

THE ROLE OF PARTY AUTONOMY IN DETERMINING THE THIRD-PARTY EFFECTS OF ASSIGNMENTS: OF “SECRET LAWS” AND “SECRET LIENS”

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I

INTRODUCTION

The party autonomy principle in private international law refers to the idea that commercial actors should be free to choose the law to govern their affairs. In making the subjective intent of private parties the decisive connecting factor, freedom of choice represents a remarkable departure from usual State-centered choice of law methodologies, whether these are based on identifying the law of the State that has the objectively closest connection to the relevant matter or the strongest claim to application on interpretative, substantive, or governmental interest grounds.¹

The last decades of the twentieth century were marked by the broad acceptance of a role for the market even in States still wedded to a command economy, and a concomitant increase, aided by technological advances, in the cross-border movement of goods, services, finance, and capital. Party autonomy to choose the applicable law was rapidly accepted as necessary to ensure certainty and predictability in cross-border commerce. Contemporary national laws and multilateral instruments endorse the freedom of parties to cross-border commercial contracts to choose the applicable law, generally without regard to whether it bears any objective connection to their transaction.² Indeed, the most recent multilateral statement of the principle authorizes the choice of non-State rules, consistent with the general freedom of choice allowed in arbitration.³

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1. See Yuko Nishitani, *Party Autonomy in Contemporary Private International Law – The Hague Principles on Choice of Law and East Asia*, 59 JAPANESE Y.B. INT’L L. 300, 309–10 (2016). See also Ralf Michaels, *Party Autonomy—A New Paradigm without a Foundation?*, Presentation to the Japanese Association of Private International Law 2–3 (June 2, 2013), http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf [https://perma.cc/K3CS-RCW3].

2. See Nishitani, *supra* note 1, at 317–22, for a global survey of national laws and multilateral instruments endorsing party autonomy. As she notes, a minority of jurisdictions, including US states, still restrict the parties’ choice to a law that has a geographical relationship to the contract.

3. Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts*, art. 2 (Mar. 19, 2015). The Principles were a logical complement to the recognition of the autonomy of commercial parties to agree on the court to have exclusive jurisdiction to adjudicate

Although global acceptance of party autonomy in the contractual context is relatively recent, the idea has a long historical pedigree and began to be accepted in national laws in the latter decades of the nineteenth century.⁴ A more novel twenty-first century phenomenon is the extension of party autonomy to private law matters far removed from the origins of the principle in choice of law for contract, where it at least resonates with substantive law theories of freedom of contract.⁵

This article addresses the extent to which party autonomy does or should play a role in determining the law applicable to the assignment of claims to the payment of money arising under a contract between the assignor and the debtor on the claim. In line with the acceptance of party autonomy in cross-border commercial contracts generally, it is accepted that the assignor and assignee should be free to choose the law applicable to their *inter partes* relations.⁶ There is also a consensus that all matters pertaining to relations between the assignee and the debtor on the assigned receivable should be governed by the law applicable to the assigned claim, as opposed to the law applicable to the contract of assignment.⁷ This rule is accepted as necessary to protect the debtor—a third party to the contract of assignment—against an involuntary change in the law applicable to its rights and obligations in relation to an assignee to whom its contractual counterparty may assign its payment obligation.⁸

National choice of law solutions diverge in how they determine the law applicable to the effects of a cross-border assignment against third parties other than the debtor on the claim. The third parties referred to here include not just another assignee of the same claim, but all third parties whose rights are affected by the assignment, most importantly the assignor's general creditors and the assignor's insolvency administrator in its role as representative of the collectivity of the assignor's creditors.⁹

any disputes between them. See Hague Conference on Private International Law, *Convention on Choice of Court Agreements*, arts. 5, 6 (June 30, 2005), reprinted in 44 I.L.M. 1294 (in force as of October 1, 2015 in the Member States of the European Union, Singapore, and Mexico).

4. Nishitani, *supra* note 1, at 308.

5. Michaels, *supra* note 1, at 2. See also the discussion in Part III of the article on the adoption of a restricted party autonomy approach in EU instruments addressing family and succession law matters.

6. Internationally, see the Convention on the Assignment of Receivables in International Trade, G.A. Res. 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81(2002), art. 28 (Dec. 12, 2001) [hereinafter Assignment Convention]. Within the EU, see Council Regulation (EC) No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art. 14(1), 2008 O.J. (L 177) 6, 14 [hereinafter Rome I Regulation].

7. Assignment Convention, *supra* note 6, art. 29; Rome I Regulation, *supra* note 6, art. 14(2).

8. Unlike novation, the assignment of a right to the payment of money is a unilateral act by the assignor generally not requiring the consent of the debtor.

9. Legal systems presume, as a general default rule, that the collectivity of a person's creditors have a contingent shared "security interest" in their debtor's assets, capable of "perfection" by attachment or the intervention of insolvency proceedings. Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S404, n.64 (2002). This idea is elegantly captured in the Civil Code of Québec: "The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors." Civil Code of Québec, C.Q.L.R. 1991, c 64, art. 2644 (Can.). On the distinction between the right of an insolvency

The 2001 United Nations Convention on the Assignment of Receivables in International Trade seemed to promise a globally uniform solution, referring the third-party effects of assignments to the law of the State in which the assignor is located.¹⁰ The Convention is not yet in force, owing to continuing disagreement on whether it offers the optimal solution, particularly among Member States of the European Union. In 2005, the European Commission had proposed that solution for adoption in the pending Rome I Regulation.¹¹ The proposal ultimately was not accepted in the Council, and the Commission was instead asked to submit a report on the question.¹² A decade later, in 2016, the Commission submitted its Report.¹³ That Report recommended a uniform European solution.¹⁴ After a period of public consultation and the establishment of an Expert Group to provide advice, the Commission released its final proposal in March 2018.¹⁵

The possible solutions envisaged by the Report included application of the law of the assignor's location, in line with the Assignment Convention.¹⁶ This solution offers a single objective connecting factor and accords with classic choice of law methodologies for determining the law applicable to the third-party effects of the creation or transfer of property rights.

Two other possibilities, however, were also proposed for consideration. Both feature a role for party autonomy. The first alternative would give the assignor and the assignee a restricted autonomy to choose the applicable law, limiting their choice to either the law of the assignor's location or the law governing the

representative to challenge the effectiveness of an assignment in its distinct roles as representative of the insolvent assignor and representative of the assignor's creditors, see Trevor C. Hartley, *Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation*, 60 INT'L & COMP. L. Q. 29, 38–39, 42–44 (2011).

10. Assignment Convention, *supra* note 6, arts. 22, 30.

11. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, at 19, COM (2005) 650 final (Dec. 15, 2005). That approach had the support of a significant majority of respondents to the Commission's 2003 Green Paper. *Id.* at 3.

12. Rome I Regulation, *supra* note 6, art. 27(2).

13. *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Question of the Effectiveness of an Assignment or Subrogation of a Claim Against Third Parties and the Priority of the Assigned or Subrogated Claim Over the Right of Another Person*, COM (2016) 0626 final (Sept. 29, 2016).

14. *Id.* at 3–4. The same instrument would also provide a uniform choice of law solution for the transfer and grant of security in investment securities, including intermediated securities, another long-standing area of disharmony. *Id.* Existing EU directives have harmonized the choice of law rules on securities only to a limited extent and the directives have been transposed into national law in divergent ways. *Id.* There are also divergent views on whether certain types of intangible assets are more appropriately characterized as securities or claims. *Id.*

15. See *Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to the Third-Party Effects of Assignments of Claims*, COM (2018) 96 final (March 12, 2018). Although the Commission released its proposal just before the article was to go to press, it has been revised to incorporate references to the proposed solution. See *infra* notes 26, 57, 74, 107, 115 and accompanying text.

