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Choice of law for third-party effects of assignments of claims

An analysis of HR-2017-1297-A and the European Commission's Proposal for a regulation

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Table of contents

1 Introduction

1.1 Presentation of the problem

The theme of this thesis is the choice of law disputes which may arise when a claim has been assigned to several assignees, and the parties to the dispute are resident in different states.

This was an issue which had not been directly considered by the Supreme Court of Norway until the Bergen Bunkers decision in 2017.[1] The main question of the thesis is how disputes concerning third-party effects of assignments of claims most likely will be resolved in Norwegian law following recent legal developments in Norway and in the EU, including the Bergen Bunkers decision and the European Commission's Proposal for a new regulation which would regulate this issue.

Assignment of claims is a practical and commonly used mechanism for obtaining liquidity or credit.[2] An example many Norwegian internet-shoppers are familiar with is paying through Klarna, which handles the payment for a plethora of online shops operating in the Norwegian consumer market. If the customer opts to pay what is owed a fortnight later, this means that the online shop has to wait to receive payment, and in addition, that there is a risk that the buyer never pays what is due. For an online shop which deals in goods, demanding payment on an unpaid bill may be costly and time consuming. It would require staff to pursue the buyer who has not settled his or her debt, and this would not provide any additional benefit to the business. On the other hand, by offering flexible payment methods such as the option to pay later or split the amount into instalments, sales may increase.

Therefore, it is a commonly applied solution to assign the claim to an assignee like Klarna. If a consumer is due to pay 1000 NOK in a fortnight, this debt could be assigned in exchange for immediate payment from Klarna to the shop of 950 NOK. The shop, i.e. the assignor, would perhaps prefer 950 NOK immediately and without risk of default, rather than the riskier promise of 1000 NOK in two weeks. If the debtor pays on time, Klarna will receive 50 NOK in profits for taking on the risk. If the debtor does not pay, Klarna will likely have available resources and the know-how for effectively demanding payment, as they specialise in buying debts. Assigning receivables is therefore a beneficial solution for both parties.

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[1] HR-2017-1297-A.

[2] The words 'claim' and 'receivable' will be used interchangeably, but in alignment with the EU Commission's Proposal for a regulation on the law applicable to the third-party effects of assignments of claims (COM (2018) 96). Therefore, a 'claim' is considered the right of a creditor against a debtor to the payment of a sum of money, which includes, but is not limited to, receivables.

As the theme of the thesis is disputes following multiple assignments of the same claim, the disputes are proprietary in nature, not contractual.[3] Multiple assignments may occur if the assignor fraudulently assigns the claim several times, but could also occur if the assignor becomes bankrupt, or an unpaid creditor has obtained a security interest from the Enforcement Office.[4] The question is which of the assignees has priority. The debtor will only be obligated to pay once, and only to the assignee which has priority.

In Norwegian law, this priority dispute is resolved by the Debentures Act[5] and by the Security Interest Act.[6] In order to obtain priority[7] in a dispute under Norwegian law, the claim must be perfected. For outright assignments and for assignments by way of security, perfection of the claim could be achieved by giving the debtor notice.[8] The assignee which gives the debtor notice first gets priority. In arrangements involving factoring, priority is obtained by entering the assignment agreement into a register called *Løsøreregisteret*.[9]

However, the method by which the assignee will perfect the rights under the assignment varies between jurisdictions. In some jurisdictions, notification and registration may be unnecessary, or there could be other means of securing the rights under the assignment.

For instance, under English law, in a dispute between two assignees who have an equal interest in the claim, the first assignee who has given the debtor notice has priority.[10] However, there are no registers in which e.g. factoring can be registered. Therefore, if the case concerns factoring, the rules on priority are different under English and Norwegian law.

If Norwegian law applies, the first to register the assignment in *Løsøreregisteret* will take priority. If English law applies, the first to give the debtor notice will take priority. The party which performed the required act lastly, will not be able to claim payment from the debtor.

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[3] Norwegian: dynamisk tingsrett.

[4] Norwegian: Namsmannen.

[5] Debentures Act (Gjeldsbrevlova).

[6] Security Interest Act (Panteloven, my translation). There is a translation which can be found on University of Oslo's website for '*Oversatte lover'* (https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19800208-002-eng.pdf (accessed 23.11.20)) which uses the term 'Mortgage Act'. This is not an official translation, and as a mortgage is a form of security interest which usually involves immovable property, this translation will not be used.

[7] Norwegian: Ha rettsvern. Could also be translated as 'perfecting the claim'. It determines which of the right holders who will be entitled to the asset.

[8] Debentures Act § 29 (2).

[9] Security Interest Act § 4-10 (2).

[10] *Dearle v Hall* (1828).

Therefore, it is vital for the parties to know which state's law applies to the third-party effects of the assignment.

1.2 Scope of the thesis

Before the choice of law can be determined, it must be determined which state's courts have jurisdiction to hear the case. The first step will therefore be for the seized court to consider whether it has jurisdiction to hear the case.

If this is answered in the affirmative, the court will then apply its own private international laws, the *lex fori,* to determine which law applies to the dispute.[11]

In Norway, the question of jurisdiction is regulated by the Dispute Act Chapter 4, and the Lugano Convention, to which Norway is a party. If the matter falls within the scope of the Lugano Convention, it has preference over the Dispute Act's provisions.[12]

The Lugano Convention will generally allocate jurisdiction to Norwegian courts when the defendant is domiciled in Norway,[13] however this is subject to exceptions in special jurisdiction rules[14] as well as express contractual agreements on jurisdiction.[15]

If the Lugano Convention does not apply, Norwegian courts have jurisdiction if the case has a 'sufficiently strong connection to Norway' according to the Dispute Act § 4-3 (1). The requirement of a 'sufficiently strong connection' usually means that a proper venue[16] must be found in Norway. Whether the courts may exceptionally hold that they have jurisdiction, even if the defendant is domiciled abroad and there is no Norwegian venue according to the Dispute Act §§ 4-4 to 4-6, has been comprehensively debated in legal theory.[17] This question has also been subject to potentially inconsistent practice in the Supreme Court.[18] This thesis will not examine this further.

The Supreme Court's application of the Lugano Convention and its reasoning with regards to jurisdiction in the Bergen Bunkers decision is also an interesting topic. However, this will not

[11] See e.g. HR-2019-1929-A para 23.

[12] Dispute Act §§ 4-8 and 1-2, see also Rt. 2012 p. 57 para 18.

[13] The Lugano Convention Article 2(1).

[14] The Lugano Convention Articles 5 to 22.

[15] The Lugano Convention Article 23.

[16] Norwegian: Verneting.

[17] For example, Cordero-Moss (2018b) p. 42, Cordero-Moss (2019) p. 346-358 with reference to Skoghøy (2017) p. 55, Robberstad (2018) p. 82, Hov (2019) p. 277 f.

[18] For example, Rt. 2010 p. 1197 (Centrebet) para 42 and Rt. 2015 p. 1040 para 46.

be discussed, as the theme of the thesis is choice of law, and by including the jurisdiction question, the thesis would become too comprehensive.

Choice of law for the assignment of a contract (subrogation) is excluded from the scope of the thesis, as this raises questions of a contractual nature. The assignment of a contract would include both rights and obligations, and the assignee would replace the assignor in the relationship with the debtor. In EU law, contractual subrogation is regulated by Rome I Regulation Article 14(1).[19]

When the assignment concerns security interests in a tangible asset, like real estate, the law of the place where the property is situated, the *lex situs,* could be applied. When the tangible asset is movable, such as a painting, there may be difficulties in determining the *lex situs* if the tangible asset is moved between countries. As these problems are of a different nature than the problems which arise with regards to intangible, monetary claims, they are outside the scope of this thesis.

