Summer 2010

Trading Debts Across Borders: A European Solution (Snyder Lecture)

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Trading Debts Across Borders: A European Solution?

RICHARD FENTIMAN*

On April 7, 2009, Richard Fentiman delivered the tenth annual Snyder Lecture at the Indiana University Maurer School of Law.

INTRODUCTION

In December 2007 the representatives of the EU Member States finally agreed on the text of Regulation 593/2008 concerning the law applicable to contractual obligations.1 The 'Rome I' Regulation contains harmonized rules for choice of law in contract. It applies in all Member States from December 17, 2009, to contracts concluded after that date. This development is significant for three reasons. First, the Regulation replaces the familiar 1980 Rome Convention,2 which previously governed contract conflicts in EU national courts. Secondly, it departs from the Convention in important ways.3 Thirdly, being a Regulation and not a Convention, it is true Community legislation, not merely a treaty between the Member States. Rome I is part of what may be described, contentiously, as the federal law of Europe. But agreement was reached on the Regulation only at the last minute, by agreeing to disagree on one of the Regulation's principal components. The sticking

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* Fellow at Queens’ College, University of Cambridge, United Kingdom. This article is an expanded version of my Snyder Lecture at the Indiana University Maurer School of Law, delivered in April 2009. I am grateful to the Dean and faculty of the Maurer School of Law for their invitation to deliver the lecture and for the many helpful comments I received on that occasion.

point was a single provision which exposed tensions not simply between Member States, but between different lobbies in Member States and even within national delegations. This provision begged questions of high technicality, and had exceptional practical importance. It was the stuff of choice-of-law theory, yet mobilized the finance ministries of Europe. It concerned the law governing transactions involving the world’s principal traded commodity, of which both the United States and the UK are major producers—debt.

The controversy surrounded Article 14 of the draft Regulation, which concerned the voluntary assignment of contract debts. Article 14 seeks to determine which law governs transactions in which a creditor sells to a third party its contractual rights against a debtor. The problem it addresses arises because, where a debt (or a parcel of debts) is assigned, several competing laws may have a claim to govern the effectiveness of the assignment. Consider the following improbable but suggestive example. Suppose that a French purchaser of goods (the debtor) owes money to a German supplier (the creditor). The contract creating the debt is governed by English law. The German supplier (now in the guise of assignor) assigns its rights against the debtor to a New York bank (the assignee) to raise finance. The contract of assignment is governed by Swiss law. Suppose the assignment is invalid in Swiss law but valid by every other relevant law. Whether the assignment is effective depends on a question of private international law: which law governs the effectiveness of a cross-border debt assignment? Is it the law in force at the debtor’s residence; or that in force at the creditor’s residence; or that in force at the assignee’s residence; or that which governs the contract creating the debt; or that which governs the contract of assignment?

In its final form, Article 14 answers these questions in the following terms:

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.

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.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security, and pledges or other security rights over claims.
As this suggests, Article 14 regulates both the effectiveness of a voluntary assignment of a contract debt and the circumstances in which an assignee acquires rights against a debtor. In broad terms, it subjects the relationship of assignor and assignee to the law governing the contract of assignment and that between assignee and debtor to the law governing the contract creating the debt. Article 14, however, is not what it seems. Rather than imperil the Regulation as a whole, it was agreed that Article 14 should merely repeat—with some modifications—the solution already provided by Article 12 of the 1980 Rome Convention. This is not to say that Article 12 is not problematic. Indeed, Article 12 ranks as one of the more ambiguous of the Convention’s provisions. But perpetuating these difficulties was nothing compared with the potential failure of the Regulation. Article 14 is, however, a temporary solution. Article 27 of the Regulation provides that, by June 17, 2010, the Commission shall submit a report on the question of the effectiveness of an assignment against third parties and the priority of the assigned or subrogated claim over a right of another person. This implies no commitment to amend, which will occur only if appropriate, but it has prompted a vigorous debate about the best regime to regulate the cross-border assignment of debts.

The following discussion is anchored by Article 14 of the Rome I Regulation and seeks an answer to two particular questions: first, why has discussion of Article 14 proved so difficult; secondly, what form should Article 14 take? These questions are not merely important for their own sake. They speak to wider issues of significance beyond Community law and implicitly address two questions of more general

importance: why is the assignment of debts in private international law so intractable an issue; and what law or laws should govern the cross-border assignment of contract debts?

I. AN INTRACTABLE PROBLEM

A. The Commercial Importance of Assignment

The difficulty of the subject is partly explained by its practical importance. In a world where debt is the principal corporate asset, and in which finance is a global business, much turns on knowing which law governs the effect of cross-border debt transactions. The commercial importance of the issues regulated by Article 14 can hardly be exaggerated. The transfer of debts by creditors (or their assigns) outright or by way of security is the engine of the financial markets. Central to the operation of those markets is the assessment and pricing of the transaction risk associated with assignment. Of paramount concern is the risk that an assignment is ineffective to transfer an assignor's rights, and the risk that a valid assignment is subordinate to a competing assignment. The topic's importance is evident by considering three common means of raising finance, each of which involves the assignment of a creditor's rights. The purchase of any high-value property—buildings, aircraft, ships—is likely to be financed by borrowing or credit. This in turn is likely to be conditional on the assignment to the lender of any interest the purchaser may have in the insurance of the property. Again, the simplest means whereby any trading corporation can raise funds—as well as one of the most expensive—is to assign the receivables it owns in return for finance. Asset-based finance, in which receivables are sold for cash, is frequently employed by manufacturers to ensure liquidity, allowing a corporation to convert its sales ledger into working capital. Commonly, a trader will assign the receivables on its balance sheet to a finance house, which will manage the trader's book and assume the risk of bad debts in return for cash. Alternatively, a cash-poor trader may simply 'discount' its unpaid invoices (sell them at an undervalue in exchange for liquidity) by assigning its interest in exchange for immediate finance.

Of particular significance, assignment underscores the securitization of debt—the principal financing operation of the global economy in recent years.5 As with more traditional forms of debt

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5. A question that is beyond the scope of these remarks is whether securitization remains a significant financing vehicle, given the impact of the economic crises created in part by the failure of the U.S. market in mortgage securitization. A provisional answer is
finance, any corporation seeking finance can obtain immediate funds in exchange for the assignment of its projected cash flow and the securitization of receivables by the financier. But securitization is of particular importance in the wholesale banking markets, allowing banks to raise substantial sums by trading their loan book. A bank may assign the value of its book—typically its domestic mortgage book—in return for funds. The defining characteristic of securitization is that the assignee funds the purchase of the assignor's rights by issuing securities linked to the performance of the assignor's assets. The essential alchemy in the process is that the value of the issued securities offers protection against any weakness in those assets, but this finally depends on the effective assignment of the creditor's rights against its debtors.