16. COM (2016) 0626, *supra* note 13, at 10–11.

assigned claim.¹⁷ In the absence of a choice, or if the chosen law did not correspond to these two possibilities, the law of the assignor's location would apply.

The other alternative would refer the third-party effects of an assignment to the law governing the assigned claim, except with respect to claims arising under future contracts, to which the assignor location rule would apply.¹⁸ Although the law governing the assigned claim seems superficially to be an objective connecting factor, this law can be chosen by the assignor and the debtor. Thus, party autonomy would also potentially operate to determine the applicable law under this solution.

This article concludes that a party autonomy-based choice of law solution should be rejected in favor of the assignor location approach. The assignor location rule is the only solution that ensures *ex ante* visibility of the applicable law for all third parties whose rights as against the assignee are governed by that law, thus eliminating the *secret laws* problem—lack of public transparency—inherent in referring choice of law to the subjective decision of parties to a private agreement. The assignor location rule is also the only solution that ensures that any mandatory requirements of the law of the assignor's location aimed at protecting third parties against the risks posed by *secret liens*—private agreements for the creation or transfer of property rights—cannot be evaded by a private choice of law agreement referring third-party effects to a law that privileges secrecy.¹⁹

This latter proposition assumes that the law of the assignor's location has the strongest claim to regulate the *secret liens* problem. The assignor is the common counterparty to transactions with the principal categories of third parties—existing and potential assignees and the assignor's general creditors—whose rights are directly affected by the risk of *secret liens*. Thus, it seems self-evident that both potential assignees and creditors would reasonably expect the assignor's law to determine their rights. That that law is perceived to represent the best general solution finds implicit support in the appearance of the assignor's location as an alternative or default connecting factor in both other alternatives.

17. *Id.* at 9–10.

18. *Id.* at 11–12. Three other solutions, the law of the debtor's location, the law of the place of assignment, and the law of the forum, were rejected because they “have little support among stakeholders, create uncertainty, are unsuited for electronic means of transacting or encourage forum shopping.” *Id.* at 10 n.40.

19. For example, German law famously recognizes the automatic effectiveness of an assignment of present and future claims, or other movable property, against third parties without any requirement for publicity or other formality. Although this requires the assignee to trust the assurances made by the assignor that its claims have not been previously assigned, the system works because of the *Hausbankprinzip*, a term describing the fact that the financing of German enterprises, including SMEs, is traditionally based on a long-term stable relationship lending model with the enterprise's *Hausbank*, meaning that bank-assignees face little or no risk of a double assignment of the same claims. See Moritz Brinkmann, *The Peculiar Approach of German Law in the Field of Secured Transactions and Why it has Worked (So Far)*, in SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE 339, 344–45 (Louise Gullifer & Orkun Akseli eds., 2016).

Although the current debate in the European Union provides the immediate impetus for this article, it has relevance even in regimes where the assignor location rule is firmly established, as it is, for example, under U.C.C. Article 9 in the United States,²⁰ and the Personal Property Security Acts²¹ and Civil Code of Quebec²² in Canada. However, Article 9 and the Civil Code both recognize a party autonomy exception for the assignment of claims to funds credited to a bank account: the applicable law is determined by reference to the law chosen by the parties to the account agreement, in other words the law governing the assigned claim.²³ Claims to deposited funds are also excluded from the general assignor location choice of law rule in the Assignment Convention²⁴ and the UNCITRAL Model Law on Secured Transactions.²⁵ This suggests that even if the assignor location rule is the optimal general solution, there remains a demand for a party autonomy solution in relation to some categories of assignment, notably those relating to what is sometimes referred to as “cash collateral.”

The analysis that follows seeks to substantiate and develop these opening conclusions and observations. Before embarking on the analysis, an explanation of terminology is needed. Although the term *assignment* carries varying legal connotations in different legal systems, there is a consensus that the same choice of law rule should apply to transactions involving the outright sale of claims and those in which claims are assigned as collateral.²⁶ Consequently, in this article, unless otherwise specified, the term *assignment* refers to both types of transactions, regardless of the nomenclature used in any legal system to which reference may be made. The term *claim* is a generic legal term typically used in civil law systems to refer to intangibles generally. It is typically used here in a narrower sense to refer to claims for the payment of money arising out of a contract, or *receivables*, to use the business term.

II

THIRD-PARTY EFFECTS OF ASSIGNMENTS: SUBSTANTIVE DISHARMONY

Disharmony at the substantive level increases the probability of conflict of laws problems in cross-border transactions. The absence of a uniform choice of law solution exacerbates the uncertainty and cost. If a potential assignee and

20. U.C.C. § 9-301(1) (AM. LAW INST. & UNIF. LAW COMM'N 2013).

21. *See, e.g.*, Saskatchewan Personal Property Security Act, S.S. 1993, c P-6.2, s.7(2) (Can.).

22. Civil Code of Québec, C.Q.L.R. 1991, c 64, art. 3105 (Can.).

23. *See* the discussion in Part IV.B.

24. Assignment Convention, *supra* note 6, art. 4.

25. U.N. COMMISSION ON INT'L TRADE L. [UNCITRAL], UNCITRAL MODEL L. ON SECURED TRANSACTIONS, arts. 86, 97, U.N. Sales No. E.17.V.1 (2016) [hereinafter UNCITRAL MODEL LAW].

26. *See* Assignment Convention, *supra* note 6, art. 2(a) (defining the term “assignment” to include both the sale of and the grant of security in a receivable). *See also* Rome I Regulation, *supra* note 6, art. 14(3) (defining “assignment” to include “outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims” for the purposes of the assignee–assignor and assignee–debtor matters addressed by the choice of law rules in articles 14(1) and 14(2)). Article 2(c) of the draft Regulation ultimately proposed by the Commission in March 2018 defines “assignment” in similarly broad terms. COM (2018) 96, *supra* note 15, at 30.

third parties affected by an assignment cannot determine with certainty which State's substantive rules will apply to their rights, they must take account of the choice of law rules of all States where a dispute may potentially arise and then attempt to adjust to the legal risks arising under all potentially applicable laws.

Although the substantive rules of different States with respect to the effects of an assignment against the debtor converge on most important matters,²⁷ they differ significantly on the rules governing the effectiveness and priority of an assignment against third parties other than the debtor on the claim.²⁸ Where instituted, limitations on third-party effectiveness typically take one or both of two forms. The first is to require some act of publicity aimed at providing objective notice that a claim has been, or may have been, the subject of an assignment by an enterprise. The second is to restrict the effectiveness of an assignment of future claims or generic categories of claims.

Most states require some act of publicity but differ as to its nature and scope. In many regimes, notification of the assignment to, or acceptance by, the debtor on the claim was the traditional mechanism. It remains so in some regimes, although laws differ as to whether notification is necessary for effectiveness against third parties generally, or only for perfection between competing assignees, and as to the effect of knowledge of a prior assignment by the first-notifying assignee.

