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Protection of Debtors on Assignment under English and French Law and the Principles of European Contract Law

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In an economy where the importance of receivables is continually increasing, the legal rules governing assignment can no longer be confined within national boundaries. Recently, several international texts with provisions on assignment have been adopted, including the Principles of European Contract Law (PECL) and their heir presumptive, the Draft Common Frame of Reference (DCFR). These texts can be seen as intending to facilitate assignment and therefore to favour indirectly assignees, whereas traditionally English and French law seek to ensure an effective protection of debtors, though in different ways and to different extents. As the Principles of European Contract Law or the Draft Common Frame of Reference may in the future have a direct impact on English and French private law, including the law of assignment, it is important to assess their impact on the protection of debtors as compared to these two existing national laws. Three levels of protection of debtors can be distinguished: the legal and contractual restrictions on assignment, the determination of the quantum of the right assigned and the determination of the person entitled to performance.

This tripartite comparative analysis reveals several remarkable common points between English and French law, most notably in the area of the defences available to debtors on assignment. The PECL replicate these convergences and generally do not bring any major innovations on the protection of debtors. By setting clear and detailed rules for aspects of assignment still unsettled in national laws, the PECL contribute to the increase of legal security and indirectly improve the debtors' situation. However, the inherent limited scope of international academic texts and the complexity of assignment prevent the PECL from having an even more considerable impact on the progress of the protection of debtors in English and French law.

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ABBREVIATIONS

C.civ. – Code civil

C.com. – Code de commerce

CCR – County Court Rules

CFR – Common Frame of Reference

C.mon.fin. – Code monétaire et financier

ConstLJ – Construction Law Journal

CPR – Civil Procedures Rules

C.proc.civ. – Code de procédure civile

CUP – Cambridge University Press

DCFR – Draft Common Frame of Reference

EJCL – Electronic Journal of Comparative Law

ERCL – European Review of Contract Law

E.R.P.L. – European Review of Private Law

Fasc – fascicule

LaLRev – Louisiana Law Review

LPA 1925 – Law of Property Act 1925

MJ – Maastricht Journal of European and Comparative Law

PECL – Principles of European Contract Law

RPDF – Revue pratique de droit français

T – tome

ULR – Uniform Law Review

UN Convention – 2001 UN Convention on Assignment of Receivables in International Trade

UNIDROIT Convention – 1988 UNIDROIT Convention on International Factoring

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INTRODUCTION

REASONS FOR THE PROTECTION OF DEBTORS ON ASSIGNMENT

In modern economies, for most trade exchanges, there is a lapse of time between the date of the transaction and the moment when parties receive their due. During this intervening period, each party has a present right to receive performance in the future, which, when it concerns intangible things, is described in English legal language with terms such as 'debt', 'receivable' and 'thing in action' and as '*créance*' in French law terminology. As debts represent a most important source of wealth[2], the creditor may need to obtain an immediate benefit. The creditor will thus transfer his debt (becoming an 'assignor'), for a price normally lower to its nominal value, to another person (the 'assignee') who will wait, in exchange of a financial benefit, until the person who owes performance (the 'debtor') will perform. The creditor may also use his debt as security for credit[3] or for creating negotiable instruments[4] or he may transfer the debt temporarily by way of security.

The prominence of the debtor in the scheme of assignment distinguishes debts from other sources of wealth. While he is not a party to the assignment contract, the debtor is the 'depositary' of the economical value represented by the debt. The assignee must request performance from him and the assignor cannot transfer in practice his debt

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[2] F Oditah *Legal Aspects of Receivables Financing* (University of Oxford, Sweet&Maxwell 1991) 1; S Worthington *Equity* (Oxford University Press 2006) 57.

[3] RM Goode *Legal Problems of Credit and Security* (Sweet & Maxwell London 2003) [1-01]; G Ripert M Planiol and J Radouant *Traité pratique de droit civil français. Les obligations* (LGDJ 1954) 485-86.

[4] N Elliott J Odgers and JM Phillips *Byles on Bills of Exchange and Cheques* (Sweet & Maxwell 2002); AG Guest *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (Sweet & Maxwell 2005) (for English law); J Hamel G Lagarde and A Jauffret *Traité de droit commercial (t2)* (Dalloz 1966) [1332] ; D Massot-Durin 'Lettre de change - Généralités' Jurisclasseur civil septembre 1995 [19] ; D Gibirila 'Effets de commerce' Rép Com Dalloz février 2005 [7] (for French law).

without the debtor's cooperation[5]. The debtor also receives the notice of assignment, which is often significant in law for purposes of priority between competing assignees and enforceability of assignment against third parties (*opposabilité aux tiers* or perfection[6]). While the creditor may change by way of assignment, the debtor remains a constant.

The debtor's main interest is that his situation remains fundamentally the same as before assignment. Assignment has often negative consequences for the debtor. He may lose the considerable benefit of having a lenient creditor[7]. As the failure to pay a debt may even entitle the assignee to file for the debtor's bankruptcy, the interest of dealing with a trusted business partner and not a competitor is all the more important[8]. Furthermore, the debtor may not have agreed to enter into contractual relations with the assignor had he known that he would have to deal with any another person.

In cases of competing requests for performance, the debtor may also have to perform a second time if he does not correctly choose the person entitled to performance or if he overlooks a notice of assignment. If the assignment is only partial, the costs of performance may significantly increase. In legal systems providing that payments are made at the creditor's place of business, an assignment may force the debtor to seek out the assignee at a distant place[9] and pay in a different currency.

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[5] C Lachièze *Le régime des exceptions dans les opérations juridiques à trois personnes en droit civil* (Imprimerie La Mouette 2001) [2]; J Ghestin 'La transmission des obligations en droit positif français' in *La transmission des obligations* (E. Bruylant/LGDJ 1980) [1].

[6] For use of expression in English legal literature: Goode *Legal Problems* (n3) [2-16].

[7] Oditah *Legal Aspects* (n2) [8-1].

[8] *Fitzroy v Cave* [1905] 2 KB 660; E Peel *Treitel on the Law of Contract* (Sweet & Maxwell London 2007) 740.

[9] B Allcock 'Restrictions on the Assignment of Contractual Rights' 42 CLJ (1983) 328, 344.

Finally, the debtor loses on assignment an important means of defence against the assignor's failure to perform his obligations, as he may not set up new equities against the right assigned.

The debtor is only one of the several persons with conflicting interests involved in the scheme of assignment. The assignor needs to transfer his debt and subsequently avoid any related liability. The assignee must be able to request performance in his own name from the debtor (and not simply as the assignor's agent) and also needs to get the debt unencumbered by any undisclosed liability arising from the relationship assignor-debtor. Assignment may also affect the interests of the creditors of the assignor, assignee and debtor, which may include employees and public authorities.

The public interest also comes into play in the law of assignment, reflecting the importance of debts in modern economies. A first interest, resulting from economic liberalism and macro-economy policy, is the free circulation of wealth. Accordingly, legislation on assignment must also serve economical and political aims and not only achieve fairness and justice in a context of adverse private interests. Other circumscribed general interests can be identified, such as the protection of persons forced to assign debts indispensable to their livelihood. The unrestricted transfer of disputed rights may also hinder the administration of justice.

Even if the debtor plays a key role in the scheme of assignment, his consent is not required and he may be put in a fundamentally unfair and unavoidable position. It falls therefore to the law to protect the debtor, in the line of the philosophical principle of freedom of will ('*autonomie de la volonté*'). Traditionally, English and French law of

assignment could be considered as restricting assignment, partly because they aimed to protect debtors[10] and partly because the transfer of incorporeal things required a more sophisticated legal reasoning. With the increase of the importance of debts, the traditional rules became unsuitable and recent legislation on assignment, national and international, shares a declared objective of encouraging assignment[11]. For example, the creation of statutory assignment by the Judicature Act 1873 in English law can be explained by the inability of equitable assignment to operate a transfer which had full effect at law. And in France, the creation of a simplified form of assignment, *cession de créances professionnelles* ('*cession Dailly*'), was the final result of several attempts to design a form of assignment more adapted to commercial needs than the traditional *cession de créance* of the Code civil[12].

The inherent complexity of assignment and its close connection with civil procedure were the most probable causes for the traditional absence of international instruments on assignment. However, in today's globalised economy, the economic importance of debts called for the adoption of rules applicable to cross-border assignment. Accordingly, rules on assignment have been included in the 1988 UNIDROIT Convention on International Factoring ('UNIDROIT Convention')[13]. The 2001 UN Convention on the Assignment of Receivables in International Trade ('UN

[10] In French law, the Code civil traditionally favours debtors: the possibility to obtain grace periods (art 1244-1-1244-3 C.civ.), the default rule that payments must be made at debtor's residence (art 1247 (3) C.civ.); the duty for creditors to send a notice requesting performance ('*mise en demeurre*') before enforcing a debt (art 1146 and 1302 C.civ.), the possibility for debtors to early repay their debts (art 1187 C.civ.). See also F Terré P Simler and Y Lequette *Droit civil. Les obligations* (Dalloz Paris 2005) [340].

[11] eg the Preamble of the 2001 UN Convention: assignment 'promote[s] the availability of capital and credit at more affordable rates'.

[12] D Schmidt and P Gramling 'La loi n°81-1 du 2 janv. 1981 facilitant le crédit aux entreprises' D 1981.217.

[13] UNIDROIT Convention on International Factoring (opened for signature 28 May 1988, entered into force 1 May 1995), 27 ILM 943 (1988). The convention is in force in France since 1 May 1995, while the UK has signed (but not ratified) it on 31 December 1990.

Convention')[14] also put in place uniform rules applicable to international assignments of receivables and to assignments of international receivables[15]. The latest versions of international academic texts, such as the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles') (since 2004), the Principles of European Contract Law ('PECL') (since 2002), as well as the Draft Common Frame of Reference ('DCFR') also contain provisions on assignment[16].

Most of these texts, especially international conventions, aim to remove the obstacles to cross-border assignment generated by national laws. New possibilities thus arise for assignees and assignors, whereas the protection offered to debtors by national legislation may not be sufficient in an international context. As the debtors' situation is only seldom taken into consideration in such international instruments, one of the purposes of this thesis is to determine whether they grant the debtor a degree of protection comparable to that of national legislation. Furthermore, as English and French law are representatives of two distinct legal traditions, the comparative study of the law of assignment may provide new light on apparently insurmountable national controversies[17].

CONCEPTUAL ISSUES WITHIN THE LAW OF ASSIGNMENT

Assignment is a legal concept of considerable complexity, as it combines aspects of several areas of law. Assignment is a mode of transfer of wealth, falling under the scope

[14] UN Convention on the Assignment of Receivables in International Trade (opened for signature 12 December 2001, currently not in force) A/RES/56/81.

[15] UN Convention art 1.

[16] UNIDROIT Principles ch.9 s.1: 'Assignment of rights'; PECL ch.11: 'Assignment of claims'; DCFR ch.5 s.1: 'Assignment of rights'.

[17] P Legrand 'Against a European Civil Code' (1997) 60 MLR 44, 57.

of (personal) property law[18]. As assignment is often based on a contract and contractual rights are commonly transferred by assignment, assignment is also governed by contract law in English law[19] and the law of obligations in French law[20]. As assignment is used predominantly in a business context, it is also a topic of interest for commercial law[21]. In English law, as assignment prospered for a long period exclusively in equity, textbooks on equity also refer to assignment[22]. In French law, *cession de créances professionnelles* is analysed by legal writers as an important part of commercial and banking law[23].

The protection of debtors is also connected to several theories pertaining to the law of assignment in general. The first series of conceptual issues concerns the legal classification of incorporeal things. They have a dual nature: they are property, similar to tangible assets, but the wealth they represent never becomes completely insulated from the legal relationship between the debtor and the assignor, holding a personal/contractual aspect. Indeed, in early Roman law debts were unassignable, as they were considered as not having an existence independent from the personal

[18] MG Bridge *Personal Property Law* (Oxford University Press 2002) 4 et seq; AP Bell *Modern Law of Personal Property in England and Ireland* (Butterworths 1989) ch.15; S Worthington *Personal Property Law* (Hart Publishing 2000) 301 et seq etc.

[19] *Treitel* (n8) ch.15 ; J Beatson *Anson's Law of Contract* (28th edn Oxford University Press 2002) 470 etc.

[20] Terré Simler and Lequette (n10) [1274] et seq ; J Carbonnier *Droit civil (tome IV) - Les obligations* (PUF 2000) 558; P Malaurie P Stoffel-Munck and L Aynès *Les obligations* (Defrénois Paris 2007) [1308] et seq etc.

[21] RM Goode *Commercial Law* (LexisNexis UK 2004) 47; FR Salinger and others *Salinger on Factoring: The Law and Practice of Invoice Finance* (Sweet & Maxwell 2005) ch.7; PM Biscoe *Law and Practice of Credit Factoring* (Butterworths 1975) ch.5.

[22] J McGhee (ed) *Snell's Equity* (31st edn Sweet&Maxwell 2005) ch.3; Worthington *Equity* (n2) 55 et seq etc.

[23] J-L Rives-Lange and M Contamine-Raynaud *Droit bancaire* (Dalloz 1995) [526] et seq; T Bonneau *Droit bancaire* (Montchrestien 2003) [556] et seq.

relationship assignor-debtor[24]. The determination of a legal concept to serve as a model for assignment is equally difficult, as it shares features with both agency[25] and sale[26]. If incorporeal things are considered inseparable from the legal relationship between the assignor and the debtor, they should be transferred only with the debtor's consent, ie by novation, as was the case in Roman[27] and English law[28]. If incorporeal things are considered simply as property, they may be assigned freely and statutory intervention is required for protecting the debtor's interests.

Similar controversies surround the assignment's effect. Assignment may be considered as transferring only the right to sue the debtor. For this reason powers of attorney were used for transferring intangible things in Roman law (*procuratio in rem suam*)[29] and in English law[30]. As the common law was shaped by the various remedies available for the protection of legitimate interests[31], it is not surprising that this reasoning survives to this date[32]. In contrast, under French law, assignment is generally

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[24] R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Clarendon Press Oxford 1996) 58 ; M Kaser and R Dannenbring *Roman Private Law* (3rd edn University of South Africa Pretoria 1980) 227; RW Leage and AM Prichard *Leage's Roman Private Law* (3rd edn Macmillan; St. Martin's Press London, New York 1961) 387; PF Girard and F Senn *Manuel élémentaire de droit romain* (A. Rousseau et cie Paris 1929) 776; J-P Lévy and A Castaldo *Histoire du droit civil* (Dalloz 2002) [706].

[25] RJ Pothier *Traité du contrat de vente* (Paris 1806) 423 : ' le cessionnaire, même après la signification du transport, n'est que le mandataire, quoique in rem suam, du cédant, en la personne de qui, dans la vérité, réside la créance'.

[26] Oditah *Legal Aspects* (n2) [2-8]; Troplong *De la vente* (Lib C. Hingray Paris 1837) [880].

[27] Zimmermann *The Law of Obligations* (n24) 60 ; Girard and Senn (n24) 777.

[28] *Treitel* (n8) 715.

[29] Zimmermann *The Law of Obligations* (n24) 60 ; Girard and Senn (n24) 777.

[30] SJ Bailey 'Assignment of Debts in England from the Twelfth to the Twentieth Century (III)' (1932) 48 LQR 547, 551.

[31] H Lévy-Ullmann *Comment un Français d'aujourd'hui peut-il aborder utilement l'étude du droit anglais* (LGDJ Paris 1928) 135 ; P Legrand and G Samuel *Introduction au common law* (La Découverte Paris 2008) 36 ; O Moréteau *Droit anglais des affaires* (Dalloz 2000) [36].

[32] eg *Treitel* (n8) 719 : 'the assignee can sue alone only if the assignment is absolute'.

considered as operating the transfer of an individual right ('*droit subjectif*')[33]. Given these differences of approach, international texts on assignment provide a neutral basis of comparison between English and French law.

PECL, A NEUTRAL BASIS FOR COMPARATIVE ANALYSIS OF FRENCH AND ENGLISH LAW

Recent academic instruments on contract law claim to be, *inter alia*, a distillation of existing national rules which are common, in the case of the PECL, to European Union states[34]. For a comparative lawyer, international uniform rules provide an invaluable focus for comparison, as they aim to avoid any national bias and do not have to accommodate older rules nor fit into a pre-existing legal system.

If a degree of convergence between European private national laws can long be seen, the surge for what has become to be known as 'European private law', understood as a set of substantive rules inspired by, but transcending national private laws, was considerably influenced by the Commission on European Contract Law, chaired by O Lando. The work of this academic group materialised in a text entitled 'Principles of European Contract Law', adopted in several steps[35].

The influence of the PECL is largely due to the efforts of the European Commission for envisaging a role for EU law in the contract law of Member States,

[33] Moréteau (n31) [46].

[34] PECL art 1:101(1).

[35] *Principles of European Contract Law. Part I, Performance, non-performance and remedies* (Martinus Nijhoff Dordrecht 1995); O Lando and H Beale (eds) *Principles of European Contract Law. Parts I and II* (Kluwer Law International The Hague 1999); O Lando and others (eds) *Principles of European Contract Law. Part III* (Kluwer Law International The Hague 2003).

particularly in the field of the protection of consumers. Following the 1999 Tampere Council, the European Commission envisaged in 2001[36] the creation of a framework for European contract law by research and the adoption of an optional instrument. The European Parliament gave a largely positive answer[37]. In 2003 the Commission published an 'Action Plan'[38] which proposed to improve the quality and the coherence of contract law from existing EU legislation. Subsequently, the idea of a 'Common frame of reference' ('CFR'), as a tool for improving the quality and coherence of contract law acquis, was formally introduced[39]. The latest significant development on European private law after the review of the consumer law acquis had been split away from the CFR[40] is the 2007 Green Paper on the Review of the Consumer Acquis[41].

In parallel with the work of the Lando Commission, various other academic initiatives in the field of European private law have subsequently sprung. The Study Group on a European Civil Code ('Study Group'), led by Christian von Bar, was created following the conference organised in 1997 by the Dutch Ministry of Justice under the banner 'Towards a Civil Code', echoing two previous resolutions of the European Parliament[42]. The Study Group is in favour of the adoption of a European

[36]Commission (EC), 'Communication from the Commission to the Council and the European Parliament on European Contract Law' COM(2001) 398, 11 July 2001.

[37] European Parliament, 'Resolution on the Approximation of the Civil and Commercial Law of the Member States' A5-0384/2001, 15 November 2001.

[38] Commission (EC), 'A More Coherent European Contract Law: an Action Plan' COM (2003) 68, 12 February 2003.

[39] Commission (EC), 'European Contract Law and the Revision of the Acquis: the Way Forward' COM (2004) 651, 11 October 2004.

[40] Commission (EC), 'Second Progress Report on the Common Frame of Reference' COM(2007) 447, 25 July 2007.

[41] Commission (EC), Green Paper on the Review of the Consumer Acquis COM (2006) 744, 8 February 2007.

[42] European Parliament, Resolutions of 26 May 1989 (OJ C 158, 28 June 1989) and of 6th May 1994 (OJ C205, 25 July 1994).

code and drafted a series of texts covering aspects normally found in a continental Civil code[43], while accepting that this is 'ultimately, a political ambition lying outside the purview of this academic Study'[44]. In contrast, the objective of the Research Group on the Existing EC Private Law ('Acquis Group') was only to structure and improve the various private law rules disseminated into existing European Union law[45].

The activity of these groups was galvanised by the call of the European Commission for expressions of interest to participate in a network of stakeholder experts called 'CFR-net', which was launched on 31 July 2004. The Acquis Group and the Study Group entered in 2005 a contract with the European Commission for drafting a text entitled 'Draft Common Frame of Reference', which was published in 2008[46].

Compared to the PECL, the DCFR has a wider scope, with rules on contract law, but also on specific contracts and non-contractual obligations. It will also ultimately cover all areas of movable property law[47]. The provisions of the DCFR relating to contract law have been largely inspired by the PECL[48], but several differences exist between the two texts, including in the field of assignment[49]. In order to limit the ambit

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[43] *PEL. Commercial Agency, Franchise and Distribution Contracts* (Sellier 2006); *PEL. Benevolent Intervention in Another's Affairs* (Sellier 2006); *PEL. Service Contracts* (Sellier 2006); *PEL. Personal Security* (Sellier 2007) and *PEL. Lease of Goods* (Sellier 2007).

[44] 'Creation of the Study Group', website of the Study Group <http://www.sgecc.net/pages/en/introduction/118. creation_of_the_study_group.htm> accessed on 31 August 2008.

[45] H Schulte-Nölke 'The Commission's Action Plan on European Contract Law and the Research of the Acquis Group' (2003) ERA Forum 2/2003. This restatement role was however criticised by N Jansen and R Zimmermann 'Restating the Acquis Communautaire?' (2008) 71 MLR 505.

[46] *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (Sellier 2008).

[47] ibid 19.

[48] ibid 24.