B. The Problem of Value

The difficulties that beset this area are partly commercial and partly conceptual. Commercial problems arise because of radically different conceptions of the function of assignment, reflecting the practices and assumptions of different markets. At the root of these differences is the distinction between those markets in which the enforceability of the assigned debt is paramount and those in which it is not. Differently expressed, it lies in the distinction between asset value and transaction value. This reflects the difference between markets in which the value of the traded asset (the debt) is central and those in which the value of the transaction lies in the value of the trade itself. Consider, for example, where value lies when debts are securitized. As previously discussed, the defining characteristic of securitization is that the assignee of the debts of the party seeking finance funds the purchase of that party's rights as a creditor by issuing securities linked to the value of those debts. The value of those debts is of paramount concern, not least because the rating given to the issued securities depends on it. For this reason, the securitization industry has vigorously advocated a solution to the problem of assignment that

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6. It is true, however, that some participants in the securitization market and some agencies engaged in rating debt-backed securities were not as assiduous in the recent past in ensuring the enforceability of securitized debt as best practice demands. However, this reflects the particular conditions concerning the securitization of sub-prime domestic debt in the U.S. A distinction must also be drawn between the legal and practical enforceability of a debt. The former depends on the effectiveness of the assignment, which a lawyer is likely to insist upon, while the latter concerns the debtor's creditworthiness, which an eager financier may be willing to ignore.
ensures that the legal enforceability of the underlying debts can be readily ascertained. They would prefer that the law applicable to enforceability is that governing the contract creating the debt. Consider, by contrast, the provision of finance by way of debt factoring. As has been noted, a creditor will assign the receivables on its book to a factoring house, which will manage the book, and assume the risk of bad debts in return for cash. Alternatively, a creditor may simply ‘discount’ its unpaid invoices by assigning its interest for less than full value in exchange for immediate finance. In such cases, the finance house may have an interest in the enforceability of the debts assigned. But it is likely to offset the risk of non-enforceability, partly by pricing the assignment accordingly and partly by taking a bulk assignment of the assignor’s book, with the effect that at least some of the assigned debts will be sound. In that context, the value of the assigned assets (the debts) matters less than the profit derived directly from the transaction (the assignment). For that reason, the factoring sector tends to favor a solution to the problem of assignment which reduces the cost (to them) of the assignment, but ignores the enforceability of the debt. They generally prefer that the law applicable to the effectiveness of an assignment is that in force at the assignor’s place of business. This is likely to be easily ascertained by the assignee, reducing the cost of due diligence, but may be irrelevant to the enforceability of the assigned debts.

C. Conceptual Assumptions

The debate about the law applicable to the assignment of debts is further impeded by some troublesome assumptions and perceptions.

1. The Lure of the Lex Situs

It is tempting to equate a creditor’s intangible rights against the debtor with tangible property by seeking to give the former a fictitious location. Just as tangible property has a location, so it is sometimes said that the effectiveness of an assignment depends on the lex situs of the debt. This typically refers to the law in force at the debtor’s residence, where (it is supposed) the rights of the creditor may be enforced. This way of thinking is doubly misleading, however. It posits that a debt has a location, and it assumes that the place where a debt is enforced has the same significance as the place where an owner takes possession of tangible property.

7. See GOODE, supra note 4, at 1108-11 (advocating the continued role of the lex situs).
Some English lawyers maintain that application of the *lex situs* of the debt should govern the position of an assignee against a third party to the assignment, such as the debtor and any competing assignee.\(^8\) Nevertheless, the claim of the *lex situs* to govern the assignment of debts has been judicially doubted.\(^9\) It is also evident that application of the *lex situs* is not regarded as an attractive option in the ongoing debate about which law should govern the assignment of debts.\(^10\)

No doubt, the *lex situs* of a debt may have a defensible role as a default rule in certain cases,\(^11\) but inspection reveals that it has no general claim to govern the enforcement of an assigned claim.\(^12\) It was once supposed that the *lex situs* should always govern on the basis that enforcement of any assigned claim would always be necessary in the place of the debtor's residence in the event of non-payment. This is no doubt explained by a false analogy with the enforcement of possessory rights in the place where tangible property is located. But the analogy is misleading. An action in debt is a personal action against the debtor that may be brought in any court of competent jurisdiction. Such a court might be located in the debtor's residence, or it might be one on which jurisdiction is expressly conferred by the contract creating the debt. It might be any court in which the assignee may sue on the debt, such as the assignee's local court if it has subject-matter jurisdiction in any claim for non-payment. It might have such jurisdiction if the originating contract, or any legal presumption, identifies the creditor's residence as the place of payment.

This confirms that no one country may be regarded as the necessary place for enforcing a debt. It argues for adopting a solution that might be applicable in any court where enforcement is sought, such as (most naturally) applying the law governing the contract creating the debt. It might be supposed that if any country is to have a claim to be the natural court for enforcement it should be the country where the debtor's assets are located. But this can hardly be relevant in the design of rules for choice of law. There may be more than one such place, and its identity (or their identity) may change. In any event, an assignee should, in principle, be able to enforce a judgment debt obtained in one court against a debtor's assets elsewhere.

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8. See id. at 1109-10.
10. See Alférez, supra note 4, at 245-46, n.61; Perkins, supra note 4, at 238-39.
11. See Bridge, supra note 4, at 671.
12. See Bridge, supra note 4, at 671.
2. Problems of Characterization

Discussion is also obscured by an intractable problem of characterization. What issues arising from the assignment of a contract debt are contractual and which proprietary? Those which are contractual may be properly governed by the law governing the contract of assignment or perhaps that governing the contract creating the debt. But those which are classified as proprietary might be subject to another law. It might be said, for example, that the mutual obligations of assignor and assignee are clearly a contractual matter and so subject to the law governing the contract of assignment. But whether an assignment is effective to transfer the assignor's rights to the assignee might be seen as a proprietary issue and so subject to another law.