One theory underlying notification as an act of publicity is that it enables third parties to determine whether a claim already had been assigned by inquiring with the debtor.²⁹ This protection is often illusory in practice because the debtor on the claim is under no obligation to respond to inquiries and has no desire to expose itself to the risk of liability for error.³⁰ More significantly, perhaps, notification requirements are incompatible with modern financing practices which frequently involve the assignment of multiple claims owed by many different debtors, whether outright as in securitization transactions, or as collateral to secure a loan. In these transactions, the assignor and the assignee

27. See *supra* note 8 and accompanying text.

28. For critical comparative expositions of the disparate regimes in various States with an emphasis on the European context, see CROSS-BORDER SECURITY OVER RECEIVABLES (Harry C. Sigman & Eva-Maria Kieninger eds., 2009); SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE (Louise Gullifer & Orkun Akseli eds., 2016); SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW (Eva-Maria Kieninger ed., 2004). The BIICL study also contains national reports on both the substantive and choice of law rules of twelve EU Member States. BIICL STUDY, *infra* note 51. The website of the Secured Transactions Law Reform Project also offers useful links to materials on the current stay of play in different states. SECURED TRANSACTIONS LAW REFORM PROJECT, <https://securedtransactionslawreformproject.org> [<https://perma.cc/LWB5-DKD2>] (last visited Jan. 15, 2018).

29. John De Lacy, *Reflections on the Ambit of the Rule in Dearle v. Hall and the Priority of Personal Property Assignments – Part One*, 28 ANGLO-AM. L. REV. 87, 89–90 (1999).

30. See, e.g., John De Lacy, *Reflections on the Ambit of the Rule in Dearle v. Hall and the Priority of Personal Property Assignments – Part Two*, 28 ANGLO-AM. L. REV. 197, 207–13 (1999); Maximilian Koessler & John Hanna, *Assignment of Accounts Receivable: Confusion of the Present Law, the Impact of the Bankruptcy Act, and the Need for Uniform Legislation*, 33 CAL. L. REV. 40, 88–91 (1945); Bernard Rudden, *Things as Thing and Things as Wealth*, 14 OXFORD J. LEGAL STUD. 81, 92 (1994).

often prefer that the assignor continue to collect the assigned claims, as agent for the assignee in the case of an outright assignment, or until default in the case of a security assignment.³¹

Although most States have implemented reforms to accommodate non-notification assignments, they have gone about this in diverse ways. Some States have established robust registration systems, requiring public filing of an assignment or a notice of the assignment for effectiveness against third parties, including both creditors and subsequent assignees. This is the regime adopted in Article 9 of the U.C.C. in the United States³² and under the Personal Property Security Acts³³ and the Civil Code of Quebec in Canada.³⁴ It is also the preferred solution in an increasing number of other States, spurred by international harmonization initiatives, notably the UNCITRAL Model Law on Secured Transactions.³⁵

In a few States, however, the register is not public. Rather, it operates merely to establish a certain date for the assignment, as a protection against the risk of fraudulent antedating,³⁶ so it provides publicity only in the most limited *ex post* sense of that term. In the more common case, the register is available to the public, but the nature and scope of the registration regimes vary widely. In some States, registration and notification co-exist as alternative modes of publicity, with priority then dependent on the order of registration or notification.³⁷ In this type of regime, the assignee in practice cannot rely solely on the registry record in determining whether it will have priority against a competing assignee. In other States, registration as a mode of publicity is available only to specified classes of assignors or assignees, or to specified industries, or only where the claims are assigned as part of a charge on the overall assets of an enterprise.³⁸ In a number of States, multiple registries co-exist, having been added on an ad hoc basis over time in response to expanding demands for alternatives to notification.

State laws also diverge on the question of whether restrictions should be imposed on the assignability of future claims and generic categories of claims. In

31. De Lacy, *supra* note 30, at 213–14.

32. U.C.C. §§ 9-310, 9-322 (2013).

33. See, e.g., Saskatchewan Personal Property Security Act, S.S. 1993, c P-6.2, ss.19, 20, 25, 35 (Can.).

34. Civil Code of Québec, C.Q.L.R. 1991, c 64, arts. 2663, 2945, 2950 (Can.).

35. UNCITRAL MODEL LAW, *supra* note 25, arts. 18, 29.

36. For example, the “silent” or “undisclosed” pledge of claim in the Netherlands. William Loof & Anna Berlee, *Case Study: Harmonizing Security Rights* 5 (Maastricht Eur. Private L. Inst., Working Paper No. 2014/15, 2014).

37. See, e.g., Scottish Law Commission, *Discussion Paper on Moveable Transactions* ¶ 14.32 (Scot. L. Comm’n Discussion Paper No. 151, 2011).

38. For example, until very recently, Italian law continued to require notification of the debtor on the claim, with the limited exception of claims assigned as part of an enterprise charge in favor of banks publicized by registration. See Anna Veneziano, *Italian Secured Transactions Law: The Need for Reform*, in SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE, *supra* note 28, at 355, 358–59. A general non-possessory pledge, also publicized by registration, that can include present and future claims has recently been introduced. See Giuliano G. Castellano, *The New Italian Law for Non-Possessory Pledges: A Critical Assessment*, 31 BUTTERWORTHS J. INT’L BANKING & FIN. L. 542, 542 (2016).

continental legal systems, the principle of specificity has traditionally required that the assigned claims be specifically identified or at least arise out of a specified existing relationship.³⁹ Restrictions of this type are sometimes justified as protecting the assignor from granting a financing monopoly to a single financier. The more convincing rationale is protection of the assignor's general creditors by ensuring that the bulk of the claims owing to an enterprise remains available to attaching creditors and to the assignor's insolvency administrator on behalf of the general creditors.⁴⁰

Relatedly, this restriction functions to impose a relationship financing model on assignor–assignee relations, forcing the assignee to monitor the assignor's claims on an ongoing basis. This benefits the assignor's general creditors by ensuring timely intervention by the assignee if the assignor encounters financial difficulties, thereby preventing the usual pre-insolvency ballooning of unsecured debt.⁴¹ This latter rationale underlay the early twentieth century pre-U.C.C. rule in *Benedict v. Ratner*,⁴² invalidating an assignment of future claims against the assignor's insolvency administrator if the assignee did not police the assignor's dealings with the proceeds of collected claims.⁴³

Whatever their benefits for general creditors, the administrative burden on assignees inherent in specificity and policing requirements is inimical to access to credit and capital by an enterprise based on an assignment of its present and future claims. In the United States, the rule in *Benedict v. Ratner* had been largely abolished by statute by the mid-twentieth century, even before U.C.C. Article 9 confirmed that an assignment may cover all present and future claims owing to the assignor without the need for policing or further specification.⁴⁴ The same liberal approach is reflected in the Personal Property Security Acts⁴⁵ and in the Quebec Civil Code in Canada,⁴⁶ and internationally in the Assignment Convention⁴⁷ and the UNCITRAL Model Law on Secured Transactions.⁴⁸

In continental Europe, the trend over time has likewise been towards loosening specification requirements, sometimes through statutory reform and sometimes by judicial sanctioning of creative legal work-arounds, even though it is acknowledged that the consequence comes at the expense of eliminating the protective function of the requirement for unsecured creditors.⁴⁹ That trend has

39. Eric Dirix, *The Belgian Reform on Security Interests in Movable Property*, in SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE, *supra* note 28, at 391, 393.

40. Loof & Berlee, *supra* note 36, at 7.

41. GRANT GILMORE, 1 SECURITY INTERESTS IN PERSONAL PROPERTY, 260–61 (1965).

42. *Benedict v. Ratner*, 268 U.S. 353 (1925), *superseded by statute*, *see infra* note 44.

43. GILMORE, *supra* note 41. *See also* Edward J. Janger, *Brandeis, Progressivism, and Commercial Law: Rethinking Benedict v. Ratner*, 37 BRANDEIS L. J. 63, 75–77 (1998).

