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Kieninger, Eva-Maria

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Section I

INTERNATIONAL PRIVATE AND PROCEDURAL LAW

The Rome-I Proposed Regulation and the Assignment of Receivables

Eva-Maria Kieninger[*] *and Harry C. Sigman*[**]

I. Introduction

The European Commission recently issued a proposed Regulation on the law applicable to contractual obligations[1] (the "Regulation"), intended to supersede the Rome Convention on the law applicable to contractual obligations of 19 June 1980[2] (the "Rome Convention"). It is the product of extensive consideration and consultation, described in the Explanatory Memorandum accompanying the proposed Regulation.

This paper examines the Regulation[3] solely as it relates to the non-contractual aspects of assignments of receivables, more specifically, the third-party effects of an assignment of receivables. We focus particularly on the relationship of the Regulation to the United Nations Convention on the Assignment of Receivables in International Trade (the "UN Convention"), approved by the UN General Assembly on 12 December 2001.[4]

The UN Convention has not yet entered into force, although it has been signed by an EU Member State, Luxembourg, as well as Madagascar and the United States, and it has been acceded to by Liberia.[5] Nevertheless, the UN Convention has already been the subject of a great deal of literature.[6]

The importance of receivables as a potential source of capital and liquidity in the economy of a country, particularly for small and medium size enterprises, has finally received widespread recognition. National legislation[7] has been enacted to

[*] *Professor of German and European Private Law, Private International Law at the University of Würzburg (DE).*

[**] *J.D. (Harvard University). Former Professor at University of Southern California (USA); Visiting Professor and Guest Lecturer at Leuven (BE) and numerous other law faculties in Europe. Member of the U.S. delegations in connection with the UN Convention on the Assignment of Receivables in International Trade, the Uncitral Project for a Legislative Guide on Secured Transactions and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary. Views expressed are strictly personal and not to be attributed to those delegations or the United States.*

1 COM (2005) 650 final, 2005/0261 (COD) of 15 December 2005, to be found at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0650en01.pdf. The German and French versions can be found at http://europa.eu.int/eur-lex/lex/LexUriServ/site/de/com/2005/com2005_0650de01.pdf, and http://europa.eu.int/eur-lex/lex/LexUriServ/site/fr/com/2005/com2005_0650fr01.pdf, respectively.

2 OJ 1980, L 266, at 1.

3 This paper is published in English and addresses primarily the English language texts of the three relevant instruments (the Regulation, the UN Convention and the Rome Convention), although reference is also made, when useful, to versions in certain other languages. As of this writing (January, 2006), the Regulation has been published in English, French and German only.

4 The text of the UN Convention is set forth as the Appendix to the Report of UNCITRAL on its 34th Session (2001), GAOR supp. No 17 (A/56/17); the Report may be found on the UNCITRAL internet site at www.uncitral.org.

5 The three signatures occurred on 12 June 2002, 24 September 2003 and 30 December 2004, respectively, and the accession occurred on 16 September 2005.

6 *E. Schütze*, Zession und Einheitsrecht (2005); *Dirix/Sigman*, The United Nations Convention on the Assignment of Receivables in International Trade: A Comparative Analysis from the Belgian and United States Perspective, Forum Financier/Droit Bancaire et Financier 2002/IV p. 204 (July/August 2002); *Sigman/Garcimartín/Heredia*, The United Nations Convention on the Assignment of Receivables in International Trade: A Comparative Analysis from Spanish and United States Perspectives, ZEuP 2-2006; *Kieninger*, Vereinheitlichung des Rechts der Forderungsabtretung – Zur United Nations Convention on the Assignment of Receivables in International Trade, in: *Dreier/Forkel/Laubenthal* (eds.), Festschrift 600 Jahre Würzburger Juristenfakultät (2002), p. 297; *Kieninger/E. Schütze*, Neue Chancen für internationale Finanzierungsgeschäfte: Die UN-Abtretungskonvention, ZIP 2003, 2181. See also *Bazinas*, Der Beitrag von UNCITRAL zur Vereinheitlichung der Rechtsvorschriften über Forderungsabtretungen, ZEuP 2002, 782; *Eidenmüller*, Die Dogmatik der Zession vor dem Hintergrund der internationalen Entwicklung, AcP 204 (2004), 457; Lukas, Auf dem Weg zu einem internationalen Zessionsrecht?, ÖBA 2000, 501; *Schmidt*, Das Übereinkommen der Vereinten Nationen über die Abtretung von Forderungen im Internationalen Handel, IPRax 2005, 93.

7 See, e.g., adoption of the *Loi Dailly* (*Loi* 81-1 of 2.1.1981) and the modification of that law, in art. L. 313-27 of the *Code monétaire financier* by law of 1 August 2003, in France; amendment through *Loi* of 6.7.1994, *Moniteur Belge* of 15 July 1994, of the general assignment of claims provisions of Article 1690 of the Belgian Civil Code, subsequently supplemented by the adoption of Article 87 Para. 3 *Loi portant le Code de droit international privé* (Belgian Private International Law Code) of 16 July 2004, *Moniteur Belge* of 27 July 2004 (adopting law of

facilitate both outright transfers and collateralisation of receivables. This recognition is also reflected in the promulgation of the UN Convention, which has as its goal the fostering of assignments of receivables, both by modernising substantive rules, providing greater autonomy, flexibility and efficiency, and by providing for a definitive and practical (i.e., aligned with modern business practices such as bulk assignments and assignments of future receivables) conflicts rule for the key issue of third-party effects – all primarily with the goal of providing sufficient certainty to induce the purchase and the granting of credit on the strength of receivables.[8]

Much has been written about the scholarly debates and conflicting judicial decisions concerning the scope and content of Article 12 of the Rome Convention, in particular whether the provision established a rule with respect to third-party effects of assignments.[9] None of this need be repeated here. This paper focuses on the new solution of the Regulation, particularly Articles 13(3) and 18, and its relationship with the UN Convention.

II. Relationship of the Regulation and the UN Convention

The Explanatory Memorandum states, with respect to Article 13 of the Regulation, that "Paragraph 3 introduces a new conflicts rule relating to the possibility of pleading an assignment of a claim against a third party; the **solution is the one** recommended by the great majority of respondents, which was also **adopted in the UN Convention**" (emphasis added).