[49] eg rules on contractual restrictions to assignment: below 37.

of a study which already carries over two national legal systems and given that the DCFR was published only very recently, this paper will focus on the PECL, but will compare, whenever necessary, the equivalent provisions of the DCFR.

TERMINOLOGY AND OUTLINE

Terminology issues. If the activity of various study groups on European private law shows that a synthesis of the substantive aspects of private national laws can be envisaged, terminology issues remains uncertain. The term most commonly used in English legal literature to describe the transfer of incorporeal things is 'assignment of choses in action'. The subject-matter of assignment is also referred to with the anglicised expression 'things in action'[50]. Alternative terms are also used, especially in commercial law books, such as assignment of receivables and assignment of debts[51]. The English version of the abovementioned international texts use 'assignment', but not 'thing (or chose) in action', preferring terms, such as 'rights', 'claims' 'receivables'[52] or 'right to performance'[53].

French law national terminology is more uniform, '*cession de créance(s)*' being universally used across French *doctrine* and *jurisprudence*[54]. French versions of international texts on assignment also use '*cession de créance*'[55]. The reason for this terminological uniformity is most probably related to the French approach to law in

[50] S136 LPA 1925.

[51] *Salinger on Factoring* (n21) [7-01] ; Biscoe (n21) 95; Oditah *Legal Aspects* (n2) [2.2] etc.

[52] Above n13.

[53] DCFR III.–5:101.

[54] Terré Simler and Lequette (n10) 1215; A Rieg 'Cession de créance' Rép Civ Dalloz, avril 1985 [1] etc.

[55] 'Convention des Nations Unies sur la cession de créances dans le commerce international' , PECL ch.11 : 'Cession de créance', UNIDROIT Principles, ch.9 : 'Cession de créance'.

general: French law is more inclined to create categories and identify general rules that are subsequently applied to particular factual situations[56].

As this thesis is written from a comparative perspective, the use of English law terminology did not seem appropriate. The subject-matter of assignment will therefore be described here as 'incorporeal things', as it has lesser national connotations. However, the terms 'assignment', 'assignee', 'assignor' and 'debtor' will be used, being uniformly employed in English and international texts on assignment.

Outline. The purpose of the thesis is to draw a tripartite comparative analysis of the protection of debtors on assignment in English law, French law and the PECL. It will take into consideration relevant case-law, legislative provisions and legal writings. The inclusion of the PECL in this comparative analysis will permit the consideration of the relationship between European national private laws and the PECL in the circumscribed field of the law of assignment. The references to articles of the PECL will be often supplemented as needed with references to the equivalent provisions of the DCFR.

The authors of the PECL do not hide their ambition that the PECL may constitute the basis of a future European civil code[57], an idea which is still highly controversial[58.] Article 1:101 envisages four usages for the PECL. First, the PECL can

[56] Above n13 et seq.

[57] *PECL. Part III* (n35) XV; J Smits 'A Principled Approach to European Contract Law?' (2000) 7 MJ 221. The authors of the DCFR are more circumspect C von Bar 'Coverage and Structure of the Academic Common Frame of Reference' ERCL 2007/3 360.

[58] For criticism of PECL: G Cornu 'Un code civil n'est pas un instrument communautaire' D 2002.351, P Malaurie 'Le Code civil européen des obligations et des contrats' JCP 2002.I.110; Y Lequette 'Quelques remarques à propos du projet du Code civil européen' D 2002.2202; Legrand (n17).

be used as a restatement of general rules of contract law in the European Union. Second, the PECL can be incorporated by parties into their contract and, more importantly, may be chosen as applicable law, as an optional instrument[59]. The third use is to apply PECL when the parties choose lex mercatoria or general principles of law as applicable law or where no applicable law was chosen. The fourth use of the PECL is to provide a solution to cases where private international law could not provide a law governing the contract. Given the uncertainty as the future usage of the PECL, their comparison with English and French laws will be operated particularly from three perspectives: PECL, as a text applicable only to intra-European Union transactions, leaving national transactions to be governed by national laws; PECL, as a set of rules which would replace and improve existing national rules and PECL, as a synthesis of existing national rules on assignment.

Additional preliminary clarifications, as a matter of substantive law, must be made. Assignment is to be understood as a transfer of rights. This means that I shall include all legal mechanisms which operate a change of the holder of the right and which grant him all the prerogatives of the right assigned (and not limited to the transfer price), such as statutory and equitable assignment in English law and *cession de créance* of the Code civil and *cession de créances professionnelles* of the Code monétaire et financier, in French law. Given this limitation, legal mechanisms which achieve effects similar to assignment, such as contractual subrogation[60] and securities over debts will

[59] Recent European legislation, such as Regulation (EC) No593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art 3 and recitals 13 and 14 allows the use of a 'non-State body of law' as applicable law.

[60] C Mitchell *The Law of Subrogation* (Oxford University Press 1994) 174 ; RM Goode 'The Right to Trace and Its Impact in Commercial Transactions - II' (1976) 92 LQR 545 ; J Mestre *La subrogation personnelle* (LGDJ 1979) 49 ; L Lorvellec 'Subrogation conventionnelle' Jurisclasseur civil, avril 2004 [6] et seq.

not be addressed. This thesis will not examine either transfers of incorporeal things governed by special rules, such as shares, intellectual and industrial property rights, negotiable instruments or financial instruments.

The structure of this thesis follows three main aspects of the protection of debtors. The first means of protection is constituted by restrictions on assignment (‘Chapter 1’), as the debtor may have an interest that the assignment does not take place in the first place. After the assignment has been made, the debtor is protected by knowing how much (‘Chapter 2’) and to whom (‘Chapter 3’) he has to perform.

CHAPTER 1 – DISALLOWANCE OF ASSIGNMENT

The debtor may be considered to have an interest in preventing any assignment of the debt owed, as any change of creditor may have negative effects for him. However, given the importance of assignment in modern economies, there is also a general interest in reducing restrictions on assignment, which coincides with the interests of assignors and assignees. The protection offered by the restrictions on assignment is thus inherently limited, as it is not conceivable to prohibit all assignments, and must be complemented with protective measures operating after assignment. On the basis of their formal source, contractual restrictions may be distinguished from legal restrictions on assignment. The two concepts can also be distinguished by their purpose: legal restrictions aim to protect assignors, whereas contractual limitations protect debtors[61].

A LEGAL RESTRICTIONS ON ASSIGNMENT

Legal restrictions have in common the fact that they operate by law, independently from the debtor's will. They protect debtors only incidentally, being adopted most often for various other purposes. The most important legal restrictions on assignment are represented by the imperfections of the law of assignment and its unsuitability to the modern use of assignment. Given the limited scope of this thesis, only indirect, general restrictions on assignment will be detailed, whereas special restrictions, such as restrictions on assignment of personal rights and litigated rights will only be briefly reviewed.

[61] H Kotz 'Rights of Third Parties. Third Party Beneficiaries and Assignment' in *International Encyclopedia of Comparative Law* (1992) [73].

1 English law

Historically, with the exception of a short period between the twelfth and the thirteenth century, when Jewish bankers had the monopoly of moneylending, including of assignments of money debts[62] and of the assignments made by or to the Crown, English common law did not permit the assignment of things in action[63]. Various legal arrangements were used to circumvent this prohibition, such as powers of attorney and novation[64]. These methods allowed assignees to sue in the assignor's name and their effects were very similar (if not identical[65]) to a proper assignment. Equity courts considered the hostility of common law towards assignment as 'absurd'[66] and, since the XVIIth century, have allowed assignees to sue in their own name in courts of equity for the enforcement of equitable rights.

The rules generated by the practice of the Chancery Court have slowly crystallised into a distinct mode of transfer, governed by its own rules: the equitable assignment. No particular form is needed for the validity of the assignment, but equitable assignments of existing equitable interests, including equitable debts[67], need to be in writing[68]. The notice does not affect the validity of the assignment, but is to be recommended for preventing the debtor from obtaining discharge by performing to the

[62] SJ Bailey 'Assignment of Debts in England from the Twelfth to the Twentieth Century (I)' (1931) 47 LQR 516; (II) (1932) 48 LQR 248; (III) (1932) 48 LQR 547.

[63] Several other limited exceptions to the rule existed, such as the transfer of negotiable instruments and assignment by operation of law in the case of bankruptcy or death of a party to a contract: *Chitty on Contracts* (Sweet & Maxwell London 2004) 1163.

[64] OR Marshall *Assignment of Choses in Action* (Pitman London 1950) 67.

[65] F Oditah 'Priorities: Equitable versus Legal Assignments of Book Debts' 9 OJLS (1989) 513, 522: 'it is a distortion of recent history to suggest before the Judicature Act 1873 non negotiable debts were unassignable'.

[66] *Master v Miller* (1791) 100 ER 1042, 1053 (Buller CJ).

[67] PM Biscoe *Law and Practice of Credit Factoring* (Butterworths 1975) 104.

[68] LPA 1925 s53(1)(c).

assignor and from setting up new equities. The advent of equitable assignment did not allow assignees to sue in their own name as regards legal rights, as only common law courts had jurisdiction to settle any matter thereof related. Equity allowed assignees to bring suit before the Chancery court in order to obtain the right to lend the name of assignors before common law jurisdictions[69]. But even for equitable rights, the enforcement of a judgement in equity still required the assignor's cooperation, which in case of refusal, could be obtained via an injunction.

In 1873 the Judicature Act was enacted, providing, inter alia, an assignment which has effect at law and must comply with several requirements. The transfer must be absolute and not only by way of security, must be made in writing and a written notice must be given to the debtor. The absence of any of these requirements makes the assignment void[70]. Most of these rather restrictive requirements can be considered as protecting debtors. If the assignment is absolute the debtor will deal only with one creditor and will avoid the supplementary expense resulting from the plurality of creditors on partial assignments or assignments by way of security[71]. The requirement of a written notice, which clearly indicates that the debt was assigned, is also inspired by the protection of debtors[72].

[69] Biscoe (n67) 98.

[70] *Hockley and Papworth v Goldstein* (1921) 90 LJKB 111: .

[71] *Durham Brothers v Robertson* [1898] 1 QB 765, 773 (Chitty LJ): 'Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred'.

[72] *Denney, Gasquet and Metcalfe v Conklin* [1913] 3 KB 177 ; *James Talcott Ltd v John Lewis & Co Ltd* [1940] 3 All ER 592, 599 (du Parcq LJ).

In the present state of the law there is little, if any, significant practical difference between the legal effects of the two modes of assignment[73]. A statutory assignee can take proceedings against the debtor in his own name and without joining the assignor as a party. An equitable assignee is also allowed to sue the debtor in his own name, but the debtor may waive this requirement[74]. Otherwise, an equitable assignee has to join the assignor as a co-plaintiff, if he agrees to cooperate, or as a co-defendant, if he does not[75]. But even if the joinder is not operated, the requirement is considered to be met if the court uses its discretion to order the assignor to take part to proceedings[76]. Furthermore, in almost all cases[77], equitable and statutory assignments can be used indifferently for transferring either equitable or legal rights[78]. Finally, another possible difference regards conflicts of priorities, as, according to one view[79], statutory assignees would always have priority over equitable assignees, regardless of the date when the assignment was made or when notice was given[80]. As since 1873 all courts apply common law and equity, the two forms of assignment co-exist[81] and the more relaxed validity requirements for equitable assignment allow often saving imperfect statutory assignments.

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[73] *Chitty on Contracts* (n63) 1164. For differences of calculation of the ad valorem stamp tax: Biscoe (n67) 108.

[74] *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454.

[75] *Bowdens Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86, 91 .

[76] CPR 19.2 (2). The assignee can prevent the joinder of the assignor: *Performing Right Society Ltd v London Theatre of Varieties* [1924] AC 1 (HL), but he has no interest in doing so, as the action would be otherwise dismissed.

[77] *Warner Bros Records v Rollgreen Investments Ltd* [1976] QB 430: the assignment of an option to renew a contract for services was considered ineffective, as only an oral notice had been given, suggesting that an equitable assignment could not be used for transferring such a right. The authority of this interpretation is however doubtful : *Chitty on Contracts* (n63) 1165 (n26).

[78] Marshall (n64) 162 et seq.

[79] Oditah 'Priorities' (n65).

[80] Below 83.

[81] *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454, 461 (Lord McNaghten).

The duality of modes of assignment seems therefore still to reflect the outdated view that assignments with full effect at law must be authorised only exceptionally. The complexity of the distinction between the two modes of assignment is dissuasive for inexperienced assignors and assignees. The multiplicity of imperfect modes of assignment is also an indirect recognition of a continuing legislative deficiency. Equitable assignment was created to compensate for the prohibition of assignment at common law, whereas statutory assignment was introduced in order to allow assignees to sue in their own name for common law things in action, but its scope remains limited. The absence of clear and uniform rules on important aspects of assignment, such as conflicts of priorities in general and conflicts between equitable and statutory assignees[82] and conflicts with holders of security interests over the debts assigned in particular[83] is equally inconvenient.

Overall, the English law of assignment is not particularly restrictive. Equitable assignments escape any formal validity requirement, whereas the rules on statutory assignment do not institute any other formality than a written document for the notice and the assignment agreement. However, the impossibility of a statutory assignment of a part of a debt or of assignments by way of security constitutes an important limitation. The requirement of a written notice for the assignment which goes to its validity is also very strict, as it may not allow holding the assignment valid even only as between assignor and assignee.

[82] Oditah 'Priorities' (n65).

[83] RM Goode *Commercial Law* (LexisNexis UK 2004) 675: the author criticizes the difference of modes of attachment and perfection, which also have an impact on conflicts of priorities and suggests the generalisation of a system based on filing, following the example of the UCC.

The rules on maintenance and champerty are another legal obstacle to assignment which indirectly benefits the debtor. Maintenance can be defined as 'the supply of pecuniary or other assistance to the claimant or the defendant in an action by a stranger without lawful excuse'[84]. Champerty is an aggravated form of maintenance, which consists in an agreement to share the spoils of the proceedings[85]. Maintenance and champerty ceased to be punishable under criminal law only after the adoption of the Criminal Justice Act 1967, section 14(2). Civil sanctions are still applicable, which means that assignments affected by champerty and maintenance will continue to be declared void and grant to the injured party the right to damages, including for the tort of abuse of process[86].

Since the enactment of Judicature Act 1873, the general application of rules on champerty and maintenance is subject to several exceptions. No question of maintenance or champerty arises if the assignment is incidental to property[87] or if the right assigned is undisputed[88] or if it is made between an insured and its insurer[89] or made by a trustee in bankruptcy or liquidator[90].

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[84] Law Commission, 'Proposals for Reform of the Law Relating to Maintenance and Champerty' Law Com no7 [1966] EWLC 7 (1966) [9]; J McGhee (ed) *Snell's Equity* (31st edn Sweet&Maxwell 2005) [3-36].

[85] *Glegg v Bromley* [1912] 3 KB 474 (CA) 479; *Ellis v Torrington* [1920] 1 KB 399 (CA) 412 (Scrutton LJ); *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) 694 (Lord Wilberforce).

[86] *Hanrahan v Ainsworth* (1990) 22 NSWLR 73, 96, 107.

[87] *Ellis* (n85); *Trendtex* (HL) (n85) 703 (Lord Roskill).

[88] *Fitzroy v Cave* [1905] 2 KB 660, 373.

[89] *King v Victoria Insurance Co Ltd* [1896] AC 250; *Compania Columbiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.

[90] eg *Guy v Churchill* (1888) 40 Ch D 481; *Seear v Lawson* (1880) 15 Ch D 426. See also Insolvency Act 1986 ss167 and 314. PH Winnifeld 'Assignment of Choses in Action in Relation to Maintenance and Champerty' (1919) 35 LQR 143, 153.

A more general exception is constituted by the genuine commercial interest doctrine, developed by Lord Denning MR in the *Crédit Suisse* case[91]. Examples of genuine commercial interest include payment of legal fees of a controlled company[92] and the legal assistance offered by a trade union to its members[93] or by a principal to its agent or employee[94], as well as an assignment made to cover an existing indebtedness[95].

Another special legal restriction on assignment is constituted by the rules on personal rights, which are rights dependent on personal confidence or on the skill, taste, judgement or expertise of the other party'[96]. Case-law provides examples of personal rights: an employer cannot assign the benefit of an employee's promise to serve in an employment contract[97] and an editor cannot assign the benefit of a contract with an author to write a book[98]. It is commonly accepted that the decisive test for qualifying a right as personal is whether 'it can make no difference to the person to whom the obligation lies to whom of the two persons he is to discharge it'[99]. This case by case analysis leads sometimes to contradictory results, especially when the performance of the right assigned must be determined according to the creditor's needs[100]. The transfer

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[91] *Trendtex* (HL) (n85) 703. See also JW Thornely 'Champertous Assignments of Causes of Action' 1982 CLJ 29, 32.

[92] *Martell v Consett Iron Co Ltd* [1955] Ch 363.

[93] *Greig v National Amalgamated Union of Shop Assistants* (1906) 22 TLR 274.

[94] *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006; *Neville v London "Express" Newspaper Ltd* [1919] AC 368.

[95] *Guy v Churchill* (n90) ; *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 (CA) 655 (Lord Denning MR).

[96] *British Waggon Co and Parkgate Waggon Co v Lea and Co* (1880) 5 QBD 149, 152; *Southway Group Ltd v Wolff* (1991) 57 BLR 33, 50-1 (Collins MR).

[97] eg *Nokes v Doncaster Amalgamated Colleries Ltd* [1940] AC 1014, 1026.

[98] eg *Stevens v Benning* (1854) 1 K & J 168.

[99] *Tolhurst v Associated Portland Cement Manufactures (1900)* [1902] 2 KB 660 (CA), 668.

[100] *Tolhurst* (n99). Cf *Kemp v Baerselman* [1906] 2 KB 604.

of a personal right is not void, but simply unenforceable against the debtor[101]: the assignment will still be effective as between the assignor and the creditor[102].

2 French law

Assignment was possible in French law even before the adoption of the Code civil, in *Ancien droit*[103]. The rules on *cession de créance* from articles 1689-1701 were present in the Code civil since its adoption, which simply consolidated existing law. The only new element was the possibility for the debtor of accepting in a notarised document (*acceptation*)[104], as an equivalent for the formal notice of assignment (*signification*). The assignment's validity is not subject to a condition of the existence of a written agreement or of a formal notice. In practice, however, a written agreement is required as a matter of evidence if the assignment's value is higher than 1500 euros[105]. The absence of a valid notice, while maintaining the assignment in force between the parties to the assignment agreement, deprives it of the intended legal effect against third parties, especially the debtor.

The most important set-back to assignment resulting from the rules on *cession de créance* is the requirement of a formal notice. Both *signification* and *acceptation* require the recourse to a third party (*huissier de justice* and notary public, respectively) and are a source of delay, paperwork and costs for the parties. The justification of these

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[101] *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262 (QB); RM Goode 'Inalienable rights?' (1979) 42 MLR 553; Munday 'Prohibitions Against Assignment of Choses in Action' 38 CLJ (1979); Kloss (1979) 43 Conv 133.

[102] *Re Turcan* (1888) 40 Ch D 5 (CA).

[103] Rogue *Jurisprudence consulaire et instruction des négociants* (Lib Guillin Paris 1773) t.1 ch.XXXIV ; J Domat *Loix civiles dans leur ordre naturel* (D. Mouchet Paris 1745) 212 .

[104] J Carbonnier *Droit civil (tome IV) - Les obligations* (PUF 2000) [310] (*Histoire*).

[105] Art 1341 C.civ..

requirements can be found in the doctrine of '*date certaine des actes sous seing privé*'[106], whose importance has considerably diminished today[107]. This doctrine provides that the date of all underwritten documents ie only signed by the parties was binding upon third parties only if it was ascertained by a public officer, as is the case for *signification* and *acceptation*.

The introduction of *cession de créances professionnelles* by the *loi Dailly*[108] was justified by the unsuitability of the *cession de créance* to modern trade needs, especially for banking[109]. Credit professionals had turned to contractual subrogation, used as an alternative mode of assignment[110]. The new form of assignment allows transferring several receivables within a same agreement[111] and considerably simplified the formal requirements for the notice to the debtor. Furthermore, individual notices were avoided, as the new form of assignment is enforceable against third parties from the date of the assignment agreement[112]. However, despite the considerable progress achieved by *cession de créances professionelles*, several unsatisfactory elements subsist. The new mode of assignment is available only to assignees which are banks or other financial institutions and only for receivables arising from the professional activity of assignors[113]. Furthermore, while avoiding the intervention of a third party, both the

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[106] Art 1328 C.civ. .

[107] P Strasser 'Date certaine' Jurisclasseur civil, 1991.

[108] *Loi n°81-1 du 2 janvier 1981* (JORF du 3 janvier 1981).

[109] D Schmidt and P Gramling 'La loi n°81-1 du 2 janv. 1981 facilitant le crédit aux entreprises' D 1981.217.