For the same reason, assignments of other registerable intangible assets, like patents and trademarks, will not be discussed. These types of assets are usually registerable, and the law of the state where the register is placed is often applied. Therefore, the problems which arise differ from the choice of law for monetary claims.

1.3 Methodology and legal sources

1.3.1 Comments on some relevant national legal sources

To examine the legal foundations and development of choice of law rules in Norwegian private international law, Supreme Court decisions will play a vital role. There are several Supreme Court decisions available, and case law from lower courts will therefore be less emphasised. The thesis will focus on newer Supreme Court decisions, as these reflect the current state of the law.

There are not many legal acts which relate to choice of law in Norwegian law, with the Act for the choice of law for sale of goods being an exception.[20] Due to few legal acts, preparatory works are not a central legal source, with the exception of one comment in the preparatory works to the Security Interest Act.

[19] Rome I Regulation Article 14(1).

[20] Act for choice of law for sale of goods (kjøpslovvalgsloven).

Cordero-Moss published a report containing a proposal for the adaptation of a legal act for choice of law in Norway in 2018.[21] The report was requested by The Ministry of Justice and Public Security, which used it to issue a public consultation. Her proposal only included choice of law for contractual disputes and tort, and excluded property law and company law.[22] It will therefore have less relevance for this thesis, although some of her more general viewpoints on the legal methodology will be discussed.

1.3.2 The significance of EU law for Norwegian private international law

Norway was not a signatory to the Rome Convention and is not bound by the Rome Regulations, which means these legal sources are not binding in Norway. Nevertheless, the Supreme Court has on several occasions in recent case law pointed to the Rome Regulations and expressed the view that harmonisation would be beneficial. The relationship between the EU legal sources and national law may in some cases be characterised as methodically unusual.

An example where the Supreme Court expressed a desire for harmonisation is Rt. 2009 p. 1537 (the Bookshop decision), which concerned defamation. A Norwegian journalist had lived with an Afghan family in Kabul and written a book about their lives. The husband in the family was a bookshop keeper. His wife sued the journalist for defamation in Norwegian courts.

The Supreme Court held that to the extent there are no divergent regulations under Norwegian law, unity of law within the EEA is to be considered when applying Norwegian choice of law rules.[23] However, this must be considered an obiter dictum, as there are no EU choice of law regulations applicable to a case concerning defamation. The case was finally resolved by applying Norwegian law, as the position under Afghan law could not be determined.[24]

The Bergen Bunkers decision also confirmed this understanding of the Rome Regulations. The Supreme Court held that it is relevant to look to the solution chosen in the EU when applying Norwegian choice of law rules.[25]

A decision which serves as an example of an unusual application of EU law is Rt. 2011 p. 531 (the War Criminal decision). The case concerned a Bosnian man was sued for damages following war crimes. He was also on trial for war crimes in a separate, criminal case in Norway.

[21] Cordero-Moss (2018a).
[22] Cordero-Moss (2018a) pp. 8-11.
[23] Rt. 2009 p. 1537 para 34.
[24] Rt. 2009 p. 1537 para 53.
[25] HR-2017-1297-A para 73.

The question the Supreme Court had to determine was which law was applicable to the law-suit for damages.

The Supreme Court concluded that the Rome II Regulation was inapplicable because the acts performed by the defendant of the case had occurred before the Regulation came into effect in the EU 11 January 2009.[26] Heimdal has argued that this reasoning is unconvincing.[27] In his view, as the Rome II Regulation is not binding for Norwegian courts and is therefore only to be used for guidance or inspiration, the date of entry into force is irrelevant. Also, the Rome II Regulation codified existing practice in European countries, and the consideration of harmonisation should therefore have led the Supreme Court towards determining the choice of law by applying the same rule as the Rome II Regulation provides.[28]

Further, HR-2019-1929-A (Spanish holiday home) may also serve as an example where the Supreme Court applies the Rome I Regulation in a manner which is methodically curious considering its non-binding status in Norway.[29] The case concerned a person domiciled in Norway who had entered into a contract with a Norwegian owned firm registered in Spain for the purchase of a holiday home in Spain. The Norwegian buyer wanted to terminate the agreement, and a separate termination agreement was entered into. The parties could not agree on the calculation of a compensation settlement following the termination, and the Supreme Court firstly had to determine the choice of law.

The Supreme Court decided the case on the basis of the Rome I Regulation Article 6, which is an exception from the main rule in Article 4. The exception is applied for consumer contracts, and its purpose is to provide additional consumer protection. Rønning argues that the Supreme Court's application of Article 6 is an application of positive law, not merely using the Rome I Regulation's solutions as an influence for the direction of Norwegian private international law.[30] In his view, the Supreme Court's detailed analysis of the wording of the regulation should be a basis for further reflection. Detailed analysis of the wording is necessary for binding legal sources such as written law and ratified conventions, however for non-binding legal sources the exact wording should have less relevance when applied by the courts.

[26] Rt. 2011 p. 531 para 46.
[27] Heimdal (2013) p. 219-220.
[28] Heimdal (2013) p. 220.
[29] Rønning (2019) p. 15
[30] Ibid.

To summarise, the method for applying the Rome Regulations in Norwegian law is somewhat undecided. Following these recent cases, the relevance of the Rome Regulations can hardly be disputed, however the significance, or weight, of the Regulations seems to be unresolved.

1.4 Outline

Several questions must be considered to form a conclusion on the main problem of the thesis, which is how disputes concerning third-party effects of assignments of claims most likely will be resolved in Norwegian law going forward.

As the main development in Norwegian law is the Bergen Bunkers decision, this decision will be the focal point of the thesis. In order to understand the scope of the decision, it is necessary to discuss the state of choice of law rules in Norwegian private international law, from the Irma-Mignon decision[31] until present day. This will be done in Chapter 2.

Chapter 3 will include an analysis of how the Supreme Court resolved the issue in the Bergen Bunkers case, in light of the preceding legal landscape. It will be discussed whether its solution may be applied to all subsequent cases concerning choice of law for third-party effects of assignments of claims.

The viable existing alternatives for a choice of law rule will be discussed in Chapter 4, in light of the choice the Supreme Court made in the Bergen Bunkers decision. The advantages and disadvantages of each approach, and the various considerations that apply, will be compared. The discussion will attempt to show that when it comes to choice of law for assignment of claims, a one-size-fits-all approach is not optimal, as different considerations apply depending on what kind of claim is assigned. Therefore, Chapter 4 will attempt to show that the approach might have to be tailored to the type of claim that is assigned, and this may be of relevance if another case concerning the third-party effects of an assignment of a claim arises in the future.

Chapter 5 will analyse the European Commission's Proposal for a new Regulation, which would regulate the issue in a harmonised manner in all Member States.[32] The Regulation has not yet been adopted into EU law as of November 2020. The thesis will compare the approach taken by the EU with the approach taken by the Norwegian Supreme Court in the Bergen Bunkers decision and discuss which significance the Regulation would have in Norwegian law if it is adopted into EU law.

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[31] Rt. 1923 II p. 58.

[32] COM (2018) 96.

2 The 'closest connection' principle in the Irma-Mignon decision

2.1 How should the Irma-Mignon decision be interpreted?

The Bergen Bunkers decision was resolved by applying the Irma-Mignon formula.[33] This formula came from the Irma-Mignon decision,[34] which has had significant influence over choice of law in Norwegian law. Therefore, it is useful to start with a discussion of what the application of this formula entails.