The significance of this question may be illustrated by reference to the sale of goods. It is clear (at least in English law) that the contractual aspects of a sale of goods are subject to the law governing the contract of sale. But whether title passes to the buyer is a proprietary issue, governed by the lex situs of the property (the law in force where the property was located at the time of sale). It is arguable that the same is true of the assignment of a contractual debt. If so, the mutual obligations of assignor and assignee might be subject to the law governing the contract of assignment. Whether the assignee acquires the rights of the assignor, however, might be subject to another law, such as the law in force at the debtor's residence or that governing the contract creating the debt.

These problems take a particular form in the context of the European regime. Difficulty arises in the Community context because matters of a proprietary, rather than contractual, nature cannot be regulated by the 1980 Rome Convention or the Rome I Regulation. This begs two straightforward questions and a third of greater difficulty.

First, what is the status of the apparent suggestion in the Giuliano and Lagarde Report on the Rome Convention that proprietary matters are excluded from the Convention? The Report states that “since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions.” This says nothing, however, about how the line between property and contract should be drawn. The statement is a reiteration of the obvious, but contributes nothing to the problem of characterization.

Secondly, how is characterization between proprietary and contractual issues to be effected? What issues concerning the assignment of contractual claims should be regarded as contractual? Principle suggests that the scope of both the Convention and the Regulation is a Community matter. To ask which matters are contractual is to enquire after the scope of Community instruments. It should not depend upon characterizations imposed by national law.\textsuperscript{15}

Finally, what issues relating to assignment may be regarded as contractual, and subject to Article 14? There are five possibilities. First, only the obligations arising from the contracts between debtor and creditor or between assignee and assignor are properly within the scope of instruments concerned with contractual obligations. Any other issues are non-contractual and thus outside the scope of the Community instruments and so are subject to national law. Second, the relevant Community instrument regulates such contractual obligations, together with any requirements of perfection, insofar as it concerns the enforceability of an essentially contractual claim by the assignee against the debtor. But it does not regulate such non-contractual matters as the intrinsic validity of the assignment and the effect of any assignment on third parties other than the debtor (such as competing assignee). Third, the Community instruments properly regulate such contractual obligations, and also the intrinsic validity of an assignment, even if the assignment depends on rules classified as proprietary under national law. On that basis, the Community instruments regulate such issues as whether an assignment by way of security is valid. But they do not control the enforceability of an otherwise valid assignment against any third party to the assignment, including the debtor. They do not therefore govern perfection of a valid assignment by notice. Fourth, the Community instruments govern the obligations of the relevant contracting parties, the validity of an assignment (however characterized under national law), and the enforcement of an assigned claim against the debtor. However, they do not regulate the rights of an assignee against a third party to the assigned claim, such as a competing assignee, or a creditor or liquidator of the assignor. The reason why the enforcement of the assigned claim against the debtor is included—and thus any requirement of perfection—is that this concerns the enforcement of the debtor's contractual payment obligation by the assignee. It is in character a contractual matter.

No doubt, each of these positions may be defended.\textsuperscript{16} But principle strongly favors a fifth and broader view of the scope of Articles 12 and

\textsuperscript{15} See Raiffeisen Zentralbank A.G., 1 Lloyd's Rep. at 596.
\textsuperscript{16} See, e.g., Goode, supra note 4, at 1108-09 (advocating the second position); Mark Moshinsky, supra note 4 (advocating the third position).
Arguably, the Community instruments govern all aspects of an assignment, including an assignee's rights against a third party, such as a competing assignee or a creditor or liquidator of the assignor. This is because the true measure of whether an issue is included within the Community contract regime is whether the enforcement of a contractual obligation is involved. If so, this embraces enforcement of the debt by a third party to the original contract, such as an assignee, or each of several assignees.

These principles are especially important for those, such as many English lawyers, who are apt to see the effect of an assignment as a proprietary issue, akin to the transfer of title in tangible property. English lawyers tend to view the assignment of a debt as if it involves the transfer of title in property by analogy with the sale of goods. For this reason, they are inclined to see the effectiveness of an assignment as a proprietary matter outside the scope of the Community instruments governing contractual obligations. There are two reasons why English lawyers, in particular, may view the assignment of debts in proprietary terms. First, they tend to equate intangible and tangible property by assuming that both may have a territorial location. It was once commonplace to identify the *lex situs* of a debt as the place of the debtor's residence. Just as possession of a chattel might be sought where it is located, so also might a debt be enforced at the debtor's residence. However, the fallacy of equating debts with chattels is readily apparent. It obscures the fact that an assigned claim to a contractual debt is a right to enforce a contractual obligation and has an essentially contractual character. To ascribe a *situs* to a debt also rests on the false premise that the debtor's residence is inevitably and naturally the place where any debt must be enforced. A debt may, in reality, be enforced by proceedings in any court of competent jurisdiction, which need not be that of the debtor's residence. Furthermore, any judgment obtained may be executed where the debtor's assets are located.

Secondly, English law's approach to the assignment of debts tends to induce a proprietary frame of mind. In English law, an assignee does not become a party to the contract between debtor and creditor by substitution. Rather the benefit of the contract is assigned in the form of the creditor's claim against the debtor. The effect is that English lawyers perceive assignment as a proprietary operation—involving the transfer an item of property—akin to the sale of a chattel. This reinforces the view that the effect of an assignment is not regulated by the Convention or Regulation where the main concern is the

enforcement of contractual obligations.

The important insight that assignment concerns at root the enforcement of contractual rights underlies Lord Justice Mance's illuminating treatment of assignment in *Raiffeisen Zentralbank A.G. v. Five Star General Trading*,¹⁹ the leading English case. There it was held that the law governing the contract between debtor and creditor regulates the essentially contractual rights of the assignee against the debtor.²⁰ The issue in dispute in *Raiffeisen* was whether the existence (and form) of any requirement to perfect an assignment by notice to the debtor was contractual or proprietary in character. Only if it were contractual would Article 12 of the Rome Convention apply. It was contended that the issue concerned whether 'title' in the assigned claim had passed to the assignee, by analogy with the passing of title in tangible property, and was in character proprietary. But Lord Justice Mance disagreed and was persuaded that “the case fits readily into a contractual, and less readily into a proprietary, slot.”²¹ In particular, he equated the assignment of contractual claims with novation, and with conferring the benefit of a contract on third parties, operations which are more obviously contractual than proprietary.²²

As we shall see, this contractual perspective has important consequences. It explains why the effects of assignment are contractual and within the province of the Convention and Regulation, and it suggests that both the perfection of an assignment—and priority between competing assignees—are properly regulated by the law governing the contract creating the debt. That law governs the enforcement of the assigned claim against the debtor, of which both issues are aspects.

