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Reform of Assignment in Security: Lessons from the Netherlands

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A. INTRODUCTION

The Scottish Law Commission has published a Discussion Paper on the reform of the Scots law of assignation and assignation in security, as part of a larger project on “moveable transactions”.¹ The Scots law of assignation has a rich history. But it has perhaps been a victim of its own success: ancient principles have endured for so long that there has been little development in either case law or legislation. In recent years, however, there have been considerable developments elsewhere, both in other national legal systems and at the supranational level. The publication, in 2010, of the full edition of the DCFR, which draws heavily, in the context of assignation, on the *Principles of European Contract Law*, provides an international benchmark against which Scots law may be measured. The most recent re-codification of private law in Western Europe,² meanwhile, is Dutch law: not only did it adopt an entirely new civil code in 1992, it amended its assignation provisions in 2004.³ Scots law has many historical links with the Netherlands and its law may provide an obvious source of inspiration. But Dutch law is, in addition, particularly interesting because its law on “pledging” claims—that is to say, the recognition of a limited security interest in the underlying claim—is as developed as any jurisdiction in Europe.

1 Scottish Law Commission, Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2011). This paper was written prior to the publication of the Discussion Paper.

2 There are codification projects in Central and Eastern Europe: the new draft Hungarian Civil Code, adopted by the Hungarian Parliament in 2009, encountered difficulties in the Constitutional Court and, at the time of writing, had not been brought into force. A new Czech Civil Code was adopted in November 2011.

3 The French *Code civil* amended its provisions on *nantissement* in 2006 and 2007: see *Code civil* art 2355 ff.

Although there have been two valuable studies of the Scots law of assignation with a comparative dimension,⁴ there has been rather less consideration of the position of the law in relation to using claims as collateral.⁵ And there is the natural difficulty of accessibility to Dutch law for Scots lawyers without Dutch. This paper therefore seeks to set out this aspect of Dutch law for a Scottish audience in the context of the debate about reform.

B. SCOTS LAW IN COMPARATIVE CONTEXT

(1) Terminology

“Assignation” is a paradigm Scotticism. “Assignation” is what, elsewhere, is referred to in English as an “assignment” or a “cession”. Where “Assignation” is used in the German language sources, it tends to refer to the related, but different, concept of a mandate to pay, the *Anweisung*.⁶ And if the Scottish terminology appears unusual for outsiders, it is a peculiarity that has been recognised by Scots lawyers too.⁷ Be that as it may, however, although both “cession” and “assignment” are sometimes referred to in the Scottish sources,⁸ “assignation” is one of those terms of art that Scots lawyers have taken to heart.

The transferor in an assignation is known as the “cedent” or, as a result of the use of English styles, the “assignor”. The transferee is the “assignee”. The object of an assignation is an “underlying claim”. One party, whose passive participation is, in Scots law at least, essential, is the debtor in the underlying claim. But one difficulty in referring to “the debtor” is that there are often multiple mutual debtors. In the case of assignation, the term “account debtor” is often used to refer to the *debitor cessus* in the underlying claim. Matters are complicated further where the underlying claim is the object of a juridical act that is analogous to, but different from, an assignation. The classic case in Scots

4 P Nienaber and G L Gretton, “Cession/Assignation” in R Zimmermann, D Visser and K G C Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004); G Lubbe, “Assignment” in H L MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006).

5 For which, see generally W Johnston (ed) *Security over Receivables: An International Handbook* (2008).

6 § 1400 ABGB (the Austrian civil code) uses the language of “Assignation” for *Anweisenrecht*; see too the Swiss *Obligationenrecht* §§ 466 ff. Cf §§ 783 ff BGB (the German civil code). For discussion from a Scottish perspective, see R G Anderson, *Assignation* (2008) paras 4-41.

7 See D Scott, “Anomalies in Scots Law” (1919) 31 JR 256 at 260. For literary usage, see John Dryden’s play, *The Assignation, or Love in a Nunnery* (1673) reproduced in G Saintsbury and Sir Walter Scott (eds), *The Dramatic Works of John Dryden* (1883) vol 4, 365 ff; Edgar Allan Poe, *The Assignation* (1845). Neither work is worth reading.

8 See, for example, Hume, *Lectures* III, 2-3 who, over these two pages, uses the full spectrum of terminology.

law is the arrestment. In such a case, the account debtor in a claim which is the object of an arrestment is known as the “arrestee”. In a case of a competition between an arrester and an assignee, however, it means that one party, the account debtor/arrestee, has two names. Moreover, when consideration is given to whether Scots law should adopt a limited security right in claims, as in Dutch law, terminology becomes even more complex, for, in the pledge case, there are two debtors: the account debtor is the debtor of the pledgor and the pledgor is a debtor of the pledgee. Scots law – and the English language – does not have ready terms to hand to describe the debtor in the underlying claim. That being so, we refer to the *debitor cessus*, as well as the debtor in a claim which is the object of a pledge, as the “account debtor”.

(2) Scots Law *de lege lata*

There are perhaps two features of Scots law which are relevant to using claims as collateral. The first is that the only way to create a security over claims⁹ in Scots law is by way of an assignation in security. There is not, under the existing law, any method whereby a limited security right may be vested in the underlying claim in favour of a security taker. Scots law is thus to be contrasted with systems like Germany, France, the Netherlands¹⁰ and South Africa¹¹ where such a pledge of claims is possible.

How, then, to characterise the Scottish assignation in security? There are two possible interpretations. The first is that the Scottish assignation in security is a security by way of *fiducia cum creditore*.¹² It is an outright transfer to the creditor. It matters not, at least for this purpose, whether or not the assignation is described as being “in security”. The security takes effect only on intimation of the assignation to the debtor (intimation raises its own difficulties, to which we return), the effect being that the assignee (the creditor in the underlying agreement giving rise to the assignation in security) becomes the creditor of the account debtor. The *fiducia* analysis is the better view of the Scots law of assignation in security. But it should be mentioned that some writers have sought to draw a distinction, probably drawing on the pre-1970 law of heritable securities, between an *ex facie* absolute assignation, qualified by a back-bond, on

9 The discussion here is limited to claims, but similar issues arise with other assets too (intellectual property rights form one important category).

10 See C.3 below.

11 The nature of the South African cession *in securitatem debiti* is somewhat controversial and is not discussed further here, primarily because it is well treated elsewhere: see generally P Nienaber and G L Gretton, “Cession/Assignation” in R Zimmermann, D Visser and K G C Reid (eds), *Mixed Legal Systems in Comparative Perspective* (2004) 787 at 814 ff.

12 *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16, [2011] 1 WLR 921 at para 4 per Lord Collins.

the one side, and, on the other, an assignation which is expressly stated to be in security. There is certainly one difference between the two security documents: an *ex facie* absolute assignation may be used as a security for “all sums due and to become due”.¹³ An assignation expressly stated to be in security, in contrast, is a valid security only in respect of indebtedness in respect of which the assignation in security was granted. But this difference does not concern the patrimonial effect of the assignation in security which, in both cases, is an outright transfer; the difference concerns rather the underlying indebtedness covered by the security. Even this distinction, however, is somewhat theoretical. In the first place, an assignation expressly in security may be granted in “all sums” terms. And, in the case of an *ex facie* absolute assignation granted by a company or LLP, where the sum contained in the back-bond is increased, the increase is considered to create an additional charge and will require further additional registrations if the security is validly to cover the additional advances.¹⁴

The second problem, as indicated above, lies with the onerous requirement of debtor notification: intimation is not merely informative, it is constitutive. Intimation applies to outright and security assignations alike, because, as was indicated above, the prevailing view is that there is no material difference – in terms of the patrimonial effect of the assignation¹⁵ – between an outright assignation and an assignation in security. The content of the necessary notice is unclear,¹⁶ practitioners having long ago given up complying even with the terms of the Transmission of Moveable Property (Scotland) Act 1862. There may be much to be said for intimation. But it is also apparent that Scots law is out of touch with other legal systems in this respect. For present purposes, the important point is that, since it is not possible to create an effective security without debtor notification, there are problems in cases of global assignments (either outright or in security) where giving individual notices is not practical.

13 *Hamilton v Western Bank* (1856) 19 D 152; *National Bank v Forbes* (1858) 21 D 79; *National Bank v Dickie's Tr* (1895) 22 R 740 (these cases, in so far as they suggest that a pledge of a bill of lading results in a transfer of ownership to the pledgee, are no longer good law: *North Western Bank v Poynter Son & Macdonald* [1895] AC 56). For discussion, see W M Gloag and J M Irvine, *The Law of Rights in Security and Cautionary Obligations* (1897) 469 ff; and A J M Steven, *Pledge and Lien* (2008) para 4-11 ff. Cf Companies Act 2006 s 881(1).

14 Companies Act 2006 s 881(2).

15 There may be important differences in terms of the obligatory relationship. The assignee under an assignation in security will be bound to retrocede the claim on repayment by the assignor of the outstanding indebtedness in respect of which the assignation in security was originally granted.

16 Compare, for example, Art R 313-15 ff *Code monétaire et financier*.

(3) Fiducia

That Scots law recognises security by way of fiduciary transfer of the underlying claim to the creditor is consistent with other civilian systems. So, in Germany, because no intimation to the debtor is required, fiduciary transfer (*Sicherungsabtretung*) is the security mechanism of choice. The difficulty with Scots law, it seems, is not so much with the concept of title-transfer security,¹⁷ but with the formalities required: intimation to the account debtor is a constitutive requirement of transfer. At this stage, however, it is important to distinguish the different purposes of intimation.¹⁸ One is legal certainty: at present it is by way of intimation that Scots law achieves *data certa* for the transfer of the assigned claim. The second purpose of intimation, however, is informative: to ensure that the account debtor knows what is happening; and, more prosaically, to ensure that the account debtor cannot be discharged by paying the cedent and to provide a cut-off date for the defences that that the account debtor may plead against the assignee. The two functions of intimation are, however, quite distinct. Intimation is unavoidable for the second purpose where the rationale is practical (and, where the claims arise out of regulated consumer credit agreement, the rationale is legal).¹⁹

But even if intimation is made to the account debtor, the substantive nature of the transaction as a security is problematic. The security-taker has little interest in dealing with the account debtor and being paid the proceeds of the assigned claim; it wants only a security. The security-giver, in contrast, has often a pressing need for the assigned claim(s) to be paid or performed directly to it. Most notices therefore instruct the account debtor to continue to pay the security-giver. The difficulty with this perfectly commercial approach is the elderly authority which holds that such an instruction to the debtor is inconsistent with the nature of an assignation in security: *Hope and M'Ca v Wauch*.²⁰ Astonishingly, in *Hope*, the account debtor who paid the cedent, in accordance with the instructions in the assignee's notice, was held liable to pay again to the assignee. The decision is

17 Although there are some: see n 9 above; and, in the context of a pledge of company shares, *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16. For discussion of taking security over company shares in Scots law, see W M Gloag and J M Irvine, *The Law of Rights in Security and Cautionary Obligations* (1897) 502 ff.