44. GILMORE, *supra* note 41, at 281–86.

45. Saskatchewan Personal Property Security Act, S.S. 1993, c P-6.2, s.13 (Can.).

46. Civil Code of Québec, C.Q.L.R. 1991, c 64, arts. 2666, 2670 (Can.).

47. Assignment Convention, *supra* note 6, art. 8.

48. UNCITRAL MODEL LAW, *supra* note 25, arts. 6(2), 8.

49. Alexander Morell & Frederic Helsen, *The Interrelation of Transparency and Availability of*

accelerated in the early twenty-first century, particularly given the increased demand for collateral in the wake of the 2007 global financial crisis. Nonetheless, divergences remain in the extent of specificity required, in the techniques available to work around the requirement, and in the categories of assignments for which specification has been relaxed. In some States as well, the quid pro quo for permitting an enterprise to grant a charge over its entire asset base including present and future claims is to reserve a carve-out for the general creditors on the assignor's insolvency.⁵⁰

III

LAW APPLICABLE TO THE CONTRACT BETWEEN THE ASSIGNOR AND ASSIGNEE: RESTRICTED PARTY AUTONOMY?

Prior to presenting its 2016 Report, the Commission had requested the British Institute of International and Comparative Law to carry out a study on the issue.⁵¹ Of the States surveyed by the BIICL, only the Netherlands and Switzerland recognize the freedom of the assignor and the assignee to choose the law applicable to the third-party effects of their assignment, and it was supported by only 11% of consultees.⁵²

Advocates of an unqualified party autonomy solution object to the rigidity of a fixed choice of law rule. Rather than tying assignors and assignees to the law of the assignor's location, it is argued that freedom of choice would give them the freedom to shop for a law that is more responsive to their specific needs.⁵³ In practice, the objection to a assignor location rule seems to be rooted in subjective assessments that any publicity or other restrictions on the third-party effects of an assignment that might be imposed by that law are unnecessary and inefficient, whereas a party autonomy approach would liberate the parties to choose a substantive law that would give full third-party effect to their agreement without the need to observe cumbersome formalities.⁵⁴

Collateral: German and Belgian Laws of Non-possessory Security Interests, 3 EUR. REV. PRIV. L. 393, 401 (2014). See also Dirix, *supra* note 39, at 393; Andrius Smaliukas, *Secured Transactions Law Reform in Lithuania*, in SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE, *supra* note 28, at 403, 412.

50. See Lynn M. LoPucki, Arvin I. Abraham & Bernd P. Delahaye, *Optimizing English and American Security Interests*, 88 NOTRE DAME L. REV. 1785, 1856–58 (2013).

51. BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, STUDY ON THE QUESTION OF EFFECTIVENESS OF AN ASSIGNMENT OR SUBROGATION OF A CLAIM AGAINST THIRD PARTIES AND THE PRIORITY OF THE ASSIGNED OR SUBROGATED CLAIM OVER A RIGHT OF ANOTHER PERSON (2011) [hereinafter BIICL STUDY].

52. *Id.* at 385.

53. AXEL FLESSNER & HENDRIK VERHAGEN, ASSIGNMENT IN EUROPEAN PRIVATE INTERNATIONAL LAW: CLAIMS AS PROPERTY AND THE EUROPEAN COMMISSION'S "ROME I PROPOSAL" 67–70 (2006); Hendrik L.E. Verhagen & Sanne van Dongen, *Cross-Border Assignments under Rome I*, 6 J. PRIV. INT'L L. 1, 17–19 (2010).

54. See, for example, the response of the Financial Markets Law Committee, a U.K. "think tank," to the consultation of the EU Commission on its alternative draft proposals. Letter from Joanna Perkins, Chief Exec., Financial Markets Law Committee, to Directorate-General for Financial Stability, Financial Services and Capital Markets Union, European Commission (28 June 2017), <http://www.fmlc.org/>

There is no question that the substantive laws of many states, including many EU Member States, have either failed to respond to the need to facilitate the efficiency and effectiveness of the assignment of claims, or have responded in a complex, fragmented, and incremental manner.⁵⁵ However, deference to party autonomy is neither a principled nor a workable solution to the need for States to rationalize and modernize their assignment laws.

The first difficulty is that deference to party autonomy in principle ends where it would intrude on the autonomy of third parties, binding them to a law to which they did not consent and of which they have no knowledge. The second difficulty is that it would enable an assignor and assignee to evade mandatory rules imposed by the law of the assignor's location aimed at protecting third parties, whether by requiring some act of publicity or by limiting the nature and scope of the claims that may be assigned. Although the wisdom or effectiveness of certain of these mandatory limitations may be open to question, the assignor's State is unlikely to sanction evasion, particularly in the case of public registration requirements.

Both the BIICL study and the 2016 Commission Report accepted—albeit without detailed analysis—that an unqualified party autonomy approach in line with Swiss and Dutch law was *a priori* unacceptable. To mitigate the lack of transparency for third parties and reduce the potential for evasion of mandatory publicity and other rules, the Commission's 2016 Report suggested that the assignor and assignee's freedom of choice could be limited to a choice between the law of the assignor's location and the law governing the assigned claim.⁵⁶

In its March 2018 proposal, the Commission ultimately rejected party autonomy as the general rule, favoring instead the law of the assignor's location. However, the proposed regulation retains a restricted party autonomy approach for the assignments of claims in a securitization, permitting the parties in this context the freedom to instead choose the law governing the assigned claim.⁵⁷ The principal justification offered for this exception was to reduce costs for large assignors and assignees (notably large banks) that are able to structure their securitisations such that all claims to be assigned are governed by the law of one State.⁵⁸

A restricted party autonomy approach to the third-party effects of assignment is consistent with the general “EU enthusiasm for party freedom of choice”⁵⁹ in

uploads/2/6/5/8/26584807/fmlc_consultation_response_-_conflict_of_laws.pdf [https://perma.cc/24N4-D3A2].

55. For a recent critique, see Giuliano G. Castellano, *Reverse Engineering the Law: Reforming Secured Transactions Law in Italy*, in INTERNATIONAL AND COMPARATIVE SECURED TRANSACTIONS LAW 285 (Spyridon V. Bazinas & N. Orkun Akseli eds., 2017). And see the discussion and sources in Part II.

56. COM (2016) 0626, *supra* note 13, at 10.

57. COM (2018) 96, *supra* note 15, art. 4(3), at 31.

58. *Id.* at 16, 19–21.

59. Janeen Carruthers, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law*, 61 INT'L & COMP. L. Q. 881, 887 (2012). The extension of

areas far removed from the traditional sphere of commercial contracts.⁶⁰ Allowing parties a limited freedom to choose the applicable law has been adopted in the Regulations on divorce,⁶¹ maintenance obligations,⁶² and, soon, matrimonial property.⁶³ These are all areas in which mandatory rules predicated on public order considerations dominate at the substantive law level and where allowing unrestricted party autonomy could lead to situations of abuse, particularly of weaker parties. In response to these concerns, these instruments limit freedom of choice to a finite set of connecting factors with a significant connection to the parties, require consonance between the chosen law and general EU fundamental rights, and impose additional safeguards aimed at ensuring an informed choice in situations of possible inequality.⁶⁴

The main reason for adopting a restricted party autonomy solution in these instruments was to address the uncertainty created by differences in the choice of law rules of Member States.⁶⁵ Because national laws used different connecting factors for determining the applicable law, parties faced the risk that legal effects regarded as valid in one State might not be recognized in another. Certainty could instead have been achieved by insisting on a uniform mandatory connecting factor. However, granting adults a limited degree of autonomy to make their own private international law arrangements advances certainty while also responding to the contemporary choice of law challenges presented by high personal mobility and international or peripatetic relationships.⁶⁶

Perhaps most importantly, a legislative technique that allows a choice among a limited set of laws accommodates the different national choice of law solutions of Member States. Although a decision must still be made on a single default rule in the absence of choice, restricting autonomy at least enables recognition of the legitimacy of the differing connecting factors used in national laws to determine the applicable law, to the extent all these factors still appear on the menu of

the party autonomy approach to the assignment context seems to have been first proposed by Verhagen and Dongen. Hendrik L.E. Verhagen & Sanne van Dongen, *supra* note 53, at 19–20.