[110] C Gavalda 'Affacturage' Rép.com.Dalloz, mars 1996 [36] ; D Legeais 'Affacturage' Jurisclasseur civil, janvier 2002 [17]; R Bonhomme 'Affacturage' Rép.com.Dalloz, mai 2006.

[111] Art L.313-23 C.mon.fin..

[112] Art L.313-27 C.mon.fin..

[113] Art L.313-23 C.mon.fin..

notice to the debtor and the debtor's acceptance must contain numerous mandatory references[114].

This new form of assignment also created new problems, as it operates side by side other existing methods of assignment, governed by different rules, such as *cession de créance*. Instead of an in-depth reform of the law of assignment, French legislators have resorted to a patchwork, denoting a lack of ambition and perspective. The outcome of conflicts of priorities between assignees having acquired their rights via different modes of assignment is highly unpredictable, as there is no definite way to ensure one's priority, given the differences of enforceability against third parties of the various methods of assignment. Further change resulted from the adoption of the reform of the law of guarantees and sureties[115]. For *nantissement de meubles incorporels* (charge on incorporeal movables) the requirement of a *signification* or acceptance in an authenticated document was replaced with a simple written notice, which needs not contain mandatory references[116]. This form of charge over receivables is, like *cession* and *nantissement de créances professionnelles*, enforceable against third parties from the date of the assignment[117]. For *cession de créance*, future progress is also foreseeable. The Report on the Reform of the Law of Obligations[118] envisages the

[114] Art L.313-23 (for the assignment agreement) and L.313-29 C.mon.fin. (for the debtor's acceptance).

[115] *Ordonnance n° 2006-346 du 23 mars 2006* (JORF n°71 du 24 mars 2006 p.4475 texte n°29). See also : L Aynès and P Crocq 'Le projet de réforme du droit des sûretés' Revue Lamy Droit Civil 01/03/2006 n°25 SUP 91; P Simler 'La réforme du droit des sûretés' JCP.I.124.597.

[116] Art 2362 C.civ..

[117] Art 2361 C.civ..

[118] P Catala (ed) *Avant-projet de réforme du droit des obligations et du droit de la prescription* (La documentation française 2006); F Petit 'Réflexions sur la sécurité dans la cession de créance dans l'avant-projet de réforme du droit des obligations' D.2006 Chr p.2819. See also 'La réforme du droit des obligations traduite en anglais (Trois questions à John Cartwright et Simon Whittaker)' D.2007 n°10 p.712.

adoption of the same legal regime: a simple written notice is deemed sufficient and the transfer is enforceable against third parties from the date of the agreement[119].

In addition to these general restrictions, French law also limits the assignment of disputed rights ('*droits litigieux*'). Article 1597 C.civ. lists the members of the legal profession who are not prohibited from acquiring disputed rights which may be reviewed by courts in whose jurisdiction they practice. Although the primary purpose of this rule is to safeguard the administration of justice, the protection of debtors is also taken into consideration[120].

Articles 1699-1701 C.civ. provide another set of rules specific to the assignment of disputed rights[121], allowing debtors to purchase the assigned debt by paying the price paid by the assignee ('*retrait litigieux*'). This right can be used only if there is a pending suit, which concerns the merits of the right assigned[122]. If the conditions for *retrait litigieux* are met, the debtor has an unfettered right to acquire the right assigned, as the assignee's consent is not required[123].

The third pillar of the protection against speculative assignees is constituted by the rules on *pactes de quota litis*, ie agreements concerning legal fees, which were

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[119] Draft articles of the Code civil 1251-1257-1.

[120] *Cass. 3e civ., 15 mai 1991* Bull.civ.III, n°146; D.1992, somm. p.195, obs.Paisant.

[121] Labbé 'Etude sur les retraits' Rev.crit.législ et jur. t.6, 1855.142; G Doublet 'Etudes sur le retrait litigieux' RPDF, t9, 1860.105; Desjardins 'Du retrait de droits litigieux' RPDF, t25, 1868.138, t29, 1870.451 et t30, 1870.225; D Tallon 'Contribution à l'étude des retraits' RTDciv. 1951.208; P Godé 'Cession de droits litigieux' Jurisclasseur civil 1991.

[122] Article 1700 C.civ. ; *Cass. civ., 5 juill. 1819* S.1819-1821.93; *Cass. req., 24 janv. 1827* S.1825-1827.507; *Cass. civ., 29 juill. 1868* DP 1868.1.376.

[123] Y Strickler 'Cession de droit litigieux' Jurisclasseur civil 2005 [47].

traditionally prohibited[124]. This has been partially attenuated by *loi n°71-1130*[125], which allowed the determination of lawyers' fees to depend on the outcome of the process, provided that the variable part ('*honoraire complémentaire*') represents only a fraction of the total of fees owed by the client[126].

Known in French *doctrine* as '*créances intuitu personae*', personal rights are considered another exception to the free assignability of incorporeal things, as while not void, their transfer will be unenforceable against the debtor[127]. The personal aspect may relate either to the right assigned and may result either from a relationship of confidence between the parties, such as is the case of agency, or from the technical character of the performance[128]. The basic assumption is that the debtor could not reasonably perform to any other person than the assignor[129]. Accordingly, a right is considered personal only if the identity of the creditor was the decisive element which persuaded the debtor to enter into contract with him[130].

3 PECL

English and French law have adopted a common stand on a number of issues regarding the general legal framework for assignment, such as the requirement of a written document for the assignment agreement and the notice to the debtor. The PECL

[124] ibid [19].

[125] JO 5 janv.1972.

[126] Art 11.3 *Règlement interne national de la profession d'avocat*.

[127] M Contamine-Raynaud *L'intuitus personae dans les contrats* (Paris II 1974).

[128] P Malaurie P Stoffel-Munck and L Aynès *Les obligations* (Defrénois Paris 2007) [323].

[129] M-E André 'L'intuitus personae dans les contrats entre professionnels' in *Mélanges Michel Cabrillac* (Litec 1999) 23.

[130] M Azoulai 'L'élimination de l'intuitus personae dans le contrat' in *La tendance à la stabilité du rapport contractuel* (LGDJ 1960) 1.

replicate partially this consensus by providing the necessity of a written notice[131], which can also be considered as a part of a general trend of increase of the significance of contractual formality[132]. Further requirements regarding the information contained in the notice are provided, such as the identification of the claim and the order to pay the assignee. As the priority system adopted by the PECL is based on the date of notice[133], a written notice is easily justifiable, as it facilitates the proof of the priority rank. The PECL chose not to impose any formal mandatory requirements for the assignment agreement, providing explicitly that no written document is needed[134]. This choice is shared by the DCFR, which, at its article II.-4:101, does not provide any mandatory formal requirements for the validity of contracts[135].

This deliberate departure from existing national consensus can be interpreted as part of a wider effort to provide an alternative legal framework for assignment. The PECL eliminate most of the obstacles to assignment found in French and English law, without sacrificing in the process the debtor's interests. Contrary to the rules on statutory assignment, the notice is not a requirement affecting validity[136]. The inconvenient requirement of '*signification*' was also avoided by the PECL, which instead provide for a simple written notice. While the PECL do not shy away from

[131] PECL art 11:303(1).

[132] S Whittaker 'Reformulation of Contractual Formality' in *Themes in Comparative Law in Honour of Bernard Rudden* (OUP 2002) 199.

[133] PECL art 11:401(1).

[134] PECL art 11:104(1).

[135] DCFR art III.-5:110 (applicable to assignment) makes explicit reference to the provisions applicable to the validity and form of contracts in general.

[136] O Lando and others (eds) *Principles of European Contract Law. Part III* (Kluwer Law International 2003) 96.

providing substantive rules on conflicts of priorities[137], they nevertheless choose the safety of the rule based on the date of notice[138]. In both English and French law, there is a current trend against the notice-based system, which does not allow prospective assignees to have information on previous assignments and delays the effect of assignment against third parties. In France, recent legislation reflects a clear preference for the date of the assignment agreement[139], whereas some English writers and the Law Commission[140] are favourable to the implementation of an American-inspired system based on filing[141]. Given these irreconcilable differences and the logistics required for a system based on filing, the provisions of the PECL (which are identical here to those of the DCFR[142]) must be regarded as only a rather disappointing achievement.

The PECL (and the DCFR, as well as the UNIDROIT Principles, UNIDROIT Convention and UN Convention) have no provisions on the assignment of disputed rights, although their Chapter 11 covers most aspects of the law of assignment. This omission demonstrates that, given the complexity of assignment, international instruments are incapable of providing a complete set of rules on assignment, especially where aspects of civil procedure are involved. This also shows another weakness of international texts on private law: the difficulty of stating mandatory rules, in the absence of a wide consensus between national laws.

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[137] B Lurger 'Assignment of Claims' in A Vaquer (ed) *La tercera parte de los principios de derecho contractual europeo* (Tirant Valencia 2005).

[138] PECL art 11:104(1).

[139] In addition to the rules on *cession de créances profesionnelles* (art L.313-27 C.mon.fin.) recent legislation, actual (art 2361 C.civ.: *nantissement sur meubles incorporels* – charge over intangible things) and prospective (art 1254 of the *Avant projet de réforme du droit des obligations*) on the *cession de créance* provide that the enforceability against third parties is obtained from the date of the transfer.

[140] Law Commission, 'Company Security Interests (Law Com No 296 Cm 6654, 2005) [15].

[141] Goode *Commercial Law* (n83) 675; F Oditah *Legal Aspects of Receivables Financing* (University of Oxford, Sweet&Maxwell 1991) [6.6].

[142] DCFR art III.–5:120.

Finally, article 11:302 PECL reflects the general consensus between English and French law on the issue of personal rights, which are defined by reference to 'the nature of the performance or the relationship of the debtor and the assignor'. The comments to the PECL seem to further confirm this convergence, stating that article 11:302 reflects that 'the identity of the intending assignor is important to the debtor'. Article III.–5:109 DCFR also contains sensibly identical rules, with the exception that personal rights are considered unassignable and not simply unenforceable against the debtor.

B CONTRACTUAL RESTRICTIONS ON ASSIGNMENT

Instead of relying on the protection offered by law, the debtor can take matters into his hands and negotiate a clause restricting assignment in the contract with the creditor. The validity of contractual restrictions as between creditor and debtor may be challenged, as the former is not allowed to freely dispose of his assets. Large-scale restrictions may also affect negatively the availability and the cost of credit. Furthermore, English and French law limit the effect of contracts to the parties via concepts as privity and *effet relatif des conventions*. Accordingly, the effect of contractual restrictions may be varied by law: the restriction may be allowed even against third parties or only between the parties or may be considered as void altogether.

1 English law

In English law[143], contractual prohibitions on assignment are recognised as valid and effective even against assignees. In *Helstan Securities Ltd v Hertfordshire County Council*[144], a County Council had hired a contractor to execute roadworks. The contract contained a term prohibiting any assignments without the written consent of the County Council. The contractors nevertheless assigned their debt to Helstan Securities Ltd. The court rejected the assignee's action because the assignment was invalid as the clause had made the debts unassignable[145]. While recognising that debtors had reasonable grounds to prohibit the assignment, Croom-Johnson J added that the assignees had a duty to try to find out if the debt was affected by any restrictions on assignment[146].

This solution was reiterated in the *Linden Gardens* case[147]. The debtor had been hired as a contractor to remove asbestos from buildings belonging to the assignor, acting as employer. The employer assigned his right to damages for improper performance of the contract, in breach of a non-assignment clause. Approving the *Helstan Securities* case, Lord Browne-Wilkinson rejected the plaintiffs' contention that agreements rendering rights inalienable were contrary to public policy. While accepting that in some cases of rights over land it may be against public policy to prohibit their alienation, given their finite nature, Lord Browne-Wilkinson stated that contractual rights did not fall into the same category, as there was 'no public need for a market in

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[143] B Allcock 'Restrictions on the Assignment of Contractual Rights' 42 CLJ (1983) 328; RM Goode 'Inalienable rights?' (1979) 42 MLR 553; G McMeel 'The Modern Law of Assignment: Public Policy and Contractual Restrictions on Transferability' LMCLQ (2004) 483.

[144] *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262 (QB).

[145] ibid 273.

[146] ibid 274.

[147] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. Also J Cartwright 'Remedies in Respect of Defective Buildings after Linden Gardens' (1993) 9 ConstLJ 281, 285.

choses in action' and the non-assignment clause was supported by a 'genuine commercial interest'[148], which consisted in not wanting to deal with anybody else than the original creditor.

The interpretation of *Helstan Securities* as voiding assignment even between assignor and assignee has however come under criticism, especially as, according to one learned opinion, it was obiter dicta[149]. Several English legal authors approve the validity of non-assignment clauses, but disagree with *Linden Gardens*. If the purpose of the rule is to protect the debtor, then it could have been satisfied only by declaring the assignment unenforceable against the debtor and granting him an action for damages[150]. Considering the clause void goes beyond the protection of debtors and can be considered as a punitive measure, which is unjustified, as no rule of public policy is breached. It is also supposedly impracticable for assignees to make inquiries over the existence of non-assignment clauses, especially for transfers of receivables on large scale[151]. For this reason, several authors have expressed the view that the validity of the transfer should be preserved between the assignor and the assignee[152], their assertion receiving support from prior case-law[153].

The uncertainty of the effects of non-assignment clauses on the relationship between assignee and assignor has been only partially dissipated by subsequent

[148] ibid 107.

[149] Goode 'Inalienable rights?' (n143) 555.

[150] Goode *Commercial Law* (n83) [1-55].

[151] Goode 'Inalienable rights?' (n143) 556.

[152]Munday 'Prohibitions Against Assignment of Choses in Action' 38 CLJ (1979); Allcock (n143); Goode 'Inalienable rights?' (n143); GJ Tolhurst 'The Efficacy of Contractual Provisions Prohibiting Assignment' [2004] SydLRev 8; *Chitty on Contracts* (n63) [19-045].

[153] *Shaw &Co v Moss Empire and Bastow* (1908) 25 TLR 190: non-assignment clauses 'could no more operate to invalidate the assignment than it could interfere with the laws of gravitation'.

decisions. In *Flood v Shand Construction Ltd*[154] a sub-contract prohibited any assignment of the benefits of the contract without the contractor's written consent, with the exception of 'any sum which is or may become payable' to him. In breach of this prohibition, the sub-contractor assigned all its interests in the contract to its controlling director, Mr Flood. The Court of Appeal held that the assignment was invalid, as it was important for the contractor to 'operate the contractual machinery, or arbitrate or litigate, only with the party with whom he has chosen to contract'[155].

The application for judicial review in the same case led to another interesting decision[156]. The company controlled by Mr Flood challenged the refusal to its request for legal aid, arguing that its claim was brought 'in a representative, fiduciary and official capacity' of Mr Flood. The Court of Appeal rejected the argument, as it implied a valid assignment to Mr Flood. As Millet LJ stated, 'equity will not enforce the performance of an obligation which constitutes a breach of a prior contract with a third party'[157]. The restriction applied therefore not only to legal, but also to equitable assignment.

Hendry v Chartsearch Ltd[158] and *Bawejem Ltd v MC Fabrications Ltd*[159] have confirmed the ineffectiveness of assignments made in breach of non-assignment clauses against the debtor, but did not void the assignment altogether. The exact extent of

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[154] *Flood v Shand Construction Ltd* (1996) 54 Con LR 125.

[155] ibid [23].

[156] *R Chester and North Wales Legal Aide Area Office, ex p Floods of Queensferry Ltd* [1998] 2 BCLC 436 (CA).

[157] ibid 442.

[158] [1998] CLC 1382.

[159] [1999] 1 All ER (Comm) 377.

contractual restrictions to assignment became uncertain after *Don King Productions Ltd v Frank Warren*[160], which concerned a boxing promotion and management agreement. Lightman J held that any purported assignment of the rights arising under the contract (which contained a non-assignment clause) was ineffective and added that the prohibition did not prevent the assignee from 'becoming trustee of the benefit of being a contracting party as well as the benefit of the rights conferred'[161]. Declarations of trust were already accepted as falling outside the scope of non-assignment clauses[162]. But the first part of the statement is controversial, as it suggests that the third party may become entitled to the debt, as the assignor's trustee. This assertion, confirmed by the Court of Appeal, defeated the purpose of non-assignment clauses and was rightly criticised[163], as it produces practically the same effects as an equitable assignment. *Barbados Trust Company Ltd* v *Bank of Zambia*[164] marked a return to orthodoxy. A loan facility agreement prohibited assignments made without the debtor's consent (if not made to a bank or financial institution). The assignee sought to avoid the prohibition by claiming to be the assignor's trustee, citing the *Don King* case. Langley J however rejected this argument, holding that 'to permit such a claim to be made by a beneficiary of a declaration of trust of the asset would achieve a result which would be inconsistent with the terms of the Facility'[165]. The decision on appeal[166] refuted the assertion that non-assignment clauses covered declarations of trust, as a matter of construction, but held

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[160] [2000] Ch 291 (CA).

[161] ibid 321.

[162] *Re Turcan* (1888) 40 Ch D 5 (CA) 10.

[163] AM Tettenborn [1998] LMCLQ 498; AM Tettenborn [1999] LMCLQ 353; G McCormick 'Debts and Non-Assignment Clauses' [2000] JBL 422; McMeel (n143); P Turner 'Charges of Unassignable Rights' (2004) 20 JCL 97.

[164] [2006] EWHC 222 (Comm);[2006] 1 Lloyd's Rep 723.

[165] ibid [73].

[166] *Barbados Trust Company Ltd v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep 494.

that the declaration of trust was ineffective because it should have been preceded by a valid assignment. The assignee therefore cannot request performance alone, unless it was preceded by a valid declaration of trust[167].

The assignee's knowledge of the existence of the clause is not taken into consideration in the assessment of the validity of non-assignment clauses, the unassignability being thus considered as 'equity'. Reluctant to recognize any public interest in the free transferability of things in action, English common law adopted a position which gives full force to freedom of contract, as embodied by the contractual arrangements between the debtor and the original creditor. However, under the influence of American law, this position may change soon, as the Law Commission favours the unenforceability of contractual restrictions assignment against assignees, for all receivables not arising from loan agreements[168].

2 French law

French law has traditionally a hostile stance towards any restrictions on the free disposal of assets (*libre disposition des biens*), inspired by the French revolution of 1789. During *Ancien régime*, inalienability of property was frequent, contributing to the concentration of wealth into the hands of the upper class (*seigneurs*) who remained owners of the land which *serfs* could use during their lifetime ('*biens de main-morte*')[169]. The inalienability of property, formally prohibited in 1790 by King Louis XVI, has therefore a highly symbolical value in French law. The rule was not given a formal recognition in the

[167] J McGhee (ed) *Snell's Equity* (31st edn Sweet&Maxwell 2005) [20-48].

[168] Law Commission (n84)

[169] A-M Patault 'Regard historique sur l'évolution du droit des biens' in *L'évolution contemporaine du droit des biens* (PUF 1990) 5.

original draft of the Code civil, but it was widely considered to flow out of the definition of ownership, from article 544 C.civ., as an absolute power to use things, limited only by legislation[170].

Nineteenth century case-law and *doctrine* considered that the general prohibition of restrictions on the disposal of assets extended to contractual rights, as they were to be treated as any other form of property. An illustration of this rule is provided by *Worms c/ Auriol*[171]. Auriol had paid Puech 1400FF to serve in the French army in his place. The contract contained a non-assignability clause. Puesch assigned the benefit of the contract to Godechau, who assigned it to Worms. The *Cour de cassation* approved Worms' claim for payment, citing the article 544 C.civ. and stating that the free disposal of assets was a mandatory rule. The *doctrine* agreed that contractual rights had to be treated as any other asset[172] and be subject to the public policy rules providing the free transferability of assets[173].

The position of modern French law of assignment remained uncertain until *Sté Clemessy c/Banque Scalbert Dupont*[174]. The parties had included in a construction contract a term prohibiting the assignment of the contractor's rights. The contractor nevertheless assigned his contractual rights to Banque Scalbert Dupont. The *Cour de cassation* held that the non-assignment clause did not bind the assignee, as he did not

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[170] F-X Licari 'L'incessibilité conventionnelle des créances' RJ com février/mars 2002.

[171] *Cass. civ., 6 juin 1853* DP 1853.1.191. Subsequent case-law however suggested that a defence of unassignability may have been available to the debtor: *Cass. civ., 16 mars 1870* Journ.not.et av., 1870, art.19887, p.315 ; *Cass. req., 12 déc. 1881* Journ.not. et av. 1883 art.22844 p.15.

[172] T Huc *Traité théorique et pratique de la cession et de la transmission des créances* (Paris 1891) vol.1 [33] et seq.

[173] J Carbonnier *Flexible droit. La propriété* (LGDJ 1995) 273.

[174] *Cass. com., 21 nov. 2000* Bull.civ.IV n°180 p.158.

consent to it. The debtor had only a remedy against the assignor, for breach of contract, but was bound to perform to the assignee. While the solution itself was hardly surprising, the decision's justification of the decision has been heavily criticised[175].

