

Proprietary effects of the assignment of claims The Impact of future Regulation in the land registry

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1.- GENERAL OVERVIEW OF THE PROPOSED REGULATION

THE CLAIM

A Claim could be considered from the proprietary effects in **two different perspectives**:

A CLAIM AS A PERSONAL RIGHT.- A claim is the right of a creditor against a debtor to the payment of a sum of money (for example, receivables) or the performance of an obligation.

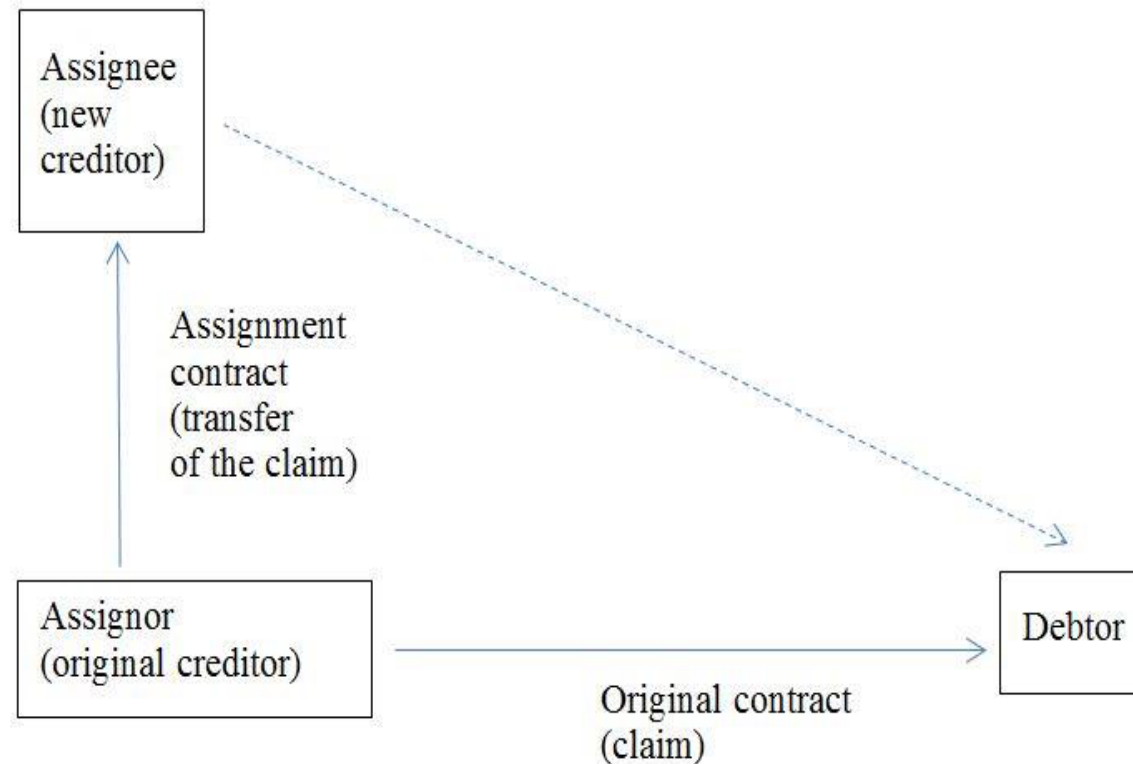
ART. 2 Proposed Regulation (PR). *A “claim’ means the right to claim a debt of whatever nature, whether monetary or non-monetary, and whether arising from a contractual or a non-contractual obligation;*

A CLAIM AS AN ASSET WITH AN ECONOMIC VALUE.

A claim can be the object of a proprietary right. It could be enjoyed, transferred or used to secure an obligation

An assignment of a claim
'assignment' means a
**voluntary transfer of a
right to claim** a debt
against a debtor.

In an assignment of a claim,
a creditor ("assignor")
transfers his right to a claim
against a debtor to another
person ("assignee").