This paper will examine the relevant text of the Regulation, and, in particular, will consider whether it has achieved the adoption of the rule of the UN Convention. It is the hope of these writers that, in the course of the consideration of the Regulation by the EU Parliament and Council, the language of the Regulation will be changed. Changes are needed to provide more consistency between the several language versions. More importantly, changes are needed to better reflect the policy decisions that have been reached, that (i) the Regulation include a conflicts rule for third party-effects of assignments and (ii) the rule be the same as that provided in the UN Convention, and to do so in more precise terms so as to provide greater *ex ante* certainty, thereby better facilitating assignments of receivables.

Let us now compare the conflicts pointers provided in the Regulation and the UN Convention.

1. The Conflicts Pointers: assignor's habitual residence/ assignor's location

Article 13(3) of the Regulation provides that "The question whether the assignment (...) may be relied on against third parties shall be governed by the law of the country in which the **assignor (...) has his habitual residence** at the material time." (emphasis added). The meaning of "habitual residence" and, importantly, the exceptions later provided to that general meaning are discussed below (II. 2.). Article 22 of the UN Convention provides, as the relevant conflicts rule, that "the law of the State in which the **assignor is located** governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant." (emphasis added).[10] The meaning of "priority" and "competing claimant" is discussed below (IV. 3.). Thus, the question presented is, does the Regulation achieve the goal of adopting the same conflict of laws rule as the UN Convention? Both linguistic and substantive issues are presented.

While the Regulation and the UN Convention both designate a conflicts pointer looking generally to the location of the assignor (and, thus, are superficially the same), the pointers are not identical. Before we examine the elaboration in each instrument of the specified pointer, it is important to stress the following. The assignor's location was selected as the primary pointer in both the Regulation and the UN Convention because it is the best rule for assignment of receivables. One of the principal arguments advanced in support of this rule during the Commission consultation was the fact that it would diminish conflicts difficulties because it would coincide most closely with the basis for jurisdiction of the main proceeding in the event of the insolvency of the assignor. The EU Insolvency Regulation[11] designates this as the place of the insolvent's "centre of main interests", which is defined (in terms applicable to all types of insolvents) in Recital 13 of that Regulation's Preamble as "the place where the debtor conducts the administration of his interests on a regular ba-

habitual residence of transferor at time of transfer of receivable for creation of in rem rights and effects of transfer); and amendment through *Gesetz* of 25 July 1994, *Bundesgesetzblatt* 1994 I, 1682, of the German Commercial Code (Para. 354a HGB) concerning the enforceability of anti-assignment clauses.

8 The willingness of the EU to make significant modifications to basic principles of property law and basic rules of insolvency law also attests to the heightened awareness of the importance of liquidity and the need for certainty and predictability in commercial transactions. See Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ 2002, L 168, at 43-50), and Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ 1998, L 166, at 45-50) (in the context of cash and securities).

9 See *von Bar*, Abtretung und Legalzession im neuen deutschen Internationalen Privatrecht, RabelsZ 53 (1989) 462.; *Basedow*, Internationales Factoring zwischen Kollisionsrecht und Unidroit-Konvention, ZEuP 1997, 615; *Eidenmüller*, Die Dogmatik der Zession vor dem Hintergrund der internationalen Entwicklung, AcP 204 (2004), 457, 493 et seq.; *Einsele*, Das Internationale Privatrecht der Forderungszession und der Schuldnerschutz, ZVglRWiss 90 (1991), 1; *Kieninger*, Das Statut der Forderungsabtretung im Verhältnis zu Dritten, RabelsZ 62 (1998), 678; *Kieninger*, Brussels I, Rome I and Questions Relating to Assignment and Subrogation, in: Meeusen/Pertegás/Straetmans (eds.), Enforcement of international contracts in the European Union (2004) p. 363 et seq.; *Kieninger/Schütze*, Die Forderungsabtretung im Internationalen Privatrecht – Bringt die Rom-I Verordnung ein „Ende der Geschichte"?, IPRax 2005, 200; *Lagarde*, Retour sur la loi applicable à l'opposabilité des transferts conventionnels de créances, Mélanges Jacques Béguin (2005) p. 415; *Mäsch*, Abtretung und Legalzession im Europäischen Kollisionsrecht, in: Leible (ed.), Das Grünbuch zum Internationalen Vertragsrecht (2004) p. 193; *Mangold*, Die Abtretung im Europäischen Kollisionsrecht (2001); *Moshinsky,* The Assignment of Debts in the Conflict of Laws, L.Q.R. 109 (1992), 591, 613 *et seq*.; *E. Schütze*, Zession und Einheitsrecht (2005) p. 311 *et seq*.; *Stadler*, Der Streit um das Zessionsstatut – eine endlose Geschichte?, IPRax 2000, 104 *et seq*.; *Struycken*, The proprietary aspects of international assignment of debts and the Rome Convention, Article 12, Lloyd's Maritime and Commercial Law Quarterly 345 (1998).

10 The French version of the UN Convention uses the identical phrase "est situé le cédant". English and French are two of the six official languages of the United Nations; German is not.

11 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings (OJ 2000, L 160, at 1).

sis (...)", i.e. the place of central administration.[12] Thus, the ideal solution would be for the Regulation to use the term "central administration" for all assignors (whether natural persons or others). Doing so would align the Regulation with the UN Convention (and effectively with the Insolvency Regulation as well),[13] would reduce the number of terms used as pointers and would provide certainty by eliminating all doubt as to the meaning, leaving nothing for subsequent adjudication. This would entail changing the verbal formulation of the pointer in the Regulation and eliminating the exceptions found in Article 18 of the Regulation (discussed below, II. 2. a) cc]).

2. Elaboration of the Pointers

Article 18 of the Regulation elaborates on the term "habitual residence". It distinguishes assignors who are natural persons from assignors that are not natural persons. We assume that the two categories are intended to be both mutually exclusive and, together, comprehensive of all types of assignors. In the former category, two conflicts pointers are established, one explicit and one implicit. In the latter category, a single pointer is established, but it is subjected to two exceptions, producing the possibility of two separate alternative pointers for that category. We will consider these categories separately, comparing them in each case to the relevant pointer established under the UN Convention. In reviewing the Regulation's text, it should be kept in mind that the UN Convention has no such dichotomy. Rather, it simply provides a single test, applicable to every "person" without regard to nature. This test is the assignor's central administration (its place of business when the assignor has only one), with a special rule for the rare case of an assignor who does not have any place of business. In our opinion, the dichotomy between natural persons and others serves no useful purpose in the assignment of receivables context and needlessly generates complexity and linguistic problems.

