UNCITRAL
Fourth International Colloquium on Secured Transactions

The law applicable to proprietary effects of assignment of receivables and insolvency

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Agenda

- The effectiveness of an assignment of receivables as security will often be tested in insolvency of the grantor of security.
- It is thus necessary to look both at the conflict rules for assignment and for insolvency.
- This shall be done for the UNCITRAL Model Law and EU law.

UNCITRAL Model Law: General rule (I)

- Conflict rules found in Chapter VIII, Art. 84 ff
- Law applicable to security in intangible asset, Art 86
  - "Except as provided in articles 87 and 97-100, the law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located."
    - Special rules for receivables relating to immovable property (Art 87), bank accounts (Art 97), certain types of assets by registration (Art 98), IP (Art 99) and non-intermediated securities (Art 100).
  - Generally, the law applicable to enforcement is the same as the law applicable to priority (Art 88(b)).
- Applicable law does not change in insolvency, Art 94

  "The commencement of insolvency proceedings in respect of the grantor does not displace the law applicable to a security right under (…) this chapter."

UNCITRAL Model Law: General rule (II)

- General rule: law of the grantor's location governs security in intangible assets
  - Grantor is located in the State in which it has its place of business/central administration/habitual residence (Art 90; recommendation 208 Legislative Guide).
  - Relevant time (Art 91):
    - For creation, location at the time of creation.
    - For third-party effects and priority, location at the time the issue arises (same enforcement, Art 88)
  - Consistent with Art 22, 30(1) UN Convention on the Assignment of Receivables

- Art 96 preserves the law governing the receivable for
  - Rights and obligations between secured creditor and debtor
  - Conditions under which security may be invoked against debtor
  - Whether obligations of debtor have been discharged.
  - Assignability (apparently) not governed by law of the grantor, even though it concerns "creation" (might be clarified).

UNCITRAL Model Law: Advantages

- Same law applies to receivables as security even where assignment relates to receivables owed by different debtors in different states.
- Law of the grantor can be easily ascertained at the time assignment is made.
  - Avoids localizing of "situs" of receivables.
  - Avoids problems of localizing future receivables.
- Law of the grantor is likely to be the law of the state where (main) insolvency proceedings concerning grantor are administered.
  - Legislative Guide Secured Transactions, para 41 with reference to Art 2(b), 16(3) UNCITRAL Model Law on Cross-Border Insolvency.
  - Exception: secondary insolvency proceedings.

UNCITRAL Model Law: Disadvantages

- Law of the grantor is different from the law which governs the receivable as such.
  - = the rights and obligations between a debtor of a receivable and the grantor of a security in that asset.
  - Two laws govern the (proprietary) aspects of assignment: 1) in relation to debtor and 2) to 3rd parties.
    - Raises issues of characterisation.
    - Arguably, there is a 3rd law (law of the contract of assignment between the assignor and assignee).
- Law of the grantor may change.
  - For subsequent assignments, different grantor(s) and thus different law(s) of the grantor(s) could apply.
  - For priority and 3rd party effects, point in time when issue arises (Art 91) (for creation fixed point).
  - Problem of joint assignors and back-assignment.

UNCITRAL Model Law: Example

- Creditor C has a claim against debtor D. He assigns this claim as security first to Bank B1 and later to Bank B2. D, who does not know of the first assignment, pays to B2.
- Solution under law of the grantor approach
  - Discharge of debt by payment D to B2 is governed by law governing the claim C-D (Art 96 Model Law).
  - 3rd party effects and priority between B1 and B2 governed by law of the grantor's seat at the time the issue arises (Art 86, 91 Model Law).
  - Problem: discharge by payment to B2 may be effective under the law governing relation C-D, but claim may – in relation B1 and B2 – "belong" to B1.
  - Solution: Claim in restitution of B1 against B2 (probably under law governing priority).
- Solution under law applicable to underlying claim: same law governs relationship with debtor and 3rd party effects

EU law: Law applicable to assignment

- Art 14 Rome I Regulation 593/2008:
  - 1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.
    - Recital 38: "Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee (…).
  - 2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