THE APPLICABLE LAW TO TRANSNATIONAL ASSIGNMENT OF CLAIMS

THE PERSONAL EFFECTS Rome I regulation (art. 14)

1. *The relationship between assignor and assignee ...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.*

THE PROPRIETARY EFFECTS (who, when owns the claim..) Proposed regulation: General rule
Article 4

1. *Unless otherwise provided, the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence at the material time.*



The Proposed regulation:

- Does not contain a substantive rules of the assignment of claims, (unlike the UN Convention), but only IPL rules.
- It applies in case of assignment of a claim “in situations involving a conflict of law”, meaning any international element in the assignment of claim determine its application.
- The law designated by the regulation has universal application. It could be the law of a third state.
- It only deals with the proprietary effects of the assignment of the claim .



2.- DOES IT AFFECT US? THE MORTGAGE LOAN

If a claim is a personal right. Why the assignment of claim might affect the land registry?

1° A claim, for instance the repayment of a loan , could be secured with a **security property right**.
When its object is an **immovable property**, the land registry becomes involved.
Typical situation; The mortgage loan, it will be registered in the land book

2° The assignment of a mortgage loan.

In most civil systems in Europe, the **mortgage is accessory** of the main obligation secured.
The transmission of the credit, the assignment of the claim, transfers also the security property right, the mortgage.

DOES THE REGULATION INCLUDES CLAIMS BACKED WITH A MORTGAGE?

The Scope of the regulation is defined in ART. 1;

Paragraph 1 **This Regulation shall apply, in situations involving a conflict of laws, to the third-party effects of assignments of claims in civil and commercial matters.**

Paragraph 2, The list of exclusions contained in do not mention the claims secured by a mortgage right on a immovable property.-

CLAIMS SECURED BY A MORTGAGE ARE WITHIN THE SCOPE OF THE REGULATION WHEN THEY ARE ASSIGNED “IN SITUATIONS INVOLVING A CONFLICT OF LAWS” .

WHAT IS THE SOLUTION PROPOSED BY THE REGULATION FOR THE MORTGAGE LOAN?

With respect to the **applicable law** , ART 4 PR proposes a **mixed system**:

-The general rule: the assignment of claim will be governed **by the law of the habitual residence of the assignor**

-Exception:2. **The law applicable to the assigned claim** shall govern the third-party effects of the assignment of:

- (a) cash credited to an account in a credit institution;
- (b) claims arising from a financial instrument.

-Voluntary regime: 3. **The assignor and the assignee may choose the law applicable to the assigned claim** as the law applicable to the third-party effects of an assignment of claims in view of a securitisation.

**THE LAW OF THE HABITUAL RESIDENCE OF ASSIGNOR WILL GOVERN THE THIRD PARTY EFFECTS OF THE ASSIGNMENT OF CLAIMS BACKED WITH A REGISTERED MORTGAGE.
ALSO THE MORTGAGE?**

The applicable law to the assignment of claim covers also its securities.

ROME I Art. 14 .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.

THE PROPOSED REGULATION on the law applicable to the third-party effects of assignments of claims:
ART. 2 (c) ‘assignment’ means a voluntary transfer of a right to claim a debt against a debtor. It includes outright transfers of claims, contractual subrogation, transfers of claims by way of security and pledges or other security rights over claims;

This means that the **proprietary effects** of the assignment of claims will be governed by the law designated by the regulation, **the law of assignor’s habitual residence, which will regulate the transmission of the mortgage.**



3.- THE LAND REGISTRATION SYSTEM vs. LAW OF THE HABITUAL RESIDENCE OF THE ASIGNOR

a).- Land registration rules affecting a mortgage right

1° CONSTITUTIVE EFFECT OF MORTGAGE'S REGISTRATION

The Mortgage is a INCORPOREAL property right needed of registration in most MS. Registration becomes a constitutive requirement for the existence of the right of hypothec. Form "ab solemnitate"

2° LEGAL PROTECTION AND EFFECTS DERIVED FROM LR PUBLICITY

Once registered, mortgage will enjoy same degree of protection as others registered rights (ownership).