The reasoning was flawed because the debtor did not refuse to pay the assignee on the ground that the assignee was not a party. The assignee's rights were nevertheless dependent on the rights of the assignor, who *was* a party. The court did not even make the assignee's knowledge a criterion for assessing the clause's effects on the assignee. As the court's justification was rather obscure, the literature interpreted it as being based on the *principe de la relativité des contrats*[176]. The decision is thus important for operating a shift from a property law approach (free disposal of assets) to an approach focused on relativity of contracts.

In 2001, *loi NRE*[177] introduced a new article L.442-6IIc) into the Code de commerce which expressly held void all clauses preventing producers, merchants, industrialists and artisans from assigning their claims. The rule's purpose was to protect suppliers and reduce their dependence on companies with a considerable superior financial power, which would systematically include in their terms and conditions non-assignment clauses. This public policy consideration is not specific to French law: American law adopts the same stand[178], as the UN Convention[179] and the UNIDROIT Convention[180]. Article L.442-6 C.com. generated uncertainties as to the validity of

[175] M Biliau *La transmission des créances et des dettes* (LGDJ Paris 2002) [20]-[21].

[176] J Ghestin M Biliau and G Loiseau *Le régime des créances et des dettes* (LGDJ 2005) [292].

[177] *Loi n° 2001-420 du 15 mai 2001* (JO n°113 du 16 mai 2001 page 7776).

[178] UCC art 9-401(b).

[179] UN Convention art 9.

[180] UNIDROIT Convention art 6(1).

clauses falling outside its scope, since a *per a contrario* interpretation leads to the conclusion that any other terms prohibiting assignments are enforceable against assignees.

The French law's position became even more confused after a 2002 decision, which concerned events before the entry in force of the *loi NRE*. In *Sté Clemessy c/ Société marseillaise de crédit*[181], departing from the *Banque Scalbert Dupont* case, *Cour de cassation* decided that the debtor could successfully rely on the non-assignment clause. Short of an acceptance of the assignment, the debtor could cite the defences he had against the assignor. The decision is remarkable as it envisages the unassignability of contractual rights as a defence, departing from the previous rules[182]. The influence of this decision seems limited, as it concerns only situations not envisaged by L.442-6 C.com.. However, it must be held to represent the current trend in French law, as the *Avant projet de réforme du droit des obligations* expressly states in the projected article 1257 C.civ. that unless the debtor accepts the assignment, he can cite any defences closely connected to the debt, including its unassignability.

3 PECL

If PECL aspire to reflect common national principles, the issue of contractual restrictions on assignment is an area which shows their limits. French law has a long-standing tradition of hostility towards non-assignment clauses, justified by ideological and historical reasons, as reflected in the principle of free disposal of assets and by the state interventionism into economy. On the other hand, the English common law is still

[181] *Cass. com., 22 oct. 2002* RTDciv. 2003.129 obs. Crocq.

[182] P Malaurie P Stoffel-Munck and L Aynès *Les obligations* (Defrénois Paris 2007) [1310]; Ghestin Biliau and Loiseau (n176) [292].

representative of an approach limiting as much as possible the intervention of legislation into the private ordering and contractual arrangements and favours a more liberal *laisser faire* approach to economy. Accordingly, English common law, in the absence of contrary statutory provisions, is still committed to ensuring full effect of non-assignment clauses[183].

By contrast, article 11:301 PECL allows the debtor to ignore any assignment made in breach of a non-assignment clause, unless:

> (a) the debtor has consented to it; or
> (b) the assignee neither knew nor ought to have known of the non-conformity; or
> (c) the assignment is made under a contract for the assignment of future rights to payment of money.

PECL adopt a contract law-based approach, reminiscent of the *Banque Scalbert Dupont* case, as the debtor's reliance on the clause depends on the assignees' knowledge of the restriction[184], whereas a property law approach would consider non-assignment clauses as equities. The first exception provided at article 11:301 PECL concerns clauses restricting assignment of future receivables. The purpose of this exception was to favour receivable financing: 'it is manifestly impossible to expect the factor to scrutinise the individual contracts, which may run in the hundreds, in order to see whether these contain a provision against assignment'[185]. This statement is controversial, as assignees already incur the consequences of other defences unknown to them. Another justification was the assignee's protection, as the debtor 'will almost

[183] G Gilmore 'The Commercial Doctrine of Good Faith Purchase' (1954) 63 Yale LJ 1057, 1119; Allcock (n143) 346; Cartwright (n147).

[184] PECL art 11:301(1)(b).

[185] *PECL. Part III* (n136) 108.

invariably hold the stronger bargaining position'[186]. This assumption is specious, as debtors are not a homogenous category: the same person may be creditor and debtor under the same contract. If financial power had to be taken into consideration when elaborating the rules, it would have been more appropriate to explicitly state this element.

The exception of the assignee's ignorance contradicts the very purpose of contractual restrictions on assignment, as the protection of debtors becomes dependent on an outside factor. Among the persons protected by the rule in the article 11:301 PECL, debtors come only in second place. The first beneficiaries are the assignees, who are protected if they did not have the opportunity to know of the restriction. A debtor with a legitimate interest in prohibiting assignment would not get any protection if the assignee was unaware of the restriction. The debtor is thus required to make active efforts to ensure that a legitimate clause is respected by third parties, while his consent was never required for the assignment.

The drafters of the PECL may have missed a chance to adopt a more reasonable approach, compatible with limitations on clauses restricting assignment, given their negative effect on credit[187]. It would have been preferable to make the debtor's protection dependent on the nature of his interest in the restriction. According to this alternative criterion, which is already used in other areas of English and French law, only clauses defending a legitimate interest would be valid against all assignees, irrespective of their knowledge of the clause.

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[186] ibid.

[187] Tolhurst (n152).

The main objection against non-assignment clauses is that an 'innocent' assignee would have no means of verifying the existence of any terms restricting assignment[188], especially for a continuing stream of debts or when the restriction was created by another contract[189]. Furthermore, it can be argued that in the context of cross-border trade it becomes even more difficult for potential assignees to contact debtors and ask them such information. The logic behind the article 11:301 PECL is that 'unsuspecting' assignees should be protected from any undisclosed arrangements between assignor and debtor. However, it is accepted by both French and English law that the assignor cannot transfer more rights than he had himself. In French and English law the assignee's knowledge of the defences available to the debtor is irrelevant – equities are an integral part of the assigned rights.

This reasoning should apply mutatis mutandis to contractual restrictions on assignment. Allowing the assignee to rely on his ignorance in order to escape non-assignment clauses would grant him more rights than the assignor. In this light, it can be seen that the PECL indirectly create rights based on detrimental reliance. It would also be unfair to prevent the debtor from setting-up new equities and make him incur the risk of the assignor's insolvency, where he took all necessary precautions for preventing an assignment prejudicial to his interests.

The PECL are also useful for examining the application of international rules in areas covered by national mandatory rules. In French law, article L.442-6 C.com., states a rule of public policy ('*règle d'ordre public*'). The application of the PECL in such a

[188] Goode 'Inalienable rights?' (n143).

[189] *PECL. Part III* (n136) 108.

context would create a conflict between mandatory rules. According to article 1:103 PECL, in cases where PECL apply, their mandatory rules replace national rules. The only exception provided by article 1:103 PECL are the rules which 'according to the relevant rules of private international law, are applicable irrespective of the law governing the contract' (international mandatory rules).

There is no known French decision on the classification of the rule found at article L. 442-6 C.com.. Notwithstanding, the fact that article 6 (1) UNIDROIT Convention, which is in force in France, contains a very similar position to article 11:301 PECL, pleads in favour of a qualification of only national mandatory rules. Assuming that PECL may at some stage serve as an 'optional instrument', it would be however difficult for a national legislator to accept that national mandatory rules are set aside by the mandatory rules of a non-binding instrument. The application of national mandatory rules would depend solely on the parties' choice[190] and would open the door to 'cherry picking'.

Finally, the rules of the PECL on contractual restrictions on assignment also reveal the limits of a 'scientific' approach to uniform and comparative law: there is no single unchallengeable rule in this area of law which comes to mind. The unavoidable choice as to which interest to favour is based on policy grounds and not purely on legal reasoning[191]. The drafters of the DCFR, describing their text as 'an academic, not a

[190] J Smits 'Law Making in the European Union' (2006-2007) 67 LaLRev 1181, 1198.

[191] J Smits 'The Principles of European Contract Law and the Harmonisation of Private Law in Europe' in A Vaquer (ed) *La tercera parte de los principios de derecho contractual europeo* (Tirant Valencia 2005) 557, 571.

politically authorised text'[192], deny any political bias and defend themselves from favouring either free competition or social solidarity[193]. But in some cases policy decisions are inevitable, which in the case of non-binding texts like the PECL are taken by academics, and not by persons with legitimacy to legislate.

The DCFR only confirms the inevitability of policy choices. While it was drafted in part by the same persons who drafted the PECL, the DCFR adopt a different position on restrictions on assignment. Article III.-5:108 DCFR effectively allows restrictions on assignment, as it entitles the debtor to ignore the transfer and perform to the original creditor for rights other than a right to payment for the provision of goods or services. In all cases, if the debtor must perform to the assignee, the DCFR give him the right to cite all set-off rights he had against the assignor 'as if the right had not been assigned'. The qualifications to this rule – the debtor's active efforts to deceive potential assignees or debtor's acceptance of the transfer – also protect the debtor's legitimate interests.

CONCLUSION OF CHAPTER 1

The efficiency of the measures disallowing assignment for the debtors' protection is generally unreliable and is inherently limited, as one cannot reasonably expect that all assignments are prohibited in the current economic context. It is also a mistake to consider that assignees' interests are necessarily antagonistic to those of debtors. Most legislative provisions restricting the rights of assignees do not grant necessarily an

[192] Study Group on a European Civil Code/Research Group on EC Private Law *Principles, Definitions and Model Rules of European Private Law* (Sellier 2008) 5.

[193] For criticism of an alleged neglect of social concerns in European private law: Study Group on Social Justice in European Private Law 'Social Justice in European Contract Law: a Manifesto' (2004) ELJ 653.

equivalent advantage to debtors. As reforms of the law of assignment are adopted all the time in national laws, this type of indirect protection can only diminish. The contribution of the PECL and the DCFR, and other international texts, to the removal of unjustified obstacles to assignment can only be welcome.

The adoption of international texts on assignment also shows that a minimal common structure of assignment exists beyond the specificities of national laws. However, the creation of uniform rules on assignment is not merely a task of arbitrating between divergent abstract interests and finding the most equitable solution. For example, there is no decisive argument for providing the perfection of assignment from the date of the agreement instead of another date. The drafting of rules on assignment supposes thus making policy choices, which, even within an identical framework for assignment, lead to a significant different configuration of the law of assignment and diverges from a simple restatement of a common European core of private law[194].

The protection deriving from contractual restrictions may be very efficient, as it allows debtor to freely choose the level of protection needed. However, the debtor may not have sufficient bargaining power and be thus deprived of such protection. There is also the inconvenience that no consensus is reached among various domestic jurisdictions as to the validity of contractual restrictions on assignment, as a matter of principle. All opposing views are equally defensible, as debtors should be free to choose the persons with whom they deal (a micro-economy concern), whereas a proliferation of clauses prohibiting assignment may have disastrous effects on the availability of

[194] Smits (n191) 567, 576.

credit[195]. Given the importance of receivables in modern times, the protection of debtor must be centred on providing adequate means of protection on assignment rather than preventing assignment altogether.

[195] Lurger (n137) 133.

CHAPTER 2 – THE NEMO DAT RULE AND ITS QUALIFICATIONS

Whereas assignment operates a change of creditor, it may also entail changes in the performance of the right assigned. The debtor needs thus to know the quantum of the right assigned and its modalities of performance, such as place of performance, payment currency and avoid any significant supplementary performance expense. The English and French law of assignment have traditionally protected debtors by providing that assignees cannot have more rights than assignors and that, in some circumstances, they may even receive less than assignors.

A ASSIGNEES CANNOT HAVE MORE RIGHTS THAN ASSIGNORS

After assignment, the assignee holds a right of his own and is allowed to sue the debtor in his name. The assignee is put in exactly the same position as the assignor and for this reason he is not entitled to obtain more from the debtor than the assignor. It should be noted that while he will not receive more, the assignee will receive the whole of the right assigned, including any accessory or ancillary rights. Whereas section 136 LPA 1925 provides that assignment operates the transfer of all remedies for the right assigned, English legal writers are less certain about the automatic transfer of accessory rights[196], recommending the insertion of express provisions to that regard[197]. By

[196] H Kotz 'Rights of Third Parties. Third Party Beneficiaries and Assignment' in *International Encyclopedia of Comparative Law* (1992) [83].

[197] FR Salinger and others *Salinger on Factoring: The Law and Practice of Invoice Finance* (Sweet & Maxwell 2005) [10-24].

contrast, the automatic transfer of accessory rights is well documented in French law[198]. The PECL[199] and the DCFR[200] have also included this uncontested rule.

The principle that assignees do not have more rights has two aspects. The first aspect is that the assignee is put in the same position as the assignor. The second aspect is that even if the assignee 'replaces' the assignor in respect of the right assigned, the assignee does not become a party to the contract – he does not *replace* the assignor, nor does he bear joint liability with him[201]. This distinguishes assignment of rights from assignment of liabilities or 'transfer of contract': the assignee's liability is limited to the value of the right assigned.

1 English law

In English law, section 136(1) LPA 1925 provides that assignments must not prejudice the debtor's situation, stating that the right assigned by statutory assignment is the one to which 'the assignor would have been entitled' and mentioning that the assignment is made 'subject to the equities having priority over the right of the assignees'. A clear, yet controversial statement of the 'subject to equities' rule can be found in *Dawson* case[202]. In 1899, pursuant to section 41 Regulation of Railways Act 1868, GNCRC had given notices to treat to the owners of three properties, in order to compensate them for the damages resulted from the construction of a tunnel crossing their properties. Before the

[198] M Cabrillac 'Les accessoires de la créance' in *Etudes dédiées à Alex WEILL* (Dalloz-Litec 1983) 107.

[199] Art 11:201(1)(b).

[200] Art III.–5:115.

[201] English law: *Young v Kitchin* (1878) 3 Ex D 127. Under French law only the assignment of contract may generate a positive liability towards the debtor P Malaurie 'La cession de contrat' Defrénois 1976, art 31194.

[202] [1905] 1 KB 260 (CA).

finalisation of the assessment of the damages, Dawson acquired in 1901 the properties and also became assignee of the statutory claims for damages, which covered 'structural damage' and 'damage to trade stock' incurred in respect to the properties. The part of the *Dawson* case relevant for the present analysis concerns the situation of one of the properties, for which 'damage to the trade stock' was claimed. Stirling LJ held that allowing the assessment of the compensation according to the losses incurred by the *assignee* would impose a greater burden on the debtor[203] and decided that the compensation had to be assessed as if the assignor was still in possession of the land.

The precise ambit of this decision is debatable. On one hand, it could be interpreted as setting a rule applicable to all assignments, revealing that the principle that assignees cannot have better rights has in English law a very practical significance. For it did not matter that the assignee had the same abstract rights as the assignor; what mattered was that the assignee could not obtain more benefits than the assignor. However, several elements plead against this interpretation. First, at the time of the assignment, any damage to trade stock had ceased, as the works were finished. Second, since the notice to treat was given only to the assignor, it could be argued that the right was granted personally to him. Third, this decision could be explained as strictly dependent on the special statutory context from which it stemmed.

The *Dawson* case could have also been interpreted as providing that only the assignor was entitled to claim damages from the debtor. This interpretation would have created a 'legal black-hole'[204], as it would have granted the debtor immunity from all

[203] ibid 274.

[204] *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SLT 533, 538.

liability to either assignee or assignor. *Offer-Hoar v Larkstore Ltd*[205] allowed avoiding the fiction that the assignee recovered the rights of another person[206]. It was held that, while the assignee was not allowed to bring claims of damages assessed as if incurred personally, he could nevertheless claim the damages to which the assignor was entitled. Even if it does not favour the debtor, this solution is fair, as the debtor could not normally expect to escape scot-free from such situation[207].

2 French law

French law focuses more on the abstract possibilities given by the right assigned and less on the practical effects resulted from its use. In French law, there is no explicit legislative provision stating the principle that assignees cannot have more rights than assignors. However the principle is well settled in *doctrine*[208] and in the case-law[209]. The *Cour de cassation* explicitly recognized it in 1881[210], observing that the assignee should not only enjoy all the assignor's advantages, but also suffer from the drawbacks of the right assigned. The court also considered that the assignee's good faith was insufficient to impose new obligations on the debtor. In a situation similar to the *Dawson* case, French law would take a different view. As the right transferred would be the one owned by the assignor, the assessment of the damage incurred could only depend on the loss of the assignor[211].

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[205] *Offer-Hoar v Larkstore Ltd* [2006] EWCA Civ 1079; [2006] 1 WLR 2926.

[206] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85.

[207] *Chitty on Contracts* (Sweet & Maxwell London 2004) [19-074]

[208] eg F Terré P Simler and Y Lequette *Droit civil. Les obligations* (Dalloz Paris 2005) [1291]; P Malaurie P Stoffel-Munck and L Aynès *Les obligations* (Defrénois Paris 2007) 782 [1318] etc.

[209] eg *Cass. req., 13 févr. 1900* DP 1905.1305; *Cass. com., 24 janv. 1989* Bull.civ.IV 23 n°39.

[210] *Cass. req., 29 juin 1881* DP 82.I.33.

[211] Terré Simler and Lequette (n208) [1289].

3 PECL

The rule that assignees cannot have more rights is shared by English and French law, as well as other national laws[212]. Article 11:307(1) PECL reflects this consensus: 'The debtor may set up against the assignee all substantive and procedural defences to the assigned claim which the debtor could have used against the assignor'[213]. The PECL clearly state that both procedural and substantive defences are covered, avoiding any divergent national interpretation of 'defences' ie some national laws allowing the 'survival' of only substantive defences, as well as differences in the legal qualification of set-off[214].

Contrary to English law, but similarly to French law, PECL do not have an abstract formulation of the rule that assignors cannot have better rights than the assignor. However, according to the official Commentary[215], article 11:307 must be considered as an application of such a rule. The only point for which it seems there was not a common view in European national laws is whether the defence should have existed, even only potentially, at the moment when the notice was received. In French law, the defence must exist at the moment when the notice was given[216], whereas in English law this is not a formal requirement[217]. The intention of the drafters of PECL

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[212] O Lando and others (eds) *Principles of European Contract Law. Part III* (Kluwer Law International The Hague 2003) 99.

[213] DCFR art III.–5:116 has a similar wording.

[214] R Zimmermann *Comparative Foundations of a European Law of Set-Off and Prescription* (Cambridge University Press 2002) 22-3.

[215] *PECL Part III* (n212) 117.

[216] Terré Simler and Lequette (n208) [1291].

[217] E Peel *Treitel on the Law of Contract* (Sweet & Maxwell London 2007) 734.

was to adopt the same position as the UN Convention[218] and not include the condition of the defence's existence among the requirements for the availability of a defence against the assignee[219].

Article 11:306 PECL (and article III. – 5:117 DCFR) grants assignees more rights by allowing them to change the place of performance for money claims: 'within the same country or, if that country is a Member State of the European Union, at any place within the European Union'. This would mostly affect debtors submitted to French law, as under English law the place of performance is the creditor's place of business or residence[220]. Under French law, all payments operated in France must be made in the domestic currency[221] and the assignee is bound by the payments terms initially agreed, including payment currency[222]. This new right favours factoring[223], whereas the debtor should not incur any additional burden, as payments are generally made by bank transfer and the payment currency will not change. Article 11:306 PECL (and article III.–5:117 DCFR) also provides that the assignee must compensate the debtor for any increased costs resulted from the change.

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[218] UN Convention art 20(1).

[219] *PECL Part III* (n212) 119: the commentary to art 11:307 suggests that the absence of reference to the existence of the defence at the moment of notice's receipt was intended.

[220] *Charles Duval & Co Ltd Gans* [1904] 2 KB 685 ; *Fowler v Midland Electricity Corporation for Power Distribution Ltd* [1917] 1 Ch 656. In French law the contrary rule prevails : art 1247(3) C.civ..

[221] *Cass. req., 17 févr. 1937* DH 1937.234.

[222] *Cass. req., 7 juin 1858* Journ. not. et av. 1858 art. 15388 p. 521 ; *Cass. 1ère civ., 6 mai 1968* JCP 1969.II.15737 note Prieur.

[223] S Enchelmaier 'Assignment in Its Commercial Context' in A Vaquer (ed) *La tercera parte de los principios de derecho contractual europeo* (Tirant Valencia 2005) 151, 174.