The Irma-Mignon formula was put into words in a Supreme Court tort law decision from 1923, concerning a collision between two Norwegian ships outside of Norwegian territorial waters. The Supreme Court held that when determining the choice of law, the court should identify which state the 'relationship' is most strongly or closely connected with, taking all relevant facts into an overall consideration.[35] This is how the choice of law is determined.

Once the court has established which state the 'relationship' has its closest connection with, and therefore which state's law applies, there are three ways of interpreting the result.[36]

The first interpretation involves that the formula requires the court to review the particular facts of the case it has before it, and determine the choice of law based on those facts. The result of applying the formula is therefore nothing more than a resolution of the case at hand. Knoph wrote in 1938 that the Irma-Mignon formula was the foundation of the Norwegian choice of law rules. He considered it beneficial that the applicable law was chosen after an overall assessment, based on the particular facts of the case.[37] This meant that each choice of law decision was to be made ad hoc. Under this interpretation, the purpose of the decisions made by applying the Irma-Mignon formula is not to create precedent, but to find the most suitable applicable law on the facts of the case. Another term for this interpretation is the 'individualising method'.

The second interpretation involves that when a solution has emerged for a certain type of dispute, it creates a presumption that it will be possible to find the 'closest connection' of most cases by applying the same approach. For instance, in the Irma-Mignon decision itself, the court put emphasis on the fact that both parties to the dispute were domiciled in Norway. Therefore, it applied Norwegian law. Under this interpretation, there would be a presumption

[33] HR-2017-1297-A paras 72 and 84.

[34] Rt. 1923 II p. 58

[35] Ibid. on page 60.

[36] Cordero-Moss (2018a) p. 117-118 – Although she does not recognise the second interpretation.

[37] Ragnar Knoph (1938) p. 51.

that the law of a common domicile would be applied if a similar case arose later. If both parties were domiciled in England, the approach would entail that English law applied. However, this presumption could be rebutted if it appeared that the relationship had a closer connection with a different jurisdiction.[38] This interpretation of the Irma-Mignon formula involves discovering presumptions for how to find the state with which the type of relationship has its closest connection. However, it could again revert to the individualising method if the presumption produced an unfavourable solution.

A third interpretation involves that when the Supreme Court has decided a case by applying the Irma-Mignon formula, it has created a firmer rule. The rule will represent an approach, which should be applied if a similar case arises later. By applying this interpretation, it involves that following a decision where the court applies the law of a common domicile, all cases where the parties have a common domicile should be resolved by applying this law. There would be no room for the individualising method once a firmer rule has been established. The result of applying the Irma-Mignon formula is settling the matter for all similar cases in the future.

The reason why it matters which interpretation is applied, is that the dispute which arose in the Bergen Bunkers might occur again in the future. Then, the parties to that dispute will need to know whether they can expect the solution which was applied in the Bergen Bunkers decision to apply to their dispute, or if the courts will consider the particular facts of their case and make an assessment based on an overall consideration.

Most agree that the traditional view in Norwegian law during the 20th century was that the Irma-Mignon formula should be understood as equal to the individualising method, i.e. the first interpretation.[39] As mentioned, Knoph was in favour of this application of the formula. The use of the individualising method was strongly criticised by Thue, who considered the its use detrimental to foreseeability.[40] In his view, when the courts made the decision on an assessment of the facts of the specific case, it became impossible to foresee how a court would assess a similar case if one arose later.[41] He considered it more beneficial if the cases were not determined on the particular facts of the case, but rather based on certain case features which would be common in similar legal relationships. However, in his view, this was not the direc-

[38] Alvik (2005) p. 299-300.
[39] Cordero-Moss (2018a) p. 25.
[40] Thue (1965).
[41] Ibid. p. 597.

tion the Norwegian private international law was moving towards at the time.[42] Both authors therefore assumed the formula involved an application of the individualising method.

An example of a case where the individualising method was applied could be Rt. 1957 p. 246 (Tour Bus). The case concerned a Norwegian widow's claim for loss of financial provider after her husband was killed in Sweden while on a Norwegian tour bus. The Supreme Court declined to review the decision in Rt. 1938 p. 691 where a Norwegian was involved in a car accident in Germany. In that case, the parties agreed that German law was applicable. The Supreme Court considered that the case had a different legal and factual basis, and therefore applied the individualising method instead of the rule in the decision from 1938.

Another example is Rt. 1931 p. 1185, known as the Thams decision, which was decided relatively shortly after the Irma-Mignon decision. It concerned a Norwegian man living in France, who was supposed to assist another Norwegian man in acquiring stocks in a foreign company. However, he was fraudulent when fixing the price of the stocks and was sued in Norway. The Supreme Court applied the Irma-Mignon formula to determine the choice of law. It stated that any firmer rules may only be found in 'statutory law, conventions or somewhat consistent case law', and if there were none, the Irma-Mignon formula, here understood as the individualising method, should be applied.[43]

Earlier legal literature and case law therefore seems to suggest that each application of the Irma-Mignon formula was ad hoc, and each case which involved choice of law required a review of the specific facts in order to determine which state the relationship had its closest connection with.

More recently, there have also been some legal literature discussing the Irma-Mignon formula. Lundgard wrote in 2000 that an application of the Irma-Mignon formula could be avoided if there was consistent case law or other firmer rules like statutory law, ratified conventions, customary law or EU law.[44]

Konow expressed criticism of the formula in 2006, when she wrote that the Irma-Mignon formula leads to uncertainty. In her view, the lack of reasoning in the decisions is a weakness, and it is difficult to determine which of the facts in the specific case led the courts to their

[42] Ibid. p. 599.
[43] Rt. 1931 p. 1185 on p. 1186.
[44] Lundgaard (2000) p. 97.

conclusions. This makes the decisions unsuitable as precedents.[45] Her criticism implied that she considers the formula as equal to the individualising method.

Cordero-Moss has also been critical of the use of the individualising method.[46] She wrote that choice of law in the individual case should not be viewed as an ad hoc exercise, determinable solely in the judge's discretion, but rather as a part in a system of private international law, which will give parties foreseeability.[47]

To summarise, this review of legal theory and case law after the Irma-Mignon decision shows that traditionally, many viewed the Irma-Mignon formula as a formula which just resolved the particular case. It involved taking all relevant considerations into an overall assessment in order to determine which state the legal relationship had its closest connection with. This should be kept in mind when examining the reasoning in the Bergen Bunkers decision, where the Irma-Mignon formula was applied.

2.2 Moving away from the individualising method?

Among others, Cordero-Moss has been critical of the application of the individualising method as it provides little foreseeability. She has argued that there has been a shift in the Supreme Court's reasoning from the 20th century cases until today, which involves that whereas the Supreme Court previously applied the individualising method, it first and foremost searches for firmer rules today.[48]

Recent case law appears to more firmly reject the individualising method as the starting point for Norwegian choice of law rules. This may be seen in the decisions in Rt. 2009 p. 1537 (Bookshop), Rt. 2011 p. 531 (War criminal), HR-2016-1251-A (Sailor), HR-2017-1297-A (Bergen Bunkers) and HR-2019-1929-A (Spanish holiday home), where the Supreme Court stated the need to look for firmer rules firstly, before reverting to the individualising method if there are none.