Registration furnishes mortgage with

- Legal Presumption: the right belongs to the registered mortgagee.
- Priority Principle.- Prior tempore potior iure. Priority derives from the rank given by the date of registration

3. THE ACCESORY NATURE OF MORTGAGE

The transfer of the claim, entails the transmissión of the mortgage's title due to the **accessory nature** of the mortgage with respect to the loan it secures. The requirement for the alteration of a registered mortgage, for instance, the registration of a a new mortgagee, is also regulated in the land registration law.

4. THE CONTINUITY PRINCIPLE.

If the same claim is transmited consecutively: The continuity principle demands a chain of titles that links the first mortgagee with the current holder of the right. The chain of titles must be complete, meaning all assignments must be registered.

5. FORECLOSURE

Although foreclosure proceeding difers from one system to another, it is truth in all cases is subjected to the lex fori. In the case of a mortgage is the **lex rei sitae**, the law of the state where the immovable asset is located, where the Registry

b).- The system proposed in the Regulation.- **The scope of the applicable law (ART 5 of the PR) :**

The law of the habitual residence of the assignor shall regulate the third-party effects of an assignment of claims, which means that the applicable law shall establish:

(i) (EFFECTIVENESS) which requirements must be fulfilled by the assignee in order to ensure that he acquires legal title over the claim after the assignment (for example, registration of the assignment in a public register, written notification of the assignment to the debtor), and

(ii) (PRIORITY) how to resolve priority conflicts, that is, conflicts between several competing claimants as to who owns the claim after a cross-border assignment (for example, between two assignees where the same claim has been assigned twice, or between an assignee and a creditor of the assignor).



4.- INNTERACTION BETWEEN THE TWO SYSTEMS. HARM MY LAND REGISTRY?

EFFECTIVENESS OF ACQUISITION

“(a) the requirements to ensure the effectiveness of the assignment against third parties other than the debtor, such as registration or publication formalities;”(art. 5).

- What would happen If the law of the habitual residence does not demand registration, but the land registry law does?
- A valid transmission/ assignment of a mortgage not needed of registration and not registered:
 - Deprives the new assignee of a registry title to the mortgage.
 - Provokes that the registry becomes inaccurate, since a new creditor, the assignee, vested with third party effects is not the registered mortgagee
 - Duplicate and confront the third party effects of the same claim: the new creditor is confronted with the registered mortgagee, also vested with third party effects to the mortgage by the land registry,

PRIORITY

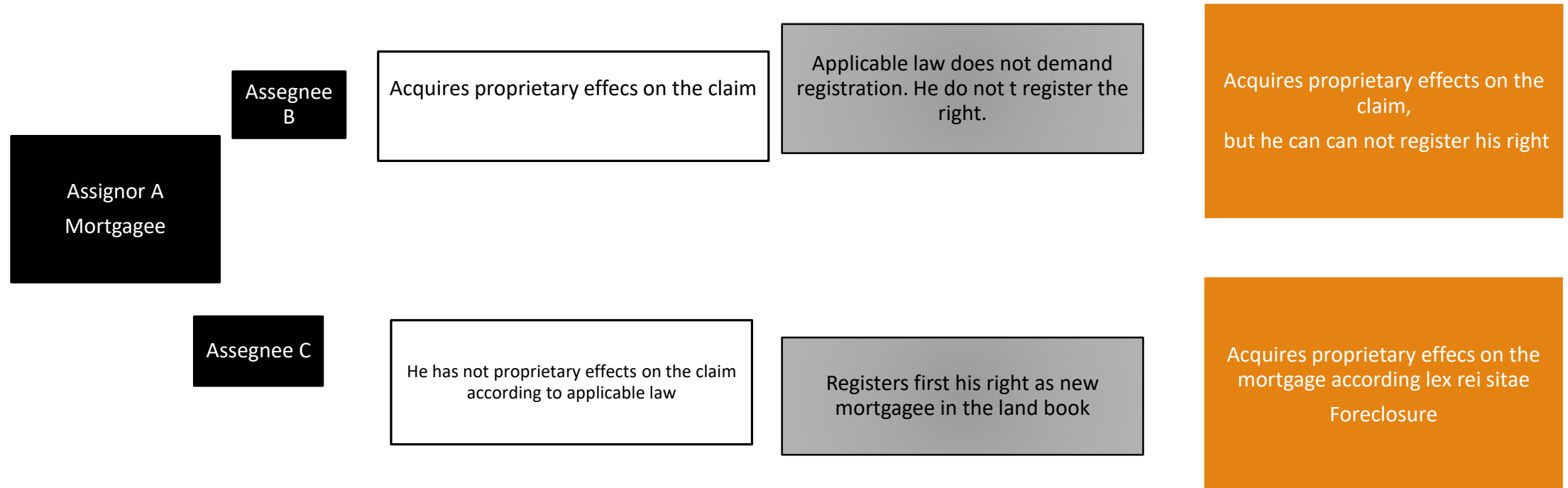
The effect of priority is linked to the other effects derived from land registry substantive publicity:
Due to the principles of **exactness and accuracy** of its entries and their strong effects, the land registries creates **LEGAL CERTAINTY**.