B ASSIGNEES MAY OBTAIN LESS THAN ASSIGNORS

In order to guarantee the neutrality of assignment it is necessary to grant the debtor the right to use against the assignee the defences available against the assignor. In most cases, the right assigned forms part of an intertwined flow of trade exchanges and extracting it by assignment entails a loss of commercial guarantee for the debtor, who cannot withhold performance as a means of pressure on the creditor. However, the connections of the right assigned with the relationship between assignor and debtor must be severed after assignment, as allowing the contrary would deprive assignment of any commercial utility. The critical date must be carefully chosen, as it has a considerable impact on the balance of the various interests on assignment. Given the specific nature of intangible things as assets, only the defences closely connected can be used subsequently to the assignment, as only they can be considered as a part of the right assigned, whereas the other defences are attached to the assignor's person.

1 Defences with temporal limits

The defences not closely connected to the right assigned are subject in both English and French law to a temporal limitation. The category contains defences arising before assignment from the relationship assignor-debtor. Subsequently, the debtor may also set-up defences arising after assignment from the contract which has generated the right assigned against other existing claims from his legal relationship with the assignee[224].

[224] Below 60.

(a) English law

Section 136(1) LPA 1925 provides that the assignment is made 'subject to equities having priority over the right of the assignee'. The term 'equities', still commonly used by legal writers[225], is taken from older case-law[226] and describes the defences available to debtors on assignment. The term 'may not, perhaps, be very happily chosen'[227] as, contrary to what it may seem, it does not refer only to equitable defences[228], but also legal defences[229]. Furthermore, the rules applicable to the debtor's defences are identical for both statutory and equitable assignment[230]. While it would be difficult to formulate an all encompassing definition of 'equities', it is generally understood that for the purposes of the law of assignment[231] it means 'all defences available by the debtor against the assignor and all rights of set-off open to the debtor against the assignor in respect of claims arising prior to the debtor's receipt of notice of assignment'[232].

The first point in the determination of the debtor's defences is the choice of the relevant date: is it the date of the assignment, the date of the notice to the debtor or, for future debts, the date of their accrual? From all these possible choices, English law opts

[225] eg *Chitty on Contracts* (n207) 1193; *Treitel* (n217) 732, etc.

[226] *Peters v Soames* (1701) 2 Vern 428; *Turton v Benson* (1718) 2 Vern 764; *Ord v White* (1840) 3 Beav 357; *Mangles v Dixon* (1852) 3 HLC 702, 731.

[227] *Stoddart v Union Trust Ltd* [1912] 1 KB 181, 188 (Vaughan Williams LJ).

[228] *Roxburghe v Cox* (1878) 17 Ch D 520.

[229] *The Raven* [1980] 2 Lloyd's Rep 266 (Com Ct).

[230] F Oditah *Legal Aspects of Receivables Financing* (University of Oxford, Sweet&Maxwell 1991) [8-2].

[231] For a complete analysis of equities: J McGhee (ed) *Snell's Equity* (31st edn Sweet&Maxwell 2005), ch2, 'Equities'.

[232] RM Goode *Legal Problems of Credit and Security* (Sweet & Maxwell London 2003) [3-35]. See also *Stephens v Venables* (1862) 30 Beav 625; *Watron v Mid Wales Ry Co* (1867) LR 2 CP 593; *Christie v Taunton, Delmard, Lane & Co* [1893] 2 Ch 175. OR Marshall *Assignment of Choses in Action* (Pitman London 1950) 181; *Treitel* (n217) 732; *Chitty on Contracts* (n207) 1193; J Beatson *Anson's Law of Contract* (28th edn Oxford University Press 2002) 480.

for the date of the notice to the debtor[233]. The underlying rationale is undoubtedly that the debtor cannot claim that he was taken by surprise by the change of creditor and continue to rely on the performance of the right assigned as a defensive means against the assignor. More precisely, the equities must exist or result from circumstances which occurred before the receipt of notice of assignment[234]. Furthermore, the fact that the debts used as defences have become payable after the receipt of the notice is not crippling. They must however have accrued before that moment[235] and they must be payable at the moment when they are used.

The defences may concern the existence of the right assigned, as is the case of the debtor's right to rescind the contract creating the right assigned for mistake, misrepresentation, fraud, duress, undue influence[236] or simply because the right assigned was already performed[237] or released[238]. The defences may also relate to the modalities of performance of the right assigned, including arbitration clauses[239]. The exception to this rule is constituted by defences personal to the assignor[240].

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[233] For statutory assignment: LPA 1925 s136 (1). For equitable assignment: *Roxburghe* (n228) 526; *Brice v Bannister* (1878) 3 QBD 569, 577*; Biggerstaff v Rowatts Wharf Ltd* [1896] 2 Ch 93; *Re Pinto Leite & Nephews* (1929) 1 Ch 221; *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1; *Business Computers Ltd v Anglo African Leasing Ltd* [1977] 1 WLR 578; [1977] 2 All ER 741; *Colonial Bank v European Grain & Shipping Ltd* [1987] 1 Lloyd's Rep 239, 252, 258 (Hobhouse J).

[234] *Re Pain, Gustavson v Haviland* [1919] 1 Ch 38, 49 (Younger J).

[235] *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674.

[236] *Turton* (n226); *Athenaeum Soc v Pooley* (1853) 3 D & J 294; *Wakefield & Barnsley Banking Co v Northampton Local Board* (1881) 44 LT 697.

[237] *Williams v Sorrell* (1799) 4 Yes 389; *Re Lord Southampton's Estate* (1880) 16 Ch D 178; *Dixon v Winch* (1900) 1 Ch 736; *Magee v UDC Finance Ltd* [1983] NZLR 438.

[238] *Stock v Dobson* (1853) 4 DM & G 11.

[239] *Bremer Vulkan v South India Shipping Corp* [1981] AC 909; *Paal Wilson & Co A/S v Partenreederei (The Hannah Blumenthal)* [1983] 1 AC 853.

[240] *Stoddart* (n227); *Provident Finance Corp Ltd v Hammond* [1978] VR 312.

Ordinary defences are generally distinguished from set-off rights, which are available only for monetary claims and are governed by distinct rules[241]. The debtor can claim the benefit of statutory (independent) set-off[242], which does not need related debts in order to operate[243], provided that the claim and counter-claim are for sums of money between the same parties, are due and payable and either liquidated or in sums capable of ascertainment without valuation or estimation when the defence of set-off is filed[244].

In the case of future debts, ie debts that will arise from existing contracts (considered in English law as present debts[245]), the choice of the reference point is more delicate. Several decisions have held that a debt resulting from an existing contract could not be set up if it had come into existence after the receipt of the notice[246]. According to this position, defences carry over the debt and not over the person of the debtor, so his knowledge of the assignment is immaterial. However, other decisions[247] and legal writers[248] suggested that the date of the notice should be taken into account for the delimitation of set-off and other defences. For transfers of simple expectations, ie rights resulting from contracts which did not exist when they were transferred, it was

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[241] Marshall (n232) 181.

[242] Goode *Legal Problems* (n232) [7-43].

[243] For discussions on the distinction between statutory and equitable set-off SR Derham *The Law of Set-Off* (Oxford University Press 2003) [1-10]; Goode *Legal Problems* (n232) [7-03] et seq.

[244] *Salinger on Factoring* (n197) [9-18].

[245] *Shepherd v Federal Commission of Taxation* (1965) 112 CLR 385; *Marathon Electrical Manufacturing Corp v Mashreqbank PSC* [1997] 2 BCLC 460, 467. Oditah *Legal Aspects* (n230) [27-9].

[246] *Stephens* (n232) ; *Watson v The Mid Wales Railway Company* (1867) LR 2 CP 593 ; *Hoverd Industries Ltd v Supercool Refrigeration and Air Conditioning (1991) Ltd* [1995] 3 NZLR 577, 588-9.

[247] *Rother Iron* (n233): notice of the appointment of a receiver crystallized a floating charge over goods; the secured creditor had to incur the effect of the receiver equities, even if the notice has been given prior to the crystallization. *Marathon Electrical* (n245): notice of assignment of a letter of credit was given before payment of the sums due therein and the collecting bank took the debt subject to the assignee's rights.

[248] Derham (n243) [17-19].

argued that the same solution should apply, contrary to existing authority[249], as the debtor's 'conscience should be affected as from the time that he becomes aware of the assignment'[250]. The above-mentioned decisions, as well as legal writers[251], favour therefore a view of non-closely connected defences which is centred on the debtor's person, in contradiction with the approach used for closely connected defences.

(b) French law

Under French law, the date from which the debtor cannot use anymore defences available against the assignor varies from one mode of assignment to another, as it is determined by the date of the perfection of the assignment ('*opposabilité des exceptions*')[252]. For *cession de créance*, the relevant date is the date of notice (*signification*), as it is explicitly provided for *compensation* (set-off) by article 1295(2) C.civ., which states that, unless the debtor accepted the assignment, the notice of assignment prevents him from setting-up against the assignee only the defences subsequent to the notice of assignment. The same solution can also be inferred for all defences from article 1690 C.civ., which states that, as regards third parties, the assignee is deemed to have the possession of the right assigned from the date of the notice.

[249] *Roxburghe* (n228).

[250] Derham (n243) 794 [17-19], who also cites Meagher Gummow and Lehane *Equity Doctrines and Remedies* (1992) [720-1].

[251] *Treitel* (n217) 733: the debtor 'knows that the assignor is no longer his creditor (…) and cannot expect to set off (…) any claims which he may later acquire'.

[252] *Cass. req., 9 janv. 1867* S 1867.1.445; *Cass req, 5 nov 1889* DP 1890 1 p 379; J Ghestin M Biliau and G Loiseau *Le régime des créances et des dettes* (LGDJ 2005) [303].

In contrast, for *cession de créances professionnelles*, the relevant date is the date when the assignment was made, which is also the date when the assignment becomes enforceable against third parties[253]. During a first period courts considered that the debtor was not allowed to use any defences arising after the date of the assignment, even if he had no knowledge of assignment[254]. However, this solution was unfair for debtors, if they had made concessions to the assignor before having been informed of the assignment, having relied on the possibility to set-up defences against the assignee arising after the assignment was made. The position of the *jurisprudence* has subsequently changed, on the basis of a *per a contrario* interpretation of article L.313-28 C.mon.fin., which states that the assignee may prevent the debtor's discharge by performance to the assignor by sending him a notice[255]. This position was explained by the rule that assignment must be neutral on the debtor's interests[256], even if it was also criticised for unjustifiably breaking the connection between enforceability against third parties (a category which normally includes the debtor) and the defences available to the debtor[257].

A certain uniformity on the issue of defences can be observed in French law[258], as similar rules apply to contractual subrogation[259]. According to one possible view, the debtor's information is a requirement for the enforceability of the transfer against the

[253] Art L.313-27 C.mon.fin..

[254] *Cass. com., 18 juill. 1989* Bull.civ.IV, n°227.

[255] *Cass. com., 14 déc. 1993* Bull.civ.IV n°469; D 1994 jurispr. p. 269 note Ch Larroumet; RTDcom. 1994 p. 332 obs. M. Cabrillac; *Cass. com., 13 déc. 1994* Bull.civ.IV n°373; RTDcom. 1995 p. 457 note M Cabrillac; *Cass. com., 6 oct. 1998, n°95-21350* RTDcom. 1999 p. 163 obs. Cebullac; *Cass. com., 26 avr. 1994, n°s 92-15.025 et 91-29.862* RD bancaire et bourse 1994 p. 235 obs. Crédot et Gérard.

[256] J-P Dumas and R Roblot 'Cession et nantissement de créances professionnelles' Rép Com Dalloz, avril 1998 [29].

[257] J François *Les obligations, régime général* (Economica 2000) [431].

[258] M Biliau *La transmission des créances et des dettes* (LGDJ Paris 2002) [37].

[259] *Cass. com., 15* oct*. 1996* Bull.civ.IV n°230 p. 201; RTDciv. 1997 p. 938-939 obs. J Mestre.

debtor. Another view is preferable, according to which, while the transfer is generally enforceable against all third parties, an exception must be provided for a debtor in good faith, ie who did not know of the previous assignment[260]. Only a notice or an acceptance may affect the accrual of the debtor's defences and the debtor's informal knowledge is irrelevant in this context[261], unless it is a part of a fraud on the assignee's interests[262]. Case-law on *cession de créances profesionnelles* shows that the notice to the debtor is unavoidable in order to ensure that the assignment has effects on the debtor, regardless of system of enforceability against third parties used.

Whereas for both kinds of assignment the debtor's acceptance is an alternative to notice for perfection purposes, its effects on the debtor's defences are different. Regarding *cession de créance*, the debtor's acceptance prevents set-off against the assignee, while the other defences remain available[263]. For *cession de créances profesionnelles*, the debtor's acceptance has a more drastic effect: the renunciation to any defences arisen before or after assignment[264].

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[260] C Lachièze *Le régime des exceptions dans les opérations juridiques à trois personnes en droit civil* (Imprimerie La Mouette 2001) 264.

[261] *Cass com, 30 juin 1992* Bull civ IV n° 252 (for cession de créances professionnelles) ; Dumas and Roblot (n256) [42] ; S Campion *De la connaissance acquise par les tiers d'un transfert de créance non-signifié* (DPhil thesis, Lille University 1909).

[262] A Rieg 'Cession de créance' Rép Civ Dalloz, avril 1985 [283] ; C Aubry C Rau and M Pédamon *Droit civil français (t5)* (1979) [359 bis], 147 ; G Baudry - Lacantinerie *Traité théorique et pratique du droit civil* (Sirey Paris 1905) [792]; G Ripert M Planiol and J Radouant *Traité pratique de droit civil français. Les obligations* (LGDJ 1954) [1122].

[263] Art 1295 C.civ. .. Terré Simler and Lequette (n208) [1282].The acceptance must be qualified in order to be interpreted as a waiver from the debtor of the right to cite any defences against the assignee: *Cass. civ., 19 avr. 1854* DP 54.1.145; *Cass. req., 29 juin 1881* DP 82.1.33.

[264] Art L.313-29 C.mon.fin..

Provided that the defences arose before the applicable relevant date, the debtor can cite set-off[265], default of performance[266], nullity[267], termination of contract[268] and generally defences that reduce the quantum of the right assigned[269]. The debtor cannot however use secret clauses (*contre-lettres*), ie provisions regarding the right assigned which are either oral or contained in a document distinct from the one generating the right assigned and undisclosed to the assignee[270].

(c) PECL

The analysis of the provisions of English and French law on the defences that precede assignment reveals a remarkable unity of views[271]. Article 11:307 PECL perpetuate this consensus, providing that the debtor may set-up 'all rights of set-off existing at the time when a notice of assignment (...) reaches the debtor'. The drafters of the PECL carefully explain the limits to the assignee's rights by stating that the 'assignee incurs no positive contractual liability'[272], reflecting equivalent national distinctions. English law distinguishes between assignment of things in action and neighbouring concepts that

[265] Art 1295 C.civ. ; *Cass. req., 4 févr. 1889* DP 90.1.121 ; Ghestin Biliau Loiseau (n252) [993] ; L Cadiet 'Cession de créances' Jurisclasseur civil, novembre 1996 [88].

[266] *CA Paris, 5 août 1871* DP 73.2.229; Journ.not. et av. 1871 art.20183 p.587.

[267] *Cass. req., 5 nov. 1889* DP 90.1.379; *CA Poitiers,10 oct. 1967* JCP 1968.II.15544 obs. R. Prieur(mistake); *CA Paris, 5 août 1871* (n266) (debtor minor) etc.

[268] *Cass. com., 9 févr. 1993* D.1993 IR 58; *CA Paris, 5 août 1871* (n266).

[269] Reduction of price for breach (*Cass. req.,19 juill. 1869* DP 70.1.81; *Cass. req., 4 févr. 1889* DP 90.1.121 ; *Cass. civ., 22 févr. 1893* DP 93.1.296 ; D Legeais 'Cession et nantissement de créances professionnelles' Jurisclasseur civil, décembre 2002 [30]); arbitration clause (*Cass. req., 15 janv. 1873* DP 73.1.210; *Cass. 1ère civ., 5 janv. 1999* D 1999 IR 31 - for *cession de créances professionnelles*; but an award made after the receipt of the notice will not be enforceable against the assignee, even if the clause was agreed before that moment: Rieg (n262) [563] and decision cited there), etc.

[270] AV Colin H Capitant and L Julliot de la Morandière *Cours élémentaire de droit civil français* (Dalloz 1953). vol 2 [1666] ; Rieg (n262) [570].

[271] Kotz (n196) [97].

[272] *PECL.Part III* (n212) 118 Comment B.

generate positive liability for the assignee[273]. In French law, assignment of rights is strictly delimited from assignment of liabilities and transfer of contract[274]. The PECL also cut short conundrums regarding the legal nature of set-off and other defences and possible national variations thereof[275], providing that both procedural and substantive defences are covered. The general character of this wording most likely covers all defences currently available in both English and French law, the decisive element being the date of their accrual (and not their maturity[276]) and not their legal nature.

No explicit time-limit is mentioned for the accrual of defences other than set-off by the PECL, but the general wording of article 11:307 seems to point to the date when the debtor was informed of the change of creditor. This is supported by the legal effect of the debtor's informal knowledge of the assignment acquired prior to the receipt of the notice, which prevents his discharge by performing to the assignor[277]. Article 11:307(2) explicitly indicates that the debtor can use any set-off rights available at the date when a notice of assignment was received, 'whether or not conforming to Article 11:303(1)'[278], suggesting that the relevant date is when the debtor was informed of assignment. The PECL further address separately the issue of set-off of non-closely connected claims in Chapter 13.

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[273] eg *Treitel* (n217) 747.

[274] eg Terré Simler and Lequette (n208) [1271].

[275] *PECL.Part III* (n212) 139; Zimmermann *Comparative Foundations* (n214) 22.

[276] B Lurger 'Assignment of Claims' in A Vaquer (ed) *La tercera parte de los principios de derecho contractual europeo* (Tirant Valencia 2005) 144.

[277] PECL art 11:303(3).

[278] PECL art 11:303(1) describes the validity requirements for notices to debtor.

2 Defences with no temporal limits

As the assignee becomes the new creditor in respect of the right assigned, the debtor is allowed in both English and French law to use against him any defences arising from their respective dealings, regardless of their date of accrual. As to defences deriving from the relationship with the assignor, the rule is, in both English and French law, that only those arising before assignment are available to the debtor. There are however exceptions to this rule, represented by defences which carry over aspects so closely connected to the right assigned that it would be inequitable to allow the assignee to enjoy only the benefit of the right assigned. In terms of property law the situation may seem illogical, as the former holder is still allowed to legally influence the contents of a right which belongs to another person. This, however, only confirms the specific nature of intangible things as assets, as their economic value is perpetually dependent on the relation assignor-debtor.

(a) English law

English law exceptionally allows the debtor to cite defences flowing from his dealings with the assignor after the receipt of the notice of assignment. The category comprises defences closely connected with the right assigned, ie claims 'flowing out of and inseparably connected with the dealings and transactions which also give rise to the claim'[279]. The justification for the rule derives from the effect of assignment, which is to extract the right assigned from its context and grant it an independent existence, as any other form of property. The right assigned is followed only by the defences directly

[279] *Newfoundland Government v Newfoundland Ry* (1883) 13 App Cass 199, 213; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] 1 AC 1056, 1110.

connected to it, which are relative to its existence or its contents[280]. Equitable set-off is available for closely connected claims, whereas only statutory (independent) set-off is available for other claims. The main advantage of equitable set-off is that it allows to invoke all types of claims, even non-liquidated[281], as substantive defences, ie as operating automatically, with no need to wait for a judgement of set-off, as required for statutory set-off[282].

Surviving defences include the defences relating to misrepresentation, mistake or illegality[283]. The assignee's ignorance of the defences' existence is irrelevant[284]. The underlying explanation seems to be that assignees take 'things in action' subject to all defects of title[285], which in the case of contracts means that the debtor will be able to keep all defences given to him by the contract. The debtor is also allowed to invoke the benefit of the various contractual provisions, including arbitration clauses[286]or exclusive jurisdiction clause[287]. If the debtor has two funds over which he could exert set-off, the doctrine of marshalling cannot limit his choice – only the assignee may have a right against the assignor, for example deriving from subrogation[288].

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[280] *Graham v Johnson* (1869) LR 8 Eq 36 (Ch); *William Pickersgill & Sons Ltd v London & Provincial Marine Insurance Co Ltd* [1912] 3 KB 614 (KB); *The Raven* [1980] 2 Lloyd's Rep. 266 (Com Ct).

[281] Derham (n243) [4-29].

[282] A-M Tolédo-Wolhsohn 'Compensation' Rép Civ Dalloz, septembre 2002 [5].

[283] *Treitel* (n217) 733.

[284] *Graham* (n280); *Banco Santander SA v Bayfern Ltd* [2000] 1 All ER (Comm) 776 (CA).