The Bookshop, War-Criminal and Spanish holiday home decisions have already been presented in Section 1.3. The Sailor decision concerned a discharged sailor who had worked on a ship registered in Antigua, which was charted by a Norwegian shipowner on a time charter party. The question was whether the Norwegian Ship Labour Act applied to his employment

[45] Konow (2006) p. 246.
[46] Cordero-Moss (2010) p. 825-827.
[47] Ibid p. 827.
[48] Cordero-Moss (2018b). pp. 89-90.

relationship. The Supreme Court looked for a firmer rule for choice of law in the Act's Section § 1-2 but found that it did not apply, as the ship did not sail under a Norwegian flag.

In Heimdal's view, the Bookshop decision finally determines that the Irma Mignon formula is secondary to firmer rules.[49] In it, Judge Sverdrup states:

> 'If the choice of law cannot be determined pursuant to firmer rules, Norwegian private international law requires that the case shall be determined based on the laws of the country with which the case, after an overall assessment, has its closest connection (The Irma-Mignon formula)'.[50]

Heimdal considers that the Bookshop decision was clarifying with regards to the role of the firmer rules. In his view, it is now clear that the firmer rules are in fact rules, and that when a firmer rule exist, there is no room for the individualising method.[51]

His view is also supported by the Supreme Court in HR-2019-2420-A, which concerned a dispute of settlement between a divorcing couple who were Norwegian and Danish but had lived in Switzerland for the past 15 years. The Supreme Court initiated the judgment with a general statement concerning the relationship between firmer rules and the Irma-Mignon formula:

> 'The tendency as of late is however moving towards the application of firmer rules developed for certain areas of law or groups of legal questions. The particular rule is typically based on what would in most cases provide a result which corresponds with which country the distinctive relationships have their closest connection with. […] The area of application for the Irma-Mignon formula is therefore limited to areas where a firmer rule for the relevant type of legal question cannot be established.'[52]

The Supreme Court was unable to formulate one firm rule which would be the correct approach in this case. It applied Norwegian law, as both the alternative approaches for determining the choice of law pointed to Norwegian law anyway.[53] However, the case is a recent example of the court attempting to find a firm rule.

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[49] Heimdal (2010) pp. 69-70.
[50] Rt. 2009 p. 1537 para 32 (my translation).
[51] Heimdal (2010) pp. 69-70
[52] HR-2019-2420-A para 24 (my translation).
[53] HR-2019-2420-A paras 51-52.

However, in an article from 2005, Alvik pointed out that the Supreme Court's reasoning in choice of law cases concerning tort law was unclear. At the time, he considered that the reasoning of the Supreme Court appeared to be grounded in a consideration of reasonableness in the specific case, rather than a firmer rule like *lex loci delicti.* He pointed out that the content of the firmer rule, and whether it is a rule or merely a presumption, are questions which the case law does not provide a clear answer to.[54]

Cordero-Moss agrees with Heimdal and writes that Alvik's view that the *lex loci delicti* might be just a presumption rather than a rule, is no longer applicable following the Bookshop and War criminal decision, as well as the influence of EU law.[55]

However, it is noteworthy that EU law is also based on a system of presumptions. An exception apply for cases where the relationship is 'manifestly more closely connected with a country' other than as indicated by the presumptions. This exception must, however, be characterised as narrow.[56] Furthermore, it is noteworthy that neither the Bookshop decision nor the War criminal decision were resolved by applying a 'firmer rule'. In the Bookshop decision, Norwegian law was applied as the *lex fori,* as the Supreme Court could not determine how the case would be resolved under Afghan law.[57] In the War criminal decision, the Supreme Court considered that the case had a special nature unlike most tort claims, and therefore the *lex loci delicti* was not necessarily the most appropriate choice. The Supreme Court then applied the individualising method.[58]

Examples of decisions where the Supreme Court stated that it was looking for a firmer rule, and then in fact also applied a firmer rule, are the Spanish holiday home decision and HR-2019-2420-A. In the Spanish Holiday Home decision, the Supreme Court applied the solution found in the Rome I Regulation and did not revert to the individualising method. However, the consequence of this was that Norwegian law applied to the dispute, which was arguably the most reasonable result on the facts of the case.[59] In HR-2019-2420-A, the Supreme Court was unable to choose between the *lex fori* and the law of the spousal support creditor's habitual residence. However, both pointed to Norwegian law, and therefore Norwegian law was applied, which was arguably also a reasonable result.

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[54] Alvik (2005) p. 296.

[55] Cordero-Moss (2018b) p. 332.

[56] Rome I Regulation Article 4(3) and Rome II Regulation Article 4(3).

[57] Rt. 2009 p. 1537 in para 53.

[58] Rt. 2011 p. 531 in paras 32-44.

[59] HR-2019-1929-A.

The Supreme Court's method and reasoning in recent case law, in which it considers applying a firmer rule before looking at the exceptions, may be characterised as a development in Norwegian private international law. Whereas older case law had to a greater extent applied the individualising method, the Supreme Court now states that it is looking for firmer rules. However, it is an important element that several of the recent cases are not ideal precedents for this view, as many of them were in fact resolved by applying the individualising method. They are therefore examples of the Supreme Court not applying firmer rules, even though the Supreme Court states that firmer rules should be applied.

So far, it appears the Supreme Court have only accepted the firmer rules when they point to a choice of law which provides a reasonable solution in the particular case. It will be interesting to see how the Supreme Court looks upon the firmer rules in cases to come, especially if the firmer rule points to a choice of law which would involve a resolution of the case which the appears unreasonable. Then, it may transpire that the 'firmer rules' are actually just rebuttable presumptions.

2.3 What are the sources of the firmer rules or presumptions?

It may be argued that the move from the individualising method to firmer rules, also involves that if any decisions are made by applying the Irma-Mignon formula, the solution found in the decision will constitute a firmer rule by itself.[60] This was also suggested by the Supreme Court in the Bookshop decision, where Judge Sverdrup stated: 'However, in increasingly more areas of law firmer rules have developed, often based on the Irma-Mignon formula.'[61] It is not clear if she meant a single application of the formula, or consistent applications.

This raises the question: Must there be a consistent case law before it could be the source for a 'firmer rule', or could a single case have enough weight on its own? Some authors have argued that the Supreme Court formulated a 'firmer rule' in Bergen Bunkers decision.[62]

As a starting point, it should be stated that although private international law could be characterised as a special part of the Norwegian legal system, the Supreme Court usually attempts to resolve the case in such a manner that the final result is reasonable. If a precedent would point to an unreasonable result, the Supreme Court can exercise discretion by distinguishing the case, or by applying considerations of reasonableness to reach a narrower interpretation of the *ratio decidendi* of a case. This suggests that the Bergen Bunkers decision's solution will not be applied if it means the result in later cases would be unreasonable.

[60] Cordero-Moss (2018b) pp. 90-91.

[61] Rt. 2009 p. 1537 para 32

[62] Cordero-Moss (2017) p. 16, Eriksrud Bergan (2019) p. 269-270 and 275-276.

In any case, case law and legal theory concerning choice of law suggests that something more than a single Supreme Court decision is required before a firmer rule may be affirmed.

For instance, in the Thams decsision, the Supreme Court stated that if the individualising method was to be avoided, there would have to be 'statutory law, conventions or somewhat consistent case law'.[63] The decision is old, and the Supreme Court's statement could be characterised as *obiter dictum* remarks. The relationship between firmer rules or presumptions and the individualising method was not a contentious issue in the case, which means less weight might be placed on this wording. However, it is worth noting that the Supreme Court stated that 'consistent case law' is required.

Lundgard wrote in 2000 that 'consistent case law' or other firmer rules like statutory law, ratified conventions, customary law or EU law was required in order to avoid the application of the Irma-Mignon formula.[64] This supports the statement in the Thams decision.