18 See R G Anderson, "Intimation 1862-2008" (2008) 12 EdinLR 275.

19 Consumer Credit Act 1974 s 82A (introduced by the Consumer Credit (EU Directive) Regulations 2010, SI 2010/1010, which implements Consumer Credit Directive 2008/48/EC art 17. This provision requires "notice" of the assignment of any credit claims arising out of a regulated consumer credit agreement "as soon as reasonably possible". There is an exception, where, in the words of art 17 of the Directive, "the original creditor, by agreement with the assignee, continues to service the credit vis-à-vis the consumer".

20 June 12th, 1816 FC.

wrong, but stands. In practice it is ignored. But any reform must make provision for the account debtor who, although not a party to any assignation, is the one person who often has to be able to make sense of any assignation or security arrangement without seeing the terms of the security documents and whose interests, too often neglected, must be protected.²¹

(4) Limited security rights: the comparative context²²

(a) Introduction

It is not at present possible, in Scots law, to vest a conventional limited right in a personal right, in the same way as it is possible to have a conventional limited or subordinate real right, by way of a standard security, over the ownership of land. We stress *conventional* because, on one analysis – albeit one not entirely consistent with the troublesome leading case, *Lord Advocate v Royal Bank of Scotland*²³ – a judicial security by way of arrestment confers a subordinate personal right on the arrester in the arrested claim. The lack of a limited security in Scots law is a major lacuna. Other major European systems recognise such a right: the English charge; the French *nantissement*; the German *Forderungspfandrecht*. We shall make a few comments about each of these in turn.

(b) English Law²⁴

We start with a couple of preliminary observations about the English law of assignment. In the first place, there are really two types of assignment in English

21 See generally A F Salomons, “Deformalisation of assignment law and the position of the debtor in European property law” (2007) ERPL 639. The idea that it is immaterial to the account debtor whether it pays the original creditor or an assignee or an arrester or an attorney of the original creditor, is an important point of departure for the law of assignment. But the assumption is one that ought to be more frequently analysed. “D’une façon générale, c’est seulement dans une théorie très abstraite de l’obligation qu’on peut en considérer le changement du créancier comme indifférent du cédé” writes Jean Carbonnier, “Le rapport d’obligation est un rapport psychologique, et du créancier inconnu, le débiteur peut redouter un manque d’égards, voire une hostilité dramatique”: *Droit civil* vol 2 (1955; repr 2004) *Les obligations*, 2458, Nr 1234.

22 There is a useful summary of the comparative law position in the Scottish Law Commission’s Discussion Paper on *Moveable Transactions* (n 1) appendix B.

23 1977 SC 155.

24 Two useful monographs are G Tollhurst, *Assignment of Contractual Rights* (2006) and M Smith, *The Law of Assignment* (2007). More general introductions may be found in H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Personal Property Security* (2007); L Gullifer, *Goode’s Legal Problems of Credit and Security*, 4th edn (2008) para 3-13 ff; E McKendrick (ed), *Goode’s Commercial Law*, 4th edn (2010) 787 ff; C Bamford, *Principles of International Financial Law* (2011) ch 5; E P Ellinger, E Lomnicka and C V M Hare, *Ellinger’s Modern Banking Law*, 5th edn (2011) ch 21; L Gullifer and J Payne, *Corporate Finance Law: Principles and Policy* (2011) ch 8 (“Transferred Debt”).

law: the legal assignment and the equitable assignment. In the normal course of things, all assignments begin life as an equitable assignment. Some will become perfected “at law” – by complying with the requisite formalities²⁵ and giving written notice to the debtor. Priority, in the case of a double assignment of the same right, is ruled by the so-called rule in *Dearle v Hall*:²⁶ the first onerous good faith assignee to notify the account debtor prevails.²⁷

English law allows the creation of two security rights over claims (so-called, “choses in action”): the mortgage or the charge. There are two types of charge, the fixed and the floating. Simply put, the difference between the two centres on control: where the chargor has control of the charged assets, the charge is floating; where the chargee has control, the charge is fixed.²⁸ The distinction is important because, on insolvency, a fixed charge holder ranks higher than a floating charge holder. Indeed, since the reforms introduced by the Enterprise Act 2002 came into force in September 2003, the floating charge holder is now subordinated even to a fund for unsecured creditors.²⁹ For present purposes, in the case of either a fixed or floating charge of claims, no debtor notification is required. Both charges are effective from the date of execution. The only caveat is where the chargor is a company: the charges must be registered with Companies House within 21 days of execution.³⁰

The other English security interest that is available for claims is the mortgage. To some extent the mortgage is rather like title transfer: the mortgagor transfers the claim to the mortgagee. In order for the mortgage to take effect at law (in other words, for the mortgage to become a “legal mortgage”), notice of the mortgage must be given to the account debtor. In the absence of notice, the mortgagee has only an “equitable mortgage”. One major difficulty with other systems using English law as a model is the role of Equity. With a mortgage, for example, although title is transferred to the mortgagee, the so-called “beneficial interest” in the claim is not; that remains with the mortgagor, who holds also the powerful “equity of redemption”, itself an important right which cannot be contracted out of³¹ and which, itself, may be the object of security interests.

Because of the major role accorded to equity in the English security interest system, English law is of limited utility for Scottish law reformers. Even if it were

25 These are set out in the Law of Property Act 1925 s 136.

26 (1828) 3 Russ 1; 38 ER 475.

27 The rule is consistent with the general maxim of equity that “where the equities are equal, the law prevails”.

28 *National Westminster Bank plc v Spectrum Plus Ltd* [2005] 2 AC 680.

29 Insolvency Act 1986 s 176A.

30 Companies Act 2006 Part 25.

31 This is the “once a mortgage always a mortgage” principle: *Noakes & Co Ltd v Rice* [1902] AC 24.

accessible, it may not be desirable, for the law is technical and complicated,³² the law on priorities particularly so. One aspect of English law, of course, has already been borrowed, namely the floating charge. Issues of “control” are of limited relevance in Scots law because there is no authority, in Scots law, for taking a non-possessory security by way of charge, which gives the chargee control. The only statutory authority available is for a floating charge, which gives control to the chargor. And in Scotland, as in England, a floating charge is now generally used as a residual security document, whose primary utility, in so far as it has been granted over the whole or substantially the whole of the company’s assets (for floating charges may be granted only by companies and LLPs), is to give the chargee the right, on the chargor’s insolvency, to appoint an administrator.³³

(c) *German Law*

German law is interesting for two reasons. In the first place, its law of assignment is governed by concise, intelligible general principles. Assignment takes place by way of a juridical act concluded by agreement. Following the agreement, the assignee becomes the creditor. Notice to the account debtor is not a constitutive requirement for transfer.³⁴ As a result, it is not possible for the *Dearle v Hall* situation to arise in German law. The German code contains instead a number of provisions protecting the position of the account debtor who performs to the original creditor or to another party asserting an entitlement to performance.³⁵

There are two possibilities for security in German law. The first is assignation in security (*Sicherungsabtretung*). Because this is essentially an assignment (albeit one for the purposes of security), no notice to the account debtor is required. It is perhaps for this reason above all that the *Sicherungsabtretung* is so important. The alternative, expressly provided for in the BGB, is the *Forderungspfandrecht*, which does require notice.³⁶ The result is that, in German law, it is not possible

32 Cf *Samuel v Jarrah Timber & Wood Paving Corporation Ltd* [1904] AC 323 at 326 per Lord McNaughton: “No one, I am sure, by the light of nature ever understood an English mortgage of real estate.” Admittedly this comment pre-dates the great reforms of the 1920s, but the case itself concerned a mortgage of debenture stock.

33 Insolvency Act 1986 Sch B1 para 14. For a brief consideration of the “qualifying floating charge” principle, see *Stephen, Petr* [2011] CSOH 119.

34 § 398 BGB. But this is subject to the provisions of the Consumer Credit Directive 2008 if the claims arise out of a regulated consumer credit agreement. In such cases, the account debtor must be informed (*informiert*): see recital (41). For the development of German law in this area, see C Hattenhauer, “§§ 398–413. Übertragung einer Forderung” in M Schmoeckel, J Rückert and R Zimmermann (eds), *Historisch-Kritischer Kommentar zum BGB* vol II/2 (2007) 2290 ff.

35 §§ 407–410 BGB.

36 § 1280 BGB. The debtor’s private knowledge is not enough: H Prütting, G Wegen and G Weinreich (eds), *BGB Kommentar*, 4th edn (2009) § 1280, Rn 1 (commentary by G Nobbe, judge of the

to vest a limited security interest in a claim without giving notice to the account debtor.

(d) *French Law*

French law is often said to be the jurisdiction from where Scots law borrowed its law of assignation and, in particular, the need for intimation to the account debtor as a constitutive requirement for transfer. However that may be, the modern French law is somewhat complicated. The basic principle is that assignment (*cession de créance*) may occur only with formal notice, served by a court officer, to the account debtor.³⁷ But this requirement is so onerous that cession under the *Code civil* provisions is rarely used in practice. More common is the use of *subrogation personnelle* which may occur by agreement, or cessions under the factoring³⁸ or securitisation provisions.³⁹

Since 2006, however, the *Code civil* has also contained provisions allowing a limited security interest (*nantissement*) to be created in “incorporeal moveables” (*meubles incorporels*).⁴⁰ Such a security agreement must be in writing but is effective (*opposable*) between the pledgor and pledgee and against third parties from the date of the agreement.⁴¹ Notice to the account debtor is required only to render the security agreement opposable against him.⁴² And, since 2008, it is also possible to conclude an outright cession by way of security. Such a cession is opposable against third parties from the effective date of the agreement, although the account debtor is bound by such a security cession only on “*notification*” (not *signification*) being made by either the assignor or assignee (*fiduciaire*).⁴³

Bundesgerichtshof). The notice must be served by the original creditor in the claim (the “*Inhaber der verpfändeten Forderung*”): *ibid*, Rn 3.

37 Art 1690 *Code civil*. Where, however, the claims arise out of a regulated consumer credit agreement, it appears necessary, for the purposes of the Consumer Credit Directive 2008, for the account debtor, only to be “*informé*”. But it is probably the case that this requirement in no way relaxes the requirement of domestic French law for “*signification*” of any *cession*.

38 The so-called *Loi Dailly*, now found in Art L 313-23 ff *Code monétaire et financier*. The provisions are not limited to factoring transactions. But the parties must be juristic persons or natural persons acting in the course of business.

39 Art L 214-43 ff *Code monétaire et financier*.

40 Art 2355 *code civil* ff.

41 Arts 2356 and 2361 *Code civil*.

42 Art 2362 *Code civil*. It is worth emphasising that only “*notification*”, not the formal “*signification*” of Art 1690 *Code civil*, is required.