II. A POSSIBLE SOLUTION

A. Preliminary

What should be the solution to the problem of cross-border assignment? How, in particular, might Article 14 of the Rome I Regulation be recast? Six distinct questions must be separated: (i) What law governs the contractual relationship between debtor and creditor? (ii) What law governs the contractual relationship between creditor/assignor and assignee? (iii) What law governs the legal attributes of the assigned debt? (iv) What law governs the validity of the

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²⁰. Id. ¶¶ 26-57, at 604-10.
²¹. Id. ¶ 34, at 605.
²². Id.
 assignment? (v) What law governs the rights of the assignee against the debtor? (vi) What law governs the rights of the assignee against a competing assignee?

The first three questions pose few problems. The relationship between debtor and creditor is self-evidently contractual, and any dispute between them is a matter of contractual rights and duties. The applicable law of their contract is ascertained in accordance with general principles, pursuant to Articles 3 and 4 of the Rome I Regulation. The most obvious aspects of the contractual relations between debtor and creditor concern the amount owed, the assignability of the debt, the preconditions for assignment (such as notice to the debtor), and the conditions for payment. A debtor may also have a contractual action against the creditor if the debt is wrongfully assigned or if the debtor incurs costs as a consequence of the assignment (as where perhaps the claim is assigned to a foreign assignee).

Again, principle requires—and Article 14(1) confirms—that the contractual relationship of the creditor and assignee is regulated by the law governing the contract of assignment. That law governs such matters as the meaning and effectiveness of undertakings and warranties by the assignor (such as any warranty of assignability) and any claim against assignee for non-payment of consideration. It would also govern the validity of the assignment insofar as it affects the mutual dealings of assignor and assignee, as when the assignor argues that the assignment is invalid as a defence to a claim for breach of warranty.

It is also clear that the attributes of the debt must be subject to the law governing the contract creating the debt—the contract between debtor and creditor. What are the attributes of the assigned debt? What is the description of the property assigned? Self-evidently a debt cannot be defined by reference to any physical attributes, as to shape, size, and color. Instead, the attributes of any contractual right to payment, the property acquired by the assignee, are those of the claim assigned as defined by the contract creating it. The shape and size of the claim is defined by reference to such matters as: the amount of principal owed, the amount of interest payable, the time when payment is due, the place of payment, whether the debt is assignable, and the conditions under which the debtor is discharged. By virtue of Article 14(2), such matters are expressly determined by the law governing the contract creating the debt, referred to as the 'law governing the assigned or subrogated claim.'

Greater difficulty concerns the remaining questions, and each requires elaboration. Question (iv) concerns the validity of the

assignment. It might be asked why this does not merely concern the contractual relationship between creditor and assignee so that it is embraced by question (iii). The answer is that some legal systems distinguish between the validity of a contract to create rights and liabilities between the parties (here, between creditor and assignee) and its effectiveness to transfer rights in property (the creditor's rights against the debtor). Such distinct questions of effectiveness may be regarded as proprietary, and not contractual, and so not immediately subject to the law governing the contract of assignment.

Such issues must in turn be distinguished from the enforceability against the debtor of the rights that the creditor purported to assign to the assignee. In principle, a valid and effective assignment may confer no rights on the assignee because the assignee has failed to give due notice to the debtor. The problem here does not concern the validity of the assignment but whether a valid assignment was properly perfected by the assignee. Distinct questions again concern the rights of one assignee against a competing assignee of the same debt. An assignment may be valid and enforceable by the assignee against the debtor. But it may be defeated by the superior claim of another assignee, typically a prior assignee.

B. Validity

Any examination of what law should govern the validity of an assignment must be anchored by two considerations. First, a distinction must be drawn between the contract of assignment and the transfer of property that accompanies such a contract—between the agreement to assign and the assignment. This is not to accept that each element should be governed by separate laws. Indeed, the opposite is probably true. But it is a necessary discipline, especially for those whose national law makes no such distinction.

Secondly, the parties' respective interests must be correctly identified. In particular, the position of the debtor must be understood. A debtor has no substantial interest in the effectiveness of the transfer. A debtor has a strong interest in the assignability of the claim, but that is an attribute of the debt that adheres to the debt in all circumstances and does not depend on the effectiveness of any particular assignment. Like other attributes of the debt, it is (unarguably) subject to the law governing the contract creating the debt. Provided the claim against the debtor is assignable, the debtor has no interest in whether it is liable to the original creditor or to a subsequent assignee. It may be said that a

24. Or, alternatively, a distinction between contract and conveyance.
debtor—certainly a commercial debtor like a bank where a customer assigns sums deposited—has an interest in the identity of its counterparty. If so, there is a case for subjecting the effect of a transfer to a law with which the debtor is familiar, such as that governing the contract creating the debt. If the debt is freely assignable, or assignable subject to conditions (such as the debtor's consent), it is unclear why the debtor should be entitled to object to the identity of the party enforcing the claim.

As this implies, the effectiveness of an assignment to transfer the assignor's claim is a matter between the assignor and the assignee. The joint interest of the assignor and the assignee is in the effectiveness of the assignment. An assignment is fully effective if the contractual obligations created by the assignment are enforceable. Most importantly, the assignor must be able to sue a defaulting assignee for the price, and the assignee must be able to enforce any warranty as to the assignability of the claim. Of equal importance, the assignment must be effective to transfer the assignor's claim to the assignee. The assignee must be able to enforce the claim against the debtor and rely upon its rights against a third party, such as a competing assignee or a hostile liquidator of the assignor. The assignment must succeed as both contract and conveyance.

With this in mind, both principle and commercial considerations ineluctably suggest that the enforceability of obligations created by the contract of assignment should be subject to the law applicable to that contract—an outcome endorsed by Article 14(1) of the Rome I Regulation. Greater difficulty concerns whether the contract of assignment successfully transfers the creditor's rights to the assignee. Such a transfer may be ineffective for two conceptually distinct reasons. First, the contract of assignment may be void, or it could be vitiated by such factors as fraud, mistake, or illegality, and thus ineffective to transfer the claim to the assignee. The contractual invalidity of the contract controls the effect of the assignment. Secondly, the transfer of the creditor's rights may be ineffective even if the contract is valid and enforceable. It may be prevented by a rule that selectively targets the effect of an assignment and not the contract which is its vehicle. Perhaps the contract of assignment purports to transfer a claim by way of security. Perhaps the liquidator of an insolvent assignor challenges the assignment on the basis that an assignment by way of security is ineffective.