In more recent case law, the Supreme Court has taken an unexpected and inconsistent turn with regard to what the sources of firmer rules are. In the Sailor decision, the Supreme Court stated that: 'The question is whether there is a statutory choice of law rule that is applicable to the facts of our case.'[65] This passage was repeated by the Supreme Court in the Spanish holiday home decision, without comment.[66]

The reason why this passage is remarkable is that the Supreme Court appears to state that the source of a 'firmer rule' may only come from statutory law, customs or 'other firmer rules applicable to the question'.[67] Further, it is stated that if no such firmer rules exist in Norwegian national law, there may be reason to emphasise solutions in EU law. This statement appears to favour some legal sources more than e.g. consistent case law. The Spanish holiday home decision, and by inference the Sailor decision, was criticised by Rønning because of this.[68] It is unclear why the Supreme Court phrased the question so that the source of the firmer rule could only be found in Norwegian statutory law and customs. It also appears at odds with the statement in the Bookshop decision.[69]

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[63] Rt. 1931 p. 1185 on p. 1186 (my translation).
[64] Lundgaard (2000) p. 97 (my translation).
[65] HR-2016-1251-A para 27 (my translation).
[66] HR-2019-1929-A para 26.
[67] HR-2016-1251-A para 27 (my translation).
[68] Rønning (2019) pp. 14-15
[69] Rt. 2009 p. 1537 para 32

Which source these firmer rules may come from is therefore arguably somewhat vague. However, the recent case law appears to show that the Supreme Court is now primarily searching for firmer rules before applying the Irma-Mignon formula. Although the Supreme Court has expressed support for this approach in several cases, the exact relationship between the firmer rules and the Irma-Mignon formula is still uncertain. It appears the Supreme Court has abandoned a method which entails solving each case on an entirely ad hoc basis by applying the individualising method, but the role of the firmer rules still seems somewhat unresolved.

3 HR-2017-1297-A (The Bergen Bunkers decision)

3.1 Legal landscape prior to the Bergen Bunkers decision

Prior to the Bergen Bunkers decision, the legal landscape for the regulation of choice of law for third-party effects of assignment of claims in Norwegian law consisted of some case law and preparatory works, as well as legal literature.

One case had similarities with the dispute in the Bergen Bunkers case. The case concerned a receivable with a Norwegian debtor. A German assignor had granted a security interest in the receivable to another German assignee. One of the assignor's creditors attempted to seize the claim in Norway. Under Norwegian law, assignments by way of security were invalid when the underlying claim was created orally. The assignor's creditor argued that Norwegian law applied, and that the assignor's creditor had priority.

The Supreme Court held that although the general rule would be applying the law of the debtor's habitual residence, this should only be extended as far as the considerations behind the rule go. The consideration behind the rule is to provide the debtor with the legal protection provided in its own jurisdiction. In a dispute between the assignee and a third party, the debtor has no legal interest in the outcome of the decision. Therefore, there was no reason for applying the law of the debtor's habitual residence.[70] The Supreme Court then applied German law, as the dispute was between German parties.

The *ratio decidendi* of the decision is somewhat unclear. The Supreme Court merely states that it would be unreasonable to apply Norwegian law. However, it is not clear whether they are applying an exception, as both parties to the dispute had a common domicile, or whether they are applying closest connection principle of the Irma-Mignon formula. In Brækhus' view, the decision is a precedent for the exception of common domicile of the parties.[71] Skøghøy considers it to be precedent for the view that the law of the assignor's habitual residence should be applied in a dispute between the assignor's creditor and the assignee.[72] The Supreme Court in the Bergen Bunkers decision appears to have agreed with Brækhus.

There were some preparatory works to the Security Interest Act which mentioned the issue with regards to the creation of security interests in receivables. After stating that the *lex rei sitae* applies to documentary receivables, a single sentence in the preparatory works states that security interests in other receivables are regulated by the law of the habitual residence of the

[70] Rt. 1933 p. 897 on p. 898.
[71] Brækhus (1976) p. 56-57.
[72] Skoghøy (1990) p. 505.

debtor.[73] It therefore formulates a clear instruction for the choice of law for the creation of security interests in receivables, although without any reasoning behind it.

At the time of the Bergen Bunkers decision, the EU legislative bodies had published some preparatory works for a new regulation. The relevance of the work in the EU will be discussed in Chapter 5. The Supreme Court dismissed these as irrelevant for Norwegian private international law at the time, as the legislative process was not finished.

In addition to the Supreme Court decision, the Norwegian preparatory works, and the EU preparatory works, there was a significant amount of legal theory written on the subject.
Brækhus wrote in 1976 that he considered that in such a dispute, the connection with the assignor's habitual residence was strong.[74] Along the same lines, Skoghøy argued in 1990 that in a dispute between the assignor's creditors and the assignee, the dispute has its closest connection with the assignor's habitual residence.[75] Marthinussen considered it beneficial that the law of the assignor's habitual residence usually aligns itself with the *lex concursus.*[76]

Cordero-Moss finds it most elegant to resolve the dispute by applying *lex rei sitae,* which is the choice of law rule which is often applied when the dispute concerns proprietary rights in tangible assets. She considered the claim a part of the assets of the assignor, and therefore her view would materially be the same as applying the assignor's habitual residence.[77]

Nordtveit rejects the assignor's habitual residence as the rule for choice of law in these disputes and argues in favour of the law of the underlying claim.[78] The opinions of these authors will be discussed more thoroughly in Chapter 4 below.

To summarise, the legal landscape in Norwegian private international law prior to the Bergen Bunkers decision consisted of a Supreme Court decision without a clear *ratio decidendi,* clear but short remarks in the preparatory works to the Security Interest Act, EU preparatory works and somewhat diverging legal theory.

[73] Ot.prp. nr. 39 (1976-1977) s. 75.
[74] Brækhus (1976) p. 55.
[75] Skoghøy (1990) p. 505.
[76] Marthinussen (2014) p. 53.
[77] Cordero-Moss (2018b) p. 281.
[78] Nordtveit (2013) p. 80-84.

3.2 Facts and dispute in the Bergen Bunkers case

Bergen Bunkers AS (Bergen Bunkers) was a company wholly owned by O.W. Bunker Norway AS, which was a part of the O.W. Bunker and Trading AS group. The parent company was Danish and had many subsidiaries in a number of countries.

The parent company and ING Bank N.V. (ING Bank) entered into a loan agreement 19 December 2013. The parent company, as well as sixteen companies in the group, granted security for the loan, and the security interest included the group companies' trade receivables. The security agreement was governed by English law.

Bergen Bunkers was not a party to the loan agreement directly, however it benefitted from the agreement as the loan amount could be moved within the group. Bergen Bunkers granted a security interest in its receivables under the company's delivery contracts, which came into effect 19 December 2013. In case O.W. Bunkers group defaulted on the loan agreement, debtors in the subsidiaries' bunker delivery contracts were to pay ING Bank directly.

Following the collapse of O.W. Bunker group in November 2014, bankruptcy proceedings were opened by Bergen District Court's orders, dated 18 November 2014. ING Bank wrote to the debtors under the bunker delivery contracts and requested direct payment to itself. Bergen Bunkers' bankruptcy estate (the Estate) asserted that the security interest lacked perfection under Norwegian law, and was therefore unenforceable against the Estate. The debtors under the delivery contracts were, in the Estate's view, obligated to pay their debts to the Estate.

The decision of the Bergen District Court was appealed through the legal system of Norway until it reached the Supreme Court. There were two questions to be resolved by the Supreme Court. The first question was whether Norwegian courts had jurisdiction, because the exception for bankruptcy in the Lugano Convention Article 1(2)(b) applied. The second question was whether the dispute was governed by English or Norwegian law.