60. Note that party autonomy has also been extended to non-contractual (tort) relationships although the parties' choice cannot prejudice third parties. Council Regulation (EC) No. 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), art. 14(1), 2007 O.J. (L 199) 40, 46.

61. Council Regulation (EU) No. 1259/2010 of 20 December 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, art. 5, 2010 O.J. (L 343) 10, 13.

62. Council Regulation (EC) No. 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, art. 15, 2009 O.J. (L 7) 1, 9.

63. *Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes*, at 30–35, COM (2016) 106 final (Mar. 3, 2016).

64. Carruthers, *supra* note 59, at 890–91, 898–99.

65. Csongor István Nagy, *What Functions May Party Autonomy Have in International Family and Succession Law? An EU Perspective*, 30 NEDERLANDS INTERNATIONAAL PRIVAATRECHT 576, 579 (2012).

66. Carruthers, *supra* note 59, at 912.

permissible choices.⁶⁷

Similar political compromise considerations may well have inspired the Commission's decision to propose a restricted party autonomy approach for the third party effects of assignments in the securitization context. However, whatever the merits of that solution in relation to family matters, they do not carry over to the assignment context.

First, the applicable law under the Commission's family instruments affects only the reciprocal rights and obligations of the parties making the choice of that law and is necessarily known to them. In contrast, a choice of law made by the assignor and the assignee in their private agreement would bind third parties without their consent to an unknown law. It is true that restricted party autonomy is also permitted under the EU Succession Regulation⁶⁸ notwithstanding that the testator's choice may affect the extent of rights to reserved shares, available under some national laws, of the testator's family members or dependents. However, the testator's freedom of choice is extremely limited for precisely that reason.⁶⁹ The law of the State of the testator's habitual residence at the time of death applies under article 21(1) unless, pursuant to article 22, she previously made a positive choice in favor of the law of her nationality.⁷⁰ Allowing nationality as an alternative to habitual residence is intended to enable a person, whose lifestyle may make the determination of habitual residence difficult, to choose a more certain and stable connecting factor and therefore have greater certainty that her estate will be distributed in the manner intended.⁷¹ State interests and the interests of family members and dependents are further protected by the potential application of any overriding mandatory restrictions affecting succession of the law of the State where special categories of assets are located,⁷² and by the usual public policy exception if the applicable foreign law is

67. Nagy, *supra* note 65, at 576, 580.

68. Council Regulation (EU) No. 650/2012, of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, art. 22, 2012 O.J. (L 201) 107, 120 [hereinafter Succession Regulation].

69. Recital 38 emphasizes that although the Regulation empowers citizens to "organise their succession in advance by choosing the law applicable to their succession," freedom of choice "should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share." *Id.* at 111.

70. Succession Regulation, *supra* note 68, arts. 21(1), (22), at 120.

71. Carruthers, *supra* note 59, at 903–04. See also Magdalena Pfeiffer, *Legal Certainty and Predictability in International Succession Law*, 12 J. PRIV. INT'L L. 566, 573–74, 577–78. And see recital 24 of the Succession Regulation, acknowledging that determining the "habitual residence" of a testator may prove complex in certain factual circumstances. Succession Regulation, *supra* note 68, at 109. Note that article 21(2) of the Succession Regulation also contains an escape clause, permitting application of the law of the state with which the deceased was closely connected at the time of death, if this connection was, given the individual circumstances of the case, manifestly closer than the connection with the state of his habitual residence. *Id.* art. 21(2), at 120.

72. Succession Regulation, *supra* note 68, art. 30, at 123.

manifestly incompatible with the public policy of the forum.⁷³

Second, restricted party autonomy in the family and succession contexts ensures the application of a single law. If freedom of choice is exercised, that law applies. If it is not, the default choice of law rule determines the applicable law. Either way, only one law applies. In contrast, allowing freedom of choice to the parties to a securitization assignment creates the risk that the third-party effects of successive assignments of the same claim may be governed by different laws. This would occur, for example, if the parties to a securitization assignment chose the law governing the assigned claims to determine its third-party effects but the same claims were the subject of a competing assignment in a factoring or secured lending transaction or in a different securitization in which no choice of law was made. In that eventuality, the law of the assignor's location would govern the third-party effects of the latter assignment under the general rule.

To address this scenario, the Commission's 2018 proposal provides that priority should be governed by the law applicable to the third-party effects of the assignment of the claim which first became effective against third parties under its applicable law.⁷⁴ The difficulty with this solution is that the parties structuring a securitization have no objectively reliable means of verifying whether theirs is in fact the first assignment in time. Thus, even if they prefer application of the law governing the assigned claims, they will still need to take whatever steps are necessary under the law of the assignor's location to ensure they have a first-ranking priority. Otherwise, they risk a loss of priority to a prior assignee of the same claims whose assignment is governed by that law. Thus, rather than providing additional flexibility, the restricted party autonomy approach would seem only to complicate the due diligence burden for the securitization sector.

Finally, the suggested solution assumes that the priority rules of the law governing the first assignment to achieve third party effectiveness under its applicable law can be applied to a competition with a subsequent assignment that was made effective against third parties under a different applicable law. But the two laws may recognize different mechanisms or impose radically different third party effectiveness requirements for assigning claims.⁷⁵ Even when a State is open to adjusting its national law concepts to accommodate foreign juridical institutions, complex characterization questions will invariably arise in attempting to fit an assignment taken under a different substantive framework into its internal law priority regime.⁷⁶

73. *Id.* art. 35, at 124. Recital 58 cautions that the courts should not be able to apply the public policy exception in order to set aside the law or decisions of another State if "doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination." *Id.* at 113.

74. COM (2018) 96, *supra* note 15, at 20–21, and see art. 4(4), at 31.

75. See the discussion and sources in Part II.

76. Jan A. Krupski, *Security Rights and Similar Security Arrangements – Neighbours against all Odds*, 52 BULL. DROIT & BANQUE 41, 52–61 (2013).

IV LAW GOVERNING THE ASSIGNED CLAIM

A. General Critique

Although application of the law governing the assigned claim is superficially an objective connecting factor, the fact that this law can be chosen by the parties—at least where the assignor and the debtor are in different states—means that party autonomy also underpins this solution. Subjecting the third-party effects of an assignment to the law chosen by the assignor and the debtor in the contract giving rise to the assigned claim is not quite the same thing as allowing the assignor and assignee to directly choose the applicable law. However, the assignee may also be the debtor on the claim, as where a bank takes an assignment of a claim to the cash credited to its customer's bank account as collateral for a loan to that customer. In this scenario, the assignor and assignee will in fact be able to directly determine the law applicable to the third party effects of their agreement. Even if the assignee is a third party, the assignor may have sufficient bargaining power with the debtor on the claim to determine the choice of law in the contract giving rise to the claim and therefore, under this solution, to also determine the law governing the third-party effects of an assignment of that claim.