[285] *Treitel* (n217) 732; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 (QB): 'The general rule, both at law and in equity, is that no person can acquire title to a chose in action… from one who has himself no title of it'.

[286] *The League* [1984] 2 Lloyd's Rep 259.

[287] *Glencore International AG v Metro Trading International Inc* [1999] 2 All ER (Comm) 899 (Com Ct).

[288] SR Derham 'Set-off against an Assignee: the Relevance of Marshalling, Contribution and Subrogation' (1991)107 LQR 126.

For contractual rights, the close connection test would seem to always designate defences arising from the contract which has produced the right assigned[289]. This can be explained by the connection of the right to be set-up with the right assigned. As it can be envisaged that defences and rights of set-off closely connected to the right assigned may arise from another source, it seems that this rule was created more for practical convenience. Following the same logic, the debtor should be allowed to set-up rights arising out from a different source. However, *Stoddart v Union Trust Ltd*[290] seems to have reached a 'regrettable result'[291] by taking a strict approach on the matter. In that case the debtor tried to set up against the assignees a claim for damages for fraud committed by the assignor. As the debtor did not invoke the right to rescind (which was a defence that survived assignment), it was held that the damages for the fraud committed by the assignor were 'something dehors the contract' and thus set-off was not possible[292].

The exact ambit of this decision is unclear, especially since it has not been confirmed by later decisions. For example, *Business Computers Ltd v Anglo-African Leasing Ltd*[293] mentioned closely connected defences as an own category, in addition to defences arising from the same contract[294]. Other decisions provide that equitable set-off is not automatically available when the claim and counter-claim arise from the same

[289] *Graham* (n280); *Treitel* (n217) distinguishes between claims arising out of the contract assigned and claims arising from other transactions.

[290] *Stoddart* (n227).

[291] *Treitel* (n217) 734. However Marshall (n232) 183 approves the decision.

[292] *Stoddart* (n227) 194.

[293] *Business Computers* (n233).

[294] *Snell's Equity* (n231) [3-24]; *Salinger on Factoring* (n197) [9-08]: the two tests are mentioned as alternatives.

contract[295]. It is therefore safe to affirm that despite occasional statements to the contrary, the test for determining defences available after assignment is their close connection with the right assigned, including for contractual rights[296].

(b) French law

The rule that only defences arisen before the receipt of the notice of assignment are available to debtors is subject in French law as well to several exceptions. The most important is *compensation légale pour dettes connexes* (statutory set-off for connected claims), which allows exceptionally to set-up claims which did not exist at the time of the assignment[297], provided however that their existence is certain at the time when they are used and they are liquidated and outstanding[298]. One explanation for the close connection test ('*lien de connexité*') is the mutual dependence, as the counterclaim is either an accessory of the right assigned or an element which impacts its value[299]. Another explanation is that *compensation pour dettes connexes* allows to maintain the original balance of interests in the contract which generated the right assigned[300]. A third explanation is that the claims stem from the same contractual relationship and are

[295] *Rawson v Samuel* (1841) ER 451, 458; *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] EWCA Civ 457; 2 Lloyd's Rep 93.

[296] *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] 1 AC 1056. For a similar position: Derham (n243) [4-55].

[297] *Cass. 3e civ., 30 mars 1989* Bull.civ.III n°77; JCP E 1991.II.108 note M Goré; Cass. com. 15 juin 1993, *Cass. com., 15 juin 1993, n°91-19677* Bull.civ.IV n°242 p. 172; D 1993.495 note C Larroumet; C Gabet-Sabatier *La connexité dans le droit des obligations* (DPhil thesis, Paris I University 1977); B Starck H Roland and L Boyer *Les obligations. Régime général* (Litec 1999) [43] ; Terré Simler and Lequette (n208) [1194] ; Lachièze (n260) [213] et seq, etc.

[298] Legeais (n269) [33].

[299] C Gabet-Sabatier 'Le rôle de la connexité dans l'évolution du droit des obligations' RTDciv 1980.39, 42. For analysis of the close connection test across French private law, see also: Bolze 'L'unité du lien de connexité en droit des obligations' Rev rech jur 1988 305; L Cadiet 'Connexité' Rép. proc.civ. 1995; Gabet-Sabatier (n297).

[300] F Leplat *La transmission conventionnelle des créances* (Nanterre 2001) [471].

united by a link which survives the transfer of the right assigned[301]. This 'common source' element is echoed in *la jurisprudence*, which has adopted an extensive interpretation of the close connection, favourable to the debtor[302]. Thus, claims issued from the same contract are presumed to be closely connected[303]. This includes claims of damages resulting from the termination of the contract and claims for the unpaid sale price and for unsatisfactory performance of contract[304].

But courts have considered that even in the absence of a sole contract, claims could be considered as closely connected if they arise from different contracts flowing from the same master agreement (*contrat-cadre*)[305]. Courts have pursued their approach favourable to debtors and even allowed set-off for claims resulting from contracts not based on the same master agreement, but which were a part of a same contractual unit ('*ensemble contractuel unique*')[306]. This trend is however subject to the limitation of the legal nature of the mutual claims: set-off cannot operate between a claim based on delict and one based on contract[307]. The limitation can be explained by the fact that a tort claim could not have been taken into account by the parties when entering the

[301] M Cabrillac RTD.com. 1993 p.697 .

[302] *Cass. com., 6 mai 1997* RTD com. 1997 p. 490 obs. M Cabrillac.

[303] *Cass. com., 11 mai 1960* D 1960.573; Tolédo-Wolhsohn (n282) [46]; Legeais (n269) [33] .

[304] *Cass. com., 4 juill. 1973* D 1974.425 note J Ghestin.

[305] *Cass. com., 9 mai 1995* Bull.civ.V n°130; RTDciv. 1996 p. 164 obs. J Mestre; *CA Paris, 16 juin 2000* Juris-Data n°2000-124100.

[306] *Cass. com., 19 mars 1991* JCP E 1991.174 note D Legeais; *Cass. com., 27 juin 1995* RTDcom. 1995 p. 824 obs. MC.

[307] *Cass. com., 22 avr. 1997* JCP E 1997.I.681 n°18 obs. Ph Pétel; *Cass. com., 6 janv. 1998* D affaires 1998 p. 382.

contract[308]. It remains possible to set-up two tort claims, if they arise from the same source[309].

Other defences than set-off, such as the refusal to perform if the assignor has not performed his contractual duties (*exception d'inexécution*)[310], remain as well available to the debtor, provided the close connection test is satisfied[311]. This suggests that the legal basis of closely connected defences is the concept of *la cause*, according to which a claim is closely connected if it represented for the other party the decisive element for entering into the contract which generated the right assigned[312].

(c) PECL

According to article 11:307(2)b) PECL, rights of set-off closely connected to the right assigned are not subject to the temporal limitations applicable to the other defences. This system is protective of the debtor's interests and is a fairly accurate application of the principle of neutrality of assignments from English and French law. PECL do not require that the defences 'closely connected to the right assigned' arise from the same contract. It is unclear whether the PECL invalidate the refusal of both English and French law to accept set-off between a tort and a contract claim. As set-off is excluded only when claims derive from 'a deliberate wrongful act'[313], this suggests that rights for damages resulting from unintentional delicts and from non-performance of contract

[308] Ph. Pétel, Note sous *Cass com, 2 avr 1997* JCP 1997 l n° 4054.

[309] *Cass. 2e civ., 12 oct. 2000* Bull.civ.II n°138.

[310] *Cass. com., 8 fevr. 1994* Bull.civ.IV n°55; D 1994 IR 64; Lachièze (n260) [215-1] ; Dumas and Roblot (n256) [49].

[311] Lachièze (n260) [216].

[312] P. Malaurie and L Aynès *Les obligations-régime général* (2001-2002) 99.

[313] PECL art 13:107.

could be set-up. The exceptions provided at article 11:307(2)b) are of strict interpretation and therefore defences closely connected to the right assigned other than set-off cannot be used by the debtor against the assignee. The debtor would have in this case only a remedy against the assignor.

CONCLUSION OF CHAPTER 2

On the issue of defences available to the debtor the PECL rise to their ambition of reflecting common principles of European laws. The protection of debtors is expressed in a remarkably similar manner in English and French law, both in terms of practical effects and conceptual background. On a general level, both English and French law share the idea that the debtor should be protected on assignment and be allowed to keep some of the defences he could have used against the assignor. Furthermore, both laws have an approach based on the distinction between defences closely connected to the right assigned and other defences, subjecting only the latter to a temporal limitation.

Given the wide range of defences available to debtors, they generally enjoy an effective protection within a traditional, national-centred context. However, the increasing globalisation of economies has also affected the law of assignment and cross-border transfers of intangible things have become more frequent. Such transfers raise a number of new issues for the protection of debtors. The determination of the law applicable to the debtor's rights and obligations has to be, in the spirit of the principle of the protection of debtors, the law which was applicable before the transfer of the intangible thing. Furthermore, the existence of a foreign assignee may also affect such aspects as the place of performance, payment currency, use of a foreign language, different trade customs and business practices. Some of the existing provisions in

national laws may be adapted in order to cover these new events, if the above mentioned aspects are dealt with by contract. It would however preferable to have explicit rules dealing with the impact of a foreign element in an assignment relationship and the PECL and other international texts on assignment mark a considerable progress given the silence of national legislation on the matter on these aspects.

If the protection traditionally offered to debtors by national legislations (and also equivalent international texts) can be considered satisfactory, there is no general rule in either English or French law providing that assignment must not significantly increase the costs for performance. Article 11:306(1) PECL does provide in embryo such a right, limited to the change of place of performance. Among the other international texts, only article 15 UN Convention goes farther and gives a full recognition to the protection of debtors by stating 'an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract'. Such a general wording is preferable, as it has the merits of setting an adaptable test for any new threats for the protection of debtors. It also acknowledges the necessity of the debtor's consent for any changes in the performance of the right assigned, reiterating the rule that no one can be obliged to something he did not consent.

CHAPTER 3 – THE DETERMINATION OF THE PERSON ENTITLED TO PERFORMANCE

Another fundamental aspect of the protection of debtors on assignment is the determination of the person entitled to performance. In the simplest case, an intangible thing is transferred to only one assignee, who receives performance after having previously notified the debtor. However, as there is usually a lapse of time between the date of the assignment and the date of the notice of assignment, the debtor may perform to the assignor before receiving notice of assignment. In some cases, notice of assignment may never be given for business reasons (eg confidential factoring[314]) or may simply not be required for the perfection of the assignment (eg *cession de créances professionnelles* in French law[315]). The debtor may also be informed of the existence of assignment, but without receiving a valid formal notice. An assigned right may also make the object of competing claims. The risk for the debtor is considerable as performing to the wrong person may oblige him to perform a second time. Ideally, the law of assignment should protect debtors by permitting to designate with certainty the person entitled to performance and by shielding them against any loss resulting from the performance in good faith to a wrong person.

A PERFORMANCE TO THE ASSIGNOR WITH NO NOTICE OF ASSIGNMENT

This situation supposes that a valid assignment exists between assignor and assignee and that the debtor performs to the assignor before receiving a formal notice. One possible solution would be to oblige the debtor to perform a second time. This would be

[314]PM Biscoe *Law and Practice of Credit Factoring* (Butterworths 1975) 11; FR Salinger and others *Salinger on Factoring: The Law and Practice of Invoice Finance* (Sweet & Maxwell 2005) 10. Notice to the debtor is still necessary for the perfection of the assignment.

[315] Art L.313-27 C.mon.fin..

very harsh on the debtor, because he could not object to the assignment and he could not have performed to an assignee whose existence was unknown to him. Both English and French laws reject this unfair solution and choose to discharge the debtor and attribute the resulting loss to the parties to assignment.

1 English law

According to section 136 LPA 1925, a written notice given to the debtor by either the assignor or the assignee[316] is required for the validity of any statutory assignment. The validity of equitable assignments is not affected by the absence of notice and an oral notice suffices in some cases[317]. The written notice does not have to be contained in a separate document, a written request for performance is deemed sufficient[318]. The importance of the notice for the transaction and for debtor is confirmed by the case-law on references to the date of assignment contained in the notice. If a wrong date is mentioned, the notice is invalid[319], while the absence of any reference to the date of assignment[320] or a reference to an inexistent previous notice[321] does not have such an effect. The protection of debtors explains this difference of treatment. A wrong date misleads the debtor, while a notice with no reference to the date of the assignment simply informs the debtor that the right was assigned[322]. The necessity of protecting

[316] Biscoe (n314) 101.

[317] *Ex p Agra Bank* (1868) LR 3 Ch App 555. See also HA Hollond 'Further Thoughts on Equitable Assignments of Legal Choses in Action' (1943) 59 LQR 129.

[318] *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607 (Ch) 615.

[319] *Stanley v English Fibres Industries Ltd* (1899) 68 LJQB 839; *WF Harrison & Co Ltd v Burke* [1956] 1 WLR 419 (CA).

[320] *Van Lynn Developments* (n318). See also *Chitty on Contracts* (Sweet & Maxwell London 2004) [19-017]; J McGhee (ed) *Snell's Equity* (31st edn Sweet&Maxwell 2005) [3-08].

[321] *Van Lynn Developments* (n318); *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669.

[322] *Van Lynn Developments* (n318), 613 (Denning MR).

debtors also explains why the notice of assignment is effective from the moment when it was received by the debtor[323]. Most importantly, in the absence of a notice, the debtor gets discharge by performing to the assignor[324]. Conversely, giving notice prevents the debtor from requesting the joinder of the assignor to the proceedings, as the assignment has become statutory from equitable previously[325].

Case-law on statutory assignments seems to suggest that only a written notice can prevent the debtor's discharge. In *Herkules Piling Ltd v Tilbury Construction Ltd*[326] it was held that knowledge of assignment acquired during arbitral proceedings could not replace a written notice. Furthermore, reading the notice to an illiterate debtor could not replace either a written notice[327]. On the other hand, several other decisions held that, from the moment when the debtor discovered the assignment, he could no longer get discharge by performing to the assignor[328]. In reality, there is no contradiction between the two series of decisions: the first simply stated that the assignment was not valid as a statutory assignment, but not that the debtor obtained good discharge. By contrast, the second series of decisions sets rules applicable to the debtor's discharge on all assignments. This is confirmed by decisions holding that, even in respect to an equitable assignment, notice (understood as mere knowledge) of assignment prevents the debtor from performing to the assignor[329]. *Tolhurst* v *Associated Portland Cement*

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[323] *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1.

[324] *Stock v Dobson* (1853) 4 DM & G 11; *Warner Bros Records v Rollgreen Investments Ltd* [1976] QB 430; *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] AC 321; *Rose v Clarke* (1842) 1 Y &C 534; *Stephens v Venables* (1862) 30 Beav 625; *Tolhurst v Associated Portland Cement Manufactures (1900)* [1902] 2 KB 660 (CA), 668-669.

[325] *Cottage Club Estates Ltd v Woodside Estates (Amersham) Ltd* [1928] 2 KB 463; *The Halcyon The Great* [1984] 1 Lloyd's Rep 283.

[326] *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 Build LR.

[327] *Hockley and Papworth v Goldstein* (1921) 90 LJKB 111.

[328] *Jones v Farrell* (1857) 1 D&J 208; *Brice v Bannister* (1878) 3 QBD 569.

[329] *Durham Brothers v Robertson* [1898] 1 QB 765, 774; *Ex p Nicholls* (1883) 22 Ch D.

Manufacturers Limited[330] provides an indication as to the underlying reasons for this position:

> The right [assigned] seems rather to be based on the equitable principle that it would be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee after he had notice that the latter had assigned the benefit of it to another person.[331]

2 French law

For *cession de créance*, article 1690 C.civ. states that the assignee is considered to have possession of a debt as against third parties from the moment when a *signification* is served to the debtor or from the moment the debtor accepts the assignment in an authenticated document. The reference to possession of the debt is generally considered to describe the perfection requirements[332]. The s*ignification* can be considered as a qualified form of written notice to the debtor[333]. It supposes that a public officer (*huissier de justice*) goes to the debtor's residence or place of business and informs him of the change of creditor. The *huissier* drafts afterwards a written document (*acte de signification*[334]), which must contain several mandatory elements[335] summarising the information provided and hands to the debtor a copy thereof.

The two perfection formalities provided by article 1690 guarantee the certainty of the debtor's information. An additional objective pursued by the rules on the notice

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[330] *Tolhurst v Associated Portland* (n324)..

[331] ibid 668.

[332] A Rieg 'Cession de créance' Rép Civ Dalloz, avril 1985 [137] et seq ; L Cadiet 'Cession de créances' Jurisclasseur civil, novembre 1996 [59] et seq..

[333] Art 651 C.proc.civ.: '*La notification faite par acte d'huissier de justice est une signification*'.

[334] Art 656 C.proc.civ..

[335] Art 648-650 C.proc.civ..

of assignment is the certainty of the date of the notice. Traditionally, in French law, the date of private writings (which would include the notice of assignment) had no value against third parties, unless it was certified by a public authority and acquired *date certaine*[336]. As the strict perfection requirements of the Code civil are often excessively restrictive for assignees, French courts allow equivalent formalities, provided that they have a certificated date. Various equivalents have been accepted[337], including the assignor's written submissions during proceedings instituted by the debtor[338] or the assignee's formal request for payment[339].

The choice of these formalities can also be explained by the dual function of perfection requirements in French law: the debtor's information and the determination of the order of priority between competing assignees. Under French law, the debtor is generally considered a third party to the assignment agreement[340] and should therefore be subject to the same rules as any other third parties. Both perfection requirements for *cession de créance* imply the debtor's information. No problems arise in this case from tying together the enforceability of assignment against third parties and the debtor's discharge. However, rules on newer modes of assignment, such as *cession de créances professionnelles*[341], break this connection and provide an immediate enforceability

[336] P Strasser 'Date certaine' Jurisclasseur civil, 1991.

[337] For a detailed analysis of the equivalents to *signification* allowed in case-law: Rieg (n332) [225] et seq.

[338] *Cass. civ., 4 mars 1931* D 1933.1.73 note Radouant.

[339] *Cass. 1ère civ., 8 oct. 1980* Bull.civ.I n°249.

[340] M Biliau *La transmission des créances et des dettes* (LGDJ Paris 2002) [25] ; AV Colin H Capitant and L Julliot de la Morandière *Traité de droit civil* (Dalloz 1957) [1652] ; Rieg (n332) [494] (this author also states that this qualification is inaccurate, as the debtor has an interemediary position between a party and a third party: ibid [507]).

[341] Art L.313-27 C.mon.fin.. See also *Cass. com., 19 mai 1992* Bull. civ. IV n°190; RTDcom. 1992.657, obs. Cabrillac et Teyssié; *Cass. com., 14 juin 2000, n°96-22634* Bull.civ.V n°121 p.110; 'Le crédit de mobilisation des créances commerciales ' Lamy droit du financement 2006 [3003] ; D Legeais 'Cession

against third parties. The rules on *cession de créances professionnelles* provide nevertheless that a notice to the debtor is still needed in order to prevent him from performing to the assignee[342], confirming his special status among third parties.

A delicate situation arises when the debtor had knowledge of assignment before receiving a formal notice. It could be argued that, in respect to the debtor, the main purpose of the notice is his information of the change of creditor. If he acquired, from another source, information of the same quality as a valid notice, he should therefore be obliged to perform to the assignee[343]. However, this position does not take into account the interests of other third parties, such as competing assignees, who may give notice before the assignee known by the debtor and thus acquire priority over other assignees.

For *cession de créance*, the debtor is obliged to perform to the assignee only if one of the two alternative perfection formalities has been operated. Article 1691 C.civ. explicitly grants discharge to debtors who perform to the assignor before receiving notice of assignment. This text has been generally applied faithfully by courts[344]. An additional ground for the debtor's discharge is constituted by article 1240 C.civ., which is based on the lack of knowledge of any assignment[345]. This article provides that the

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et nantissement de créances professionnelles' Jurisclasseur civil, décembre 2002 [30] ; J-P Dumas and R Roblot 'Cession et nantissement de créances professionnelles' Rép Com Dalloz, avril 1998 [29].

[342] Art L.313-28 C.mon.fin..

[343] C Beudant *Cours de droit civil français. La vente et le louage* (A Rousseau Paris 1908) 294.

[344] *Cass. req., 6 mars 1828* Jur. gén. Vente n°1781; *CA Bastia, 10 mars 1856* DP 56.2.178; *Cass. civ., 27 nov. 1944* D 1945.78; *Cass. ass. plén., 14 févr. 1975* Bull.ass.plén. n°1; D.1975 p.349; *CA Paris 5e ch. sect. B, 26 avr. 1985* Juris-Data n°022083 ; *CA Douai, 31 oct. 1985* Juris-Data n°043426; *Cass. com., 7 janv. 1981* JCP G 1981.IV.94 . See also J Carbonnier *Droit civil (tome IV) - Les obligations* (PUF 2000) 562 ; Rieg (n332) [289] ; Cadiet (n332) (Effets) [63].