We first consider the Regulation.

a) Assignors that are not Natural Persons

aa) The Regulation's Delineation of the Category

We begin our analysis of the Regulation's dichotomy with the category of assignors that are not natural persons. In the context of the assignment of receivables, that is the more important category, in terms of both number of assignors and value of assigned receivables. If our assumption about comprehensiveness is correct, the Regulation would provide greater certainty, albeit perhaps less elegantly, by simply referring to this category as "all assignors that are not natural persons". This would provide a sharp contrast to the category of "natural person" referred to in Article 18(2), eliminate any need for consideration of the scope of the terms otherwise used, and make explicit the intended comprehensiveness of the two categories.

Unfortunately, the Regulation refers to this category, in Article 18(1), as "companies or firms and other bodies or incorporate or unincorporate". This language in the English version is certainly an error. Most likely, the English version was intended to read "companies, firms or other bodies corporate or unincorporate", i.e., three errors require correction: the "and" should be an "or", the second "or" should be deleted and "incorporate" should be "corporate".[14] This intention becomes clear when one considers the French version of 18(1), which delineates this category of assignor as "société, association ou personne morale", and the German version, which refers to "einer Gesellschaft, eines Vereins oder einer juristischen Person".

The foregoing suggested change deals with the formulation used by the Regulation to delineate the category of assignors that are not natural persons. We now turn to the conflicts pointer established by the Regulation for this category.

bb) The Regulation's Pointer for the Category

Again, we first consider the terminology used. Article 18(1) of the Regulation defines the habitual residence of an assignor that is not a natural person. The English version uses the term "principal establishment". This too is likely an error. It is inconsistent with the other language versions of Article 18(1) of the Regulation, with the usages in all versions of the Rome Convention and with the English versions of other European instruments.[15] The German version of Article 18(1) uses for this purpose the term "Hauptverwaltung", and the French version uses "administration centrale". These terms correspond to "central administration", not "principal establishment". A linguistic comparison of Articles 4(2) and 4(4) of the Rome Convention shows that the parallel terms for three possible locations, depending on the circumstances, are as follows: "central administration, principal place of business and other place of business"; "Hauptverwaltung, Hauptniederlassung" and "andere Niederlassung"; and "administration centrale, principal établissement" and "autre établissement". Nothing in the Explanatory Memorandum gives any indication of a considered intentional change of the basic pointer for assignors that are not natural persons from "central administration" to "principal establishment".

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12 See *Virgós/Garcimartín*, The European Insolvency Regulation: Law and Practice (2004) paras 44 *et seq*.

13 Alignment with these instruments is far more important than alignment with the forthcoming Rome II Regulation. The latter instrument deals with torts, which not only presents different considerations than contracts but even wider differences than those presented in the context of third-party effects of assignments of receivables. Whatever the merits of aligning Rome I and Rome II generally, this effort should not be allowed to spill over into the area of third-party effects of assignments of receivables.

14 In the English version of the Rome Convention, Article 4(2) refers to "a body corporate or unincorporate".

15 The term "principal establishment" also differs from the terminology of EU Regulation 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L12, at1). In that Regulation, at Article 60(1)(b) and (c), the English version refers to "central administration" as corresponding to "Hauptverwaltung" in German and "administration centrale" in French, and refers to "principal place of business" as corresponding to "Hauptniederlassung" in German and "principal établissement" in French. Similarly, Article 48 of the EC Treaty (freedom of establishment) refers, in the English version, to the three possible locations under that rule as "registered office, central administration or principal place of business". The German version of Article 48 uses "satzungsmäßiger Sitz, Hauptverwaltung oder Hauptniederlassung"; and the French version uses "siège statutaire, administration centrale ou principal établissement".

This is not a quibble. "Central administration" is, in numerous European instruments and in every language,[16] distinguished from "principal place of business" (and not from "principal establishment").

The difference is particularly important in light of the stated objective of adopting the rule corresponding to that in the UN Convention since "central administration" is the basic pointer under the UN Convention. Article 5(h) of the UN Convention defines the location of the assignor generally as its "place of business", and, when it has more than one place of business, then it is located at its place of central administration.[17]

Thus, even if the use in the English version of the Regulation of "principal establishment" as the pointer is not simply a translation error, in order to be better aligned with the French and German versions of the Regulation and to correspond more directly to the UN Convention, the English version of the Regulation pointer in Article 18(1) should be changed to "place of central administration".

cc) The Exceptions in the Regulation

Unfortunately, even if the pointers under the two instruments are thus aligned, Article 18(1) of the Regulation provides two situations (each of which would be very common) which call, in problematic language, for a deviation from the basic pointer. That provision, presented as a separate second sentence in Article 18(1), states: "Where the contract is concluded in the course of operation of a subsidiary, a branch or any other establishment, or, if under the contract, performance is the responsibility of such an establishment, this establishment [rather than the assignor's principal establishment] shall be considered the habitual residence." This provision, which creates two exceptions to the "central administration" pointer, presents not only problems of expression, but an important substantive problem as well.

aaa) The Way the Exceptions are Expressed

First, reference is made, in the English version, to a "subsidiary, branch or any other establishment". This seems clearly to be a mistake, as it designates a subsidiary as an establishment of the parent. A subsidiary is a separate legal entity and must be regarded as such. Surely, what was intended is "branch, agency or any other establishment". This is apparent when one compares the English version to the German version "einer Zweigniederlassung, einer Agentur oder einer sonstigen Niederlassung" and the French version "d'une succursale, d'une agence ou de tout autre établissement" (both of which mean a branch, agency or any other establishment).[18]

Since the formulations of types of alternate locations add nothing of value, why, if either exception is retained, would it not be better simply to refer to "any other place of business"?[19] This would be more direct and would have the additional merit of matching the terminology of the UN Convention.

Second, the first exception is made when the contract (presumably, the contract of assignment) is concluded "in the course of operation" of a non-principal establishment of the assignor. Precisely what does this mean? Would this cover a single assignment of a single claim by an establishment that is engaged primarily (or exclusively, but for the assignment) in manufacturing operations? Or, is this language intended to apply only if assignments of claims are a regular part of the operations of that establishment? Note, too, that the test is not a geographic one; i.e., it is not "if" the contract of assignment is concluded at a branch, but rather "if" the contract is concluded in the course of operation of a branch (which might occur even if the contract is concluded somewhere else, even a different country). The language of the exception is far from certain, and the merit of the exception is far from clear.

Third, the second exception comes into play if, regardless of the course of operations in which the contract of assignment was concluded, performance is the responsibility of a non-principal establishment (or, more precisely, a place of business other than the central administration). In the context of an assignment of receivables, what performance is left for an assignor after concluding the contract of assignment? Standing behind warranties given in connection with the assignment?[20] Is it intended that the second exception may ever come into play in the context of an assignment of a receivable? If so, the condition should be more clearly elaborated; if not, the exception should be deleted, at least with respect to assignment of receivables.