43 Art 2018-2 *Code civil*. This provision is not mentioned in the Scottish Law Commission’s Discussion Paper on *Moveable Transactions* (n 1). See generally P Simler and P Delebecque, *Droit civil: Les sûretés, la publicité foncière*, 5th edn (2009) para 665 ff, especially at para 667 which suggests that, in France, a fiduciary cession is not always treated as full transfer. This approach is reminiscent of the trend in the Scottish sources criticised by G L Gretton, “Radical rights and radical wrongs” 1986 JR 51 and 191.

(5) Modern international instruments⁴⁴

The law of assignation is served by a number of important international benchmarks: the *Undroit Ottawa Convention on Factoring*;⁴⁵ the *McGregor Contract Code*;⁴⁶ the *Gandolfi Code*;⁴⁷ the *UNCITRAL Convention on the Assignment of Receivables in International Trade*;⁴⁸ the *Principles of International Commercial Contracts*;⁴⁹ the *EBRD Model Law on Secured Transactions (“MLST”)*⁵⁰ and the *DCFR*.⁵¹ But only the MLST and the DCFR have anything to say about the creation of security interests in receivables. The DCFR applies to security assignments⁵² and limited proprietary rights alike.⁵³ Both the DCFR and MLST envisage a full-blown register for movable transactions; both contain unitary provisions for moveable and incorporeal moveable transactions alike, with specialist provisions for intangibles.

(6) Publicity

The policy of publicity is one to which Scots law has long had affection. It is sometimes said that, in the case of assignation, intimation is a type of publicity. This is one rationale. But it is not persuasive: only the cedent, assignee and account debtor may know about it. Notification is, in Bernard Rudden’s oxymoron, a type of “private publicity”,⁵⁴ an elegant acknowledgment that intimation (unlike the onerous *signification* of French law) is not public at all. Claims are unlike real rights in that they have no physical object which can

44 For the Scottish Law Commission’s summary of these provisions, see Scottish Law Commission, Discussion Paper on *Moveable Transactions* (n 1) appendix A.

45 1988, available at <http://www.unidroit.org/english/conventions/1988factoring/main.htm>.

46 H McGregor QC, *Contract Code: Drawn up on behalf of the English Law Commission* (2003).

47 G Gandolfi (ed), *Code européen des contrats: Avant-projet* (2000) Art 118 ff, an English translation by Harvey McGregor QC and others is published in a special issue of the *Edinburgh Law Review* (volume 8, 2004).

48 2001, available at http://www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html

49 S Vogenauer and J Kleinheisterkamp, *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (2009) ch 9.

50 2004, available at <http://www.ebrd.com/pages/research/publications/guides/model.shtml>.

51 C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (2010) Art III.-5:101 deals with assignment; Book IX deals with “proprietary security in movable assets”. For a discussion of the assignment provisions, see E Clive, “The assignment provisions of the Draft Common Frame of Reference” 2010 JR 275. The DCFR provisions essentially adopt the provisions of O Lando, E Clive, A Prum and R Zimmermann (eds), *Principles of European Contract Law (“PECL”)* Part III (2003) chapter 11. There is a commentary on Part III of PECL from the perspective of Dutch law: D Busch et al (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (2006).

52 DCFR Art IX.-1:102(4)(b).

53 DCFR Art IX.-2:301.

54 B Rudden, “Things as thing and things as wealth” (1994) 14 OJLS 81 at 92.

be seen. And, while it is possible to conceive of a system of registration of security interests in intangible objects, there is some incoherence in having registration for limited rights in the object, but not registration either of the underlying object – the contractual claim to performance itself – or of an outright transfer of the underlying object. Such an asymmetry is seen in German law: debtor notification is required for the creation of a limited right (the *Forderungspfandrecht*) but not for the transfer of the underlying right which is the object of the transfer (the underlying claim).⁵⁵ A similar asymmetry is also seen with the UK's curious system relating to the registration of company charges.⁵⁶ A floating charge, for instance, is registrable as a charge, although the objects of the charge – the grantor company's ownership of the charged moveable assets – are unlikely to be registered anywhere.

Two practical difficulties with registration as a constitutive requirement for a pledge of contractual rights should be mentioned here. The first practical difficulty relates to specification. Physical objects are easily identified: by a map, by a registration number, by possession. Assets that have no material object are more difficult to identify. One possibility is that state intervention is required in order for the right to come into existence at all. This happens with registered intellectual property rights. Another type of privatised publicity arises when a company keeps a register of holders of its securities.⁵⁷

But publicity of the underlying right would be possible for contractual rights only if a full-blown notarial system were adopted, whereby probative effect was conferred only on those obligations executed before a notary or registered in the Books of Council and Session. Such a suggestion is unlikely to be widely supported by the commercial community. So if the law is to continue to admit of limited formalities for the formation of contractual claims, the object of the personal rights created by contracts – the contractual counter-performance – can be described, specified, identified only in words. And since the contents of contracts are infinite, the publicity afforded by registration is not as high for contractual claims as with other assets. The obvious search criterion is the name of the grantor. But that may not be particularly helpful in the case of a large commercial undertaking that is constantly generating contractual claims and regularly creating security interests in income streams from IP licences, immoveable property, bonds and other securities, as well as over its contractual rights.

⁵⁵ Compare § 398 *BGB* with § 1280 *BGB*.

⁵⁶ For which, see G L Gretton, "Registration of company charges" (2002) 6 *EdinLR* 146.

⁵⁷ Companies Act 2006 Part 8 and Part 21 (register of members and transfer of shares); and Part 19 (register of debenture holders).

The second difficulty relates to time. Unlike other types of registered asset, contractual rights, to borrow another Rudden expression, “are born to die”.⁵⁸ Other registered moveable assets are of a fixed duration (patents, trade marks and some bonds) or indefinite duration (as in the case of some bonds and most shares). Contracts, and rights arising under them, *may* endure for similarly long periods: a common term for a syndicated loan, for example, is twenty years; but just as many contractual rights – particularly receivables – are ephemeral. And a register of the ephemeral is likely to become as clogged with dead entries in the same way as the Register of Births, Marriages and Deaths contains more information about the dead than the living. It will be difficult for a register of moveable security interests to keep up. The present Register of Charges, for instance, contains many, many charges on its books which have long been discharged. Nonetheless, if it is considered that such a register is desirable, there is a ready solution, for we already have one: the Books of Council and Session (“BCS”). Any reform would extend only to reversing *Tod’s Tr v Wilson*⁵⁹ (which held, most unfortunately, that registration in the BCS is not an equipollent of intimation), some express provisions for dates of constitution of the security interest, together with some rules on debtor and fourth party protection. The major drawback of the BCS, of course, is that it is not online.⁶⁰ But it might be suggested that the best way of proceeding would be get the BCS online in such a way that all persons – natural and legal – have their own unique identifier. It is not immediately apparent what the adoption of a modern filing system on, say, the New Zealand model⁶¹ would provide that an electronic version of the BCS cannot.

Looking elsewhere, it is of interest that, in Dutch law, where registration has been adopted as one way of constituting a pledge of claims, the registration is entirely private: other creditors cannot search the register.⁶² The Dutch example well underlines the general point that “publicity” is but one manifestation of the policy of legal certainty; publicity is one way, but not the only way, of promoting certainty. The costs of setting up a register have to be offset not just by the registration fees, but by its utility. A register that tells a searcher little more than that the granter *may* have granted a security interest in *some* receivables to *someone* is hardly helpful, for it tells the searcher little that it does not already know. A lack of publicity can also be counter-balanced by

58 B Rudden, “Economic theory v property law” in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence, Third Series* (1987) 239 at 259.

59 (1869) 7 M 1100.

60 Cf Requirements of Writing (Scotland) Act 1995 s 6A(2).

61 See Personal Property Security Act 1999. The register is here: <http://www.ppsr.govt.nz>.

62 See text at n 92 below.

third party protection rules.⁶³ Consideration too should be given to other ways of establishing certainty. One such is the internationally established benchmark of notarial execution. Although European notarial practice is cumbersome, in Scotland, many, though not all, Scottish solicitors are notaries. This would allow one of the parties' solicitors to certify the date on which the document was executed. The solicitor would be entitled to record the document for preservation (and perhaps execution too), but the document would have effect from the date of execution.⁶⁴ If it were desired that a moveable security interest be public, then any reform could require that any document is recorded.

C. THE DUTCH CONTEXT

We turn now to Dutch law. It is useful to trace the development of the Dutch law of assignation, since different views have been taken at different times about both (a) the need for notice and (b) the method by which security may be taken over claims.

(1) The old Dutch Civil Code (1838-1991)

Under the old, pre-1992, Dutch Civil Code of 1838 (the old *Burgerlijk Wetboek* or the "old *BW*"),⁶⁵ an assignation required only a written deed.⁶⁶ Intimation to the debtor was not a prerequisite for transfer. It was thus possible to effect an assignation either with notice (a so-called "disclosed" or "public" assignation) or without notice (a so-called "undisclosed" or "silent" assignation). The old Dutch assignation could be employed for the purposes of security. And it was also possible to pledge a claim. But although the old Dutch law recognised a pledge of claims, the pledge was not much used in practice. There were two reasons. First, a valid pledge required notice to the debtor and many borrowers did not wish to inform their customers and trade partners that security interests had been created in their accounts. Second, it was uncertain whether the pledgee could, on default, collect the pledged claim from the debtor, or whether the pledgee

63 In Dutch law, for third party protection, the relevant moment for good faith is the moment of notification, not the moment of constitution of the undisclosed pledge: see for example, Art 3:239 (4) jo 3:88 (1) *BW*.

64 The Department of Business, Innovation and Skills has consulted on whether the rules regarding the date of creation of Scottish charges should be changed to the date of "execution and delivery" under the proposed s 863A: BIS, *Revised Scheme for Registration of Charges Created by Companies and Limited Liability Partnerships* (August 2011).

65 For pre-1838 Dutch law, see: J H A Lokin, "Code Civil in den Nederlanden" (2004) 12 *Zeitschrift für Europäisches Privatrecht* 932.

66 Art 688 old *BW*.

was entitled to enforce only by way of sale. As a result, the outright security assignment, which did not require notice, was generally preferred. In such a case, the security assignee could, on the borrower's default, collect the pledged claim by demanding payment from the account debtor.

(2) Introduction of the new Dutch Civil Code (1992)

In 1992 the new Civil Code of the Netherlands (the *Burgerlijk Wetboek*, hereafter the "BW") was enacted.⁶⁷ The genesis of the BW can be traced to the 1950s and the draft produced by Professor E M Meijers.⁶⁸ Meijers died in 1953. The BW was enacted in 1992, but substantially in the form Meijers envisaged.