[345] *Cass req, 19 mai 1858* DP 1858.1.286 (payment of freight) ; J Issa-Sayegh 'Paiement: Caractères généraux. Parties. Effets' Jurisclasseur civil, juillet 2006 Fasc 20 [151].

performance of a right ('*créance*') to a person who could reasonably be considered by the debtor as being his creditor grants him discharge.

For *cession de créances professionnelles*, article L.313-27 C.mon.fin. provides that the transfer operates in respect to parties and third parties at the date of the assignment contract. The only purpose of the written notice, which must contain several mandatory elements ('*mentions obligatoires*')[346], is to prevent the debtor's discharge by performing to the assignor, as expressly stated at article L.313-28 C.mon.fin.. Conversely, a debtor who receives no notice of assignment or only an imperfect notice is discharged by performing to the assignor[347]. The rules on the notice of *cessions de créances professionnelles* confirm a certain preference of French law for the discharge of the debtor exclusively upon the receipt of a formal notice[348].

3 PECL

English and French law most often require a written notice of assignment and article 11:301(1) PECL adopts the same position. The main advantage of a written notice is that it facilitates the proof of notice, which is beneficial for both assignee and debtor. In common with English and French law, the debtor's protection is further assured by the requirements as to the information contained in the notice. Article 11:301(1) provides that the notice must 'reasonably identify' the right assigned and indicate that the right assigned must be performed to the assignee. Regarding performance to the assignor in the absence of knowledge of assignment, both English and French law grant discharge

[346] Art R.313-15 C.mon.fin..

[347] *Cass com, 7 janv 1997* Bull.civ.IV n°2; D.affaires 1997 p.183. See also Legeais (n341) [20] ; Dumas and Roblot (n341) [33].

[348] Carbonnier (n344) 561.

to the debtor, as a means of protecting the debtor, regardless of the proprietary effect of assignment. Article 11:303(4) PECL does nothing more than codify this uncontested rule, stating that, in the absence of knowledge of assignment, the debtor is discharged. Art III.–5:119 DCFR does not provide a mandatory written notice, leaving at the debtor's discretion to request a notice 'in textual form on a durable medium' containing 'adequate information about the assigned right or the name and address of the assignee'.

A similar convergence could not be found on the issue of performance during the period between the date of the debtor's actual information and date of the notice. French law still hesitates between the two moments, with a preference for the receipt of the notice, whereas English law is firmly in favour of the view that only the lack of knowledge discharges the debtor[349]. Under article 11:303(4) PECL (and article III.-5.118(1) DCFR), the decisive element for the debtor's discharge is the knowledge (actual or constructive) of assignment. This position denotes a certain conceptual unity of the PECL as regards the distinction between knowledge and notice of assignment. Article 11:401(1) also states that the assignee who gave first notice loses his priority if he knew or ought to have known of a previous assignment. Accordingly, under the PECL, a written notice of assignment is not needed if all interested persons knew of the existence of assignment. The requirement of a written notice appears to have been conceived only as a form of publicity, as it is considered that any potential assignee could ask the debtor if he had received any prior notice of assignment[350]. This publicity role is questionable, as the PECL do not create a duty for the debtor to respond to such requests for information and English and French law are against such a duty.

[349] The differences between the two national laws are also recognized by the drafters of the PECL: O Lando and others *Principles of European Contract Law. Part III* (Kluwer Law International The Hague 2003) 113.

[350] ibid 122.

B THE RIGHT TO REFUSE TO PERFORM TO THE ASSIGNOR AND THE DUTY TO PERFORM TO THE ASSIGNEE

Given that, after the receipt of the notice, the debtor can no longer obtain discharge by performing to the assignor, he needs the legal means allowing him to resist any subsequent request for performance made by the assignor. The application of this rule is in most cases straightforward, but it becomes problematic when the relevant point of reference is the moment when the debtor was informed of assignment. The debtor can either be prevented by law from performing to any person, until receipt of a valid notice of assignment or be bound to perform to the assignee or to a neutral third party, acting as trustee for the entitled assignee.

1 English law

From the receipt of a notice of a statutory assignment, the debtor ceases to be liable to the assignor and is bound to perform to the assignee, with no option to perform to the assignor[351]. The same rule applies to equitable assignments, even if only a part of a debt is assigned[352]. As a result, if the debtor performs to the assignor after receipt of a notice he will not obtain discharge[353]. Another consequence, specific to equitable assignment, is that the assignor can no longer sue the debtor alone, as he will obliged to join the assignee to the proceedings[354]. If the assignor requests performance in his name, the

[351] *Cottage Club Estates Ltd v Woodside Estates (Amersham) Ltd* [1928] 2 KB 463, 467; *The Halcyon* (n325) 289.

[352] E Peel *Treitel on the Law of Contract* (Sweet & Maxwell London 2007) 724.

[353] *Jones v Farrell* (1857) 1 D&J 208; *Brice* (n328).

[354] *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584.

claim will be rejected, in its totality or only partially, if he assigned only a part of debt[355].

The simple knowledge of a statutory assignment has no effect on the debtor's discharge, as the assignment is not valid as a statutory assignment. However, in most cases, if it is only the written notice which is missing, the assignment will be valid as an equitable assignment. On the authority of *Tolhurst* v *Associated Portland Cement Manufacturers Limited*[356], a debtor who knows of a non-notified assignment is prevented from performing to the assignor. In practice, this means that the debtor has a choice between withholding performance until the receipt of a valid notice and performing to the assignee[357]. The latter choice may oblige the debtor to perform again if a second assignee will give notice first and gain thus priority over the first assignee. The rule preventing the debtor's discharge by performing to the assignor seems balanced. The debtor is protected against the risks resulting from the lack of notice, whereas the assignee is also assured that he will not lose the performance of the right assigned if he were to give subsequently a valid notice. English law makes here a distinction between the moment when the debtor can no longer perform to the assignor and the moment when the assignee is entitled to request performance. The notice of assignment is thus indirectly considered to affect only the interests of other persons than the assignor.

[355] *Deposit Protection Board v Dalia* [1994] 2 AC 367, 386-7.

[356] *Tolhurst v Associated Portland* (n324) 668.

[357] ibid.

2 French law

For *cession de créances professionnelles*, only the assignee has the right to request performance from the debtor after receipt of the notice of assignment, even if the assignment was enforceable against third parties from the moment it was effected[358]. It is generally considered that, after the receipt of the notice, the assignor can no longer be presumed as receiving performance as the assignee's agent[359]. Accordingly, the debtor is bound to perform to the assignee, whereas the assignor has no right to request performance from him[360].

Article 1691 C.civ. expressly states that until the receipt of a valid notice the debtor gets discharge by performing to the assignor. However the courts have allowed equivalent formalities. First, the proceedings undertook by the debtor for obtaining performance can replace the written notice, as the debtor's claim is communicated in a written form by a *huissier*. Second, the courts have allowed the assignee to take measures preventing the loss of the right assigned (*mesures conservatoires*)[361]. Courts also consider that, if the debtor is a party to a written document mentioning the assignment, the requirements of the Code civil for the notice may be avoided. It should also be mentioned that the debtor is discharged by performing to the assignee, even in

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[358] *Cass com, 8 janv 1991* Bull.civ.IV n°8 p.5; RTDcom. 1991 p.271 obs. Cabrillac et Teyssié; RTDciv. 1991 p.368 obs.Bandrac.

[359] Legeais (n341) [21] ; Dumas and Roblot (n341) [34].

[360] *Cass. req., 25 mars 1885* DP 85.1.405; *Cass. req., 4 févr. 1889* DP 90.1.121; *Cass. req.,17 févr. 1896* DP 98.1.129; *Cass. req., 20 juin 1898* DP 99.1.241; *CA Paris, 8 mars 1904* DP 1905.2.65 *; Cass. civ., 6 mai 1968* D 1968.695; JCP 1969.II.15739 obs. Prieur ; Rieg (n332) [530] *;* Cadiet (n332) [73] ; C Aubry C Rau and M Pédamon *Droit civil français (t5)* (1979) [359 bis] 156; G Baudry-Lacantinerie *Traité théorique et pratique du droit civil* (Sirey Paris 1905) t 19 [845]; G Marty P Raynaud and P Jestaz *Les obligations (t2)* (2nd edn 1989) [359] ; G Ripert M Planiol and J Radouant *Traité pratique de droit civil français. Les obligations* (LGDJ 1954) [1128].

[361] *Cass. civ., 1er mai 1889* S 1889.1.460.

the absence of a valid notice[362]. The debtor is also bound to perform to the assignee if he accepted the assignment within a non-authenticated document[363], even if his acceptance will be irrelevant for perfection and priority purposes[364]. Courts allow even an oral or implied acceptance, resulting most often from the debtor's qualified knowledge of assignment[365], provided that his behaviour indicates undoubtedly an (implied) acceptance[366]. The knowledge of assignment alone is not however sufficient to prevent discharge by performance to the assignor.

The two functions of the notice (protection of third parties and information of the debtor) are thus clearly separated. If only the debtor's position would be taken into account, he could be informed informally and not only by a written 'acceptance'. However, in French law, the mere knowledge of the existence of the assignment has no legal consequences[367], unless it is a constitutive element of fraud to the assignee's interests[368].

The multiplicity of functions of the notice of assignment generates hesitations as to the debtor's discharge. If a strict adherence to the requirement of a formal notice, as an absolute condition for enforceability against third parties, is adopted, then the debtor

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[362] *Cass. civ., 9 mars 1864* DP 1864.1.190.

[363] *Cass. 1ère civ., déc. 1856* DP 56.1.439 ; *Cass. req., 6 févr. 1878* DP 78.1.275; Rieg (n332) [261] ; Baudry-Lacantinerie (n360) t19 [776] ; Beudant (n343) t11 [361] ; Carbonnier (n344) [124] Marty Raynaud and Jestaz (n360) [809] ; Ripert Planiol and Radouant (n360) [1121bis] ; G Ripert J Boulanger and M Planiol *Traité de droit civil (t2)* (LGDJ 1956) [1669].

[364] *Cass. 1ère civ., déc. 1856* DP 56.1.439 ; Rieg (n332) [262].

[365] *Cass. req., 6 févr. 1878* DP 78.1.275; *Cass. soc., 20 mars 1953* Bull.civ.IV n°237.

[366] *Cass. ass. plén., 14 févr. 1975* Bull.ass.plén. n°1; D.1975 p.349; *Cass. 3e civ. 22 avr. 1971* Bull. civ. III n°247. For an overview of the general principle of French law *fraus omnia corrumpit* :F Terré P Simler and Y Lequette *Droit civil. Les obligations* (Dalloz Paris 2005) [1286]

[367] Terré Simler and Lequette (n367) 1194.

[368] Beudant (n343) 294.

should obtain discharge even if he knew of the assignment. Several decisions have adopted this view[369], with the approval of a part of the *doctrine*[370]. On the other hand, if the purpose of the notice is the debtor's information, then the source of the information is irrelevant. According to article 1240 C.civ., an imperfect formal notice would prevent the debtor's discharge, as he knew of the change of creditor and he could no longer be considered of good faith. Case-law in support of this alternative view can be also found, providing that a personal and direct knowledge ('*connaissance spéciale et personelle*') of assignment constitutes an obstacle to the discharge of the debtor[371].

The *jurisprudence* has gone even farther by granting to the assignee the right to request performance from the debtor, in the absence of a valid notice, if the rights of other persons (including the debtor) are not affected[372]. The case-law on *cession de créances professionnelles* also denies any assimilation between knowledge of assignment and a valid notice[373]. The rules governing the intervening period are therefore not very consistent and it is a delicate task for a debtor to determine whether he *must* or whether he *may* perform to the assignee in the period between the moment when the assignment is made and the moment when the debtor receives formal notice of assignment.

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[369] *Cass. civ., 26 avr. 1831* Jur.gén. v° Vente n°1746;*Cass. req., 3 juin 1893* DP 1894.1.118; *Cass. com.,19 mars 1980* Bull.civ.IV n°137.

[370] Rieg (n332) [589].

[371] ibid [279] et seq.

[372] *Cass. civ., 4 mars 1931* D 1933.1.73 note Radouant; *Cass. 1ère civ., 18 mars 1969* Bull.civ.I n°116 p.91.

[373] Terré Simler and Lequette (n367) [1302].

3 PECL

Article 11:303(1) PECL lays down the principle that the debtor is required to perform to the assignee 'if and only if' he is given a written notice of assignment, which 'reasonably identifies the claim which has been assigned and requires the debtor to give performance to the assignee'. The assignor is therefore prevented from requesting performance to the debtor. The PECL do not, however, allow the debtor to ignore an imperfect notice of assignment, preventing him from performing to the assignor[374]. The debtor is given thus two basic options: withhold performance or perform to the assignee. Article 11:303(4) provides further dissuasion for performing to the assignor when stating that the debtor is discharged only if he had no knowledge of an assignment.

The system put in place by the PECL revolves around two main ideas. First, the debtor does not have to perform to the assignee before he receives a valid notice of assignment. Second, from the moment when the debtor acquires knowledge of the assignment he is precluded from performing to the assignor, even though he does not have to perform to the assignee either. All aspects considered, the mechanism put in place by article 11:303 PECL is laudable, as it gives a balanced solution to the issues surrounding the intervening period. The debtor is protected, as the assignee does not have, in any circumstance, a right to request performance from him. The main beneficiary of article 11:303 is the assignee, as the debtor cannot perform in any circumstance to the assignor if he knows of the assignment.

[374] Art 11:303(3).

The debtor's interests are also catered for, as the PECL replicate the protection offered in national laws. The debtor's situation during the intervening period is also governed by simpler and more coherent rules. But the debtor continues to undergo considerable pressure, as he still must assess the assignment's validity before performing to the assignee. As the PECL do not provide any mechanism allowing the debtor to deposit the sum owed into the hands of a neutral third party, he incurs the risk of either performing to a wrong person and also of being accused of abusively refusing performance to the assignee.

Article III.–5:119 DCFR follows the line set by the PECL and grants the debtor an option to perform to the assignee or withhold performance. The DCFR goes even farther and allows a debtor who 'believes on reasonable grounds that the right has been assigned but who has not received a notice of assignment' to request from the assignee a notice of assignment or a confirmation that the right has not been assigned. In the context of an imperfect notice the same article also allow the debtor to request a new notice of assignment, satisfying all relevant validity requirements. The introduction of these prerogatives is interesting for future developments of the law of assignment, as, while they do not necessarily provide additional protection for the debtor, they allow him to play a more active role in the scheme of assignment.

C PERFORMANCE IN THE CONTEXT OF COMPETING CLAIMS

After assignment, the debtor may receive competing requests for performance, from the assignor and/or assignee(s). A first choice would be to determine by himself the person entitled to performance. The protection of debtor in this situation is effective if the

relevant rules of the law of assignment allow him to identify easily the creditor and, in case of doubt, grant him a right to request additional information or proof of assignment from the assignor and/or the assignee(s). As not even supplementary information protects completely the debtor from making an error in the determination of the creditor, a legal mechanism allowing the debtor to perform the right assigned without making such a choice is equally necessary.

1 English law

The basic rule for conflicts of priorities both in equity and at common law[375] is *prior tempore potior jure*, the first transferee in time gets priority. However, in the case of assignment, the asset transferred is controlled not only by the transferor, but also by a third party, the debtor. An alternative approach was developed in equity, whose authoritative expression is to be found in *Dearle v Hall*[376] and which is applicable, since 1926, to all transfers of equitable interests[377]. This case concerned a conflict between two successive assignees of the benefit of an annuity trust fund held by trustees. As the second assignee wanted to be certain that the right assigned had not been transferred already, he questioned the trustees, who informed him that that no prior dealings had taken place. Departing from existing rules, it was held that, as the second assignee gave notice first, his interest should prevail.

[375] J De Lacy 'The Priority Rule of Dearle v Hall Restated' 1999 Conv 311; RM Goode *Commercial Law* (LexisNexis UK 2004) 563; RM Goode *Legal Problems of Credit and Security* (Sweet & Maxwell London 2003) [5-08]; S Worthington *Equity* (Oxford University Press 2006) 86-7.

[376] *Dearle v Hall* (1828) 3 Russ 1.

[377] LPA 1925 s137(1),(2).

This rule based on the date of the notice clearly applies to conflicts between equitable assignees[378] and to conflicts between statutory assignees[379]. The extension of the scope of *Dearle v Hall* rule to conflicts between equitable and statutory assignees was criticised for several reasons, including the bona fide purchaser doctrine[380]. This doctrine provides that the holder of an equitable right over tangible property loses priority if a person subsequently acquires a bona fide legal right over the same asset, for valuable consideration and with no notice of the previous transfer[381]. The applicability of the bona fide purchaser doctrine to assignment is debateable, as is the assertion that the generalisation of *Dearle v Hall* was based on a false assumption. Regardless of the merits of this criticism, it would not seem reasonable to overturn a settled rule[382], which has the merit of uniform application to all types of assignments. Moreover, the roots of this position seem to lie rather in a critical position towards solutions to conflicts of priorities based on the date of notice to debtors and in an indirect plea for implementing a filing-based system[383]. From the point of view of substantive law, it seems that any subsisting doubt as to the scope of the rule in *Dearle v Hall* was dissipated by *E Pfeiffer Weinkellerei Weinenkauf GmbH & Co v Arbuthnot Factors Ltd*[384] where Philips J

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[378] Firth 'The Rule in *Dearle v Hall*' (1895) 11 LQR 337.

[379] Biscoe (n314) 137: in the case of statutory assignment, as the notice to the debtor is a constitutive element of assignment, the conflict rule based on the date of the agreement will coincide with the rule based on the date of the notice.

[380] *Ward v Duncombe* [1893] LR 3 AC 369; J De Lacy 'Reflections on the Ambit of the Rule in Dearle v Hall' (1999) 28 Anglo-Am L Rev 87; *Snell's Equity* (n320) [4-06]; F Oditah 'Priorities: Equitable versus Legal Assignments of Book Debts' 9 OJLS (1989) 513; F Oditah *Legal Aspects of Receivables Financing* (University of Oxford, Sweet&Maxwell 1991) [6.6].

[381] *Pilcher v Rawlins* (1872) 7 Ch App 259; *Macmillan Inc v Bishopgate Trust (No 3)* [1995] 1 WLR 978, 1000.

[382] Biscoe (n314) 136; DW McLauchlan 'Priorities - Equitable Tracing Rights and Assignments of Book Debts' 96 LQR 90; *Salinger on Factoring* (n314) [8-04].

[383] Among the legal writers who support this system: Goode *Legal Problems* (n375) [2-31].

[384] *E. Pfeiffer Weinkellerei Weinenkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150.

rejected the argument of the second assignee that his right should have prevailed merely because it was legal.

While the primary purpose of the rule in *Dearle* v *Hall* is to settle priority conflicts, it also serves to protect debtors on assignment, as it associates discharge with performance to the person who gave first a valid notice[385]. The debtor is thus relieved from an impracticable duty to inquire into which assignment was first in time, as his knowledge of assignment comes from the notice. The knowledge of the assignment does not alter the debtor's duty to perform to the assignee who gave first notice. Even between competing assignees, the knowledge of a previous assignment is immaterial if acquired only at the moment when notice of assignment was given[386]. Furthermore, the debtor has no obligation to inform potential assignees about any previous notice received[387], unless he is a trustee[388].

When the notice of assignment comes from the assignee, the debtor may suspend performance until additional evidence of assignment is provided[389]. Furthermore, section 136(1) LPA 1925 provide two legal mechanisms allowing the debtor to perform his obligations without incurring the risk of paying the wrong person: interpleader and

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[385] MG Bridge *Personal Property Law* (Oxford University Press 2002) 163.

[386] *Mutual Life Assurance Society v Langley* (1886) 32 Ch D 460. For an opinion the notice of a prior assignment should be inoperative in all cases: J De Lacy 'The Priority Rule of Dearle v Hall Restated' 1999 Conv 311.

[387] *Ward v Duncombe* [1893] LR 3 AC 369; Biscoe (n314) 121. Statements of the opposite position can also be found: *Re Dallas* [1904] 2 Ch 385 (CA) 414: 'it is common to all the theories of the principle that the trustee or other person who legally dominates the fund will inform the person giving the notice whether there is any prior encumbrance in existence'.

[388] LPA 1925 s137(8).

[389] *Van Lynn Developments* (n318) 613: 'After receiving the notice, the debtor will be entitled, of course, to require a sight of the assignment so as to be satisfied that it is valid'. S Fisher *Commercial and Personal Property Law* (Butterworths 1997) [13-24].

payment into court. In English civil procedure[390], interpleader may be used by a person confronted with competing claims who seeks protection against the risk of having to perform twice[391]. On assignment, interpleader allows the debtor to force all persons with competing claims to litigate in the same proceedings.