Which law should govern the transfer of the creditor's rights? For both the assignor and the assignee, the theoretical distinction between contract and transfer is unhelpful. The issue is whether their transaction succeeds in both respects. Their object is to create an
enforceable contract that transfers the claim to the assignee. Practicality suggests that the same law should govern both, while principle suggests that the governing law should be that which governs the contract of assignment.

This conclusion may be supported for several compelling reasons. First, the law governing the contract of assignment clearly governs the contractual obligations it creates. Commercial reality suggests that only in exceptional cases should the parties to a transaction be required to investigate more than one law to assess the validity of a transaction. Secondly, if the law governing the contract of assignment also governs the transfer of the creditor’s rights, the parties are free to choose the law applicable to its effectiveness. It might be argued that this should be the case only as between the assignor and assignee—where the former sues the latter for payment, and the latter pleads in its defence the ineffectiveness of the transfer. If so, it would not apply to issues arising between the assignor and a third party to the assignment, such as the debtor or a competing assignee. Such an objection is, however, hard to comprehend. An assignment is only effective insofar as the claim assigned can be relied upon against third parties. That is what the effectiveness of the assignment means. It is also incoherent to suggest that the same legal issue—the effectiveness of the assignment—should be governed by one law in one situation and a different law in another.

A further objection is that this solution extends the province of the European regime beyond the regulation of contractual obligations and into the realm of property. But this may be answered in two ways. First, the issue is not whether any given matter belongs in principle to one category or the other, still less whether it does so in any one national law. As we have seen, the scope of Articles 12 and 14 is an autonomous matter. Secondly, the assignment of contract debts is inherently contractual in a way that other transfers of property are not. It concerns whether a creditor or subsequent assignee is entitled to enforce a contractual obligation against the debtor. When a contractual obligation may be enforced is self-evidently a contractual matter which the Convention and Regulation may properly control.

This analysis confirms that Article 14(1) of the Regulation (in its present form) should govern both the contractual obligations created by a contract of assignment and the conveyance of the claim that is its purpose. This does not mean, however, that Article 14(1) requires no amendment. Clarity requires that Article 14 should explicitly provide that the law governing the contract of assignment governs both the

25. Goode, supra note 4, at 1107-09.
obligations arising from that contract and its effectiveness to vest the assignor's claim in the assignee. Again, to subject the effectiveness of the transfer to the law governing the contract of assignment does not meet all cases. To do so is problematic unless the law governing the contract of assignment is expressly stipulated in the contract. In practice the law applicable in default will be the law in force at the assignor's residence by operation of Article 4(3) of the Regulation. This is not free from doubt, however, and there may be room to argue that the parties' impliedly intend some other law to govern, pursuant to Article 3. Clarity requires that Article 14(1) should stipulate that, in cases where the applicable law has not been stipulated, the law applicable to the effectiveness of the transfer should be the law in force at the assignor's place of business.

C. Perfection

The assignment of a creditor's rights may be directly ineffective when the assignment is invalid. Furthermore, it may be indirectly ineffective where the assignment is valid, but the assigned rights are unenforceable against the debtor for some reason extrinsic to the assignment. Typically, this occurs when the assignee fails to perfect an otherwise valid assignment by giving notice of the assignment to the debtor. Which law governs any requirements for perfection of a valid assignment? Once again, any one of four laws might govern: the law governing the contract of assignment, the law governing the contract creating the debt, the law in force where the assignor is located, or the law in force where the debtor is located.

Which law should govern perfection depends on the respective interests of the assignee and the debtor. No doubt the assignor has an interest in the validity of the assignment—a transaction to which it is a party. Nevertheless, only the assignee is concerned with the steps necessary to perfect an assignment, so as to make it enforceable against the debtor. The assignee must be in a position to determine at the moment of assignment what further steps, if any, it must take, typically by giving notice to the debtor. This requires that the relevant law must be readily capable of ascertainment. On the assumption that the lex situs of the debt is no longer an option, the law that is most easily ascertained is the law governing the contract creating the debt (the contract between debtor and creditor). This practical consideration is underwritten by principle. The law governing the contract of origin in any event governs the attributes of the debt. Inevitably, the assignee will wish to satisfy itself as to the amount of the debt, its assignability, and the conditions for payment. It is natural that it should also make
enquiry under the same law to ascertain any conditions for perfection.

Application of the law governing the contract creating the debt offers the optimal solution for the assignee, but what interest, if any, has the debtor in the law governing perfection? Arguably, the debtor has no interest in perfection provided that the creditor's rights are freely assignable and provided any conditions for assignability imposed by the original contract are met. The debtor must accept any consequences flowing from the assignment, including any uncertainty associated with perfection. Arguably, again, the only matter of concern to a debtor is whether payment is good discharge of its obligations. But that is clearly regulated by the law governing the original contract and ascertainable by the debtor. These arguments do not, however, apply to all debtors in all cases, which means that the debtor's interests must be respected in any general rule. A commercial debtor, such as a bank or an insurer, will wish to avoid any uncertainty concerning the need to pay an assignee in addition to any cost associated with such uncertainty. Even if a bank is discharged by payment to an assignee whose claim is not perfected, it will suffer loss—the loss of interest on the monies disbursed—by doing so.

The uncertainty that follows from protracted enquiries as to the need to pay also has a cost. This suggests that the law governing perfection should be one ascertainable by the debtor as well as by the assignee. This excludes the possibility that perfection should be governed by the law in force at the assignor's residence. It might suggest that the applicable law should be the law in force at the debtor's residence, but we have seen that the claims that the lex situs should govern are spurious. The inevitable conclusion is that it is in the debtor's interest, as much as in the interest of the assignee, that perfection should be governed by the law that governs the contract creating the debt. Since the debtor will also look to this law to discover the amount payable, the conditions for payment, assignability, and discharge, principle suggests that this law should also govern perfection from the debtor's perspective.

Perfection should be governed therefore by the law governing the law applicable to the contract creating the debt. This solution is perhaps already evident from Article 14(2) of the Regulation, but Article 14 requires amendment for two reasons.

