

Cross-Border Assignments of Receivables

— *Conflict of Laws in Secured Transactions* —

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I. Introduction

▶ Cross-border Transactions in the Globalized World

Global Capital Market

Importance of Secured Transactions & Assignments of Receivables

Assignment: Outright Transfer or Creation of Security Rights

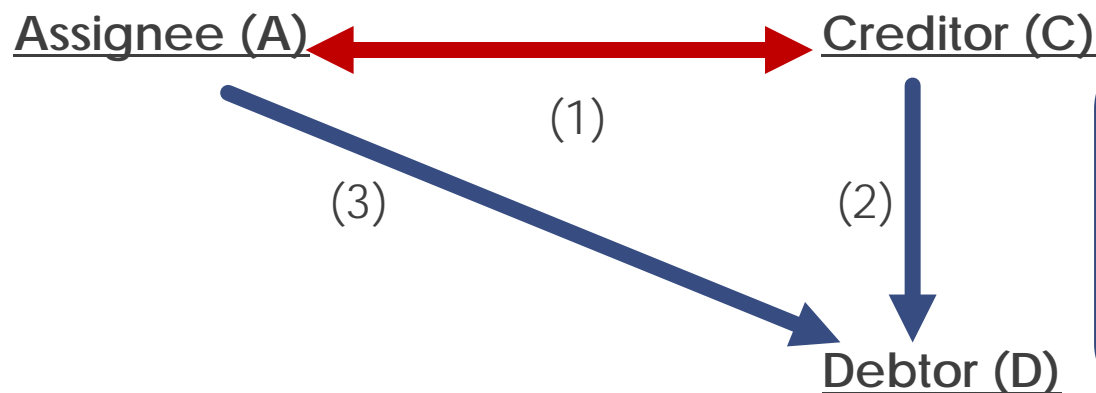
▶ Conflict of Laws Dimension

Triangular Relationship: Creditor (Assignor/Grantor) + Assignee + Debtor

Proprietary Effects: Third-Party Effectiveness & Priority

II. Conflicts Rules on Assignment of Receivables

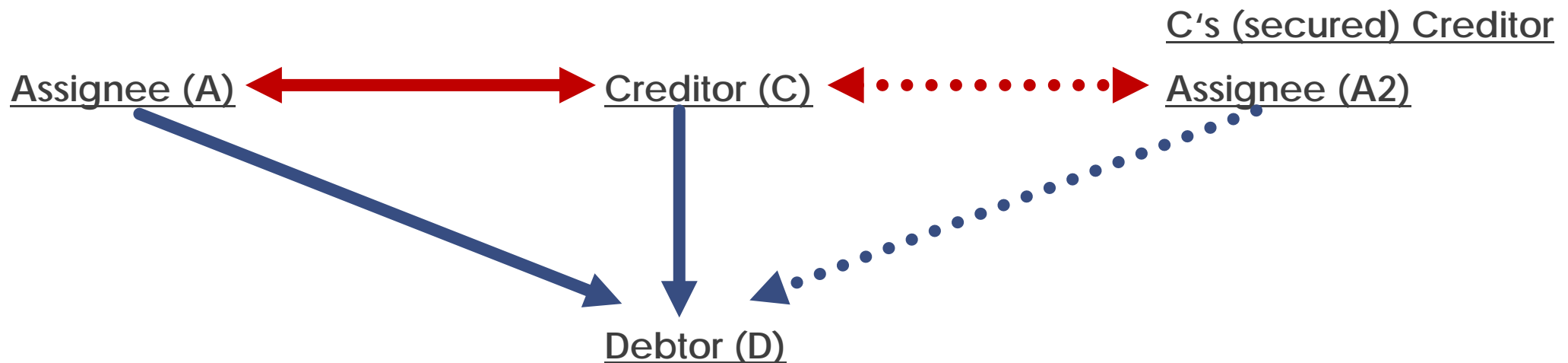
- ▶ (1) Assignment Contract between Creditor (C) (Assignor/Grantor) and Assignee (A): Law governing the Assignment Contract
- ▶ (2) Assignability of the Claim: Law governing the claim
- ▶ (3) A's Rights A against D + Discharge of D's Obligations: Law governing the claim