- A third party, a potential assignee or a creditor of the assignor, must be confident in what the land registry states about proprietorship of the mortgage.
- More over the priority between competing rights on the mortgage loan , is given by the LR, frequently based on the date of registration.

If a law different to the *lex registrationis* establishes the priority between competing rights over a registered mortgage, **legal certainty in the national systems would be seriously damaged**.
Lets check a with a couple of examples.

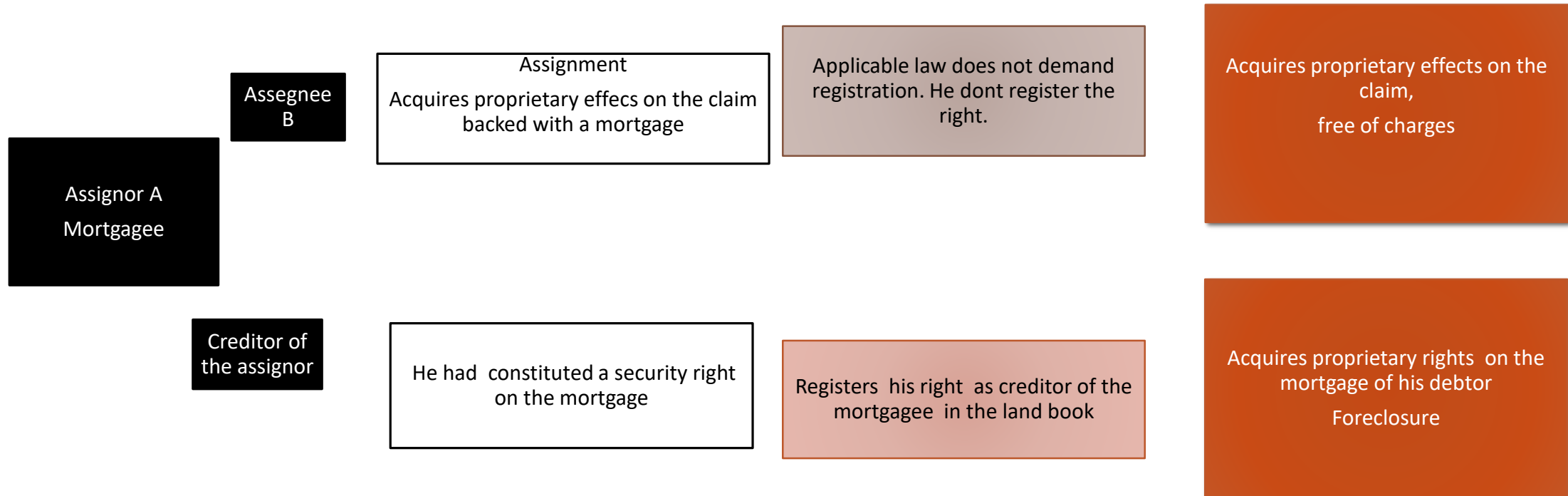
CONFRONTATION BETWEEN LAWS

CASE ONE.- priority between assegees



CONFRONTATION BETWEEN LAWS

CASE two.- priority between assignee and the creditor of the assignor



NEGATIVE CONSEQUENCES

In both cases the confrontation derives in **a breach between the claim and its security (the mortgage)**

1°.- This will undermine national LR systems, and legal certainty.