First, amendment is necessary to put this solution beyond doubt. Clarity requires that Article 14(2) should explicitly provide that the law governing the contract between debtor and creditor governs both the obligations arising from that contract and any requirements for perfection.
Secondly, it is necessary to address the difficulty present whenever reliance is placed on the law applicable to a contract. This solution only provides the necessary certainty and only allows the parties to make due enquiry as to their position at the time of the assignment if the law governing the contract creating the debt is expressly stipulated. Where it is not stipulated, principle suggests that the law applicable in default should be the law in force at the original creditor's residence by operation of Article 4(3) of the Regulation. This reflects the principle that the goods or services supplied by the creditor represent the performance that is characteristic of the contract and leads to application of the creditor’s law as the law in force at the place of business of the party whose performance is characteristic of the contract. Where perfection is in question, it is inappropriate, however, to deploy this familiar default rule. There remains scope to argue that the parties impliedly intend some other law to govern, pursuant to Article 3, introducing unwarranted uncertainty. More significantly, there is no justification for applying the original creditor's law to the issue of perfection. The location of the creditor/assignor may be unknown, or not readily known, to the debtor and to the assignee, whose interests are paramount in matters of perfection.

This suggests that Article 14(2) should be amended to provide expressly which law should govern perfection by default in the event that the law governing the contract between creditor and debtor has not been expressly stipulated. Arguably, separate provision should be made for cases where the original contract contains an exclusive jurisdiction agreement and for those where it does not. Where the originating contract contains an express agreement to submit to the jurisdiction of a particular court, clarity would be served if Article 14 were to provide that the law in force in any court having exclusive jurisdiction conferred by agreement shall govern the effect of the assignment against third parties. Where the originating contract contains no such agreement, principle suggests that the law in force at the debtor's residence should be applied. The debtor will be familiar with its local law, just as the assignee will know the location of the debtor insofar as it is the place where payment will be sought. This suggests that the law governing perfection should be the law in force at the debtor's residence at the time of the assignment where the law governing the contract of origin is not expressly stipulated, and it suggests that Article 14(2) of the Regulation should be amended to this effect.
D. Priority

Suppose that a creditor assigns its rights against a debtor more than once to different assignees, perhaps to raise finance. Distinct difficulties concern the law applicable to determine priority between competing assignees of the same debt. An immediate problem, special to the European regime, is that priority between competing assignments may not be regulated by the Rome I Regulation or the Rome Convention at all. Self-evidently, no contractual obligations arise between competing assignees, which may suggest that neither instrument is relevant. However, this objection neglects the reality that any issue concerning the enforceability of an assigned claim relates ultimately to the enforcement of an obligation that is contractual in origin, deriving from the contract between debtor and creditor/assignor.

If this initial question of scope is answered, which law should regulate priority between competing assignees of the same debt? The choice is likely to be between two alternative solutions: the law in force at the assignor's residence, or the law applicable to the contract creating the debt. One argument in favor of the law in force at the assignor's residence is that any other law is incapable of regulating assignments in bulk. Another is that the assignee must be able to ascertain whether notice must be given to secure priority. Neither argument is compelling. The argument for subjecting bulk assignments to the law of the assignor's residence may be misconceived. Principle and commercial practice also suggest that assignees are as well or better protected by the application of the law governing the originating contract.

The arguments for applying the law governing the contract creating the debt to issues of priority mirror those for applying that law to perfection. In both contexts, the question is whether (and in what manner) an assignee must give notice to the debtor to preserve its claim. Assignees and debtors alike must know whether a validly assigned debt is enforceable. The content of the applicable law must be ascertainable by both. For reasons already considered, if the applicable law is the law that governs the contract creating the debt it is ascertainable, but it is not ascertainable if the applicable law is the law in force at the assignor's residence. Again, if the law of the original contract in any event governs the attributes of the debt and perfection of the assignment, principle suggests that the same law should govern the steps necessary to obtain priority. An assignee should not be required to

26. Id. at 1110; Bridge, supra note 4, at 696-97.
27. Bridge, supra note 4, at 696-97.
examine more than one law to determine its position and the steps it must take to preserve it. Moreover, whether notice must be given cannot depend on different laws even if the purpose of giving notice—to perfect the assignment or to achieve priority—is distinct in each case. As this suggests, the interests of both debtor and assignee are protected if the conditions for obtaining priority are regulated by the law governing the contract creating the debt.

This suggests that Article 14(2) should be amended to provide that priority between competing assignments is governed by the law governing the contract creating the debt. Again, however, as with the role of Article 14(2) in cases of perfection, it will also be necessary to provide for appropriate default rules where the law governing the original contract has not been expressly stipulated. Arguably, this should be the law in force at any court having exclusive jurisdiction by agreement or (if there is none) that in force at the debtor's residence.

E. The Assignment of Bundled Debts

1. Special Treatment for Bundled Debts

The solutions suggested above make no distinction between the simple assignment of a single debt and the assignment of bundled parcels of debt. Single debts are certainly assigned in a commercial context, as where the extension of credit to purchase property is conditional on assigning the benefit of any insurance affecting the property to the lender. However, debts are more commonly traded in bundles, such as when mortgages are securitized, or in the receivables financing markets, where consumer receivables are sold or transferred to a factor. It is commonplace in discussions of assignment to insist that distinct considerations dictate a different response in cases involving assignment in bulk. It is frequently suggested that the only law suitable to govern the assignment of bundles of debt is the law in force at the assignor's place of business.

Reference to the law in force at the assignor's place of business is inappropriate as a general rule. Yet it is often said that this solution should govern such distinct matters as the validity of the assignment, its perfection, and priority between competing assignees in the context of bundled debts. The justification is that the assignee of a bundle of debts cannot be expected to know the content of any other law. More precisely, an assignee cannot acquaint itself with the content of the laws

29. GOODE, supra note 4, at 1109; Moshinsky, supra note 4, at 609-25.
governing each debt in a bundle of debts. An assignee cannot investigate the law in force at the debtor's residence, nor the law applicable to the contract creating the debt. Inspection reveals, however, that it is misleading to propose such a stark contrast between single and bundled assignments and inappropriate even in the second case to apply the assignor's local law. The arguments for a special rule may be doubted, or are of more restricted application than initially might appear, for several reasons.

First, the assignor's local law cannot plausibly govern the validity of an assignment, save as a default rule. Whatever its claims to regulate, in particular, priority between competing assignments, its claim to govern validity is readily defeated by that of the law applicable to the contract of assignment. That law may be expressly chosen by the parties to the assignment, allowing them to determine themselves what law should govern its intrinsic effectiveness.