Interpleader is complemented and can operate together with payment into court. English law offers the possibility to pay money into court where a right is disputed between several persons, thus ending litigation and facilitating settlements[392]. Section 136(1) LPA 1925 provides that payments into court made by debtors on assignment are governed by the Trustees Act 1925[393]. Using this procedure, the debtor will pay the sum assigned into court, which, at the end of proceedings, will simply allocate the sum to the entitled creditor.

2 French law

As French law does not have any rules applicable exclusively to conflicts of priorities, the courts have elaborated a system based on the date of perfection of the assignment (*opposabilité aux tiers*)[394]. This system applies to all conflicts between assignees, regardless of the mode of assignment and even to conflicts with holders of security rights over receivables[395], conflicts related to the proceeds of a sale of an asset affected

[390] CCR Ord 33 r6(1).

[391] Fisher (n389) [13-54].

[392] CPR 36; NH Andrews *Principles of Civil Procedure* (Sweet & Maxwell London 1994) [13-005].

[393] Trustees Act 1925 s63; *Snell's Equity* (n320) [27-12].

[394] Biliau (n340) [47]-[48].

[395] ibid [49] et seq.

by reservation of title[396] and conflicts with sub-contractors who have a statutory right to sue the employer for monies owed to them[397], but not to conflicts with holders of negotiable instruments[398]. Across the various modes of assignment, considerable differences as to perfection can be observed: the date of notice or the debtor's acceptance for *cession de créance* of the Code civil[399] and the date of the assignment agreement, for *cession de créances professionnelles*[400]. The importance of the perfection criterion is such that competing assignees (*cession de créance*) who notify by *signification* on the same day and at the same time are put on equal footing regardless of the date of their assignment[401]. The choice of the perfection date was explained by the publicity role of the notice, which was compared to the registration of sales of land[402]. The comparison is unfounded[403], as the debtor has no duty to inform potential assignees. For *cession de créances professionnelles* the debtor may not even know of an assignment that has become enforceable against third parties from its inception. The formal requirements of the notice are more likely a historical legacy of a system of sale

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[396] M Cabrillac 'Réserve de propriété, bordereau Dailly et créance du prix de vente' D 1988 chron XXXVI p 225; D Mainguy 'Conflit entre le vendeur sous réserve de propriété et l'affactureur: avantage à l'affactureur' Actualités des procédures collectives n° 14 21 séptembre 2001; D Martin 'Du conflit relatif à la créance du prix de revente d'une marchandise acquise sous réserve de propriété' D 1986 Chron p 323; F Pérochon 'La revendication du prix de revente' D affaires 1996 p 140231.

[397] H Synvet 'Nouvelles variations sur le conflit opposant banquiers et sous-traitants' JCP 1990.I.3425.

[398] M-A Ribeyre 'Conflit entre cessionnaire Dailly et porteur d'une lettre de change' Lamy droit des affaires 2000 n°116 p.1 ; A Boujeka *La provision: essai d'une théorie générale en droit français* (LGDJ 2001) 372.

[399] *Cass. req., 13 janv. 1845* S 1845.1.319; Cadiet (n332) (Effets) [69] ; P Malaurie P Stoffel-Munck and L Aynès *Les obligations* (Defrénois Paris 2007) [1315] etc.

[400] *Cass. com., 5 juill. 1994* Bull.civ.IV n°251; Dumas and Roblot (n341) [51]. The same rule applies for contractual subrogation: J Mestre *La subrogation personnelle* (LGDJ 1979) 47.

[401] *Trib. civ. Grenoble, 23 déc. 1885* Jur. gén. Suppl v° Vente n°755; *Trib. civ. Seine, 8 juill. 1872* Jur. gén. Suppl. v° Vente n°755; Rieg (n332) [598]. This applies even to assignment of part of a fraction of a debt : *Cass. civ., 20 mai 1866* S 66.1.393 ; *Cass. civ. 12 août 1879* DP 79.1.473 ; Aubry Rau and Pédamon (n360) 168 n 81.

[402] Beudant (n343) [365] ; Marty Raynaud and Jestaz (n360) [366].

[403] J Ghestin 'La transmission des obligations en droit positif français' in *La transmission des obligations* (E. Bruylant/LGDJ 1980) [37] ; Carbonnier (n344) [318] (Théorie juridique).

based on delivery (*traditio*) as a requirement for transfer of title[404], an idea that article 1690 C.civ. also echoes when stating that the assignee seizes the debt ('*le cessionnaire* (…) *est saisi*').

If a debtor receives two notifications of a *cession de créance*, he is discharged by performing to the first assignee who gave notice, regardless of the date of the assignment[405]. The same rule applies to *cession de créances professionnelles*[406]. The difference with *cession de créance* is that, if the debtor receives two notifications before performing the right assigned, he is obliged to give priority to the first assignee, regardless of the date of his notice[407]. This shows that the solution adopted for the debtor's discharge does not necessarily coincide with the solution applied in regard to other third parties. Whereas the debtor is discharged, the first assignee is nevertheless protected as he can sue the second assignee on grounds of unjust enrichment[408].

The main source of debtors' protection in cases of competing demands is article 1240 C.civ.. This text of general application allows the discharge of debtors who performed in good faith to a person who had 'possession of the debt' ('*créance*')[409], which, in the context of assignment, means a person who appeared to be the assignee[410].

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[404] Carbonnier (n344) [316].

[405] Rieg (n332) [592].

[406] *Cass. com., 3 janv. 1996* JCP 1996.II.22682 note Stoufflet; RTDciv. 1997 p.479 n°2 obs. Crocq; *Cass com, 26 nov 2003* Bull.civ.IV n°176.

[407] *Cass com, 12 janv 1999* Dalloz affaires 1999 337 obs XD ; Dumas and Roblot (n341) [51].

[408] *CA Paris, 12 janv. 1826* DP 1826.2.203.

[409] Issa-Sayegh (n345) [147] et seq.

[410] Malaurie Stoffel-Munck and Aynès (n399) 788 n16 ; Issa-Sayegh (n345) [151].

The debtor is discharged even if the assignment was subsequently retroactively annulled or was fictitious[411].

French law grants few other means of protection for the debtor. As French law has no statutory provision granting debtors a right to ask for evidence of assignment, they must satisfy with the information provided in the notice of assignment or ask the assignor. Courts, in their interpretation of article 1690 C.civ., have set the requirements for a valid notice, among which the most important are the clear indication that the right was assigned and the identification of the person entitled to receive performance[412].

In a context of a conflict of priorities, articles 1257-1264 C.civ. and articles 1426-1429 C.proc.civ. governing *consignation* allow debtors to perform a right disputed among several persons into the hands of a third party[413]. If the right transferred is for payment of money, the debtor is allowed to deposit the sum owed to a designated financial institution (*Caisse des dépôts et consignations*).

3 PECL

The PECL provide a complete range of measures for the protection of debtors suspecting a fraudulent request of performance. Article 11:303(2) PECL grants the debtor the right to withhold performance and request 'reliable evidence of the assignment' if the notice of assignment is given by the assignee. Articles III.–5:119(3) and (4) DCFR adopt an identical position, detailing the meaning of 'reliable evidence'.

[411] *Cass. civ., 9 juill. 1851* DP 1851.1.311.

[412] *Cass. civ., 13 nov. 1928* DH 1928.605; *Cass. civ., 4 mars 1931* D 1933.1.73 note Radouant.

[413] Rieg (n332) [499] ; T Huc *Traité théorique et pratique de la cession et de la transmission des créances* (Paris 1891) t.2 [363].

In order to protect the assignee from an abusive exercise of this defence, the PECL locked the debtor's right to request evidence within a 'reasonable time' from the receipt of the notice.

Furthermore, article 11:304 PECL (and article III.–5:118(2) DCFR) also protects the debtors who have performed to an assignee, by stating that:

> A debtor who performs in favour of a person identified as assignee in a notice of assignment under Article 11:303 is discharged unless the debtor could not have been unaware that such person was not the person entitled to performance.

The debtor is therefore discharged if there were no obvious indications that the person requesting performance was not entitled to it[414]. The debtor's performance is presumed valid and the debtor has no duty of inquiry. Even if national laws have rules of general application that produce similar effects, the PECL have the merit of stating a rule explicitly applicable to assignment. The solution adopted by the PECL shows that favouring the circulation of credit does not imply necessarily a sacrifice of the debtor's interests. The debtor is thus indirectly encouraged to perform to the assignee with no delay, as he knows that he does not incur any significant risk by doing so.

Looking at article 11:303(2), it is unclear what would happen after the debtor would use the right to ask for more information from the assignee. Would he be precluded from citing article 11:304 PECL, as it would not be reasonable to believe that, after requesting further information, he 'could not have been unaware' that the assignee was not entitled to performance? If this interpretation were correct, the

[414] *PECL. Part III* (n349) 114.

cumulative application of articles 11:303(2) and 11:304 PECL, could have the opposite effect to their purpose – protection of debtors.

A more accurate interpretation would be that where a debtor's request for additional information has been answered, the debtor's discharge should not be affected, as the supplementary evidence may not provide any new significant information: the assignee may provide false and yet apparently valid evidence of assignment. Therefore, debtors should not be penalised when they take the time to analyse the assignment's validity, unless the evidence itself presented by the assignee contained elements indicating that the request for performance was illegitimate. In any event, debtors should be careful when performing to an assignee whose notice was not written, as only a written notice allows their discharge under article 11:304[415].

Another difficult situation arises where, after the receipt of a valid notice from an assignee, other persons also request performance from the debtor. Unfortunately, the PECL do not provide rules of substantive law on this issue and settle for a private international law rule. Article 11:305 PECL indicates that a debtor confronted with conflicting demands for performance is discharged by complying with the law of the due place of performance or, alternatively, if performance is due in different places, with the law applicable to the claim. A possible reason for providing a rule of private international law is that national laws frequently decide that performance must be received by a neutral and reliable party, more often by a court[416]. As transposing this solution into the PECL would have implied the recourse to rules of civil procedure,

[415] B Lurger 'Assignment of Claims' in A Vaquer (ed) *La tercera parte de los principios de derecho contractual europeo* (Tirant Valencia 2005) 133, 145.

[416] *PECL. Part III* (n349) 114.

which lay outside the scope of the PECL, it was more convenient to designate a rule of conflict of laws. Article III.–5:120(2) DCFR adopts a bolder attitude and provides that the debtor is discharged in the context of conflicts of priorities by performing to the first notifying assignee, even if the debtor was 'aware of competing demands'. This solution has the merits of simplicity and is uncontroversial, as it is already adopted in both English and French law.

CONCLUSION OF CHAPTER 3

The determination of the person entitled to performance after assignment presents an interest not only for the debtor's discharge, but also for competing assignees and other interested third parties. The determination of the creditor can be a very delicate matter in situations where the information of the debtor does not coincide with the date of perfection ('*opposabilité aux tiers*'). These two levels seem unbridgeable whenever a system based on the date of the notice to the debtor is not used for deciding the priority between competing assignees, as in practice the debtor will perform to the first notifying assignee. The priority assignee will then have to recover from the other assignee. For notice-based systems, the duality of levels surfaces when the debtor has acquired knowledge of assignment from another source than a valid notice. Choosing the date when the debtor was informed of the assignment as a criterion for determining the order of priority remedies this problem. However, such a system is not viable as against third parties, as it does not permit to have readily evidence of the relevant date for priority purposes and it also lacks transparency.

The discharge of the debtor who performed to the assignor because he did not know of the assignment is accepted by all the legal systems studied in this thesis,

regardless of their solution for conflicts of priority. Discharge is granted in these circumstances as a measure of protection of a debtor in good faith, who is reasonably entitled to believe that the person to whom he performs is his creditor[417]. In legal systems where the notice of assignment is used for determining the order of priority, the debtor loses the benefit of this protection if he acquired knowledge of assignment and nevertheless performed to the assignor. The debtor's information is a cornerstone of assignment and is unavoidable even where a filing system is used for priority purposes. The choice of a particular priority system is irrelevant to the debtor, even if a system better than the one based on the date of the notice could provide him additional information.

The notice-based system is considered increasingly inadequate as, despite the alleged publicity function of the notice, the debtor is under no duty to inform potential/actual assignees of the receipt of a previous notice of assignment. It also propagates what can be perceived as an injustice, as subsequent assignees may gain priority by taking advantage of the lack of notice by a prior assignee. In order to improve the protection of assignees and thus facilitate credit, two alternative systems are at present used or will be used in English and French law. The system based on the date of the agreement which is increasingly applied in French law is simply a return to the basic rule on conflicts of priority *prior tempore*, which is also recognised in English law. It has the merit of eliminating the uncertainty of the period between the date of assignment and the date of the notice to the debtor, but it does not ensure performance to the entitled assignee, as the debtor may perform to the assignor or to another assignee

[417] Lurger (n415) 133, 144.

who gave notice first. The system also perpetuates the absence of a publicity role for perfection formalities.

The filing-based system, currently applied in the United States, as well as other jurisdictions[418], does not necessarily provide more protection for debtors, for whom a notice of assignment is still required. It has other considerable benefits, as it permits the information of potential assignees and provides a reliable date for determining the order of priority. The debtor may indirectly benefit from such a system as, after he was informed of the assignment, he may check the register centralising all the filing applications in order to verify the assignee's entitlement.

The filing system is, however, not easily transposable at an international level, as it would require a centralised international system, managed by an international body, and it would thus imply a wide consensus which can be very difficult attained. This reveals another limitation of the contribution of international texts, such as the PECL, to the creation of new national legislation. In their effort to achieve progress of the law, international texts are generally limited to solutions which do not imply the recourse to new administrative bodies. Another limitation of international texts is their inability to cover all the aspects and ramifications of the legal concepts which constitute their subject-matter. The PECL (and DCFR as well) do not have provisions allowing the debtor to pay a debt for which he received competing claims to a neutral central party. Article 11:305 PECL simply states a rule of conflicts of law for the situation when a debtor received conflicts requests for performance, a position which has been replicated by other international texts, most notably by the UN Convention, which contains only

[418] P Wood *Comparative Law of Security Interests and Title Finance* (Sweet & Maxwell 2007) 168.

'autonomous conflicts-of-law rules' in respect to the form of the assignment agreement, respective mutual right and obligations of assignor, assignee and debtor, priority rules and public policy and imperative rules[419].

[419] UN Convention art 26 to 32.

CONCLUSION

This comparative analysis of English and French law has revealed a relatively efficient protection of debtors on assignment coexisting with archaic provisions which restrict assignment. More particularly, the existing law is not suitable for transfer of flows of receivables in factoring and to cross-border assignments. The status quo is put under a considerable pressure, nationally and internationally, by the ever increasing significance of receivables in modern economies and the necessity of facilitating assignment, as an instrument of circulation of wealth. Substantive aspects aside, the absence in either English or French law of clear rules on all aspects of the law of assignment, as well as the multiplication of modes of assignment entails considerable insecurity for all persons involved in assignment, including debtors.

This thesis also represents an attempt to assess the possible impact of Chapter 11 PECL and, incidentally, of the equivalent provisions of the DCFR, on the protection of debtors under English and French law. Three possible roles for these texts have been envisaged: a restatement of existing law; an optional or mandatory instrument, applicable only to dealings between persons located in different EU Member States (with a view to their 'toolbox' role, as a basis for improving existing national rules); and finally a comprehensive collection of rules, which could form a Code of private law, in the continental sense of the word, replacing existing national laws. The role of restatement of European national rules on assignment can be supported to some extent, eg assignment of personal rights and defences available to the debtor. It would, however, be hazardous to describe Chapter 11 as being only a reiteration of commonly shared national rules, as on some issues, such as the treatment of contractual limitation of assignment, conflicts of priorities and assignment of disputed rights, significant

differences between national laws exist. More importantly, the restatement ambition of the PECL is flawed from its inception, as its postulate is a scientific, universalistic view of the law, which minimises the importance of policy imperatives, different from one national jurisdiction to another. The PECL and the DCFR are not either a political-neutral reiteration of common rules. Their very existence is a political act, as it implies that the creation of uniform rules in the field of private law can be legitimately made by legal scholars and that such rules are the only solution to an hypothetical distortion of competition mentioned at articles 94 and 95 of the EC Treaty generated by the diversity of national rules on private law[420].

In respect to the role of PECL as an instrument applicable only to cross-border dealings, Chapter 11 could be implemented in English law as another 'statutory assignment'. This would leave in place existing statutory and equitable assignments and would facilitate the incorporation of the Chapter 11 PECL in English law, as no structural changes would be necessary. For French law, as the provisions of Chapter 11 PECL are very similar to those of the Code civil, their introduction would be redundant. The PECL would have a significant drawback, as they would contribute to the multiplication of legal rules on assignment, which is a source of legal uncertainty and an obstacle to assignment. As for the use of the PECL as a valid choice of law governing a contract, it should be noted that parties cannot decide to apply only parts of the PECL. The PECL may be chosen to govern a contract only for the purposes of avoiding a national law rule on assignment. For example, parties wanting to avoid the rules of English law on non-assignment clause could choose PECL as applicable law. The parties arguably could draft a distinct contract covering only the aspects of assignment

[420] M Hesselink 'The Structure of the New European Private Law' (2002) 6.4 EJCL <http://www.ejcl.org/64/ art64-2.html> accessed 31 August 2008.

of rights from a contract and leave the rest of the provisions in a contract governed by another law of their choice. This raises the question of the scope of application of the PECL. As they are not an international convention, they do not state the cases in which they are applicable. The parties, according to art 1:101 PECL, may chose to include them in the contract. However, unlike the UNIDROIT Principles, the mandatory rules contained in the PECL replace national mandatory rules[421]. By combining all these elements, it would be possible for what would being a purely domestic transaction, private international law, to be governed by a complete set of different rules, lying at the unrestricted choice of the parties.

Another ambition for the PECL and even more the DCFR is to contribute to the adoption of a European Civil Code, replacing existing national law. The PECL and the DCFR would fit more into a system of law based on codification and the prominence of written, legislative rules, such as French law. Despite the increased importance of legislation in English law, common law remains the backbone of English law, offering often more reactivity to social changes than legislation[422]. The existence of a comprehensive text covering all aspects of an area of law is contrary to the tradition of English law, even if codification is envisageable in some limited areas, as shown by the Sale of Goods Act 1979. For assignment itself, the existence of section 136 LPA 1925 shows that such an objection can be overcome. A civil code would go against the understanding of law and the legal reasoning used in English law as "it imposes on common lawyers the supposedly superior worldview of civilian legal doctrine"[423]. Such

[421] PECL art 1:103.

[422] MP Furmston 'Unification of the European Law of Obligations - An English View' in *Mélanges offerts à Marcel Fontaine* (2003) 372.

[423] J Smits 'Law Making in the European Union' (2006-2007) 67 LaLRev 1181, 1195.

a code would reflect only the position of the civil law tradition, which focuses on elaborating abstract rules which are later applied to particular factual situations[424]. Such a centralised system would also go against national diversity[425] and the decentralisation of administration promoted by EU policies.

From a substantive law point of view, the provisions of the PECL on assignment do not bring any revolutionary innovations to the existing law of assignment from English and French law. They do not create a new mode of transfer of rights, nor do they bring radical new solutions to controversial issues from English and French laws. The PECL have however the considerable merit of providing modern and clear rules for areas where English and French law are silent or on which they still hesitate on the solution to adopt (eg the legal effects of the debtor's knowledge of assignment – art 11:303(1) PECL). The PECL also demonstrate the possibility of a third way in the law of assignment ie of measures which would benefit both assignees and debtors. The existence of detailed and clear rules benefits all persons involved in assignment, as the uncertainty as to the legal rules applicable is an important factor of risk for all participants to assignment. Compared to the provisions of the Code civil or the Law of Property Act 1925 on assignment, the PECL offer written rules covering most aspects of assignment.

The most notable, yet insufficient contribution of the PECL to the progress of the law of assignment innovation is the debtor's right to claim compensation for

[424] P Legrand 'Against a European Civil Code' (1997) 60 MLR 44, 44-6.

[425] ibid 62.

increased costs generated by assignment[426]. This right is fully in accordance with the principle of neutrality of assignment. Even if the debtor's right to compensation concerns a specific situation (change of place of performance), this idea, once introduced in legal practice, could pave the way for the creation of a rule of a general application. The debtor should not be awarded compensation automatically and should be requested to provide evidence of a significant increase of costs of performance. In most cases, this new right would not change anything to the current situation, but it would be however a precious safety net for debtors for some exceptional cases, where other rules of law do not offer them any comfort, being also in line with the objective of fairness and good faith promoted by articles 1:201, 4:109 and 4:110 PECL, which are shared to a certain extent by most European national laws[427]. As the circulation of incorporeal things is crucial for modern economies, this adaptable test would also ensure a fair balance of interests on assignment and avoid giving assignees and assignors a disproportionate advantage in the detriment of the debtor's legitimate interest.

[426] PECL art 11:306(1).

[427] S Whittaker and R Zimmermann 'Coming to Terms with Good Faith' in *Good Faith in European Contract Law* (CUP 2000) 653.

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