Cross-Border Security over Receivables

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The Law of Assignment of Receivables: in Flux, Still Uncertain, Still Non-Uniform

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I. General Framework

This volume is a companion work to “Cross-Border Security over Tangibles”, published in November of 2007. Reference should also be made to that book, as it provides a deeper introduction to the legal systems studied and to the notion of security, as well as a more detailed study of filing/registration and of the basic structure of secured transactions law – thus, providing a context for the material contained in this volume. In the interest of brevity, that material is not repeated in this volume.

During the past twenty-five years, there has been a great deal of legislative activity in Europe with respect to transactions in receivables. Virtually every country studied in this volume has engaged in this activity, albeit in varying ways.¹ This activity is largely in response to demands of the marketplace. It reflects the recognition of the growing importance of receivables as a means of raising finance² (both as collateral and as a commodity that can be sold) and the role that receivables financing can play in economies, particularly for the financing of small and medium enterprises, not to mention in the capital markets. The changes have ranged from changes in the basic rules provided in civil codes for transfers of claims to special legislation to make possible or to facilitate securitisation and other financing techniques that involve transactions in receivables.

This activity has also occurred in the international and regional spheres, with the adoption of the United Nations Convention on the Assignment of Receivables in International Trade (covering both outright transfers and security transactions) (the “UN Convention”),³ the UNIDROIT Convention on

¹ See the more detailed discussion below in this Introductory Chapter, as well as the National Reports. Also see, generally, Salomons, Deformalisation of Assignment Law and the Position of the Debtor in European Property Law, ERPL 2007, 639 et seq.
² In many instances, receivables are the most significant part of the assets of a business and they are often the most liquid and simplest to collateralise.
International Factoring, the struggles with respect to what is now Art. 14 of the EU Regulation on the law applicable to contractual obligations (the “Rome I Regulation”), and the UNCITRAL Legislative Guide on Secured Transactions (covering, with respect to receivables, both outright transfers and security transactions) (the “Legislative Guide”). And, of course, the national implementations of the EU Directive on Financial Collateral Arrangements (“Financial Collateral Directive”) have had a role, albeit to

The UN Convention was adopted by the General Assembly in 2001; it has not yet entered into force; it has been signed by Luxembourg, Madagascar and the United States, and acceded to by Liberia. For a detailed analysis of the UN Convention, including a comparison with relevant provisions of Article 9 of the Uniform Commercial Code in the U.S. (“UCC Article 9”), see Sigman/Smith, Toward Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade, 57 Bus. Law. 727 et seq. (2002).

Text available at http://www.unidroit.org (1 April 2009); adopted (Ottawa) 28 May 1988; entered into force 1 May 1995; ratified or acceded to by seven countries, including three of the countries studied in this volume: France, Germany and Italy.


The most recent publicly available text may be found at http://www.uncitral.org (1 April 2009). With respect to receivables, the Legislative Guide’s recommendations effectively track the UN Convention; thus, reform based on the Legislative Guide would result in the enactment of the UN Convention as national law.

Directive 2002/47/EC of 6 June 2002 (OJ 27 June 2002 L 168/43 et seq.). It should be noted that the European Commission has proposed amendments to the Financial Collateral Directive (Proposal for a Directive of the European Parliament and of the Council amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims, COM (2008) 213 final). Immediately prior to submission of the manuscript of this volume to the publisher, the Community institutions agreed to amendments to the Financial Collateral Directive. The actual state of affairs may be reviewed at http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosID=196941 (1 April 2009). These amendments would, inter alia, extend to “credit claims” (very broadly defined) eligible for the collateralisation of central bank credit operations the same level of insulation from various national legal impediments enjoyed by other types of financial collateral under the Directive, several Member States having already included certain bank loans and other assets as eligible for use in collateral operations in financial markets, but operating
a widely varying extent, in the development of national law in this field as well.

Although the focus of this volume is primarily on seven European countries – Germany, the Netherlands, France, Belgium, England, Spain and Italy – this Introductory Chapter will include references, for comparison and contrast purposes, to the above-mentioned international and regional instruments and also to the Principles of European Contract Law (“PECL”), now integrated into the Draft Common Frame of Reference (“DCFR”), the UNIDROIT Principles of International Commercial Contracts (“UNIDROIT Principles”), and the Uniform Commercial Code (“UCC”) in the United States.