Secondly, reference to the assignor's local law ignores the interests of the debtor. It is sometimes assumed that the debtor has no interest in the application of a law with which it might be familiar, such as the law governing the contract creating the debt. In particular, it is assumed that the debtor requires no such protection in cases involving securitization, invoice discounting, or factoring. This is for several reasons. There is doubt as to whether the debtors whose debts are assigned in bulk have a strong interest in the application of a law with which they are familiar, such as that governing the contract creating the debt. Others things being equal, it is proper to respect a debtor's interest in the enforceability of the debt and the identity of the claimant. Commercial debtors, such as banks and insurers, have a commercial interest in both matters. Where mortgages are securitized, however, or receivables discounted or sold to a factor, the debtor is usually a non-business consumer—probably an individual mortgagor or a purchaser of goods or services. Such consumers require protection from any cost or uncertainty associated with the assignment of their obligations. But such protection is provided by the consumer protection laws in force in their home state.

The argument that the debtor's interest is irrelevant in the context of bundling is not, however, as compelling as might appear. At best, it means that a possible objection to the assignor's local law falls away. But it is not an argument in favor of that law, nor is it true that only consumer debtors are involved. Where a wholesaler assigns future receivables, its obligors are trade retailers not consumers. Again, it is uncertain that the general principle that the debtor must be respected should be ignored unless particular reasons favor applying the law of the assignor's local law.
Thirdly, not all market models involving the bulk assignment of debts are the same. Some at least may be as well or better regulated by applying the general principles described above. Indeed, it appears that the true distinction is not between single and bulk assignments but between market models that prize, respectively, asset value and transaction value. The only significant distinction is between models in which the value to the assignee lies in the enforceability of each bundled debt and those where it lies in the profit derived from the assignment itself irrespective of the enforceability of each debt.

Consider, first, models in which asset value is paramount. Presumably, the parties to the assignment of a single debt contemplate that the debt is enforceable. This is clearly so of the assignee, which has presumably purchased the asset represented by the assigned claim in the expectation that it has value—that it is enforceable. This may also be true of the assignor, insofar as the assignor of an unenforceable debt may incur contractual liability to a disappointed assignor. Importantly, however, the expectation of enforceability may also exist where an assignor's claims are assigned in bulk. This is true of any model in which the enforceability of each assigned claim is significant. It is especially true of the securitization of debts, which involves the issue of securities by a corporate vehicle backed by the value of debts assigned to that vehicle by the original creditor.\footnote{Alférez, \textit{supra} note 4, at 247; Perkins, \textit{supra} note 4, at 241-42.}

The events of the recent past confirm that not all securitizations comply with the normal principles of commercial prudence and due diligence, at least in that segment of the market concerned with the securitization of sub-prime domestic mortgages. In principle, however, the issuer of debt-backed securities (the assignee of the creditor's claims) is likely to examine the legal enforceability of the underlying debts before taking any assignment. This is a matter of commercial prudence. But it is also necessary to ensure the highest rating for the issued securities by a rating agency and thus the highest price for their purchase. For this reason, the issuer/assignee will enquire as to the enforceability of each bundled debt under the law governing the contract creating it.

Where this practice is followed, it would be both pointless and expensive for the assignee to make further enquiry under the law in force at the assignor's place of business. If, indeed, the assignor's local law were to govern enforceability this would not remove the need to examine the law governing the contract originating the debt. The expectation of enforceability means that any diligent assignee will examine the law governing the contract creating each bundled debt. As
this suggests, to provide that the assignor's local law will govern the
effect of an assignment will increase the cost of securitization. It will
require assignees to make enquiry under that law in addition to the law
governing the contract creating the debt.

It might be objected that the threat of increased costs will not arise
if Article 14 were to provide that the assignor's local law applies. If the
transaction is effective under that law the rights of the assignee are
assured. There is no need for an assignee to examine any other law.
This only holds, however, where any dispute comes before the courts of
an EU Member State. In any other court, it is possible that
enforceability will depend upon some other law, very likely the law
governing the contract creating the debt. The consequence is that an
assignee doing business within the Community might safely examine
only the assignor's local law but not one that does business worldwide.

Consider, by contrast, markets in which the enforceability of each
bundled debt is not of decisive significance. It is, at first sight, counter-
inuitive to purchase an asset that may have no value, such as an
unenforceable debt. Where, however, debts are assigned in bulk, the
assignee may take the risk that some of those debts are bad debts.
Furthermore, debts may be bad not only because the debtor cannot pay
but also because the debt is legally unenforceable. In such a case, the
assignee is likely to offset this risk in two ways: by taking an
assignment in bulk, with the expectation that most of the assigned
claims will be enforceable; and by purchasing each debt at a discount,
ensuring an overall profit from the transaction even if some debts are
bad. According to such a business model, there is no need to ensure the
enforceability of each debt assigned. The assignee takes the risk of non-
enforcement onto its books and prices the assignment accordingly. The
value of the transaction consists not in the enforceability of the debt but
in the profit derived from the assignment.

Such a transaction-led model underlies the receivables financing
market. Certainly, those arguing for separate treatment for receivables
financing in the discussions concerning Article 14 did not associate
themselves with the argument that market assignees would, in any
event, examine the law governing the contract creating each debt, and
therefore could not be expected to examine in addition the assignor's
local law. Indeed, they argued the opposite. The necessary inference is
that the enforceability of each debt is not an overriding concern. For this
reason, those engaged in invoice discounting and factoring tend to favor
the assignor's local law as the law governing the effectiveness of an
assignment. It is a law of which an assignee will be aware, and the
argument that they will in addition need to examine the law governing
the debt is irrelevant.
2. Special Treatment for Receivables Financing?

The foregoing analysis suggests that the distinction between the assignment of single and bundled debts is less robust than might be supposed. Yet, it also implies that a special rule may be required for cases involving invoice discounting and factoring. It is uncertain, however, that even this seemingly innocuous proposition is sound.

The fact that assignees in certain specialized markets do not regard enforceability as paramount is no argument for devising a special rule relevant to their distinctive business model. Clearly, reference to the assignor's place of business is attractive in this context. It offers certainty at little cost, but this is not to say that such a rule is required. There is no suggestion that the receivables financing market is currently impaired by the fact that assignees do not, or cannot economically, enquire as to the enforceability of each debt. Even if the risk of partial unenforceability is perceived as non-optimal, it is a risk reflected in the structure and cost of such transactions. The market already provides a solution.\(^3\)

The fact that the receivables financing sector currently operates effectively, without special treatment, is suggested by the techniques already employed in the market to absorb the risk that particular debts are unenforceable. This is typically achieved in four ways. First, it is in the nature of such financing that a finance house takes the assignment of a substantial bundle of debts, with the effect that some or perhaps most will be enforceable. Secondly, it is inherent in such arrangements that the assigned debts are purchased cheaply, allowing assignees to offset any risk of non-recovery. Thirdly, the assignment may provide that the assignor must indemnify the assignee for any unpaid accounts. Fourthly, the model adopted in cross-border receivables financing insulates the assignee from the risk of non-enforcement. The assignee will typically re-assign the rights acquired from the creditor to a second assignee in the jurisdiction where the receivables are payable. The second assignee bears the risk of non-recovery. The effect is that "[i]t is commonly perceived by factors that by the use of the two-factor system . . . all those problems will be overcome."\(^3\) According to such a business model, there is no need to ensure the enforceability of each debt assigned. The assignee takes the risk of non-enforcement onto its books.