EU law: Law applicable to assignment

- Art 14 Rome I Regulation:
  - Unclear: Relationship between assignee (= secured creditor) and third parties (other creditors). Not even "agreement to disagree":
    - „The explicit statement in Recital (38), however, to the effect that the Rome I Regulation applied to the proprietary as well as the contractual aspects of an assignment excludes any possibility that a ‚proprietary aspect' of the assignment, including a question of priority between multiple assignees, is excluded from Art. 14" (Dicey/Morris/Collins, para. 24-069).
    - "However, there is an important element missing in the existing regulation, which concerns the question which law governs the effectiveness of an assignment against third parties" (COM(2016) 626 at p 3).
  - Possible solutions (COM(2016) 626 at p 9):
    - 1) Law of the underlying claim assigned (mostly UK, Germany).
      - Supplemented by law of the grantor for future assignments?.
    - 2) Law of the assignor's habitual residence (US, Belgium, some sectors in Lux (?), some doctrine in Italy and Germany).
    - 3) Law of contract of assignment (but choice only of 1) or 2)?).
    - 4) Lex situs (= normally seat of the debtor) (out of question?).

EU law: Law applicable to insolvency

- Art 7(1) EU Insolvency Regulation 2015/848:
  - "the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened". Covers
    - (b) "the assets which form part of the insolvency estate (…)"
    - (m) "rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the (…) creditors".
  - Jurisdiction to open proceedings is where "the centre of the debtor's main interests is situated" (Art 3(1)1).
    - "where the debtor conducts the administration of its interests (…) and which is ascertainable by third parties"
    - Presumed for registered office/habitual residence.
  - Secondary insolvency proceedings possible where debtor has establishment (Art 3(2)).
    - Applicable law (Art 35): MS of secondary proceedings.
    - Effect restricted to assets in the State (Art 34).

EU law: Law applicable to insolvency

- Art 8(1) EU Insolvency Regulation 2015/848:
  - "1. The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets (…) belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings."
    - Consequence: rights *in rem* situated outside the State where insolvency proceedings have been opened "determined according to the *lex situs"* and not affected by the opening of insolvency proceedings (recital 68).
    - "Member State in which assets are situated" means
      - the Member State within the territory of which the third party required to meet the claims has the centre of its main interests, as determined in accordance with Article 3(1)" (Art 2(9)(viii); this is not necessarily the MS whose law governs the claim).
      - For debtors in the state of proceedings, only lex concursus applies.

EU Law: Advantages and Disadvantages

- Law applicable to 3rd party effects of assignment is unclear.
  - In most MS it is the law governing the assigned claim.
- Advantages (if understood as law governing assigned claim)
  - The connecting factor is stable and does not change (easier for banks to have single law for security in their accounts).
  - All proprietary aspects of assignment (against debtor and 3rd parties) are governed by the same law.
    - Avoids problems of characterisation whether an issue is a 3rd party effect or a creditor-debtor effect.
- Disadvantages
  - Uncertainty in cases of insolvency of the grantor where the *lex concursus* (grantor's COMI) does not coincide with the law applicable to the assignment.
  - Uncertainty where law governing assigned claim is unclear.
  - Problems with future assignments/bulk assignments.

Law of the underlying claim: Example

- Creditor C has a claim against debtor D (from another country than C). C assigns this claim as security to B1. After insolvency proceedings have been opened over C's estate, the administrator seeks to invalidate the assignment as being detrimental to the general body of creditors.
- Solution under "law of the underlying claim approach":
  - 3rd party effects and priority of assignment governed by law which governs claim C-D.
  - Invalidation in insolvency governed by lex fori concursus (Art 7(2)(m) EU Insolvency Regulation).
  - But: Art 16 Ins Reg: Art 7(2)(m) does not apply where
    - (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings (here C-D); and
    - (b) the law of that Member State does not allow any means of challenging that act in the relevant case.
  - Consequence: Law applicable to 3rd party effects prevails also over avoidance of transactions in insolvency.
- Solution under the law of the grantor approach: same law applies both to insolvency, avoidance and security right.

Wrap up

- The choice of law rule for proprietary effects of assignment of receivables has (probably) boiled down to
  - Law governing the assigned claim, or
  - Law of the grantor,
  - or a combination (choice) between both.
- Both raise problems of delineation:
  - The law governing the assigned claim (primarily) with the law applicable to insolvency.
  - The law of the grantor (primarily) with the law governing the relationship with the debtor.
- Leaving aside other aspects, the choice will depend on whether it is found easier to draw a line between effects against debtor and 3rd parties, or between effects against 3rd parties, and the law governing insolvency.
  - But: If law of grantor is adopted, why allow so many exceptions?

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