The Supreme Court held that it had jurisdiction to hear the case, and therefore it had to apply Norwegian choice of law rules, as Norwegian law is the *lex fori*.

The Supreme Court then held that the material dispute had to be resolved by applying Norwegian law. Its reasoning behind this conclusion will now be analysed.

3.3 Analysis of the Supreme Court's reasoning

3.3.1 A firmer rule or the Irma-Mignon formula?

As discussed in Section 2.2, it appears Norwegian private international law has moved away from the Irma-Mignon formula and towards an approach where firmer rules are applied, if

they exist. The Bergen Bunkers decision is consistent with this method, and the Supreme Court stated:

> 'Thus, the first question is whether any "firm rule" exists determining which country's law to apply when resolving disputes regarding creditor protection in connection with security interest in non-negotiable claims.'[79]

A preliminary question is therefore whether the Supreme Court found any firmer rules in existing Norwegian legal sources. Then, it may be asked whether the Bergen Bunkers decision will now constitute a source for a firmer rule itself, as discussed in chapter 2.3 above.

Firstly, the Supreme Court established that there are no statutory acts in Norwegian law which regulate choice of law for assignments of receivables.[80] It then dismissed the sentence in the preparatory works to the Security Interest Act, as it appeared inadvertent and dated in an area of law which is currently in development.[81] Therefore, the debtor's habitual residence would not be applied to determine the choice of law, despite the express statement in the preparatory works to the Security Interest Act.

Further, it distinguished the decision in Rt. 1933 p. 897. This case concerned the assignment of a claim where both the assignor and the assignee were domiciled in Germany, but the debtor was domiciled in Norway. The Supreme Court stated that this situation was different, and thus the case was not a precedent for the current case.[82] Why this is their view is not expressly stated, but a reason could be that in the 1933 decision, both assignor and assignee were domiciled in the same country. In the Bergen Bunkers decision, the Bergen Bunkers bankruptcy estate was domiciled in Norway, whereas ING Bank was domiciled in the Netherlands.

The Supreme Court examined the law in search of a firmer rule, and it searched beyond legal acts and customs. As seen, the Supreme Court also had regard to the preparatory works and case law, although neither provided a firmer rule in this case. This may be contrasted with the Spanish holiday home decision para 26-27, where the Supreme Court cited the Sailor-decision and stated:

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[79] HR-2017-1297-A in para 76 (the translation provided by Lovdata is used throughout this thesis when quoting from this decision).

[80] HR-2017-1297-A in para 77.

[81] HR-2017-1297-A in para 78.

[82] HR-2017-1297-A in para 78.

> ‘The question is whether there is a statutory choice of law rule that is applicable to the facts of our case. […] There is no law regulating the choice of law. EU's choice of law rules for obligations arising from a contract as laid down in Rome I of 17 June 2008, are thus essential.’[83]

The method applied in the Bergen Bunkers decision seems more in line with the general Norwegian legal method, as it takes all relevant legal sources into account.

Legal literature was also considered, however the Supreme Court held that although several academics agreed on an approach which involves applying the law of the habitual residence of the assignor, this was insufficient to form a firm rule in Norwegian law. The Supreme Court then concluded that there was no basis for a firmer rule in Norwegian law, having reviewed all relevant legal sources, including EU law which will be discussed further below.[84]

It then stated: ‘As mentioned, the solution must therefore be based on an overall assessment of the country with which the case is most strongly or closely connected.’[85]

As such, the Bergen Bunkers case was also resolved by reverting to the Irma-Mignon formula. However, the decision confirms recent developments, where the Supreme Court initially searches for a firmer rule.[86]

3.3.2 Scope of the decision

The Supreme Court decided the Bergen Bunkers case by applying the Irma-Mignon formula, according to paragraph 72 and 84 of the decision. This leads to some uncertainty. The question is how this application of the Irma-Mignon formula must be interpreted.

On the one hand, the arguments presented by the Supreme Court appear principled, which would imply that the argumentation could be impactful for later decisions as well. This could entail that the Supreme Court was formulating a firmer rule, i.e. the assignor’s habitual residence. On the other hand, it explicitly states that it is applying the Irma-Mignon formula. As shown above in Section 2.1, this has traditionally been associated with unprincipled decisions, decided after an overall assessment of the facts of the particular case.

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[83] HR-2019-1929-A paras 26-27 (translation provided by Lovdata).

[84] HR-2017-1297-A para 83.

[85] HR-2017-1297-A para 84

[86] Rønning (2019) p. 14, Cordero-Moss (2017) p. 16, Eriksrud Bergan (2019) p. 264-265.

In Cordero-Moss' opinion, the Supreme-Court formulated a firmer rule in the Bergen Bunkers decision. In a comment on the decision, she wrote: 'With consideration to foreseeability, the Supreme Court argued that a firm factor of affiliation should apply in typical situations.'[87]

This is also the view of Eriksrud Bergan, who wrote that following the Bergen Bunkers decision, there is 'no doubt that a choice of law made by the Supreme Court will constitute a firmer rule', which will therefore be applied in cases with the same features later.[88] He refers to paragraphs 84-86 in the decision as support for this statement.

However, in those paragraphs, the Supreme Court stated that the decision must be made based on the Irma-Mignon formula.[89] It goes on to state the importance of predictability and clarity in insolvency law, and the desire to achieve harmonised choice of law rules for all issues which may arise in third-party disputes, as these must often be viewed in the same context. The Supreme Court then endorses the recommendation by Cordero-Moss:

> 'The choice of law in each case should thus not be seen as a single act to be carried out freely in accordance with the judge's discretion, but as part of the system under international private law – which gives predictability for the parties involved.'[90]

In Eriksrud Bergan's and Cordero-Moss' views, this passage and those paragraphs together must be interpreted as asserting that through the application of the Irma-Mignon formula in the Bergen Bunkers decision, the Supreme Court formulated a 'firmer rule'.

It would have been desirable for the Supreme Court to state this in much clearer wording than endorsing Cordero-Moss' wish for a coherent private international law system. As older legal sources reviewed above show, there is no tradition in Norwegian law for a single Supreme Court decision to establish a 'firmer rule'. The traditional view is that the use of the Irma-Mignon formula is an ad hoc exercise.

The Supreme Court upheld this view as recently as the War criminal decision in Rt. 2011 p. 531, where it stated:

> '[…] According to the Irma-Mignon formula the choice of law is not fixed to predetermined and firm factors of affiliation. A choice of law based on connection is based

[87] Cordero-Moss (2017) p. 16 (my translation).
[88] Eriksrud Bergan (2019) p. 269 (my translation).
[89] HR-2017-1297-A para 84.
[90] HR-2017-1297-A para 86.

> on a concrete assessment and an elastic consideration of the particular case. The purpose is to find the state with which the legal relationship has its strongest and closest connection.'[91]

As private international law is an area of law which unfortunately has been plagued by cases with unclear reasoning, it would have been useful for the Supreme Court to explicitly state that even though the case was decided by applying the Irma-Mignon formula, it was not meant to be ad hoc. Furthermore, it would have been useful if the scope of the approach taken in the Bergen Bunkers decision had been set out. Was it supposed to be a principled decision which would have applicability to all disputes concerning third-party effects of the assignment of claims? Could it be interpreted as a presumption for a rule which could be rebutted if it produced an unreasonable result? Or was it merely an application of the individualising method, and has little applicability for future cases where the facts are different?