Dutch law considers moveable and immovable things (corporeals), as well as patrimonial rights (incorporeals), to be *goederen*,⁶⁹ which, for the purposes of this paper, despite some shared etymological heritage,⁷⁰ we translate simply as "property". Claims are thus treated, in general, as other types of property. It is thus unsurprising that it is also possible to vest a limited (real) right of pledge in a claim.⁷¹

67 English translations of the assignment provisions of the BW referred to in this paper can be found in the useful commentary by J M Milo and L P W van Vliet on chapter 11 of the *Principles of European Contract Law* in D Busch, E Hondius, H van Kooten and H Schelhaas (eds), *The Principles of European Contract Law (Part III) and Dutch Law* (2006) 77-129.

68 Meijers is perhaps best known, apart from drafting the Dutch Civil Code, for his *De Algemene Begrippen van het Burgerlijk Recht* (1948). It was written while he was interned during the Second World War: see R Feenstra, "Meijers, Eduard Maurits (1880-1954)" in J Charité and A J C M Gabriëls (eds), *Biografisch Woordenboek van Nederland* vol 1 (1979). For further information, see R Feenstra, "Meijers, Eduard Maurits" in M Stolleis (ed), *Juristen: ein biographisches Lexikon* (2001) 432; and E Hondius, "Eduard Maurits Meijers" in R Domingo (ed), *Juristas Universales* (2004) vol 3, 1000. A comprehensive bibliography of Meijers' writings is in R Feenstra et al (eds), *Bibliographie der geschriften van Prof. Mr E M Meijers* (1957); which is essentially a supplementary volume to the three volumes of Meijers' private law works: E M Meijers, *Verzamelde Privaatrechtelijke Opstellen* 3 vols (1954-1955) and the four volumes of his works on legal history: R Feenstra and H F W D Fischer (eds) *Études d'histoire du droit par E M Meijers* 4 vols (1956-1973). All of these volumes are available in the Glasgow University Library. Meijers held honorary doctorates from Glasgow and Aberdeen. There may be further research to be done on Meijers' links with Scotland.

69 Art 3:1 BW: "*Goederen zijn alle zaken en alle vermogensrechten*". Cf Art 3:2 BW for *zaken* and Art 3:6 BW for *vermogensrechten*.

70 In Latin, *bona*. Compare *Termes de la Ley: or, Certaine difficult and obscure Words and Termes of the Common Lawes of this Realme expounded* (1641) 49, s.v. "Catal" (= the modern English "chattels"): "The Civilians comprehend these things, and also lands of all natures and tenures under the word Goods, which is by them divided into Moovables and Immoovables". *Termes de la Ley* was compiled by William Rastell, but is said to have been based on his father's work: John Ratsell, *Expositiones Terminorum Legum Anglorum* (1527). *Termes de la Ley* was in print from the 1620s to 1742. See too W Blackstone, *Commentaries on the Laws of England* vol 2 (1766) 385; and *OED*, 2nd edn (1989) s.v. "good" C.III.

71 Art 3:84 (1) jo 3:98 BW and Art 3:236 (2) jo 3:94 (1) BW or Art 3:239 (1) BW. We need not here enter into the debate about whether it is possible to "own" claims.

Assignment and pledge in Dutch law are part of general patrimonial law, which is contained in Book 3 *BW*. Book 3 deals with the formalities required for assignment and pledge as well as with most of the juridical effects of the pledge. Book 6 *BW* (on the law of obligations) deals with most of the juridical effects of assignment and some of the juridical effects of pledge.⁷²

(3) Prohibition on fiduciary transfers and introduction of the undisclosed pledge

Meijers did not support the use of fiduciary transfer as a functional security. He considered fiduciary transfers a misuse of transfer: the intention of the parties is manifestly to vest a limited security right, not ownership, in the “transferee”.⁷³ He thus included in the draft code a general prohibition on security transfer, the so-called “*fiducia* prohibition”: the transfer of ownership of property, where the transfer is intended to operate for the purposes of security, is not valid. As a result, under the current *BW*, the security assignment of claims is generally no longer possible.⁷⁴ In return, Meijers provided for a pledge that could take place with or without notice.⁷⁵ And the draft expressly provided that, after intimation, the pledgee could collect the pledged claim. Although the undisclosed pledge was welcomed by legal practice, the *fiducia* prohibition has been much criticised, not least because of the perceived uncertainty of the prohibition’s application.⁷⁶

72 See for assignment example Arts 3:83, 3:84, 3:94 *BW*; Arts 6:32-6:36, 6:130 (1), 6:142, 6:143, 6:144 (1), 6:145, and 6:149 *BW*. For pledge, see Arts 3:84, 3:98, 3:239, 3:246, 3:248-3:255 *BW*; and Arts 6:33 and 6:130 (2) *BW*. The law on civil procedure deals with some other aspects of assignment. See for example Arts 136, 225, 227, 236 (2) and 431a *Wetboek van Burgerlijke Rechtsvordering* (Civil Procedure Act) (“*WvBRv*”).

73 See Parl. Gesch., Boek 3, 317-318 and Meijers, *Algemene Begrippen* (1948) 89 ff; and *idem.*, “Eigendomsoverdracht tot zekerheid” in R Feenstra et al (eds), *Bibliographie der geschriften van Prof Mr E M Meijers* (1957) 250 ff.

74 Art 3:84 (3) *BW*. One important exception to this general principle has been introduced in order to implement the Financial Collateral Directive (2002/47/EC, as amended by directive 2009/44/EC): Art 7:55(1) *BW*, which provides that a title transfer financial collateral arrangement does not contravene the *fiducia* prohibition. For commentary in English, see generally: S Timmermann and M Veder, “Netherlands” in H C Sigman and E M Kieninger (eds), *Cross-Border Security over Claims* (2009) 181 at 193-194; W Rank, “Netherlands” in W Johnston (ed), *Security over Receivables* (2008) ch 25; M Haentjens, *Harmonisation of Securities Law: Custody and Transfer of Securities in European Private Law* (2007); T Keijser, *Financial Collateral Arrangements: the European Directive considered from a Property and Insolvency Law Perspective* (2006). For assignment of credit claims pursuant to a financial collateral arrangement, see F E J Beekhoven van den Boezem and G J L Bergervoet, “Nieuwe vragen naar aanleiding van herinvoering stille cessie tot zekerheid” 2011 *Tijdschrift voor Insolventierecht* 48.

75 An *openbaar pandrecht* (disclosed pledge) and a *stil pandrecht* (undisclosed pledge).

76 Cf the decision of the Dutch Supreme Court (*Hoge Raad*) holding that sale and lease back financing does not breach the *fiducia* prohibition: HR 19th May 1995, *Nederlandse Jurisprudentie* (hereafter “*NJ*”) 1996/119 (Sogelease); see too HR 18th November 2005, *NJ* 2006/151 (BTL Lease/Erven van Summeren).

(4) Assignment and intimation

Where the law allows a valid pledge of claims without notice, Meijers considered that there was no need, in addition, for the law to permit assignment without intimation. The provision in the 1992 *BW* on assignment thus required both a written deed of assignment and intimation. Intimation was a constitutive requirement. In other words, in 1992, on the introduction of the *BW*, the Dutch law of assignment and pledge of claims was reversed. Whereas, under the pre-1992 *BW* it was possible to conclude a valid assignment without intimation and a valid pledge with intimation to the debtor, from 1992, intimation became a constitutive requirement for assignment, but it was removed as a constitutive requirement for the undisclosed right of pledge, which co-exists with the long-accepted public right of pledge.⁷⁷ A similar volte-face may be observed with respect to the *fiducia* prohibition: pre-1992 assignments could be concluded on a fiduciary basis; post-1992, in contrast, fiduciary transfers are prohibited.

(5) Introduction of the undisclosed assignment (2004)

Debtor notification for outright assignment was, however, cumbersome.⁷⁸ It posed problems for bulk assignments such as securitisations: banks are reluctant to notify each customer of the securitisation. As a result, Dutch lawyers developed a different securitisation structure: the transfer of the claims to the special purpose vehicle (SPV) issuing the securities was postponed; in the meantime, the SPV took a pledge of the same claims (since a pledge does not require notification) in security of the obligation to transfer the claims at a later date.

In 2003 the Dutch Parliament decided to introduce—or, rather, re-introduce—assignment without the need for intimation to the debtor, the so-called “silent assignment”. Perhaps surprisingly, however, the existing assignment provision was not replaced.⁷⁹ Instead a new subsection was introduced making it possible to transfer claims without notice to the account debtor.⁸⁰ So, just as claims can be pledged in two different ways (with or without notice), so too can claims now be assigned in two different ways (again, with or without notice to the account debtor). As will be shown below, since the introduction of the new *BW*

⁷⁷ A helpful summary in English of the content of the notice is contained in Timmermann and Veder (n 74) at 212.

⁷⁸ See generally *ibid* at 186. The Consumer Credit Directive 2008, requiring notice in cases of the assignment of claims arising out of a regulated consumer credit agreement, does not purport to extend to pledges of claims: see recital (41).

⁷⁹ Art 3:94 *BW*.

⁸⁰ Art 3:94 (3) *BW*. See J W A Biemans, “Kritische kanttekeningen bij wetvoorstel 28 878 (cessie zonder mededelingsvereiste)” 6584 (2004) *Weekblad voor Privaatrecht, Notariaat en Registratie* (hereafter “WPNR”) 532.

both the regulation of the right of the pledgee on claims and the assignation of claims have posed some fundamental questions. One basic question is why Dutch law has retained a dual system, with separate rules for disclosed and undisclosed transactions respectively.

(6) Summary of Dutch development

Dutch law has, from the days of the old *BW*, always recognised assignments and pledges of claims with notice to the account debtor. The extent to which Dutch law has recognised assignation or pledge without notice, and the extent to which it has recognised fiduciary assignments for the purposes of security, can be summarised in tabular form thus:

Dutch law/ Years	Fiducia permitted?	Assignment without notice?	Pledge without notice?
Pre-1992	Yes	Yes	No
1992-2004	No	No	Yes
Post-2004	No ⁸¹	Yes	Yes

D. FORMALITIES

(1) General

The requirements in Dutch law for pledge and transfer of a claim are identical.⁸² There are three requirements.⁸³ The first is that the transferor has the power to dispose (*beschikkingsbevoegdheid*).⁸⁴ In general, only the owner of property has the power of disposal. In bankruptcy, however, the owner loses this power which is instead exercised by the bankruptcy trustee (liquidator, administrator).⁸⁵ The second requirement is that there is a valid *causa* (*geldige titel*) for transfer. Whereas Scots law probably subscribes to the abstract system of transfer,⁸⁶ Dutch

⁸¹ There are statutory exceptions, such as the exception under Art 7:55 *BW* which applies to Financial Collateral Arrangements.

⁸² This is mainly due to Art 3:98 *BW*, stating that the requirements for vesting limited rights in property are the same as the requirements for the transfer of rights in property.

⁸³ Art 3:84 (1) *BW*.