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16 *Supra* note 15.

17 These terms would correspond to "Niederlassung" and "Hauptverwaltung" in German. Like the UN Convention, the English version of Article 4(2) of the Rome Convention uses "place of business", not "establishment."

18 Likewise, Article 5(5) of the EU Regulation 44/2001 (*supra* note 15), with respect to vulnerability to suit in a dispute arising out of the operation of a branch, agency or other establishment, uses this exact formulation in these three language versions. In the *Somafer* case, ECJ of 22 November 1978 – 33/78 (involving the Brussels Convention, predecessor to that Regulation), the Court said, in that context, that "[t]he concept (...) implies a **place of business** which has the appearance of permanency, (...)" (emphasis added). In general, the ECJ has decided that the special jurisdictional provisions of Article 5 are to be interpreted strictly, as they are exceptions to the general forum of the defendant's domicile.

19 To the extent that European law makes any distinction between a "place of business" and an "establishment" based on permanency or the appearance of permanency (see the language of *Somafer*, *supra* note 18), those notions seem more fitting in the context of jurisdiction than in the context of an assignment of receivables. The EU Insolvency Regulation (*supra* note 11) uses the term "establishment" as the key to jurisdiction to open territorial (whether independent or secondary) insolvency proceedings. In Article 2(h) of the Insolvency Regulation, "establishment" is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". That use of the term, however, is said to be "autonomous", defined specifically for the purpose of that Regulation, and intended to be interpreted broadly, and was a conscious and intentional deviation from the principle of 'continuity of concepts' within EC law. See *Virgós/Garcimartín*, *supra* note 12, paras 293-302. If this exception in the Regulation has any merit, that would presumably be based on the fact that the assignment contract was concluded in the course of operation of the assignor's activity at a location other than the location of the central administration; even if this fact is important, however, the matter of how permanent that other location is or appears to be seems irrelevant in this context, so "place of business" would be more appropriate than "establishment".

20 One might also think of the distinction, under German law, between the contractual and proprietary acts, but in practice both agreements are typically concluded in a single act. Furthermore, the abstraction principle is less strictly adhered to with respect to the assignment of claims than with respect to the transfer of corporeal movables. See *Hein Kötz*, Europäisches Vertragsrecht I, (1996) p. 405 *et seq*.

Fourth, what if both exceptions apply and each points to a different country? The Regulation does not specify a hierarchy for application of the exceptions.

bbb) The Substantive Problem

Even were the language of the exceptions more precise and free from doubt,[21] the very existence of the exceptions generates a significant problem.

Suppose the assignor (acting through an employee at the assignor's central administrative office in Member State A) assigns to X all of the assignor's present and future receivables; assume that neither of the exceptions applies. Suppose that the assignor (acting through an employee located at the assignor's branch in Member State B) on the same day assigns to Y in the course of the operation of the assignor's branch in Member State B all of the assignor's present and future receivables generated by sales concluded by that branch. In such a case, the existence of the exception leads to uncertainty as to which law should decide the priority conflict between X and Y. From the perspective of X it is the law of Member State A, from the perspective of Y it is the law of Member State B. Obviously, certainty is not achieved if there exist PIL rules pointing simultaneously to more than one country to provide the applicable law governing priority among multiple assignees of the same receivable by a single assignor. Thus, the existence of the exceptions prevents achievement of the ex-ante certainty sought by the European legislator in introducing Article 13(3).

Deletion of the exceptions to the central administration rule (or, more precisely, making the exceptions inapplicable in the context of assignment of claims while preserving them for other types of contracts, perhaps by returning them to Article 4) would solve this problem, and would also be in line with the common recognition that local places of business are, after all, only parts of a single legal organization. Absence of these exceptions would put no burden on assignors. On the contrary, it serves to negate any possible advantage to an assignee from the local branch and puts all potential assignees from a single assignor on a level playing field (and, by not favouring local assignees, supports the single market already required under EC law). Thus, this approach should result in more and cheaper credit for assignors. Under this approach, all potential assignees, whether they are doing business with the central administrative office or a local branch office, will know that the priority (in the broad UN Convention sense) of their positions are all governed by a single law – that of the place of the assignor's central administration. And, this is equally true whether a particular country's law involves some form of registration or permits a "secret" right.

The exceptions in the Regulation have their conceptual roots in the notion of "closest connection". That notion may be appropriate in the context of purely contractual issues between parties that contract with each other, the matter addressed by the Regulation generally and by Article 13(1) as to the mutual obligations of assignor and assignee in particular. Even in that contractual context, moreover, these exceptions come into play only when the fallback rule is applicable (i.e., the parties to the contract are able to avoid these exceptions by choosing the governing law). However, Article 13(2) deals with matters between the assignee and the debtor, who do not contract with each other, and Article 13(3) deals with (other) third-party effects. Moreover, these provisions must satisfy the pragmatic need to produce clear and certain results so as to facilitate receivables financing. The uncertainty produced by the exceptions in the context of Article 13(3) far outweighs any perceived benefits that might be derived from them.

In light of the foregoing analysis, it may well be that the drafters of the Regulation did not have in mind the imposition of these exceptions onto the rule of Article 13(3), but that this was simply the unintended result of moving the exceptions from Article 4, where the Rome Convention placed them, in the context of contractual matters, to Article 18, perhaps to achieve closer alignment with the anticipated Rome II Regulation, without excluding their application in the context of third-party effects of assignments of receivables.

b) Assignors that are Natural Persons

Now we turn to the situation when the assignor is a natural person. In this category, too, the Regulation and the UN Convention do not in all instances provide the same pointer, although they might coincide in any given case.

In the context of an assignor that is a natural person, the Regulation provides, in Article 18(2), a rule that turns on whether "the contract is concluded in the course of [his or her] business activity".[22] If that is the case, the individual's "establishment"[23] is considered to be the individual's habitual residence. If that is not the case, the Regulation is silent, but we assume that this means implicitly that the Regulation points to the individual's habitual residence in its natural sense.

[21] We also note that the language of both exceptions in the Regulation differs from that used in the exception provisions of Article 4(2) of the Rome Convention, which states: "However, if the contract is entered into in the course of that party's [the party who is to effect the characteristic performance of the contract] trade or profession, the [most closely connected] country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated." While the terminology used in the Regulation to express the conditions leading to departure from the central administration content of the primary pointer differs from that used in the Rome Convention, we think this difference is without significance to the question of the desirability of the exceptions in the context of assignments of claims.