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31. As Francisco Alférez has argued concerning the application of the law of the original contract to factoring, "[t]he factoring industry could live with this solution as they live with it nowadays in Europe. They just have to accept the cost of territorializing the transactions." Alférez, supra note 4, at 247.
and prices the assignment accordingly.

As this suggests, the arguments for giving special treatment to the assignment of debts in the receivables financing market are weak. The case applying the assignor's local law to the effectiveness of assignments in the receivables financing market has yet to be established. In principle, such a solution would become attractive if it could be shown that the cost of factoring and debt finance would be reduced if the market is no longer required to reflect the risk of non-enforcement in its pricing. It is difficult, however, to envisage how such an argument might be made. Even if the national courts of Member States subject the effectiveness of an assignment to the assignor's local law, the law governing the original contract is likely to become decisive if recovery is sought in a non-Member State. The risk of non-enforcement, which the pricing of any assignment will reflect, will always remain unless assignees make due enquiry under the law governing the contract creating the debt. Moreover, insofar as the market for receivables finance currently operates efficiently without need for a special rule, it is unclear why special provision for the market is required.

CONCLUSIONS

The previous discussion was anchored by Article 14 of the Rome I Regulation and the debate about its future, and suggests a solution to a local but important difficulty within Europe. It also answers more universal questions concerning the private international law treatment of cross-border assignment. On a technical level, it suggests an appropriate choice-of-law regime for the cross-border assignment of debts and in particular how Article 14 of the Rome I Regulation might be amended. Principle and commercial practice suggest that each of the issues arising from the assignment of a contractual debt might be regulated as follows and Article 14 amended accordingly.

First, where the law governing the contract of assignment is expressly stipulated it should govern: (a) the obligations arising from the contract of assignment; and (b) the effectiveness of the assignment to transfer the assigned claim to the assignee.

Secondly, where the law governing the contract of assignment is not stipulated in the contract of assignment, those matters should be governed by the law in force at the residence of the assignor.

Thirdly, where the law governing the contract creating the debt is expressly stipulated, it should govern: (a) the attributes of the debt, including assignability, discharge, and the conditions for enforcement; (b) the perfection of a valid assignment; and (c) the priority between competing assignments.
Fourthly, where the law governing the contract creating the debt is not stipulated in the originating contract, those matters should be governed by the law in force in any court having exclusive jurisdiction over enforcement (by virtue of a term in the originating contract), or (if there is no such term) the law in force at the residence of the debtor.

These are technical conclusions to an inevitably technical discussion. They suggest, however, several somewhat broader observations. They depend, in particular, on four more general methodological assumptions.

First, it is necessary to approach the private international law treatment of any matter free of assumptions rooted in national law. The question is not how best to regulate assignment in English or any other law. This is not simply required where uniform law, such as that embodied in a European regulation, is in question. It is in the nature of the choice-of-law process that it is the vehicle whereby foreign laws, based on foreign assumptions, are applied in national law.

Secondly, it follows that we must isolate the essential features of assignment in an autonomous way. This approach is required in the particular context of the Rome I Regulation, where an autonomous characterization is inevitable. However, it may suggest an approach of wider application. On this basis, it was suggested above that the essential feature of the assignment of a contract debt is that it concerns, at root, the enforcement of a right that is created by a contract and is contractual in nature.

Thirdly, it is necessary to isolate each of the distinct issues arising from an assignment on the assumption that each might be subject to a different law. Certainty and convenience may favor applying a single law to a variety of issues, but principle may not.

Fourthly, it is necessary, above all, to identify correctly the interests of those affected by reference to how the relevant markets operate. This depends on the extent to which any solution captures the expectations of the parties, the extent to which it imposes realistic requirements of due diligence, and the extent to which it ensures a predictable allocation of risk. Satisfying these criteria in connection with the assignment of debts depends chiefly on whether the rules for choice of law properly respect the interests of the assignee, as the party whose primary interest is the effective enforceability of the assigned claim. Such interest analysis suggests in particular that the law governing the contract that creates the debt should govern perfection of an assignment and priority between competing assignees. This protects the debtor by ensuring that its conduct is regulated by a law with which it can be expected to be familiar. Above all, it reflects the reality that a diligent assignee will generally wish to make enquiry under the law that in fact governs
enforcement of the debt. The decisive consideration is to ensure that the assignee can enforce the debt assigned and that the ultimate purpose of the transaction is achieved. This is not to deny that the commercial objective of certain assignments is not that each debt assigned should be enforceable. The value to the assignee may lie instead in the profit from the assignment, as in much receivables financing. It is uncertain, however, why such assignees should be concerned what law governs the effectiveness of an assignment given that their business model protects them, whatever it might be.

In the end, however, two particular lessons may be learned from this survey of the law applicable to the cross-border assignment of debts. The first concerns the law's role in regulating commercial activity. The proper function of market regulation by legislation is to improve the efficiency of markets and to reduce transaction risk. As the difficulties described above in connection with receivables financing suggest, however, it has no role where a market is already efficient and where legal risk is already reduced by the pricing and structure of transactions. The second lesson concerns the nature of assignment. Many legal systems rightly insist that assignment confers on assignees a right created by a contract but not a right to enforce the contract between debtor and creditor. Assignees enforce rights created by a contract, not a contractual obligation. The alternative would amount to allowing a third party to enforce a contract to which it is a stranger. The defining characteristic of any assignment (whatever the niceties of national law) is nonetheless that the rights assigned are contractual in origin, defined and shaped by contractual terms. This has two important consequences. It means that issues arising from cross-border assignment may properly be regulated by a regime such as the Rome I Regulation intended to govern the enforcement of contractual rights. Moreover, it explains why no law more appropriately governs the rights of assignees against third parties to the assignment (including the debtor) than the law applicable to the contract creating the debt.