⁸⁴ Compare the *Verfügungsbefugnis* of German law.

⁸⁵ Art 23 and 68 Bankruptcy Act (*Faillissementswet*) ("*Fw*").

⁸⁶ K G C Reid, *The Law of Property in Scotland* (1996) para 606; D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (2005) para 8-06; Anderson, *Assignation* (n 6) para 10-01 ff.

law has the causal system.⁸⁷ The absence of a valid *causa* thus leads to the invalidity of the transfer. The third requirement is the conveyance (*levering*) of the property. All property is subject to the conveyance requirement; but the particulars of the juridical act differ according to the nature of the property.

Where the pledge or assignation is disclosed, the juridical acts for both assignation and pledge are a written deed and intimation to the account debtor. Either the assignor/pledger or the assignee/pledgee may intimate.⁸⁸ Since assignation is a bilateral act, the deed of assignation needs to be accepted by both parties, but only the assignor needs to sign.⁸⁹ Where there is a *causa* for the transfer (or pledge), legal doctrine presumes that the assignee has accepted the assignation.

Usually the pledgee notifies the debtor. The pledgee can do so if the pledgor (we assume that the pledgor is the borrower) is in default or the pledgee reasonably apprehends that the pledgor is about to default.⁹⁰ But the position is not mandatory; parties may stipulate by contract different conditions for notification. There is no default rule for intimation of outright assignations. The parties generally provide by contract when the debtor can be notified and by whom. In Scots law, the equivalents to intimation are payment or part-payment of the claim by the account debtor to the assignee, or judicial intimation by way of service of a summons on the debtor; in Dutch law, the intimation has to be done by the pledger or the pledgee, but has no formalities⁹¹: a demand for payment addressed to the debtor by the assignee or the service of a summons by the assignee or pledgee, to give two examples, are also considered to be notification.

Where the pledge or assignation is undisclosed (or “silent”), the juridical act is concluded by a notarized deed, or a written deed which is registered with the local tax authority.⁹² The requirement of a notarized deed or a written deed registered

87 See generally L P W van Vliet, “Iusta causa traditionis and its history in European private law” (2003) 3 ERPL 342 at 372; and L P W van Vliet, *Transfer of Movable in German, French, English and Dutch Law* (2000) 196 ff.

88 Art 3:94 (1) BW for assignation; Art 3:94 (1) to Art 3:98 BW for pledge (or, alternatively, Art 3:236(2) BW which is in the same terms as Art 3:98 BW).

89 M.v.A. (= Minister’s reply) II, Parl. Gesch., Boek 3, 395; and W H M Reehuis and A H T Heisterkamp, with G E van Maanen and G T de Jong, *Pitlo, Goederenrecht* (2006), nr. 257-258. See too HR 29th June 2001, *NJ* 2002, 662 (Meijs q.q./Bank of Tokyo-Mitsubishi).

90 Art 3:239 (3) BW.

91 Art 3:37 (1) BW. The formal requirements for notice in Scots law remain unclear: see W A Wilson, *The Scottish Law of Debt*, 2nd edn (1991) para 27.3 ff; W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) para 12-63 and 12-83 ff; and, most recently, *Christie Owen and Davies plc v Campbell* 2009 SLT 518 discussed at (2009) 13 EdinLR 484 and at (2008) 12 EdinLR 275. Cf French law, which provides exactly what an informative notice (under Art L 313-28), given in the case of *Loi Dailly* cession or *nantissement*, must contain: *Code monétaire et financier* Art R 313-15 ff.

92 Art 3:94 (3) BW for assignation; Art 3:239 (1) BW for pledge.

with the local tax authority is designed to prevent antedating of the assignment. It is important to emphasise that the tax authority register is not public.

It is possible to convert an undisclosed pledge into a disclosed pledge, and an undisclosed assignment into a disclosed assignment.⁹³ This is achieved by giving notice. One advantage of converting an undisclosed assignment or an undisclosed pledge into a disclosed assignment or disclosed pledge respectively is to prevent account debtors from making a valid payment to the assignor or pledgor.

How, then, to tell whether an assignment or pledge is designed to be disclosed or undisclosed? The basic principle is that the choice is a matter for the agreement of the parties. If the choice cannot be ascertained from the wording of the deed of assignment or the deed of pledge – such as by reference to words like “public” or “silent”, or by reference to the statutory provisions on undisclosed or public pledges/assignments – attention has to be paid to what the parties in the given circumstances could reasonably expect of one another and to the meaning they could reasonably attribute to the deed of assignment or the deed of pledge.⁹⁴ So if the deed of assignment or the deed of pledge is a notarial deed, or if it is a normal deed registered with the tax authorities, an intention to conclude an undisclosed assignment or pledge can be inferred. In contrast, where a non-probative deed is used, which is not registered with the tax authorities, the assignment or pledge cannot operate on an undisclosed basis and so must be followed by notice.

(2) Future claims

One burning issue in the law of assignment is whether future claims can be assigned. The first problem is one of definition. What is a future claim? The DCFR, for instance, states that “A future right to performance may be the subject of an act of assignment but the transfer of the right depends on its coming into existence and being identifiable as the right to which the act of assignment relates.”⁹⁵

Dutch legal doctrine makes a distinction between (a) claims that do not yet exist and (b) claims which do exist, but which are not yet in the patrimony of the

93 Rank (n 74) para 25.10.

94 HR 16th May 2003, NJ 2004, 184 (De Liser de Morsain/Rabobank); HR 13th March 1981, NJ 1981, 635 (Haviltex); cf. W H M Reehuis and A H T Heisterkamp, with G E van Maanen and G T de Jong, *Pitlo Goederenrecht* (2006) nr. 259c; R P J L Tjittes, *Uitleg van schriftelijke contracten* (2009) 22-23. In HR 21st April 1995, NJ 1996, 652 (Eemswater Beheer/Curatoren Capcan Beheer), the court also considered the reasonable interpretation of the account debtor. Whether or not the deed is executed before a notary (or registered with the tax registry) is relevant, but not decisive. For a notarial deed may nevertheless indicate that the parties have intended a disclosed assignment.

95 DCFR III-5:106(1).

assignor. In both cases the assignor lacks the power to dispose of the claims, for, in both cases, the claims do not form part of the assignor's patrimony. As a result, neither a completed transfer nor a completed pledge of such a future claim is possible under Dutch law. For this reason, it is important to know at the outset whether the claims to be assigned are either existing or future claims. There is no clear criterion. Some guidance is found in the case law. Take, for example, claims which arise out of a rental agreement. These claims originate subject to uncertain future events, namely, vacant peaceable possession being provided to the tenant for the duration of the lease. Rental claims arise periodically in respect of each term of the lease; until each term arrives, however, the landlord's claim to rent is a future claim.⁹⁶ A repayment claim under a loan agreement, however, is an existing claim. Thus, claims under an existing legal relationship can be either existing or future claims, depending on the nature of the claims. In Scots law, in contrast, an assignation of rents in year one of a twenty year lease is effective from the date of intimation to the tenant, albeit that the assignee will only have a right to payment of the rental streams as and when they fall due.⁹⁷ Of course, in the event that the lessor breaches his obligations to provide vacant and peaceable possession, the tenant will be able to withhold payment from the assignee.

In Dutch law the juridical act of assignation or pledge can, however, be executed in advance (*bij voorbaat*).⁹⁸ Transfer or pledge takes place automatically as soon as the assignor or pledgor has the power of disposition in respect of the claim, which will normally be the moment he comes to hold the claim. So, in the example above, it would be possible, under Dutch law, to enter into an advance assignation, in year 1, of the rents due under a twenty year lease. But there is an important exception to advance assignations: bankruptcy of the transferor or pledgor in the intervening period between conclusion of the advance assignation or pledge and the claim coming into existence; for, on bankruptcy, the bankrupt loses his power of disposal (*beschikkingsbevoegdheid*).⁹⁹ Neither transfer nor pledge can, therefore, occur should bankruptcy intervene between conclusion of the juridical act and the claims coming into existence.¹⁰⁰ It has been held in

96 See HR 30th January 1987, NJ 1987, 530 (WUH/Emmerig q.q.). Cf also HR 26th March 1982, NJ 1982, 615 (Viskotter 'Leon'); HR 25th March 1988, NJ 1989, 200 (Staal Bankiers/Ambags q.q.); HR 5th January 1990, NJ 1990, 325 (Dubbeld/Laman).

97 The text puts the matter simply. For an indication of the complexities in practice: see G L Gretton and K G C Reid, *Conveyancing*, 4th edn (2011) para 11-17 (a passage which contains, at n 68, one of the best footnotes of all time); and G L Gretton, "Assignation of contingent rights" 1993 JR 23.

98 Art 3:97 (1) BW.

99 Art 23 and Art 35(2) *Fw*.

100 See too Rank (n 74) para 25.14.

Scots law that the right of an assignee to a future right takes effect by virtue of the doctrine of accretion:¹⁰¹ that is to say, where a transferor executes a transfer of assets before he has any power to transfer the assets (for example, because they do not yet exist), the law holds the juridical act of transfer to take place on the transferor obtaining the power. The basis for accretion has been held to be in the transferor's personal obligation in warrandice to give good title. By the same token, however, because accretion is a personal obligation, should insolvency intervene between intimation of the assignation to the debtor and the claim coming into existence, there is no apparent basis for the assignee to be protected.¹⁰² But, in practice, the view is taken that, provided the debtor is identifiable and intimation has been made, the assignee is protected, even if, between intimation and the claim coming into existence, the assignor becomes insolvent.¹⁰³

With respect to future claims, there is, in Dutch law, no restriction on entering into *disclosed* assignations or pledges in advance (as opposed to undisclosed advance assignations or pledges). The deed must be signed in advance and so too must advance notice be given to the debtor. Future claims can thus only be assigned in advance where the debtor is known.¹⁰⁴

With respect to the assignation or pledge in advance of future claims without notice, there is a restriction: only future claims that arise out of a relationship that exists at the moment of the assignation or pledge can be validly assigned or pledged in advance without notice.¹⁰⁵ If a bank demands that all claims of its borrower are to be pledged without notice, the borrower can pledge in advance only claims arising out of existing contracts. In practice, therefore, relatively few future claims can be assigned in advance.¹⁰⁶

101 The classic case is *Miller v Muirhead* (1894) 21 R 658 at 660 per Lord Rutherford Clark, discussed in McBryde, *Contract* (n 91) para 12-67. For accretion generally, see Reid, *Property* (n 86) paras 677-678.

102 See Anderson, *Assignment* (n 6) para 11-46 ff.

103 *Buchanan v Alba Diagnostics Ltd* 2004 SC (HL) 9 at para 22 per Lord Hoffmann, discussed at (2005) 9 EdinLR 457. The assignee is likely to be protected if, in the period between intimation and the claim coming into existence, the assignor goes into receivership (which is still possible in a number of important commercial situations: Insolvency Act 1986 ss 72B-H).