[22] The term "course of business activity" of a natural person differs from "course of operation" (in Article 18(1)) of an establishment of an assignor that is not a natural person. In the German version of Article 18 of the Regulation, the terms are, respectively, "im Rahmen der Ausübung der beruflichen Tätigkeit" and "im Rahmen des Betriebs", and in the French version of Article 18, they are "dans l'exercice de l'activité professionelle" and "dans le cadre de l'exploitation". (Compare Article 4(2) of the Rome Convention, which shifts the pointer from central administration to principal place of business when the assignment contract is entered into "in the course of that party's trade or profession".) It is likely that no difference in meaning is intended. Perhaps the clearest usage would be "course of business activity" for a natural person and "course of activity" of the place of business for an assignor that is not a natural person. Under the UN Convention, this issue does not arise because the dichotomy is based not on the nature of the assignor, but rather on whether the assignor has or does not have a place of business.

[23] The Regulation seems to assume that an individual conducting business activity will have an establishment (as contrasted with a place of business), and only one establishment, i.e., it provides no central administration pointer if the natural person has more than one establishment.

In contrast, the UN Convention does not look to whether the assignment contract was concluded in the course of the assignor's business activity (whether or not the assignor is a natural person), but instead looks only to whether the assignor has a place of business, a standard that is simpler to apply and that should, in most cases, leave less to be questioned in litigation. If an assignor who does not usually assign receivables arising from his law practice decides to make an assignment to finance a pleasure trip to Monte Carlo, was that assignment contract concluded in the course of the assignor's business activity? If the individual assignor has a place of business, the UN Convention applies the same rules as in the case of an assignor that is not a natural person, i.e., the pointer is the sole place of business or, if there is more than one place of business, the central administration. If the individual assignor has no place of business, then the UN Convention points to the habitual residence of the individual (presumably in its natural sense – this is the only use in the UN Convention of this term in connection with locating the assignor).

In many if not most cases of an assignor who is a natural person, the contract of assignment will be concluded in the course of the person's business activity and the person will have a place of business, so the two instruments should produce the same result in those cases. But this will not always be true. The advantages of the UN Convention formulation are that (i) it provides the entire rule explicitly and (ii) it uses as the variable a somewhat more objective standard, whether the assignor has a place of business rather than whether the particular assignment contract was concluded in the course of the assignor's business activity.

III. The Issue of Timing

We turn now to the matter of timing, i.e., assuming the conflicts pointer under the Regulation for third-party effects is the place of the assignor's central administration – as of which date? The English version of Article 13(3) states that the "question whether the assignment (...) may be relied on against third parties (...) at the material time". The French version, however, states that "La loi (...) résidence habituelle au moment de la cession (...) régit l'opposabilité (...) aux tiers", and likewise the German version refers to "gewöhnlicher Aufenthalt zum Zeitpunkt der Übertragung".

In our opinion, all these formulations need improvement. The English version has the merit of suggesting that not all issues are necessarily governed by the location at a single moment of time, but it gives no guidance as to what "material" means. The French and German versions give a precise – and the correct – answer for matters relating to the creation of the assignment (whether viewed in a particular legal system as contractual or proprietary), which (whether outright or for security) is a transfer by agreement. Is it, however, the correct answer for third-party issues?

Viewed from a practical standpoint, the assignee (lender or buyer) must know that the transfer to it has been created by a contract that is enforceable against the assignor, so it must be able to rely on the assignor's location at the time of the conclusion of the agreement as determining the law governing that issue. On the other hand, matters relating to effectiveness against third parties and priority vis-à-vis third parties – all the issues covered by the term "priority" as defined in the UN Convention – are not necessarily fixed without regard to subsequent changes in the assignor's location. It is in the interest of third parties, i.e. lenders, buyers, seizing creditors and insolvency administrators, that determination of priority of an assignment vis-à-vis them should take into account changes of the assignor's location after the initial assignment. Therefore, there are good reasons to suggest that the location that governs priority vis-à-vis such person's rights must be that as of the time the question of such priority is posed.[24] Indeed, in the circumstance when the assignor becomes the subject of an insolvency proceeding after a change of the location of its central administration, the proceeding is likely to be commenced in that new location and, thus, this understanding of the conflicts rule is most likely to avoid a conflicts issue.

The merit of this approach is apparent when one considers that under the lex rei sitae rule applicable in the context of corporeal movables, a change in the location of the asset will (in many countries) produce a similar change in the law governing the third-party effectiveness and priority of the security right. In both contexts, the assignee of the receivable (or the secured party with a security right in a tangible asset) must police its assignor (or its collateral) to be alert for a change in location.[25]

Thus, for these "priority" issues, the "material time" formulation is the correct rule – but it should be properly elaborated in the text. We suggest that both Article 13(3) and the Explanatory Memorandum, in all language versions, should be modified to fully explain the "material time" rule in the way suggested above. Regrettably, the UN Convention is silent on the timing issue, although the suggested reading would be a natural reading of the text. The Uncitral Legislative Guide for Secured Transactions, however, though still in draft form, does deal with timing and provides for such a rule in Recommendation 144 ("(...) for creation issues, to that location at the time of the creation of the security right and, for third-party effectiveness and priority issues, to that location at the time the issue arises.").[26]

IV. Coverage of Article 13(3) of the Regulation

We conclude our analysis with a consideration of the coverage under each of the instruments of the PIL rules we have been discussing.

1. Subject Matter of the Assignment

Article 13(1) of the Regulation states that the subject matter of the assignment covered by that Article is "a right against

[24] On the merits of different solutions for the timing issue see also *Kieninger/Schütze*, IPRax 2005, 200, 204.

[25] Some countries have, in their substantive law, a rule providing a grace period for compliance with local requirements for perfection to a creditor that had perfected its rights under the previously applicable foreign law in the circumstances when an assignor (or an encumbered tangible asset) comes into the jurisdiction.

[26] See A/CN.9/WG.VI/WP.24, submitted by the Uncitral Secretariat 15 November 2005.

another person." The French version of Article 13, in its title, states that the subject matter covered is "créances", and the German version refers to "Forderung". All these formulations, especially in the English version, include, but clearly are broader than, "receivable" as defined by the UN Convention.[27] The term "receivable" means, for UN Convention purposes, a "contractual right to payment of a monetary sum from a third person". The French version of the UN Convention refers to "droit contractuel du cédant au paiement d'une somme d'argent ("créance")". Thus, the French version of the UN Convention narrows the scope of the term "créance" for purposes of that Convention.