Art. 28-29 UN Assignment Convention (2001)
Art. 84 & 96 UNCITRAL Model Law (2016) (*creation)
Art. 10 Hague Principles on Choice of Law (2015)
Art. 14 Rome I (EU); Art. 23 Japanese PIL Act
(Cf.) Art. 145 Swiss PIL Act (party autonomy)

III. Possible Solutions for Proprietary Effects

- ▶ Third-Party Effectiveness & Priority between A and competing claimants
- ▶ Third parties: C's (secured) creditor, second Assignee etc. + insolvency administrator



1. Debtor's Domicile

- France, Sweden, Czech Republic; **Art. 12 of the 1898 Jap. PIL Act**
- Focal point of the assignment (creditors may change, but not the debtor)
- Protection of the debtor; consent of/notification to the debtor
- (fictive) Location of the claim (*lex situs*)



Drawbacks

- ◆ Change of creditors: destiny of the claim = Law governing the claim should decide
- ◆ Debtor's domicile may be unascertainable or change
- ◆ No sufficient protection for third parties
- ◆ Supreme Court 20 April 1978: (Priority against a secured creditor) Law governing the claim

Reform in Japan  **2006 PIL Act**

2. Party Autonomy

- Switzerland (Art. 145 (1) PIL Act): Party Autonomy; in relation to the debtor, consent is required; in the absence of choice of law: Law governing the claim
- Effective Law Determination and Application (incl. bulk assignment)



Drawbacks

- ◆ Relativity of Effects (if different laws are chosen; the debtor's partial consent)
- ◆ Complication as to priority issues

Cf. Law governing the Assignment Contract (eg. Netherlands): Relativity; defrauding C's creditors; no protection of the debtor (*with limitations, suggested in the EU)

3. Law Governing the Claim

- Spain, Poland, Germany, UK, Italy; Australia, Canada, Russia: traditional solution in many jurisdictions
- „Destiny of the claim“
- Clarity and Stability
- Protection of the debtor



Drawbacks

- ◆ Multiple claims governed by different laws; Future claims
- ◆ Uncertainty or change of the applicable law (third parties' rights are reserved)
- ◆ Difficulty for bulk assignments (securitization; factoring contracts)

Cf. Specific conflicts rule for bulk assignments? Difficulty of relativity (if the claim is subject to both a single and bulk assignment)

4. Location of Creditor (Assignor/Grantor)

- Art. 22 and 30 UN Assignment Convention (2001) + Art. 86 Model Law (2016); also Belgium (Art. 77 (3) PIL Act) = Location of Assignor/Grantor (central administration)
- Easy to ascertain, also for future claims
- Effective for bulk assignments
- „Registration system“ in the Jap. substantive law



Drawbacks

- ▶ Characterization & Delineation (different laws govern effects against debtor and priority)
- ▶ Assignments involving multiple creditors (e.g. inseparable claims)
- ▶ Change of the creditor's location
- ▶ No practical need (banking sector); assignees check the law governing the claim in any case



Art. 23 of the 2006 PIL Act: Law governing the claim: viable arguments?

IV. UN Assignment Convention & UNCITRAL Model Law

UN Assignment Convention (2001) and UNCITRAL Model Law (2016)

Location of Assignor/Grantor (central administration)

*Additional Advantages

- Unitary Approach for all assets
- Registration System
- Coincidence with Insolvency Proceedings (cf. Art. 94 Model Law; Art. 30 (3) Convention) (UNCITRAL Cross-border Insolvency Model Law (1997); Jap. Implementation Act (2000))
- Adjustment for certain claims by establishing exceptions?

*Some exceptions

Bank accounts (Art. 97 Model Law)

Certain types of assets in registration (Art. 98)

Non-intermediated securities (Art. 100)

V. Conclusion

Future developments

- New types of transactions
- Practical need
- Developments in other jurisdictions, particularly in the EU

 Possibility to Revisit the Existing Rules