2°.- Jeopardize the recovery of the claim at the time of foreclosure.

Foreclosure is most frequently subject to the rules of enforcement, lex fori.

Foreclosure will always demand the aseegnee to be registered as mortgagee in the land book.

3° Introduce uncertainty in the capital market.

COULD all these problems been solved by the application of art. 6 regarding OVERRIDING MANDATORY PROVISSIONS?

To my opinion, the answer is NO.

The exceptional nature of the overriding mandatory provisions contradict the ordinary nature of the land registration requirements for mortgages, and its effects.

And it would NOT solve the question of the effectiveness and priority of the assignment, which are based on the exactness and accuracy of the register, (the mirror and the curtain land registry principles

CONCLUSION

The proposed regulation must envisage **a particular solution for those claims involving immovable properties, in particular the claims backed with a mortgage.**

How to combine the system envisaged by the regulation and the system in force in the land registers of the MS?

We propose any of following three solutions:

5. SOME PROPOSALS

FIRST.-EXCLUSION OF THE MORTGAGES FORM THE SCOPE OF THE PR REGULATION BY INTRODUCING ANOTHER EXCEPTION IN ARTICLE ONE.

Art 1 Scope of the Regulation, already excludes certain type of claims:

“assignment of claims arising from family relationships, from matrimonial property regimes, from bills of exchange, cheques and promissory notes and other negotiable instruments from questions governed by the law of companies...”

Extend the list of exclusions to those claims secured with a registered security property right, in particular those claims secured with mortgages on immovable properties, whose proprietary effects are already settled at national level.

SECOND.- INTRODUCE IN ART 4 A DIFFERENT RULE WITH RESPECT TO THE APPLICABLE LAW TO CLAIMS BACKED WITH A MORTGAGE AND OTHER REGISTERED SECURITIES.

Just the same as art. 4 contains in paragraph 2 an exception for two specific types of claims,

Another exception should be introduced to include those claims which are backed by a registered security, which would be dealt by the law of the state where the security is registered.

That would mean **that the proprietary effects of assignment of a claim secured by a mortgage will be dealt by the law where the mortgage is registered.**

This special rule of applicable law complies with the objectives envisaged by Commission, since the lex registrationis:

- IS PREDICTABLE BY EVERYBODY AND EASILY CHECKED BY ANYONE.
- DOES NOT ALLOW ASSIGNOR TO CHOOSE A MOST CONVENIENT LAW.
- UNIFORMS LAW IN CLAIMS WITH A PLURALITY OF CREDITORS WITH DIFFERENT RESIDENCES

IT IS IN LINE AND FULLY COHERENT WITH OTHER INSTRUMENTS OF THE UNION

- Rome I... art. 4 applicale law in absence of choice
- Brussels I... art. 24.1..... exclusive competence actions relating immovable properties
- Regulation 650/2012 on Successions and 1103/2016 Matrimonial property regime regulation, which excludes publicity of property rights
- Directive 2014/17 credit agreement for consumers on on residential immovable properties----- transparency trace back the mortgage



THIS SOLUTION IS IN LINE WITH OTHER INSTRUMENTS

In accordance with **the Capital Markets Union Action Plan**, this proposal on claims is complemented by a non-legislative initiative on **the law applicable to the proprietary effects of transactions in securities.**

The conflict of laws rules on the proprietary effects of cross-border transactions in securities are laid down in the

- Financial Collateral Directive,
- the Settlement Finality Directive and
- the Winding-Up Directive.