For assignees, this solution does not raise the same *secret law* concerns as where the applicable law is the law governing the contract of assignment. Because the applicable law is instead determined by reference to a contract between the assignor and debtor, and because all potential assignees will naturally be given access to the relevant contract, potential assignees can determine with relative certainty what law will apply to a priority competition with a subsequent assignee, attaching creditor, or other third-party acquirer of a right. The only exception would be the presumably rare case where the choice of law clause in the contract between the assignor and debtor is modified after the first assignment is concluded to change the applicable law.

For the assignor's general creditors, however, the *secret law* problem persists. The applicable law is invisible to them, being contained in private agreements between the assignor and its debtors. Unlike a potential assignee, general creditors typically lack sufficient practical leverage over the assignor to gain access to those agreements.

Where an assignment covers claims arising under future contracts, even potential assignees face a *secret law* problem, albeit of a different order. Here, the transparency problem is that the law can be ascertained only after the contracts come into existence, not at the time of the assignment. Similar problems arise in the case of a bulk assignment of claims owed by multiple geographically-dispersed debtors. Here, the applicable law will often remain invisible as a practical matter, simply because it will be too burdensome to sift through hundreds of contracts to ascertain the law applicable to each. Instead, the potential assignee will have to rely on the assurances of the assignor as to the

applicable law, meaning that the assignor may need to pay a premium because of the additional legal risk posed for the assignee.

In its 2016 Report, the Commission had suggested that these concerns might possibly be addressed by a default rule pointing to the assignor's law in the case of an assignment of claims arising under future contracts.⁷⁷ Like the restricted party autonomy approach examined in Part III, this solution is fraught with inconvenience and legal uncertainty. First, if a bulk assignment, as it often does, covers both present and future claims, different laws will govern the third-party effects of the assignment for the two categories of claims. Second, the solution gives rise to the potential for different and conflicting laws to apply in the event of successive assignments of the same claim. This would occur where a future claim covered by the first assignment in time is assigned to a subsequent assignee after the claim has come into existence. The third-party effects of the first assignment would be governed by the law of the assignor's location, whereas the third-party effects of the second assignment would be governed by the law applicable to the assigned claim.

Finally, and perhaps most importantly, the law governing the assigned claim approach is fundamentally incompatible with State substantive laws making the third-party effectiveness of an assignment dependent on public registration. Third parties could not rely on a search of the registry in the assignor's home state because the third-party effects of assignments of present claims would not be governed by that law but instead would be subject to the publicity requirements of the law governing the assigned claims. The assignor's creditors would not know what that other law might be. Potential assignees would be able to ascertain the other law but would face the burden of having to register or otherwise publicize their assignment under multiple state laws: the law of the assignor's location for future claims, and the law applicable to each of the assigned claims for present claims. To the extent that the order of registration determines the order of priority, as is often the case, the certainty intended by that rule would be eliminated in the scenario where a first assignment covers future claims and is followed by a subsequent assignment of the same claims after they come into existence because the competing assignees would be directed to comply with the registration or other publicity regimes of different States.

This catalog of problems once again leads to favoring application of the law of the assignor's location. That solution provides a single, objectively ascertainable connecting factor for determining the applicable law, regardless of whether the assignment involves a single claim, claims under future contracts, or a portfolio of claims arising under contracts governed by many different laws.⁷⁸

77. COM (2016) 0626, *supra* note 13, at 11.

78. The assignee in principle would still need to investigate the law governing the claim to verify its collection rights against the debtor. However, there is considerably more uniformity between the substantive laws of different states on matters relating to assignee-debtor relations than in the areas of third-party effects and priority. Consequently, due diligence is more easily accomplished and the risk of a conflict of laws is considerably lower. Thus, the delegates to the Assignment Convention project were able to agree on uniform substantive rules in relation to matters affecting assignor-assignee and assignee-

Most importantly perhaps, the assignor location rule avoids frustrating the domestic publicity and priority ordering goals of States that choose or already have chosen to establish a public registration system for assignments.

B. Claims to Cash Credited to Bank Accounts: A Special Case?

Conceptually, a bank account is simply a claim by the customer against its bank for payment of the money credited to its account. In principle, it should be assignable by the customer in the same way as any other contractual claim for the payment of money. In practice, bank accounts play a key role in general bank lending and in capital and financial market transactions. Banks rely on the funds credited to the accounts of their enterprise customers as collateral in extending loans. Counterparties rely on funds credited to accounts as cash collateral to mitigate risk in financial and capital market transactions. To address the demands of financial institutions for legal certainty and finality in both markets, laws increasingly sanction exemptions from general publicity and priority rules.

Thus, U.C.C. Article 9 establishes a special control regime for bank accounts analogous to that applied to intermediated securities (security entitlements).⁷⁹ If the account holder assigns its claim to the bank itself, the bank automatically has control.⁸⁰ If the assignee is an outside party, it can obtain control either by becoming the bank's customer with respect to the account, or by entering into a control agreement with the bank and the assignor under which the bank agrees that it will comply with the assignee's instructions directing the disposition of the funds in the account without further consent by the assignor.⁸¹

Control perfects an assignment against third parties without the need for public registration, and the assignee has priority over an assignee who perfected its assignment by registration even if the registration was prior in time.⁸² As between the bank and a potential assignee who wishes to obtain control, the Article 9 regime privileges the bank. The bank is not obligated to enter into a control agreement with an outside assignee.⁸³ If it agrees to do so, a subsequent assignment of the account to the bank has priority,⁸⁴ so in practice an outside assignee will also need to obtain a waiver of priority from the bank. In theory, an outside assignee could obtain priority over the bank by relying on the alternative method of control: becoming the bank's customer with respect to the deposit account.⁸⁵ This method of control gives the assignee priority over any assignment

debtor relations, and were only compelled to resort to the *faute de mieux* solution of a uniform choice of law rule for issues relating to third-party effects and priority.

79. U.C.C. §§ 9-104, 9-312, 9-314, 9-327, 9-340 (2013).

80. *Id.* § 9-104(a)(1).

81. *Id.* § 9-104(a)(2)–(3).

82. *Id.* § 9-327(1).

83. *Id.* § 9-342.

84. *Id.* § 9-327(3).

85. *Id.* § 9-104(a)(3).

to the bank⁸⁶ and terminates the bank's set-off rights.⁸⁷ However, it requires the cooperation of the bank, so in practice the bank's consent is still needed.⁸⁸

In Canada, Quebec has implemented a similar though even broader control regime for "monetary claims" in its Civil Code.⁸⁹ Ontario has designated reform similar to Article 9 as a priority.⁹⁰ Internationally, the UNCITRAL Model Law on Secured Transactions adopts substantively the same rules as Article 9.⁹¹

The special priority accorded by these regimes to banks and other assignees who obtain control exempts them from the need to publicize their assignment by registration or to conduct searches and obtain subordinations from prior registered assignees. Facilitating efficiency, certainty, and finality in commercial lending and financial markets is considered to outweigh traditional publicity concerns with *secret liens*.

The same policy is considered to justify tolerance for *secret laws* at the choice of law level. Under both U.C.C. Article 9⁹² and the Quebec Civil Code,⁹³ the third-party effects of an assignment of cash in a bank account is governed by the law expressly designated as applicable to these issues in the account agreement between the bank and the customer, or, in the absence of a choice, the law expressly designated as applicable to the account agreement. Because the bank invariably has control over the terms of the account agreement, deference to party autonomy ensures that the chosen law preserves the bank's privileged position.