2. Assignments – Outright and Security Transfers (Regardless of Form)

The English version of Article 13 of the Regulation uses the term "voluntary assignment", the French version uses the term "cession", and the German version uses the term "Übertragung". All three versions of Article 12 of the Rome Convention use the same terms. The Regulation provides no elaboration on the types of transfers covered by those terms.

The term "assignment" is used in the UN Convention. It is defined, in Article 2(a), to mean a "transfer by agreement", and, in line with the UN Convention's practical goal, it is explicitly stated that the "creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer". Thus, it is clear that assignment under the UN Convention includes three types of transfer – (i) outright transfers, and (ii) transfers for security purposes, whether these are (ii)(A) transfers of "title" by way of security or (ii)(B) transfers of a security right denominated as such.[28]

The French version of the UN Convention states, in apposite language, that "'cession' désigne le transfert qu'effectue par convention (...). La création de droits sur des créances à titre de garantie d'une dette ou d'une autre obligation est considerée comme un transfert." While an abstract discussion of the meaning of the term "cession" in French legal parlance might be thought to include only the first two types of transfers and not a hypothecation of claims in the form of a nantissement,[29] it is clear that under the UN Convention the latter as well as the two former transactions are all covered as a "cession". If further analysis from the French perspective suggests the need to clarify in the Regulation that, for the purposes of the private international law rule in Article 13, "cession" includes nantissement, we suggest that an additional sentence be added to Article 13 similar to that set forth in Article 2(a) of the UN Convention.

The German version of the Regulation speaks of "Übertragung", which would in German legal parlance definitely cover both an outright transfer and a transfer of title by way of security (often referred to as a fiduciary transfer), the latter being a common practice in Germany. German law also provides for the third type of transfer of receivables – a pledge of intangibles, including claims (Paras 1273 *et seq*. BGB). The language of the Civil Code generally distinguishes between the transfer ("Übertragung") and the pledge ("Verpfändung") of tangibles or intangibles, including claims. Nevertheless, it can be assumed that Article 33 EGBGB (the transposition into German law, *verbatim*, of Article 12 of the Rome Convention, both using the term "Übertragung") covers a pledge of claims, given the fact that PIL rules often cover broader categories than substantive provisions. An argument in support of this suggestion can be derived from Para. 1274(1) BGB, which provides that pledges are governed by the same rules as transfers, except when a special rule in Paras 1274 *et seq*. BGB provides otherwise. This question has not been the subject of focus in German practice or legal literature because in German practice most hypothecations of claims are accomplished as transfers of title by way of security rather than as pledges.[30]

That a voluntary assignment under Article 13 of the Regulation should mean the same thing as an assignment under the UN Convention is even more likely because the transfer by a "contractual subrogation" has been moved from Article 13 of the Rome Convention into Article 13 of the Regulation, with the Explanatory Memorandum stating that the latter device performs "a similar economic function" as a voluntary assignment.[31]

3. Definition of "Third-party Effects"

The Explanatory Memorandum speaks in terms of "the possibility of pleading an assignment (...) against a third party", and the Regulation speaks of an assignee's "rel[ying][32] [on the assignment] against third parties". The French versions of both the Explanatory Memorandum and Article 13 of the

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[27] Of course, the UN Convention has exclusions from its scope, so that not all receivables, as defined therein, are actually covered by the UN Convention. In reviewing the Regulation, the Parliament and Council should take note of those exclusions and either make similar exclusions from the "assignor location" rule or adopt more suitable rules for specific types of claims. For example, discussions at Uncitral during the formulation of the UN Convention suggested that the assignor location rule, despite being the best solution for ordinary receivables, would be inappropriate for assignments of bank accounts. Rather than create a more appropriate special rule (e.g., the law chosen by the bank and its customer to govern third party priority rules or to govern the deposit account agreement generally), the UN Convention simply excluded assignments of bank accounts completely. Likewise, the Regulation should respond to the need for a different rule for financial contracts governed by netting agreements, intermediated securities, letters of credit and independent guarantees, and other specific types of claims for which the assignor location rule is not appropriate. See Article 4(2) of the UN Convention.

[28] It is contemplated that the Uncitral Secured Transactions Guide will cover outright transfers of receivables as well as transfers by way of security (whether or not denominated as the creation of security rights), in alignment with the UN Convention.

[29] Transactions under the Loi Dailly might be in the form of an outright transfer, a transfer of "ownership" à titre de garantie or a nantissement. The latter is rare, particularly because the remedies aavailable in this structure are inadequate.

[30] The reason for this practice is that under Para. 1280 BGB (which deviates from the general rules regulating the transfer of claims, Paras 398 *et seq*. BGB) the pledge requires notification of the debtor while the security transfer does not.

[31] Despite introduction of contractual subrogation into this provision on assignments, Articles 13(1) and (2) of the Regulation refer, in the English version, only to assignor/assignee, and only Article 13(3) refers separately to "author of the subrogation". In this respect, the German version resembles the English. In contrast, the French version is more precise throughout with respect to subrogation. We assume that this is because, with respect to these three legal systems, it is only in the French legal system that the legal device of contractual subrogation is utilized.

[32] The Regulation in Article 13(2) vis-à-vis the debtor speaks of "invoked" rather than relied on. We suggest changing the English version of Article 13 (3) from "relied on" to "invoked against".

Regulation use "opposabilité aux tiers", and the German version of the Regulation states: "Für die Frage, ob die Übertragung der Forderung Dritten entgegengehalten werden kann (...)."

The Regulation's terminology must be compared with that of the UN Convention, "priority (...) over the right of a competing claimant". Under the UN Convention, "priority" means "the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant [itself a defined term that encompasses another assignee of the same receivable, a creditor of the assignor and the assignor's insolvency administrator] have been satisfied." The French text uses substantially the same formulation. We believe that the Regulation's formulation with respect to the 'third-party effects' is intended to embrace all the issues embraced within the UN Convention's formulation using the defined term "priority".

In light of the explicit statement in the Explanatory Memorandum of the intent to adopt the solution provided in the Convention, national and European courts should pay particular attention to the defined terms "priority" and "competing claimant" used in the UN Convention when interpreting the scope of Article 13 and particularly the meaning of the term "relying [invoked] against third parties" and interpret them as being co-extensive. For the same reason and to the same end, any assignment that would be covered by the UN Convention should also be covered under Article 13 of the Regulation, even in the absence of any change in the language of the Regulation. Modification of the text of the Regulation would still be useful to provide certainty *ab initio*, even if it is believed that the proposed language would be read to mean such alignment with the UN Convention.