Winding up Directive

Article 24 Lex rei sitae

The enforcement of proprietary rights in instruments or other rights in such instruments the existence or transfer of which presupposes their recording in a register, an account or a centralised deposit system held or located in a Member State shall be governed by the law of the Member State where the register, account, or centralised deposit system in which those rights are recorded is held or located.



Settlement Finality Directive

Art. 9. 2. Where securities (including rights in securities) are provided as collateral security to participants and/or central banks of the Member States or the future European central bank as described in paragraph 1, and their right (or that of any nominee, agent or third party acting on their behalf) with respect to the securities is legally recorded on a register, account or centralised deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State

Financial Collateral Directive

Article 9 Conflict of laws

1. Any question with respect to any of the matters specified in paragraph 2 arising in relation **to book entry securities collateral** shall be governed by the law of the country in which the relevant account is maintained. The reference to the law of a country is a reference to its domestic law, disregarding any rule under which, in deciding the relevant question, reference should be made to the law of another country.

Financial Collateral Directive

Article 9 Conflict of laws

2. The matters referred to in paragraph 1 are:

- (a) the legal nature and proprietary effects of book entry securities collateral;
- (b) the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral and the provision of book entry securities collateral under such an arrangement, and more generally the completion of the steps necessary to render such an arrangement and provision effective against third parties;
- (c) whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred;
- (d) the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event.



COHERENCE WITH INSOLVENCY REGULATION

“Coherence between the conflict of laws rules in this Regulation and those laid down in Regulation (EU) 2015/848 on insolvency proceedings is therefore desirable.” “...the use of the assignor’s habitual residence as connecting factor coincides with the debtor’s centre of main interest (COMI) used as connecting factor for insolvency purposes.” (Proposed regulation Explanatory memorandum)

But Insolvency regulation contains several exceptions to the application of the lex fori concursus, precisely third party effects of property rights and registration.

Art. 8 Third parties rights in rem # Art. 11 Contracts relating immovable property for the LEX REI SITAE.

Article 14 Effects on rights subject to registration

The effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

THIRD SOLUTION : TO MAINTAIN THE PROPOSED APPLICABLE LAW BUT FULFILING THE BASIC REQUIREMENTS of LEX REGISTRACIONIS

A rule following the path set by art. 3.3 or 11.5 of Rome I Regulation should be envisaged for the specific cases of assignment of claims backed with a registered security (like a mortgage) in which case:

To produce the third party effects, the assignment of the claim shall have to comply not only with the applicable law, but also with the IMPERATIVE requirements imposed by the law where the security property right is registered.

This is the less impact solution in the system of the regulation, and prevents conflicts between the law envisaged to produce the proprietary effects and the lex registracionis



UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

Article 4

Exclusions and other limitations

....

5. Nothing in this Convention:

(a) Affects the application of **the law of a State in which real property is situated** to either:

(i) An interest in that real property to the extent that under that law the assignment of a receivable confers such an interest; or

(ii) The priority of a right in a receivable to the extent that under that law an interest in the real property confers such a right; or

(b) Makes lawful the acquisition of an interest in real property not permitted under the law of the State in which the real property is situated



CONCLUSION

1.- If the purpose of the regulation is to ensure a field of **legal certainty** to promote cross border assignment of claims developing the European internal market, **a specific solution must be given to the claims secured by a registered security property right**, otherwise the expected effect will be diametrically opposed: **a breach between the claim and its security** that will undermine market

2.- If exceptions to the applicable law has been already envisaged, mortgage claim should be included among them , being the lex registrationis the applicable law

If lex registrationis could not govern the third party effects of assignment of the mortgage claim, at least the imperative requirements imposed by the lex registrations for the third party effect of the mortgage's transmission must be fulfilled

3° Land registries exist to produce and ensure legal certainty in the European Space of freedom security and justice,

Measures to be adopted must preserve, strengthen but don't damage the national systems.

Thank you very much!

Other questions can be addressed to ELRA: secretariat@elra.eu