Although it would be unusual for the Supreme Court to characterise its own reasoning as principled, some comment on the scope of the decision would have been beneficial given the unclear legal bases for choice of law in Norway.

Cordero-Moss and Eriksrud Bergan view the Bergen Bunkers decision as establishing a firmer rule, and that the approach of the assignor's habitual residence should be applied when determining choice of law in cases in the future.[92] The problem with viewing the decision as establishing a broad rule arises if a future case concerns third-party effects of assignment of claims, but a different type of claim. Then, the rule may produce unfavourable results. An example is the assignment of a claim against a bank, which all accountholders hold. This will be demonstrated in the following sub-chapter.

3.3.3 Application to assignments of security interests in credit institution accounts

When a party deposits funds in an account in a credit institution, for instance a bank, the party has a claim against the bank for the funds in the account. In this relationship, the bank is the debtor, and the accountholder is the creditor.

A security interest in an account may be granted by the accountholder under the Security Interest Act § 4-4. Perfection is obtained by notifying the debtor, i.e. the bank where the account it kept, see § 4-5. This could be done for the purpose of obtaining a loan from either the bank

[91] Rt. 2011 p. 531 para 50 (my translation).

[92] Cordero-Moss (2017) p. 16, Eriksrud Bergan (2019) p. 269-270 and 275-276.

where the account is kept, or from a different lender. The funds in the account act as security for the loan.

As has been discussed, the issue arises when the assignor becomes bankrupt or has assigned the claim several times. If the claim for the funds has been assigned to a different bank as part of a loan agreement, this assignee bank would then have to compete with e.g. the bankruptcy estate, creditors or other assignees for priority. The question is which law applies to the dispute between the assignee bank and e.g. the bankruptcy estate, creditors or other assignees.

The solution in the Bergen Bunkers decision may be applied to this situation. In the Bergen Bunkers decision, the Supreme Court stated that the problem is how to determine 'the choice of law in third party conflicts regarding security interest in non-negotiable claims'.[93] The wording 'non-negotioable claims'[94] is the same as is used in the Securities Act § 4-4, and is a more general denomination which encompasses all types of receivables, including claims to, and security interests in, bank accounts.

This is where the interpretation of the Bergen Bunkers decision becomes crucial. If it is assumed that the Supreme Court did not create a firmer rule, but merely a rebuttable presumption, or even solved the case based on its particular facts, then the Bergen Bunkers decision is unproblematic with regards to security interests in credit institution accounts.

It would also be unproblematic if the Supreme Court utilised the normal technique of 'distinguishing the case', and held that the approach in the Bergen Bunkers decision was inapplicable to a dispute concerning an assignment of a claim to an account in a financial institution.

However, as discussed in the chapter above, the legal position is unclear after the Bergen Bunkers decision. Cordero-Moss and Eriksrud Bergan argue that the Bergen Bunkers decision has created a firmer rule for choice of law for third-party effects of assignment of claims.[95] Erikrud Bergan writes that there is 'no doubt that a choice of law rule created by the Supreme Court will constitute "a firmer rule."'[96] In his view, the Bergen Bunkers decision would be very problematic if applied to a case concerning assignments of security interest in accounts.

[93] HR-2017-1297-A para 83.

[94] Norwegian: enkle pengekrav.

[95] Eriksrud Bergan (2019) p. 269, Cordero-Moss (2017) p. 16.

[96] Eriksrud Bergan (2019) p. 269 (my translation).

If the premise of Eriksrud Bergan is accepted, and it is assumed that the Bergen Bunkers decision established a firmer rule for all third-party effects of assignment of claims by way of security, it should be examined how this will apply to security interests in bank accounts.

The rule which the Supreme Court finally applied was the law of the assignor's habitual residence.[97] This connecting factor is arguably less suitable for choice of law for security interests in bank accounts. In order to find out which party to pay to, the debtor bank would have to comply with the local laws of the countries where its account holders are habitually resident, which would increase the work burden on the banks.[98] If the debtor bank could apply a law it is familiar with instead, this would not place an onerous burden on the debtor bank.

By applying the law of the underlying claim, i.e. the choice of law in the agreement between the bank and the account holder, the bank and other parties involved would have foreseeability. The choice of law would likely be the law applicable in the place of operation for the bank.[99]

To summarise, the implication of applying the Irma-Mignon formula is not settled, and the consequence of this is uncertainty. As was discussed above in Chapter 2, the result of applying the Irma-Mignon formula may be viewed in different ways. It would have been useful if the Supreme Court elaborated on its view of what an application of the Irma-Mignon formula entails, and how much weight should be placed on single decisions decided by its application.

3.3.4 How the Supreme Court regarded the EU law

As the EU legislation for choice of law is not binding in Norway, the Supreme Court's use of EU legal sources is interesting with regards to development of the method in Norwegian private international law. The Bergen Bunkers decision is a confirmation of the development in recent case law, where the Supreme Courts looks to EU law to find firmer rules. This is based on a desire for harmonised rules, which has been expressed in several recent choice of law cases.[100]

The Supreme Court stated that the Rome I Regulation Article 14 did not govern the issue. This has been contentious among EU Member States and scholars but must be considered correct in light of, among other developments, the EU Commission's Proposal.

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[97] HR-2017-1297-A para 93.

[98] Eriksrud Bergan (2019) p. 271.

[99] Eriksrud Bergan (2019) p. 273.

[100] E.g. Rt. 2009 p. 1537 and Rt. 2011 p. 531.

In paragraph 80 the Supreme Court mentions the Commission report which had been published in 2014. However, at the time of the decision, there was no Commission's Proposal. The Proposal which will be discussed in this thesis was published in 2018, a year after the Bergen Bunkers decision. The Supreme Court stated: 'Until this work gives results, the above-mentioned concern for uniform rules has no relevance to the decision of these choice of law issues.'[101]

Although the European Commission had not published its Proposal at the time, the British Institute of International and Comparative Law (BIICL) had published a report in 2011, as they were engaged by the Commission to propose a suitable solution for the EU legal systems.[102]

Their report did not result in a recommendation for a choice of law rule, however it discussed advantages and disadvantages by applying the different solutions. If alignment with the EU legal systems is desirable, a reference to this report and the preparatory works in the EU could have been beneficial.

[101] HR-2017-1297-A para 80.
[102] BIICL (2011) p. 10.

4 Five approaches for choice of law in assignments of receivables

4.1 Introduction

In the Bergen Bunkers decision, several different approaches were considered before the Supreme Court concluded that the law of the assignor's habitual residence was the best approach to resolve the case.[103] The Bergen Bunkers decision has left some uncertainty regarding its scope. The question remains whether the approach the Supreme Court took, i.e. the law of the assignor's habitual residence, will apply to all types of assignments, or whether the Supreme Court will have to modify its rule later, to better accommodate various types of assignments.

Especially for some financial instruments, the law of the assignor's habitual residence may be an impractical approach. This is what has led the EU to move in the direction of an option which encompasses different rules. This will be discussed in Chapter 5.

In this chapter, the thesis will consider the five approaches which have been most discussed in legal theory for determining choice of law for third-party effects of assignments of claims. Four of these were considered by the Supreme Court in the Bergen Bunkers decision. Their advantages and disadvantages will be compared, and their suitability for particular situations discussed, in light of the legal literature written on this subject.

Although the law of the assignor's habitual residence is an approach which is practical and suitable in many situations, it has some inherent issues, and will not necessarily be suitable for all assignments of e.g. financial instruments. Therefore, the current position in Norwegian law may have to be modified when moving forward. It could be necessary to formulate exceptions to the solution in the Bergen Bunkers decision and apply one of the following approaches.