V. The Effect of Article 13(2) of the Regulation

Finally, in analysing the question of the coverage of Article 13(3) of the Regulation, it is necessary to consider Article 13(2), which points to the law governing the original (assigned) contract, not that of the assignor's habitual residence. The present text of Article 13(2) might be misconstrued to divert some issues from the rule in Article 13(3).

Article 13(2) allocates four categories of issues to the law of the original contract. The last three are all explicitly stated to cover matters as they concern the debtor. The first of these, however, presents crucial differences between the language versions, with the French and especially the German versions generating doubt both as to the material scope of the first category and as to whether it is limited to matters solely as between the assignee and the debtor.

1. Linguistic differences

The English version of Article 13(2), first category, states: "the law governing the original contract shall determine the effectiveness of contractual limitations on assignment as between the assignee and the debtor"; the French version states: "la loi, qui régit la créance cédée détermine le caractère cessible de celle-ci"; and the German version states: "Das Recht, dem die übertragene Forderung unterliegt, bestimmt ihre Übertragbarkeit". It should be noted that the French and German versions of Article 13(2) of the Regulation are identical with their corresponding versions of Article 12(2) of the Rome Convention, whereas the English version deviates from the English version of Article 12(2) of the Rome Convention, which states: "The law governing the right to which the assignment relates shall determine its assignability (...)."

With respect to the first category of issues covered by Article 13(2) of the Regulation, the English version[33] is far narrower and more precise then the other two language versions. It limits that category of the applicability of the law governing the assigned claim to the single issue of the effectiveness as between the assignee and the debtor of contractual anti-assignment clauses. The French and German versions of this category are wider and more vague, referring to the "assignable character" or "assignability" of the assigned claim, and also are lacking the explicit limitation of this issue to as between the assignee and the debtor. The French version might be read to limit this category to matters based on the assignable nature of the claim rather than broadly embracing any rule that might affect any assignment; the German version does not do so. In German literature on the identical (in German) formulation in Article 12(2) of the Rome Convention, how "Übertragbarkeit" should be interpreted is highly disputed. The still predominant opinion holds that it is a question of "Übertragbarkeit" whether and under which conditions future claims can be assigned, and whether and how claims can be assigned by way of security.[34] These issues would not fall within the English version of Article 13(2) of the Regulation, and, in our view, should not be allocated to the law governing the original contract because they typically involve issues of concern between competing claimants and not the rights and obligations between the debtor and the assignee.

It goes without saying that this material difference between the language versions cannot be allowed to subsist and must be dealt with during the next steps in the legislation process. The interesting question, however, is: What is the right solution?

2. Solution of the Substantive Issue

a) A general point

One element of the solution is straightforward. Article 13(2) first category must be clearly limited to matters as between the debtor and the assignee. This is already expressly stated in the other categories and it is already stated in the English version of the first category. This is the basis for the rule pointing to the law governing the original contract and it gives guidance for the remaining task of clarifying and aligning the substantive scope of the first category.

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[33] This provision is identical to the English version of Article 29 of the UN Convention (entitled "Law applicable to the rights and obligations of the assignee and the debtor").

[34] See Münchener Kommentar-*Martiny*, Article 33 EGBGB, paras 18 and 28.

b) Anti-assignment provisions

There is clear agreement (all language versions of the Regulation, as well as the UN Convention) that Article 13(2) first category, should cover the matter of effectiveness, between debtor and assignee, of contractual anti-assignment provisions.[35] This is obviously a matter of great concern to the debtor (else it would not have included the anti-assignment provision). Further, this prohibition, included in the original contract itself, could not be more closely linked with the original contract and with the very substance of the obligation undertaken by the debtor.

c) Other Issues that Might be Argued to Fall within "Assignability"

What about a rule of law precluding the effectiveness of assignment of future receivables? This seems neither to be a rule relating to receivables of a particular nature nor to be a rule devised for the protection of debtors. Why should it matter to the debtor whether the claim on which it is liable was assigned before or after the claim arose? This seems to be a "priority" matter – of concern to creditors of the assignor and other competing claimants (or, in perhaps an expression more familiar to some, a proprietary matter between the assignee and the assignor or others claiming through it) – that should fall under Article 13(3), not (2). The receivable itself is of an assignable nature; the rule concerning future receivables relates not to the nature of the receivable but only to the timing of the act of transfer.

What about a rule precluding the effectiveness of bulk assignments? This too seems to be a "priority" matter that should fall under Article 13(3), not (2). This rule seems even less susceptible of being held to be related to the character of the receivable, but only whether it is assigned together with other receivables.

What about a rule that permits a pledge of receivables but prohibits a transfer of title by way of security? This is a rule devised for the protection of creditors of the assignor and should be of no concern to the debtor. Also, this rule has no relation to the character of the assigned receivable.

All three of the preceding classes of issues involve the possibility that the assignee's position might be vulnerable to attack by third parties If those other parties indeed have a better entitlement, they can themselves assert that position against the assignee, either to prevent the assignee from enforcing the claim or to extract from the assignee what it previously collected from the debtor. Therefore, Article 13(3), not the first category of Article 13(2), should apply.

The debtor is, of course, concerned with the issue whether its payment will result in the discharge of its obligation. This, however, falls not within the first category, but already sits explicitly in the fourth category, which entitles the debtor to rely on the law governing the original contract to determine the issue of discharge. Thus, there is no need to distort the first category or even to express it vaguely. The concern to protect debtors does not require retention of the uncertain terms "Übertragbarkeit" or "caractère cessible" in the German and French versions. In addition, it should be kept in mind that it is likely that some procedure is available to the debtor in every forum to protect itself against the risk of double payment by "interpleading" or depositing the sum due in court or some other official depository. It is also likely to be a common rule that a debtor who chooses to itself determine whom to pay as between competing claimants (or who pays to a purported assignee based on a forged assignment) does so at its own risk, although this is likely to be accompanied by a rule that a debtor who pays the "ultimately right" person will be protected from having to pay twice.

d) Proposed Text for Article 13(2)

We therefore propose the following wording for Article 13(2), suggesting change only with respect to the first category of issues:

In English: "The law governing the original contract shall determine the effectiveness, as between the assignee and the debtor, of contractual limitations on assignment of the claim [and of rules of law (whether statutory or otherwise) limiting assignments of claims that are designed to protect the debtor],[36] the relationship between the assignee and the debtor,[37] the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged."

