personal to the assignor.

The person subject to the assignment may set up against the assignee all the defences which he could have been able to set up against the assignor.

Article 1216-3

If the assignor is not discharged by the person subject to the assignment, any securities which may have been agreed remain in place. Where the assignor is discharged, securities agreed by third parties remain in place only with the latter's agreement.

If the assignor is discharged, any joint and several co-debtors remain liable to the extent which remains after deduction of the share of the debtor who has been discharged.

Title IV/Chapter 2 (continued)

Section 3 - Novation

Article 1329

Novation is a contract which has as it subject-matter the substitution of one obligation (which it extinguishes) with a new obligation (which it creates).

It may take place by substitution of obligations between the same parties, by change of debtor or by change of creditor.

Article 1330

Novation cannot be presumed. The will to effect it must be shown clearly in the instrument.

Article 1331

Novation takes place only if the old and the new obligations are both valid, unless it has as its declared subject-matter the substitution of a valid undertaking for an undertaking which is tainted by a defect.

Article 1332

Novation by change of debtor may take place without the concurrence of the first debtor.

Debateable characterisation/applicability; it seems difficult to apply this text on the ground that the novation agreement is governed by French law if the debt extinguished is governed by a foreign law not accepting the same operation.

Article 1333

Novation by change of creditor requires the consent of the debtor, who may agree in advance that the new creditor is to be appointed by the old.

Novation can be set up against third parties at the date of the instrument. In the event of challenge, the burden of proof of the date rests on the new creditor, who may establish it by any means of proof.

Article 1334

Extinction of the old obligation extends to all its ancillary rights and obligations.

By way of exception, any initial security may be preserved to guarantee the new obligation if the third party guarantors so agree.

Article 1335

A novation agreed between the creditor and one of two or more joint and several debtors discharges the others.

A novation agreed between the creditor and a guarantor does not discharge the principal debtor. It discharges the other guarantors to the extent that their contribution is based on the novated obligation.

Section 4 - Delegation

Article 1336

Delegation is a transaction by which one person (the delegator) obtains from another (the delegate) an obligation in favour of a third party (the beneficiary of the delegation), who accepts him as debtor.

Unless otherwise provided, the delegate may not set up against the beneficiary of the delegation any defence arising from his relations with the delegator, or from the relations between the latter and the beneficiary of the delegation.

Article 1337

Where the delegator is debtor of the beneficiary of the delegation and the instrument demonstrates expressly the will of the beneficiary of the delegation to discharge the delegator, the delegation takes effect as a novation.

However, the delegator remains bound if he had expressly undertaken to guarantee the future solvency of the delegate, or if the delegate is subject to a procedure for cancellation of his debts at the time of the delegation.

Article 1338

Where the delegator is debtor of the beneficiary of the delegation but the latter has not discharged his debt, the delegation provides the beneficiary with another debtor.

Satisfaction rendered by one of the two debtors discharges the other to the extent of the satisfaction so rendered.

Article 1339

Where the delegator is creditor of the delegate, his rights are extinguished only by the performance of the delegate's obligation in favour of the beneficiary of the delegation, and only to the extent of that performance.

Until then, the delegator may require or accept satisfaction only in relation to the share beyond that which the delegate has undertaken. He may enforce his rights only if he performs his own obligation in favour of the beneficiary of the delegation.
An assignment or distraint of the rights of the delegator can take effect only subject to these same limitations.
However, if the beneficiary of the delegation has discharged the delegator, the delegate is also discharged as against the delegator, to the extent of the value of his undertaking in favour of the beneficiary of the delegation.

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