In the European Union, the Financial Collateral Directive⁹⁴ provides that publicity formalities such as registration or notification cannot be required for a financial collateral arrangement to be effective and enforceable. Financial collateral includes not just investment property but also bank accounts. Similar to the U.C.C. Article 9 and Quebec Civil Code approaches, disapplication of

86. *Id.* § 9-327(4).

87. *Id.* § 9-340(c).

88. See, e.g., Willa E. Gibson, *Banks Reign Supreme Under Revised Article 9 Deposit Account Rules*, 30 DEL. J. CORP. L. 819, 844 (2005).

89. Civil Code of Québec, C.Q.L.R. 1991, c 64, arts. 2713.1–2713.9 (Can.). The Quebec regime covers any assignment of cash to secure an obligation owed to the counterparty, not just cash deposited to accounts with financial institutions. On the background to the Quebec reform, see Michel Deschamps, Mathieu Dubord & Mary Jeanne Phelan, *New Regime in Quebec for Security on Bank Deposits and Other Monetary Claims*, MCCARTHY TETRAULT (May 15, 2015), www.mccarthy.ca/article_detail.aspx?id=7105; Sterling H. Dietze, *Quebec is First Province to Propose Cash Collateral Regime*, STIKEMAN ELLIOTT LLP (Dec. 9 2014), <https://www.lexology.com/library/detail.aspx?g=49717485-43d5-41be-9cd3-1fb34d4518f6> [<https://perma.cc/2T5G-RCYG>].

90. See ONT. MINISTRY OF GOV'T AND CONSUMER SERVS., BUSINESS LAW AGENDA: PRIORITY FINDINGS AND RECOMMENDATIONS REPORT 9 (2015). See also ONT. BAR ASS'N, PERFECTING SECURITY INTERESTS IN CASH COLLATERAL 2–3 (2012)

91. UNCITRAL MODEL LAW, *supra* note 25, arts. 15, 25, 47, 69, 97.

92. U.C.C. § 9-304 (2013).

93. Civil Code of Québec, C.Q.L.R. 1991, c 64, art. 3106.1 (Can.).

94. Directive No. 2002/47/EC, of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, art. 3, 2002 O.J. (L 168) 43, 48, amended by Directive 2009/44/EC 2009 of the European Parliament and of the Council of 6 May 2009, art. 2(6), 2009 O.J. (L 146) 37, 42.

publicity requirements is not limited to assignments in financial markets but also applies to ordinary commercial bank lending.⁹⁵

To balance the absence of publicity with protection of third parties, the Directive requires Member States to disapply publicity formalities only if the financial collateral has been provided in such a way as to be in the possession or control of the collateral taker-assignee. The European Court of Justice has confirmed that control means that the collateral provider-assignor must be prevented from dealing with or disposing of the funds in the account.⁹⁶ In contrast to Article 9 and the Civil Code, it is insufficient that the collateral taker-assignee is merely empowered to direct disposition of the funds at any time without the consent of the collateral provider-assignor.

However, the objective of the Directive is to establish a minimum level of harmonization across Member States.⁹⁷ Thus, the Directive does not obligate Member States to impose publicity requirements in the absence of control by the collateral taker-assignee. It merely requires the disapplication of any otherwise applicable publicity obligations if control in the positive sense described in the preceding paragraph is obtained. Scotland plans to implement a registry for assignments—assignments—of claims both outright and by way of security,⁹⁸ and registries already exist in a number of States for at least some categories of assignments. On the other hand, Belgium ultimately decided to exclude all claims from its new registration-based regime for movable security. The decision was based on concerns that since a pledge on claims under existing law was automatically effective against all third parties other than the debtor upon entering into the pledge agreement, having to record the pledge “would have added an unnecessary extra layer of formalities.”⁹⁹ The Belgian reversal of policy reflects a certain trend in some EU States, perhaps fueled by the Financial Collateral Directive, to see publicity formalities as an unnecessary drag on assignments generally and therefore to extend automatic third-party effectiveness to the assignment of all claims, not just bank accounts, and not just claims over which the assignee has obtained positive control.¹⁰⁰

95. This was recently confirmed by the European Court of Justice in Case C-156/15, *Private Equity Ins. Grp. SIA v. Swedbank AS*, 2016 E.C.R. (Nov. 10, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=185247&doclang=EN> [<https://perma.cc/4FGD-7VV2>].

96. *Id.*

97. For a thorough recent analysis, see Thomas Keijser, *Financial Collateral Arrangements in the European Union: Current State and the Way Forward*, 22 UNIF. L. REV. 258 (2017).

98. See *supra* note 37 and accompanying text.

99. Hadrien Servais & Willem Van de Wiele, *Towards a New, More Flexible Legal Framework for Secured Lending in Belgium*, WHITE & CASE (Dec. 15, 2016), <https://www.whitecase.com/publications/alert/towards-new-more-flexible-legal-framework-secured-lending-belgium> [<https://perma.cc/NK9F-NW9S>]. Claims may still be included in a registered pledge where the collateral is a “universality”—for example, the assets of a business—that includes its receivables. *Id.*

100. See, e.g., Krupski, *supra* note 76. See also Dirix, *supra* note 39, at 397, 400–01; Jean-Francois Riffard, *The Still Uncompleted Evolution of the French Law on Secured Transactions Towards Modernity*, in SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE, *supra* note 28, at 369, 381.

That said, the trend against imposing publicity requirements does not seem to have taken hold generally. In 2009, the Financial Collateral Directive was amended to add “credit claims”—bank loans—as financial collateral.¹⁰¹ Although the 2009 revision prevented Member States from requiring the creation or validity of financial collateral arrangements relating to credit claims to depend on a formal act, such as registration or notification of the debtor, it gave Member States the option to preserve these types of requirements for the purposes of determining the third-party effectiveness and priority of the assignment. In its follow-up report to the European Parliament and the Council on the appropriateness of this option in 2016, the Commission concluded that publicity requirements for the assignment of credit claims, provided that they are not unnecessarily weighty, offer valuable protection for third parties, both in combatting fraud and in ensuring certainty of priority for assignees.¹⁰²

The Commission’s conclusion reflected continuing support among most Member State respondents for retaining some form of publicity requirement in their national laws for the assignment of claims, apart from the special case of bank accounts. This has important implications at the choice of law level. If most States had favored disapplication of publicity requirements for the assignment of credit claims, this might have signaled a general rejection of the value of publicity for assignments, making a general choice of law solution predicated on some form of party autonomy more appealing, despite the lack of transparency as to the applicable law inherent in that approach.

A party autonomy choice of law solution limited to assignments of bank accounts is defensible in view of the importance of bank accounts as collateral to the stability of financial markets and to facilitate enterprise access to bank credit. Its expansion beyond that context would gravely undermine the effectiveness of State reforms aimed at establishing a comprehensive modern system of publicity and priority for the assignments of claims in general.¹⁰³

In fact, the Commission’s recent consultation on the law applicable to the assignment of claims treated the law applicable to the assignment of bank accounts as a distinct issue.¹⁰⁴ The alternatives presented drew on the two options in the UNCITRAL Model Law on Secured Transactions.¹⁰⁵ Under Option A, the

101. See *supra* note 94 and accompanying text.

102. *Report from the Commission to the Council and the European Parliament on the Appropriateness of Article 3(1) of Directive 2002/47/EC on Financial Collateral Arrangements*, at 9–11, COM (2016) 430 final (June 29, 2016).