II. Scope and Terminology

It is important to establish at the outset the terminology used in this volume. Two elements must be kept in sharp focus – (i) the asset that is the subject matter of the transaction, and (ii) the nature of the transaction itself.

This volume, like the UN Convention, is confined to “receivables”. This is not a traditional legal term, but rather is a business term. It is a subset under different legal regimes. This asset class has been eligible collateral for Eurosystem credit operations since the beginning of 2007.

References herein to the UCC are to the 2007 Official Text and references to UCC Article 9 are to the 2000 Official Text. Subject to minor variations, UCC Article 9 has been enacted and is in effect in all fifty states and the District of Columbia. For an in-depth discussion of key aspects of UCC Article 9, many of which apply also to receivables transactions, see, the Introduction to Sigman/Kieninger (eds.), Cross-Border Security over Tangibles (2007), p. 3 et seq.
of the broader class “claim”, usually referred to in the countries studied as créances, créditos, Forderungen.  

This volume uses the term “receivable” to refer to a “contractual right to payment of a monetary sum”, the definition used in the UN Convention. This term, thus, excludes both non-contractual rights and rights to performance other than payment of a monetary sum. Nevertheless, the category of receivables embraces the vast majority of claims used in ordinary financing transactions, although in the codifications in Europe references are generally to the broader class “claims.”

12 English law has historically used the term “book debts”, and the term is used in legislation requiring registration of certain types of transactions involving such assets. Consequently, that term has acquired a particular meaning, not precisely coterminous with “receivables” – “essentially an amount due in the course of a business which is normally entered into the ‘books’ of the business.” Beale/Bridge/Gullifer/Lomnicka, The Law of Personal Property Security (2007), p. 216. “However, modern commerce [...] tends to use the wider term ‘receivables’ to refer to all debts owed to a business.” Ibid.

13 Under the UCC, while most ordinary commercial receivables would likely be classified as accounts or chattel paper, a receivable within this volume (and, subject to its exclusions, within the UN Convention) could fall into one of the other UCC categories – promissory note or conceivably another instrument, payment intangible or conceivably another general intangible, investment property, deposit account or letter-of-credit right. These are all defined terms. The reason for the detailed subclassification of rights to payment is to facilitate the expression of refined rules (e.g., concerning perfection or priority) that are designed to satisfy differing business needs and efficiently support differing business practices.

14 PECL defines “claim” as “a right to performance” and application of PECL Chapter 11 extends beyond contractual claims. See fn. 16 infra. The DCFR uses „right to performance“ instead of the usual term „claim“. The UNIDROIT Principles deal with the “transfer by agreement” of a “right to payment of a monetary sum or other performance from a third person” (Art. 9.1.1), although a number of the specific rules apply only to, or differently in the case of, non-monetary performance (e.g., Art. 9.1.3).

15 Even this subset was narrowed in the scope of the UN Convention by exclusions in Art. 4, because the full subset would have added complexity and required detailed special rules in one or more particular aspects, susceptible of solution within a particular legal system but thought too difficult to deal with in a global instrument. The European codifications generally refer to “claims”. UCC Article 9 does not use the term “receivables”. See fn. 13 supra with respect to UCC terminology.

16 Chapter 11 of PECL applies to (1) “the assignment by agreement of a right to performance (“claim”) under an existing or future contract, and (2) [...] the assignment by agreement of other transferable claims.”
There is a list, in Art. 4 of the UN Convention, of excluded types of transactions and types of receivables – these are discussed below in the part of this Introductory Chapter dealing with private international law issues (in the context of the analysis of the Rome I Regulation), para. VI.3.c)bb)(1).

The second element that requires terminological specificity is the nature of the transaction. This volume deals with transactions whereby the owner of a receivable (whether in a particular legal system this is an item of property or ‘only’ a personal right), by agreement, transfers or creates a proprietary right in the receivable in favour of another person. This transaction may be (i) an outright transfer (sometimes referred to in the literature and the marketplace as a “true sale”), (ii) a transfer by way of security, i.e., title transfer for a security purpose (sometimes referred to as a “fiduciary transfer” or a “security transfer”), or (iii) the creation of a pledge or other security right denominated as such. In some legal systems, the term “assignment” may encompass all three categories. In other systems, only the first two categories are referred to as “assignments” and, in some cases, the applicable substantive rules make no distinction between them. In other systems, the latter two categories are collapsed into a single category;