In German: "Das Recht, dem die übertragene Forderung unterliegt, bestimmt die Wirksamkeit von vertraglichen Abtretungsverboten im Verhältnis zwischen Zessionar und Schuldner [und von gesetzlichen Beschränkungen der Abtretbarkeit, die den Zweck verfolgen, den Schuldner zu schützen], das Verhältnis zwischen Zessionar und Schuldner, die Voraussetzungen, unter denen die Übertragung dem Schuldner ent-

[35] Perhaps, in all three language versions, it should be expanded beyond contractual prohibitions to include also legal (whether statutory or judicial) prohibitions of assignment the purpose of which is debtor-protection, e.g., a legal prohibition of assignment of a receivable with respect to which the debtor is a Government or public entity [note that this category must be distinguished from prohibitions the purpose of which is assignor-protection, e.g., an assignment of wages under a certain amount; this is not a debtor-protection provision (the debtor is the employer) but rather is an assignor-protection provision and should thus be allocated to the law of the assignor's location, not that of the original contract]. Such an expansion beyond contractual prohibitions, however, can and should be achieved by precise language, rather than by relying on a vague term such as "assignability", which might include that issue but also possibly more.

[36] The bracketed phrase is suggested (in all three languages) should it be desired to expand the scope of this first category beyond contractual limitations. See *supra*, note 35.

[37] We do not suggest any change in the text of the second category despite the vagueness of the term "relationship" ("rapports" in French and "Verhältnis" in German) and the potential that this category might be misconstrued so as to sweep in far more than is appropriately within its scope. We take comfort that the second category is, in all three language versions, explicitly limited to the relationship "between the assignee and the debtor", and that this same text is found in Article 29 of the UN Convention. It should be understood to be limited to issues between those two parties that are covered elsewhere in the UN Convention and that do not fall within the scope of any of the other three categories (e.g., the scope of the debtor's ability to assert defences and set-offs against the assignee, enforceability of an agreement by the debtor not assert defences or set-offs against the assignee, the effectiveness against the assignee of modifications to the original contract after notification of the assignment, and the ability of the debtor to recover from the assignee sums previously paid). See Articles 18-21 of the UN Convention.

gegengehalten werden kann, und die befreiende Wirkung einer Leistung durch den Schuldner."

In French: "La loi qui régit la créance cédée détermine, l'efficacité, entre cessionnaire ou subrogé et débiteur, des limitations contractuelles à la cession [et également celle des limitations légales qui ont pour objet la protection du débiteur], les rapports entre cessionnaire ou subrogé et débiteur, les conditions d'opposabilité de la cession ou subrogation au débiteur et le caractère libératoire de la prestation faite par le débiteur."

We believe that the proposed texts are preferable because they are more precise and less susceptible of inappropriate extension (and, of course, because the various language versions are aligned). Because PIL rules are taken into account and relied on by parties in ordering their arrangements, the *ex ante* certainty resulting from precision is of great importance to these financing transactions.

V. Conclusion

It is clear in our view that changes must be made to the text of the Regulation, in all language versions, during the course of its finalisation. It would be very undesirable to leave it to courts to deal with the differences, both as to variances from the UN Convention and among the several language versions, even if the courts could be relied on ultimately to seek to approximate to the greatest extent possible the rules under the UN Convention. This would leave for many years uncertainty as to whether and to what extent the courts would achieve this result and it would still leave those variations that could not be bridged by interpretation.

Ideal would be modification of the text of the Regulation to match the language of the UN Convention; if not entirely, then at least to the extent of application to assignments of receivables (as those terms are used in the UN Convention). The Explanatory Memorandum states very clearly that it was intended to adopt the UN Convention solution, and it is, after all, in the interests of European Member States to not only be in synchronisation with each other but also with the rest of the world when such an opportunity presents itself. Towards this end, it would be useful to put language into the Preamble of the Regulation that states directly the intent to be coterminous with the UN Convention, at least when Articles 13 and 18 are called into play by a transaction that falls within the UN Convention's scope. Note that this should not be limited to actual applicability of the UN Convention; i.e., this rule should be applied whenever a transaction would fall within the UN Convention even if the assignor is not located in a State that is not a Contracting Party to the UN Convention, even if the assigned receivable is not an international receivable under the UN Convention, etc.

Also consistent with the policy decision already taken by the Commission to adopt the UN Convention solution, it is desirable that, depending on the question of external competence,[38] the EU itself accede to the UN Convention and/or that it encourage and expressly permit the Member States to do so. The Regulation should also provide that, upon accession by the EU or the Member States, the Convention rules supersede the Regulation rules to the extent they are not identical.

[38] See ECJ 31 March 1971 – 22/70 – *AETR*, [1971] ECR 263; ECJ 7 February 2006 – Opinion 1/03, on the Competence of the Community to conclude the new Lugano Convention. On the question, whether, based on the *AETR*-doctrine, the EU or the Member States are competent to accede to the UN Convention, see *E. Schütze*, Zession und Einheitsrecht (2005) p. 318 *et seq*. with further references. It should be kept in mind that the Regulation deals with Private International Law, the same subject as Art, 22 UN-Convention, but that the UN Convention has important substantive rules as well.

Will the distinction between common law and civil law be pertinent in the future?[*]

Veronica Magnier[**]

Traditionally, Europe consists of two different legal systems. This makes it difficult to move the European countries towards unification. Besides, it is part of the richness of the European Union, and it should not be erased, as long as it allows good competition between the laws and legal progress or innovations.[1] Currently we are therefore witnessing what we can call the European paradox: Legal systems can converge (and they already do so as far as legal techniques or legal methods are concerned). But, at the same time, there is still room left for differences, for divergence in the legal solutions to be applied.

Part I of this article shall analyse why there is a need for convergence between common law and civil law. Part II shall highlight the reasons pleading in favour of room left for divergence between the two systems.

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[**] *Veronica Magnier, Ph.D in Law (Paris), Diploma of Institut d'Etudes Politiques (Paris), Professor in Private Law and Criminal Sciences at the University of Picardie (FR), member of the Henri Capitant Association and Visiting Researcher at Georgetown University (Washington DC).*

[1] See mainly *McCahery, Bratton, Picciotto & Scott et alii*, International Regulatory Competition and Coordination, Clarendon Press, Oxford, 1996; *C. Esty, D. Geradin et alii*, Regulatory Competition and Economic Integration, Oxford University Press, 2001; *A. Ogus*, Competition between National Legal Systems: A Contribution of Economics Analysis to comparative Law, 48, ICLQ 405; *C. M. Tiebout*, A pure theory of local expenditures, Journ. Pol. Econ., 64, 1956, 416-424; *James M. Buchanan*, The Domain of Constitutional Economics, 1 Const. Pol. Econ, 1, 1990.