104 See, in more detail, W H M Reehuis and A H T Heisterkamp, with G E van Maanen and G T de Jong, *Pitlo Goederenrecht* (2006) nr 318-319a.

105 Art 3:94 (3) *BW* for assignation; Art 3:239 (1) *BW* for pledge.

106 In practice, Dutch banks often seek a power of attorney from the pledgor which authorises the bank to execute on behalf of the pledgor conveyances or pledges in favour of the bank on a monthly, weekly or even daily basis: see T H D Struycken, "Dagelijkse bulkverpanding door middel van een verzamelpandakte", in N E D Faber et al (eds), *Bancaire zekerheid: Liber amicorum Mr J H S G K Timmermans* (2010) 305-327.

(3) Specification requirement

An aspect of Scots law that has, until recently, received very little attention is the issue of specificity: what degree of specification is required to identify the object of transfer? The problem is particularly acute with claims,¹⁰⁷ since they can be identified only in words (or, sometimes, by reference to identification numbers). The specification principle has long appeared to be so self-evident that it is barely mentioned in any of the Scottish sources.¹⁰⁸

In Dutch law all goods, including claims, have to meet the specification requirement (*bepaaldheidsvereiste*). There has been discussion of the extent to which the claims assigned and pledged have to be specified. For a long time, in order to avoid possible problems, banks would attach to the deed of pledge an appendix listing the individual debtors, together with other relevant information, in order to meet the requirement of specification. In 1980s the *Hoge Raad* ruled in several cases that the claims do not have to be specified (*bepaald*) in advance.¹⁰⁹ To meet the specification requirement it is thus sufficient that the claims which are to be assigned or pledged are capable of being determined (*bepaalbaar*) at a later date.¹¹⁰ These decisions have allowed banks to limit the wording of the deed of pledge to one simple line: the pledgor pledges all present and future claims arising out of relationships with customers existing at the date of the pledge; and, in addition, the pledgor obliges itself to pledge periodically any and all claims that arise out of new relationships. A similar position is found in the DCFR.¹¹¹

107 The specification requirement is little analysed in the Scottish sources. Some Scottish cases deal with the specification issue in the context of blank bonds: see, for example, *Goldie v Gray* (1774) Mor 14,598 and *Abernethie v Forbes* (1835) 15 S 263, as does one older statement that has recently come to light: W Forbes, *The Great Body of the Law of Scotland* (1708-1742?) (GUL MS Gen 1246) I, 511. Ross Anderson is grateful to Kenneth Reid for drawing this passage to his attention. The *Great Body*, otherwise unpublished, is available online at: www.forbes.gla.ac.uk/contents. The most recent consideration of the question has been with respect to the identification of the common parts in a split-off disposition: *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2.

108 Anderson, *Assignment* (n 6) para 10-19 ff.

109 See notes 98 above and 112 below.

110 There is much case law on this. See, for example: HR 14th October 1994, NJ 1995, 447 (Spaarbank Rivierland/Gispén q.q.); HR 19th September 1997, NJ 1998, 689 (Verhagen q.q./INB II); HR 20th September 2002, NJ 2004, 182 (Mulder q.q./Rabobank); HR 27th November 2009, *Jurisprudentie Onderneming & Recht* ("JOR") 2010, 43 (VEB/WOL). See also W Reehuis and A H T Heisterkamp, with G F van Maanen and G T de Jong, *Pitlo Goederenrecht* (2006) nr 810 n 78.

111 DCFR III-5:106(2): "A number of rights to performance may be assigned without individual specification if, at the time when the assignment is to take place in relation to them, they are identifiable as rights to which the act of assignment relates."

(4) Assignability and security

Because in Scots law there is, at present, only one possible technique available for outright transfers and security alike, the general principle is the same: those claims that can be assigned outright can also be assigned in security. In the Netherlands there is a similar general principle: only assignable claims can be pledged.¹¹² Money claims can generally be assigned and pledged. Claims to delivery of property can be assigned and pledged.¹¹³ But other claims, such as social security, pension and labour claims, may be neither assigned nor pledged, whether in whole or in part.¹¹⁴

(5) Anti-assignment clauses and security

As in Scots law, the parties to a Dutch contract may agree to render any claims arising under the contract unassignable. Such a claim may not be assigned. There is some discussion about whether an anti-assignment clause also prevents the claim being pledged. The basic principle is that if a claim is unassignable it also cannot be pledged. Some authors have argued that it depends on the intention of the parties whether the anti-assignment clause should also be interpreted as an anti-pledge clause. There is not yet a conclusive view on the point, although it is of interest that an anti-assignment clause, under Dutch law, cannot prevent arrestment.¹¹⁵ But, as yet, Dutch law has not taken the position that, for the purposes of security transactions, anti-assignment clauses should be deprived of effect, as some international instruments have done.¹¹⁶

(6) Fourth party protection

Since every assignation involves three parties, we refer to issues involving strangers to this tripartite relationship as “fourth parties”. In Dutch law, fourth parties are protected in the case of a pledge as in the case of an assignation. Suppose an assignor sells a claim twice. Following the first transfer, the assignor

112 This general principle of property—that property that is transferable may also be the object of a security—is set out in Art 3:228 *BW*.

113 Cf especially Art 3:246 (5) *BW* for pledge.

114 For Scots law, see McBryde, *Contract* (n 91) para 12-46; Anderson, *Assignment* (n 6) para 10-30 to 10-31. In Dutch law, the prohibitions have a statutory basis. See for example Art 7:633 (1) *BW* with regard to wages.

115 See T M, Parl. Gesch., Boek 3, 314; F E J van den Boezem, *(On)overdraagbaarheid van vorderingen* (2003) 143 ff; L P Broekveldt, *Derdenbeslag* (2003) 146-148; H L E Verhagen and M H F Rongen, *Cessie: De overdracht van vorderingen op naam* (2000) 104-105.

116 As under the UNCITRAL Convention on the Assignment of Claims in International Trade (2001) Art 9; and the DCFR III-5:108 (1).

has nothing to assign; and no power to assign that which he does not have.¹¹⁷ An assignor who, having transferred, nonetheless purports again to transfer the same claim, transfers nothing. In such a case the second assignee is unprotected, even where the second assignee is in good faith and has given value. In this case, the second assignee's remedy is against the assignor for breach of contract.

Suppose, then, that, on day 1, Julius executes and delivers an assignment (to be disclosed) to Alice; on day 2 Julius concludes an undisclosed assignment to Brian; and, on day 3, Alice intimates the disclosed assignment to the debtor. In this case, Brian wins: for his assignment is completed first. Dutch law has a different rule for the transfer of corporeal moveables. With corporeal moveables, ownership passes on delivery.¹¹⁸ In the case of a double sale of a corporeal moveable, a second buyer, who is in good faith, gives value, and takes possession, becomes owner.

Suppose now a putative pledgor agrees to grant a first ranking pledge in a claim to two different pledgees. Priority is regulated by the date of the granting of the pledge, not the date of any agreement to pledge. It is irrelevant that a pledgee is in good faith and gives value. Again, in this respect, Dutch law has a different rule for the pledge of corporeal moveables: a second pledgee, to whom the pledgor agreed to pledge a corporeal moveable, would prevail over a first pledgee, if the pledged moveable were delivered to the second pledgee first and the second pledgee was in good faith at the time of delivery.

The second assignee in a double sale of claims situation is protected, under Dutch law, only in two situations. In the first place, the second assignee is protected where the conduct of the assignor and the first assignee leads the second buyer to believe, in good faith, that there is no prior assignment. In that case the first buyer and the assignor cannot hold the first assignment against him.¹¹⁹ The same principle applies *mutatis mutandis* in the case of a pledge. The second situation is this. Suppose Ralph assigns to Mieke. Ralph originally acquired the claim from Jacques. The assignment from Jacques to Ralph was invalid because, for example, Ralph was guilty of some fraudulent misrepresentation. If the Jacques-Ralph assignment is avoided,¹²⁰ Ralph never

117 A similar point is made by two Scottish Lords of Appeal, Lord Reid and Lord Keith of Avonholm, in an English appeal before the House of Lords: *BS Lyle Ltd v Roscher* [1959] 1 WLR 8 regarding the effect of an equitable assignment in English law.

118 Art 3:84 (1) *BW*. See too Van Vliet, *Transfer of Movables* (n 87) 133 ff.

119 Art 3:36 *BW*.

120 In Dutch law, avoidance of an agreement has retrospective effect (Art. 3:53 *BW*) and, because of the causal system, avoidance of the underlying agreement, which provided the basis for the assignment or pledge, has the effect of also avoiding the transfer or pledge as the case may be. The avoidance of the assignment or pledge is also retrospective.

had power to assign (*beschikkingsonbevoegdheid*) to Mieke. Nonetheless, provided Mieke is in good faith, she is protected.¹²¹ In such a case, however, Ralph's assignment to Mieke must be disclosed since, in order to enjoy this third party protection, the assignee or pledgee must be in good faith *at the moment of the notification to the debtor*.¹²²

E. JURIDICAL EFFECTS¹²³

(1) General

The effect of an assignment under Dutch law is that the assignee becomes the creditor of the account debtor. As a result, the assignee may collect payment from the debtor. In order to be able to do so, however, the assignee needs copies of all documents relating to the claim. The cedent has a statutory obligation to provide the assignee with these documents.¹²⁴ The account debtor can ask for proof of the assignment and suspend payment¹²⁵ until he has received such "ocular evidence".¹²⁶ In his capacity as creditor of the account debtor, the assignee can also interrupt prescription, reduce any fraudulent conveyances by the debtor (under the Dutch provisions on the *actio Pauliana*),¹²⁷ discharge the debtor, novate the claim and so forth.

¹²¹ Art 3:88 (1) *BW*.

¹²² Art 3:94 (3), third sentence *BW* for assignment; Art 3:239 (4) *BW* for pledge. If a claim has been attached by several creditors ("attachment"), each attaching creditor, in principle, ranks equally (unless a creditor has a right of preference, *voorrecht*); unlike in Scots law, the exact moment of attachment does not accord an attaching creditor any preference. The rules of fourth party protection, as set out in the text, apply also to attaching creditors. In the case of a disclosed assignment, a creditor of the assignor can attach claims held by the assignor until the account debtor is notified. In the case of an undisclosed assignment, the creditor can attach the receivable until the deed of assignment has been completed (signed and notarized; or signed and registered with the relevant tax authority); from that moment, whether or not the account debtor has been notified, the claim is no longer an asset of the assignor. This may be problematic: J W A Biemans, "Derdenbeslag en stille cessie" (2010) 6835 *WPNR* 221; J W A Biemans, *Rechtsgevolgen van stille cessie* (2011) 617-620. In a case where the claim is attached first, and then assigned, the assignee's rights are subject to the attachment: Art 475h *WvBRv*. In the case where a claim is attached after the same claim has been pledged, the pledgor has priority over the attaching creditor. Where a claim is first attached and then afterwards pledged, the pledgee's rights are subject to the attachment: Art 475h *WvBRv*. If there is a surplus of proceeds after the arresting creditor has been paid, the balance falls to the pledgee.