103. Veneziano observes that the Italian legislator’s decision to retain the traditional “antiquated” requirement of notification of the debtor for the third-party effectiveness of an assignment of financial collateral in the form of credit claims should be seen as a positive choice because it will enable a future legislator to institute a comprehensive modern system of publicity and priority for assignments of claims in general as opposed to simply abolishing publicity requirements. Veneziano, *supra* note 38, at 360–61.

104. See EUSURVEY, PUBLIC CONSULTATION ON THE CONFLICT OF LAWS RULES FOR THIRD PARTY EFFECTS OF TRANSACTIONS IN SECURITIES AND CLAIMS, <https://ec.europa.eu/eusurvey/publication/securities-and-claims-2017?surveylanguage=en> [<https://perma.cc/2KR8-YCWB>] (last visited Feb. 12, 2018).

105. UNCITRAL MODEL LAW, *supra* note 25, art. 97.

connecting factor would be the bank's place of business, or the place of the branch maintaining the account in the case of a multinational bank. Under Option B, the law of the State chosen by the bank and its customer in the account agreement would apply provided that the bank has an office in that State that is engaged in the regular activity of maintaining bank accounts. Option B is equivalent to the Article 9 and Quebec party autonomy approaches, except for the added requirement that the bank have an office in the State whose law is chosen by the bank and customer in the account agreement.¹⁰⁶

In its March 2018 proposal, the Commission ultimately endorsed a choice of law approach equivalent to the Article 9 and Quebec party autonomy solutions albeit formulated somewhat differently: the law applicable to the third-party effects of the assignment of "cash credited to an account in a credit institution" would be the law governing the assigned claim, that is, the law that governs the contract between the account holder and the credit institution from which the claim arises.¹⁰⁷ As the Commission observed, this law is normally expressly designated in the account contract between the account holder and the credit institution.¹⁰⁸ In the view of the Commission, recognizing party autonomy did not create transparency problems for third parties including the assignor's general creditors because "it is generally assumed that the claim that an account holder has over cash credited to an account in a credit institution is governed by the law of the country where the credit institution is located" and it is this law that is "normally chosen in the account contract between the account holder and the credit institution."¹⁰⁹

V

CONCLUSION

While disagreeing on some points of policy, and more points of detail, Canada and the United States have a long-shared commitment to expanding access to credit by facilitating financing against the security of the full range of an enterprise's movable assets, present and future, including its portfolio of receivables and other intangible claims. This commitment is reflected in the Personal Property Security Acts and the Civil Code of Quebec in Canada, and U.C.C. Article 9 in the United States. These regimes all permit security to be

106. The approach under Option B is based on the approach in the Hague Securities Convention for determining the law applicable to the transfer and grant of security in intermediated securities (security entitlements); if no choice of law is made in the account agreement, option B relies on the same series of default connecting factors as the Convention. See Hague Conference on Private International Law, *Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*, arts. 4, 5 (July 5, 2006), reprinted in 46 I.L.M.649 (in force April 1, 2017).

107. COM (2018) 96, *supra* note 15, art. 4(2)(a), at 31. Under art. 4(2)(b), the third-party effects of an assignment of claims arising from financial instruments such as derivative contracts (for example, the amount due after calculation of the close-out in a derivative contract) would also be governed by the law governing the assigned claim, that is, the law chosen by the parties or the law determined in accordance with the rules applicable to financial markets. This exception is not addressed in this article.

108. *Id.* at 19.

109. *Id.*

taken over a company's present- and after-acquired property to secure any kind of obligation. The *quid pro quo*, however, is the need for transparency for third parties, reflected in the general requirement that notice of non-possessory security rights in movables—as well as assignments of claims, whether outright or by way of security—be filed in a public registry, with third-party effects generally determined by the time of registration.¹¹⁰

Conflict of laws issues in both countries arise in the intra-state as well as the international context owing to the constitutional allocation of lawmaking authority to the provincial or state level. Legislators early on recognized that effective regulation of the problem of *secret liens* at the substantive law level required a choice of law approach that would ensure transparency and predictability of the applicable law for third parties. For the law applicable to the third party effectiveness and priority of an assignment of intangible claims, they settled on the law of the location of the assignor as the only solution capable of effectively addressing the *secret law* problem.¹¹¹

The early decades of the twenty-first century have seen a retreat from transparency for the assignment of claims to the credit balance in accounts with banks and other financial institutions. Counterparties in modern capital and finance markets require assurance that their rights to cash deposited to accounts are effective and enforceable against third parties. Access to bank credit for enterprises requires assuring banks that they will have a first-priority right to funds credited to their enterprise borrowers' accounts. In the United States and increasingly in Canada, these demands have led to exempting assignments of this type of claim from general public registration and priority ordering rules at the substantive level, and deferring to the autonomy of financial institutions to control the law applicable to the third-party effects of assignments at the choice of law level.¹¹² Publicity nonetheless continues to be the general rule, and secrecy the exception.

In Europe, the increased demand by business enterprises and financial institutions for access to credit and collateral in the decade following the 2007 financial crisis has led to the dismantling of some of the traditional substantive law constraints on the effectiveness of an assignment of claims.¹¹³ At the substantive law level, this liberalization has sometimes come at the expense of decreased transparency for third parties, with some State laws eliminating publicity requirements for the assignment of claims in general. Overall, however, most States remain committed to some form of publicity apart from the special case of assignments of claims to the credit balance in accounts with financial

110. See *supra* notes 32–34, 44–46 and accompanying text.

111. See *supra* notes 20–22 and accompanying text. See also the discussion of the fundamental incompatibility of the law governing the assigned claim approach with State substantive laws making the third-party effectiveness of an assignment dependent on public registration in the concluding paragraphs of Part IV.B of the article.

112. See *supra* notes 79–93 and accompanying text.

113. See *supra* note 49 and accompanying text.

institutions.¹¹⁴

At the choice of law level, the picture is more mixed. In March 2018, after an extended period of consultation and debate, the European Commission rejected a general party autonomy solution in favor of application of the law of the assignor's location to the third-party effects of assignment as a rule, citing transparency and predictability as primary justifications.¹¹⁵ Although the proposal endorses application of the law chosen in the account agreement to assignments of cash deposited to accounts with financial institutions, this limited exception is defensible and in line with national and international trends.¹¹⁶

However, the Commission's proposal would also give the parties to an assignment for securitization purposes the freedom to choose between the law of the assignor's location and the law governing the assigned claim.¹¹⁷ This exception significantly undermines the certainty and predictability benefits of the general assignor location rule.¹¹⁸ Indeed, it may be the exception that swallows the general rule. If so, and assuming it is retained in the final enacted version, it would also significantly undermine future reform efforts by EU member States to establish the kind of robust public-registration based regimes of the kind in place in Canada and the United States and favored in an ever increasing number of other States under the influence of international harmonization initiatives.¹¹⁹

114. *See supra* notes 99–102 and accompanying text.

115. COM (2018) 96, *supra* note 15, at 15.

116. *See supra* notes 92–95, 106, and accompanying text. Note also the observation in Part IV.B of the article that a party autonomy choice of law exception for assignments of bank accounts is defensible in view of the importance of bank accounts as collateral to the stability of financial markets and to facilitate enterprise access to bank credit.

117. *See supra* note 57 and accompanying text.

118. See the critique of the proposed securitization exception in the final four paragraphs of Part III of the article.

119. *See supra* note 35.