¹²³ See generally J W A Biemans, *Rechtsgevolgen van stille cessie* (2011).

¹²⁴ Art 6:143 (1) *BW*. Cf Arts 7:9 (1) to 7:47 *BW* which apply where the *causa* for the assignment is sale.

¹²⁵ Art 3:94 (4) *BW* and compare Art 6:37 *BW*. Cf § 402 and 410 BGB. Under § 410(1) BGB, the account debtor may withhold payment against delivery of the assignment signed by the cedent. This does not apply where the cedent has notified the account debtor of the assignment: § 410(2) BGB.

¹²⁶ The expression is from H Home, Lord Kames, *Principles of Equity*, 3rd edn (1778) I, 59: "knowledge of an assignment, where it falls short of ocular evidence, will scarce be sustained to put the debtor *in mala fide*".

¹²⁷ Art 3:45 ff *BW*.

There is one exception to the general principle that the new creditor can exercise all powers of the assignor. That is where the assignation takes place after the assignor instituted legal proceedings against the debtor. As is the case in Scots law,¹²⁸ the assignee does not automatically become a party to the proceedings. The proceedings have to be adjourned and the old creditor formally replaced by the new creditor.¹²⁹ If the new creditor does not do this, the old creditor is assumed to continue the legal proceedings with a mandate of the new creditor.

(2) The position of the debtor

The debtor can raise all defences against the assignee that could be raised before the assignation against the assignor.¹³⁰ The powers and rights of the debtor are regulated separately in various provisions in Book 6 *BW*. In Dutch law, set-off occurs by way of a juridical act, a declaration;¹³¹ it does not occur by force of law; and, unlike the position in Scots law, it does not require to be asserted in court. The effects of the set-off are, as in Scots law, retrospective: the effective date is the moment the concurrence of debit and credit arose, rather than the date of declaration or court judgment.¹³² If the assignor is indebted to the account debtor, the assignor cannot, following the assignation, exercise his right of set-off. The debtor, however, can exercise his right of set-off vis-à-vis the assignor with regard to a debt that was due before the date of assignation. And a debt, arising out of the same contractual relationship as the assigned claim, may also found a set-off for the debtor, irrespective of whether the debt is due at the moment of assignation.¹³³ This is a standard rule found in many of the international benchmark instruments.¹³⁴ It is even now concisely formulated in the Consumer Credit Directive: “Assignment of the creditor’s rights [under a

128 In Scots law, many of the cases have involved the cedent raising an action after granting an assignation. The law is somewhat difficult to follow. Even the unflappable Lord Reid observed that, “it is fairly obvious that the law on these matters is not entirely logical”: *Cole-Hamilton v Boyd* 1963 SC (HL) 1 at 13. See generally McBryde, *Contract* (n 91) paras 12-32 and 12-79.

129 Art 225 *WvBRv*.

130 Art 6:145 *BW*.

131 See generally R Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription* (2002). The relevant *BW* provision is Art 6:127.

132 Art 6:129 *BW*. Scots law is based on the Compensation Act 1592 (*RPS*, 1592/4/83). Compensation must be pled and sustained in court: Erskine III.iv.12. The foundational authority on compensation operating with retrospective effect in Scotland is *Maxwell v Creditors of McCulloch* (1738) Mor 2550 discussed in Anderson, *Assignation* (n 6) para 8-43.

133 Art 6:130 (1) *BW*.

134 UNCITRAL Convention on the Assignment of Receivables in International Trade (2001) Art 18; Art III-5:116 (3) DCFR.

credit agreement] should not have the effect of placing the consumer in a less favourable position.”¹³⁵

The account debtor, in Dutch law, can also plead set-off against the assignee in respect of any debts which the assignee incurs to the account debtor whether before or after assignation. As to the right to withhold performance, such as the *exceptio non adimpleti contractus*,¹³⁶ any such defence that the debtor held against the assignor can be pled against the assignee.¹³⁷

Prior to assignation the account debtor can pay only to the original creditor; after notice of assignation, the account debtor can pay only to the assignee. Under the old Dutch Civil Code, if the claim was assigned but no notice was given to the account debtor, the account debtor could be discharged by paying the original creditor in good faith.¹³⁸ Under the modern *BW* if a disclosed assignation is concluded, intimation to the account debtor is required, meaning that, in principle, an account debtor cannot pay in good faith to the assignor after intimation.

If the account debtor pays to the assignee after the deed of assignation is made, but before intimation to him, the debtor is not discharged: he has paid to a party who is not his creditor. The account debtor can reclaim what he has paid to the putative assignee on the basis that there is no legal ground for payment to the putative assignee.¹³⁹ If the assignor approves the payment to the assignee, or if the assignee has paid the assignor, the debtor is discharged by his payment to the assignee.¹⁴⁰

If the account debtor wishes to rescind or avoid the underlying contract – that is to say, the contract out of which the assigned claim arose – he has to bring this to the assignor’s attention. The account debtor can then rescind or avoid the contract as a defence to any claim from the assignee; but the *account debtor*, in order to do so, must notify the assignee.¹⁴¹

(3) Undisclosed assignation

The main difference between the “disclosed” and the “undisclosed” assignation is that, after an undisclosed assignation, the account debtor continues to view the assignor as the creditor. The second sentence of Article 3:94 (3) *BW* states

135 Directive 2008/48/EC, recital (41).

136 Art 6:52 *BW* ff., Art 6:262 *BW* and Art 6:263 *BW*. Cf Art 6:37 *BW* and Art 6: 48 (3) *BW*.

137 Art 6:145 *BW*.

138 Cf Art 6:34 (1) *BW*.

139 Art 6:203 *BW*.

140 Art 6:32 *BW*.

141 Art 6:149 (1) *BW*.

that the assignation cannot affect the debtor until the debtor is notified of the assignation by either the assignor or the assignee.¹⁴² In essence this provision means that, even if the account debtor has private knowledge of the assignation, he is not bound by it until either assignor or assignee serves notice. That being so, the account debtor can pay the assignor, or exercise rights of set-off against the assignor, without having to show any good faith. Pending intimation, as far as the account debtor is concerned, the assignor is the debtor's creditor. As a standard eighteenth century Scottish work puts it:

A Party cannot without a legal Intimation be in *mala fide*. For his Knowledge of such and such an Assignment, Translation, or the like, which ought formally to be intimate to him, even altho' he confes'd he knew it, cannot prejudge him; seeing it was not made known to him by the Law: For as the Party's Knowledge is not equivalent to a formal Intimation, one cannot be bound or obliged to know what was not necessary for him to know.¹⁴³

In the Netherlands the question has been asked, if not answered, of what happens if an account debtor, who has private knowledge of an assignation, pays the assignee instead of the assignor. The legislator, in an explanatory memorandum, takes what is the traditional Scottish approach that, strictly speaking, the account debtor has paid the wrong person and must pay again to the assignor.¹⁴⁴ But a number of Dutch authors have argued that, in such a case, the account debtor would be discharged.¹⁴⁵

The exact scope of the assignor's powers after execution of an undisclosed assignation remains unclear. The claim and any accessory rights, on an undisclosed assignation, are transferred at the moment of assignation.¹⁴⁶ From the moment of assignation, therefore, the assignor no longer has any powers in respect of the assigned claims. But the account debtor, pending notice, may be none the wiser. So, vis-à-vis the account debtor, the assignor has ostensible authority to grant a valid discharge of the claim; vis-à-vis the assignee, the assignor's powers and liabilities are regulated by the contract between assignor

¹⁴² Art 3:94 (3), second sentence BW.

¹⁴³ Anon, *Ars notariatus: or, the art and office of a notary-publick, as the same is practised in Scotland* (1740) 227; 2nd edn (1762) 252. This passage had a clear, if unattributed, influence on the opinion of the Lord Justice Clerk (Miller of Glenlee) in *Dickson v Trotter* (1776) Mor 873; 18th January 1776 FC; Hailes 675 at 675-676.

¹⁴⁴ See Documents of the Parliament, Second Chamber (Kamerstukken II) 2003/04, 28 878, nr 5, 10-11; and Documents of the Parliament, First Chamber (Kamerstukken I) 2003-2004, 28 878, Nr. C, 3. Such a result, admittedly, could give rise to an enrichment nightmare. Cf A.F. Salomons, "Stille cessie: de verdere lotgevallen van het wetsvoorstel", WPNR 6572 (2004) 242. Cf Art. 6:32 BW.

¹⁴⁵ For an overview, see J W A Biemans, "Inning, betaling en afdracht bij stille cessie in faillissement" in N E D Faber et al (eds) *De bewindvoerder, een octopus* (2008) para 2.

¹⁴⁶ Cf R J van der Weijden, "Overgang en uitoefening van nevenrechten bij stille cessie" (2007) 6716 WPNR 574.

and assignee,¹⁴⁷ and it will usually be a term of that agreement that the assignor does nothing to prejudice the assignee's position. The assignor's powers after an undisclosed assignation need not be the same as those of the pledgee following an undisclosed pledge. A pledgee has only limited powers, which are required only on default by the pledgor; the pledgee otherwise has no interest in dealing with the account debtor.

F. PLEDGE OF CLAIMS

The *BW* expressly provides that, once the account debtor is notified of the right of pledge, the pledgee has the exclusive power to collect the claim.¹⁴⁸ For this, the pledgor does not have to be in default. The account debtor is released only by paying to the pledgee. If the account debtor is not notified, as in the case of an undisclosed pledge, the pledgor (as the creditor) has the exclusive power to collect the claim and the debtor is released only by paying to the pledgor. If the right of pledge is disclosed, the pledgee can also exercise the contractual right of a lender to accelerate any payment terms; but he ought not to exercise this right unnecessarily.¹⁴⁹ Where there is more than one pledgee, the pledgee with the first ranking *disclosed* pledge can exercise these rights.¹⁵⁰

If the debtor is not notified of the right of pledge and the pledgor collects the claim, the claim is discharged and with it the pledge. The pledgee has no specific rights to the proceeds of the claim by virtue of the pledge. It is likely, however, that the pledgor may have contractual obligations to the pledgee with regard to these proceeds or contractual obligations to replace discharged claims by pledging new claims. If the pledgee collects the claim, the debtor does not pay to the pledgee as the creditor, but to the pledgee as a third party that has the power to collect the pledgor's claim. The *BW* provides that there will be a right of pledge on the proceeds of claims paid to the pledgee,¹⁵¹ which assumes that the pledgor is the owner of the proceeds. If the proceeds are money, and the pledgor's underlying debt to the pledgee is due, the pledgee can pay himself directly from the proceeds.¹⁵² With regard to a claim for delivery of a corporeal moveable, the right of pledge will attach to the corporeal moveable by operation of real subrogation. The pledgee can sell the corporeal moveable

147 See references in n 132 above.

148 Art 3:246 (1) *BW*.

149 Art 3:246 (2) *BW*.

150 Art 3:246 (3) *BW*.

151 Art 3:246 (5) *BW*.

152 Art 3:255 *BW*.

and pay himself from the proceeds. The pledgee must distribute the proceeds among the other creditors, such as other pledgees, according to their ranking. Any surplus must, ultimately, be returned to the pledgor.¹⁵³ The general principle regarding defences applies to the pledgee as to an assignee: the account debtor can raise all defences against the pledgee that could have been raised against the pledgor.

In practice, three main issues have proved controversial. The first question is whether the pledgee can, on default by the pledgor, exercise any accessory security rights held by the pledgor. Most writers assumed this to be possible. In 2005, the *Hoge Raad* ruled that a creditor arresting a claim was entitled to exercise, on the mortgagee's default, any rights of *hypotheek* (mortgage) held by the mortgagee against the account debtor (the arrestee) in respect of the underlying claim.¹⁵⁴ From this ruling it can be argued that a pledgee can also exercise any security rights accessory to the pledged claim. The second issue relates to the nature of the rights of the pledgee in the bankruptcy of the pledgor. The primary remedy of a creditor holding an undisclosed pledge of claims is, on default, to notify the account debtor. In 1995, the *Hoge Raad* ruled that, if there is an undisclosed right of pledge, the pledgee retains the right to give notice to the debtor and collect the claim on the pledgor's insolvency.¹⁵⁵ Where the pledgee exercises the right to give notice in such a situation, the right of pledge attaches to the proceeds in so far as they represent payments made after the pledgee's notification. This right of pledge on the proceeds maintains the same ranking as the pledgee would have had with respect to the original right of pledge outside the pledgor's bankruptcy. In accordance with general rules of Dutch bankruptcy law the pledgee can act as if there is no bankruptcy.¹⁵⁶

If the pledgee does not notify the account debtor (and the pledge remains undisclosed), the bankruptcy trustee (liquidator, administrator) has the right to collect the claim instead of the bankrupt pledgor. In such a case the pledgee has no right of pledge on the proceeds. However, the *Hoge Raad* has ruled that the pledgee, as a creditor of the bankrupt pledgor, retains a preference as a pledgee when claiming payment from the bankruptcy trustee, but this means that the

153 Art 3:253 (1) *BW*. In the case of a claim to the transfer of registered property, such as immovable property, the right of pledge on the claim is transferred into a right of mortgage (*hypotheek*) on the registered property: see J W A Biemans, *Rechtsgevolgen van stille cessie* (2011), nr 92; and A J Verdaas, "Inning door de pandhouder van een vordering tot levering van een registergoed: substitutie van het pandrecht door een hypotheekrecht" in N E D Faber et al (eds), *Knelpunten bij beslag en executie* (2009) 677-693.

154 HR 11th March 2005, NJ 2006, 362 (Rabobank/Storpolder).

155 HR 17th February 1995, N. 1996, 471 (Mulder q.q./CLBN).

156 Art 57 *Fw*.

pledgee is paid only after the expenses of the bankruptcy procedure have been paid, which, in many cases, will mean that the pledgee receives nothing. Recent case law has narrowed down the right of the bankruptcy trustee to collect the pledged claims in favour of the pledgee. The bankruptcy trustee must first give the pledgee a reasonable time to give notice to the account debtor, which, in practice, in the case of a pledgee that is a bank, means at least two weeks following the pledgor's bankruptcy.¹⁵⁷

A third question is whether the pledgee has a right vis-à-vis the bankruptcy administrator to information regarding the pledged claims. This is particularly important in cases where there has been a pledge of claims in bulk. As has been seen, the specificity requirements are undemanding, so a pledge of claims may be valid, but the pledgee may not know the identity of the account debtors or, for that matter, what sums are outstanding. In a recent decision, the *Hoge Raad* has ruled that the bankruptcy trustee is obliged to provide information to the pledgee about the pledged claims. The bankruptcy trustee may even be held personally liable to the pledgee in so far as he fails to provide this information.¹⁵⁸

G. CONCLUSIONS

The historical links between Scots and Dutch law are well documented.¹⁵⁹ It was in this area of law that Kames thought Scots law took its judicial security over claims – arrestment – from Friesland.¹⁶⁰ For many years the links appeared to have lapsed; but there is now ample evidence that strong links are developing between the two systems.¹⁶¹

For present purposes, Dutch law is of importance for a number of reasons. In the first place, it is one of those European systems that has amended its law to

157 HR 22nd June 2007, NJ 2007, 520 (ING/Verdonk q.q.). Cf Timmermann and Veder (n 74) at 191.

158 HR 30th October 2009, NJ 2010, 96 (Hamm q.q./ABN Amro). Cf J W A Biemans, "Inbreuk op een vordering en het recht op informatie" (2009) 6801 WPNR 473 and T H D Struycken and T T van Zanten, "Hamvragen omtrent de inning van stil verpande vorderingen in faillissement" 2010 Tijdschrift voor Insolventierecht 57 and 87.

159 See, for example, J W Cairns, "Importing our lawyers from Holland: Netherlands influences on Scots law and lawyers in the eighteenth century" in G Simpson (ed), *Scotland and the Low Countries, 1124-1994* (1996) 136.

160 H Home, Lord Kames, *Principles of Equity*, 3rd edn (1778) II, 183.

161 See, for example, J M Milo and J M Smits, *Trusts in Mixed Legal Systems* (2001); M Hogg, "Lowlands to low country: perspectives on the Scottish and Dutch law of unjustified enrichment" (2001) 5 Electronic Journal of Comparative Law 1; S Bartels and M Milo, *Contents of Real Rights* (2004); L P W van Vliet, "The transfer of moveables in Scotland and England" (2008) 12 EdinLR 173; D Busch and L Macgregor (eds), *The Unauthorised Agent: Perspectives from European and Comparative Law* (2009); J Blackie, "Doctrinal history of the protection of personality rights in Europe in the ius commune: general actions or specific actions?" (2009) 13 Electronic Journal of Comparative Law 1.

allow the creation of a limited security right in a claim, without requiring notice to be given to the account debtor. German law, an obvious source of inspiration in this area of the law as in others, is thus, in this respect, of less interest, since a limited interest may be created only with notice.¹⁶² Secondly, Dutch law has, in this area, a rich jurisprudence and pool of legal writing from which it is possible to draw. For these two reasons we consider Dutch law to have particular relevance to any reforms of Scots law.

From the perspective of Scots law, Dutch law contains three clear points of departure: (a) it recognises a pledge over claims; (b) there is a prohibition on the only type of security presently available in Scots law, namely fiduciary transfer; and (c) both assignation and pledge can occur without debtor notification. Of these, (a) and (c) are of most interest. Dutch law demonstrates how assignment can take place without unnecessary formality. The goal of certainty (*data certa*) is achieved in Dutch law by the role of the notary in drawing up an authentic act or by registration (with the local tax authority).¹⁶³ Scots law could, of course, employ variants of either. Notarial execution is recognised internationally.¹⁶⁴ Registration may also be possible, either in the Books of Council and Session, the sheriff court books or, in the case of corporate pledgors, by registration of particulars of the pledge in the Register of Charges maintained at Companies House. The failure of Scots law to recognise the possibility of a limited security right as an alternative to fiduciary transfer is a major lacuna in Scots law. For some assets, such as intellectual property rights, fiduciary transfer is only practical with fairly involved accompanying documentation whereby the assignee immediately grants various rights of use back to the cedent. In such cases a limited security right would be of considerable practical utility.

This brings us to the aspect of Dutch law which is inconsistent with the present Scots law: the *fiducia* prohibition. This rule, adopted from Meijers' writings, demonstrates a rather modern functional approach, which may also be found in the UCC and UCC-like systems. It would be a fairly radical departure for Scots law to follow Professor Meijers' lead and abolish the outright assignation in security. Such a course would require serious and careful consideration. In Anderson's view, German law shows that it is possible for the

162 The German law of both *Forderungsabtretung* and *Sicherungsabtretung*, in contrast, remain of considerable importance in so far as any Scottish reform may abolish the requirement for intimation for outright assignations.

163 Timmermann and Veder (n 74) at 210.

164 At least with an apostille from the Foreign and Commonwealth Office under the Hague Convention, of 5th October 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents. A wealth of information will be found in N P Ready (ed) *Brooke's Notary*, 13th edn (2009) especially on this point at para 11-28.

two security constructs – outright transfer or limited security interest – to co-exist (albeit that one difficulty with the German system is the inconsistency in requiring formality for the pledge but not outright transfer.)¹⁶⁵ There seems to be something to be said for allowing both outright transfers and limited security rights in claims. Neither should be subject to formal intimation requirements for validity (although, admittedly, for many practical purposes, intimation is often unavoidable).¹⁶⁶ The market can decide which is preferable and in what circumstances. In Biemans' view, although he is not in favour of the *fiducia* prohibition as such, if the introduction of an undisclosed pledge over claims is to be admitted in Scots law, there may be something to be said for doing away with an undisclosed fiduciary assignation in security.

Dutch law is not, and cannot be, a perfect model for Scots reform. There can be no wholesale adoption. We have considered only the law of assignation and assignation in security, but any Scottish reforms will now also encompass corporeal moveables. That point alone suggests that an assignation-specific solution is perhaps unlikely. But over such matters we have no control; nor, to some extent, does the Scottish Law Commission, for wholesale reform requires political will. We can highlight only what can be learned from the Dutch experience. The advantages of the Dutch approach are, we think, these:

- Intimation can be dispensed with as a constitutive requirement for outright transfer.
- The introduction of a limited security interest in claims is quite workable.
- Such a limited security interest can operate well without intimation being a constitutive requirement.
- A workable law on limited security rights, assuring *data certa*, can be achieved without resort to the full panoply of a moveable property security register (Scots law, admittedly, would have to decide how to assure *data certa*: we have suggested notarial execution or the BCS). This point may be of importance if, for whatever reason, the grand reform of moveable transactions becomes too ambitious.
- Relatively slight changes to the details of the law can have important practical consequences: amendment along Dutch lines could be done with limited fuss and expense and achieve considerable practical results.

¹⁶⁵ The Scots law of corporeal moveables is similarly inconsistent: a transfer of ownership pursuant to a sale may take place *solo consensu*; a right in security, in contrast, by way of pledge can be constituted only by delivery of possession to the creditor.

¹⁶⁶ Consumer Credit Act 1974 s 82A (implementing Consumer Credit Directive 2008/48/EC, art 17) renders intimation mandatory where the assigned claim arose under a regulated agreement. But intimation is required here only for debtor protection purposes.