4.2 Law of the assignor's habitual residence

Debates in both Norway and Europe on how the rule for choice of law for third-party effects of assignment of claims should be formulated have been ongoing for several years. In Norway, some authors have argued in favour of the law of the assignor's habitual residence.

Brækhus argued that when a dispute arises between the bankruptcy estate of the assignor and the assignee, the connection to the assignor's domicile is strong. The dispute concerns whether the assignee or the assignor's bankruptcy estate take priority. If the priority is ensured by registration in the assignor's domicile, it would be particularly artificial for another law to

[103] HR-2017-1297-A para 93.

apply.[104] Skoghøy argues along the same lines and considers that the assignee of the security interest must have viewed it as likely that the law of the assignor's domicile would apply if a dispute was to arise between the assignee and the assignor's other creditors.[105]
Judge Kaasen expressed agreement with the arguments made by Brækhus and Skoghøy in the Bergen Bunkers decision.[106]

Following the Bergen Bunkers decision, Cordero-Moss also expressed support for applying the law of the assignor's habitual residence.[107] Previously, she supported a solution based on *lex rei sitae* in her book from 2018. This appears to have been written without reference to the then recent Bergen Bunkers decision.[108] In any case, as she considers the receivable a part of the assignor's assets and therefore located in the assignor's domicile, the result of both approaches would be the same.

There are several reasons why the assignor's habitual residence is a beneficial solution for determining which law should apply. As mentioned, the dispute would arise between the assignee and a third party. The third party could be the assignor's creditors, the assignor's bankruptcy estate, or another assignee in a case where the assignor has assigned the receivable twice. Marthinussen points out that by applying the law of the assignor's habitual residence, this is often aligning with *lex concursus* and is the choice of law in the Nordic bankruptcy convention.[109] The authors at the BIICL argue that the law of the assignor's habitual residence is compliant with EU law for choice of law in insolvency, as well as the United Nations Convention on the Assignment of Receivables in International Trade.[110] Although ratified by Liberia, and the US in 2019, it is not yet in force.[111]

The assignor's habitual residence is a single connecting factor which is objectively ascertainable. Therefore, it promotes certainty.[112] As the Supreme Court stated, this is an important consideration in these disputes.[113] All of these third parties will rely on the law of the assignor's domicile with regards to the assignment. As Skoghøy writes, all of the mentioned parties

[104] Brækhus (1976) p. 55.
[105] Skoghøy (1990) p. 503-507.
[106] HR-2017-1297-A para 90.
[107] Cordero-Moss (2017) p. 16.
[108] Cordero-Moss (2018b) p. 281.
[109] Marthinussen (2014) p. 53.
[110] UN Receivables Convention.
[111] UN Commission on International Trade Law (undated).
[112] BIICL (2011) p. 394.
[113] HR-2017-1297-A para 85.

derive their right from the assignor, and the assignor's domicile is therefore known to all parties involved.[114]

In comparison, the law of the underlying claim may be unknown to a third-party creditor. The law of the underlying claim is the agreed choice of law between the debtor and the assignor. This could be more difficult for parties who derive their rights from the assignor to find out what is, as they would need to look at the contract between the debtor and the assignor.[115]

If the assignor changes its habitual residence between the first assignment and a later bankruptcy or seizure by creditors, the question is which state should be considered the assignor's habitual residence for the purpose of choice of law. Skoghøy argues that it is conceivable for the assignee that the assignor might move following the assignment. The assignee cannot reasonably expect the assignor to remain in the same domicile in perpetuity. The assignee should therefore to the best of its ability comply with the assignor's current habitual residence's rules on priority.[116]

The fact that the assignor can move between countries creates some uncertainty as it means that the connecting factor is not stable. However, it could be made more stable by choosing a point in time at which the current assignor's habitual residence is decisive. This would reduce the uncertainty created by a change of habitual residence.[117]

Another benefit of applying the law of the assignor's habitual residence is the suitability for bulk assignments, for instance in the factoring sector. If the assignment concerns receivables in several jurisdictions, having a common connecting factor irrespective of the individual debtors' domiciles is vital. Using a connecting factor which relies on the individual debtors is impractical for bulk assignments.

However, according to Nordtveit, the assignor's habitual residence is an impractical solution. She points to a problem which may arise if the right is assigned several times. This problem is what made her conclude that the assignor's habitual residence should not be the factor for determining which law applies to the dispute.[118]

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[114] Skoghøy (1990) p. 504.
[115] BIICL (2011) p. 396.
[116] Skoghøy (1990) p. 506.
[117] BIICL (2011) pp. 397-398.
[118] Nordtveit (2013) p. 82.

She argues that when a claim is assigned in a chain, it becomes too uncertain which assignor's habitual residence should apply. In her article, she provides the following example:

> 'A assigns the claim to B which is domiciled in another country. Then, A grants a security interest in the claim to X. B, unaware of the security interest which has been granted, assigns the claim to C, domiciled in a third country. Around the same time, B enters into bankruptcy and his creditor Y wishes to seize the right to payment under the claim.'[119]

The applicable rule should be the law of the assignor's habitual residence. In order to demonstrate the issue, I will also add countries to Nordtveit's example.

A is Norwegian and B is English. For C, the assignor's habitual residence would be England, as B is domiciled in England. It was B who assigned the claim to C. C would therefore assume that English laws on priority would apply, and would only ensure compliance with English rules on priority to take priority over B's creditors.

However, B was already in a dispute with X, who, like B, was also granted the security interest by A. It was A who assigned the claim to B and X. Therefore, B and X would assume Norwegian law applied to their dispute. They would have to ensure compliance with Norwegian rules on priority for claims, i.e. give notice to the debtor.[120]

The issue arises if X has given notice and B has not. In such a case, X takes priority in the dispute between X and B. Then, the remaining unsolved dispute would be between X and C, and the issue would be which assignor's habitual residence is relevant. C would have assumed it was B's habitual residence, i.e. England, and X would have assumed it was A's habitual residence, i.e. Norway.

Building on Skoghøy's argument,[121] it is arguable that this risk should fall on C, as some time has passed since the original assignment. It would therefore be more reasonable to require C to investigate the chain of assignments. X could only rely on A's habitual residence at the time the security interest is granted.

However, it would be difficult for C to protect itself from third parties it is unaware of, especially if the chain of assignments is long.

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[119] Nordtveit (2013) p. 82 (my translation).

[120] The Debentures Act § 29.

[121] Skoghøy (1990) p. 506.

The British Institute for International and Comparative Law also recognised this issue in their discussion of possible solutions, although they did not propose a clear response. They put forward the following suggestions:

> 'This issue could be addressed in the rule itself or in a recital and potentially solved by reference to either a center of gravity or solved by means of the closest connection principle. Another alternative would be to subject the question of the multiplicity of assignors to party autonomy. Any abuses of such party autonomy could be dealt post facto by court intervention.'[122]

In order for the assignor's habitual residence to work as a foreseeable approach for determining the choice of law for the third-party effects of assignments of claims for all parties involved, a solution to this problem should be determined.

4.3 *Lex rei sitae*

The *lex rei sitae,* or simply *lex situs* is commonly applied in disputes concerning transfers of property for immovable and movable, tangible property.[123] A benefit of this approach is therefore a coherent and logical system for all proprietary disputes.

Among others, Cordero-Moss, Lundgaard and Cordes, Stenseng and Lenda consider the *lex situs* to be customary law for immovable property rights in Norwegian private international law.[124] This is the solution under Rome I Regulation as well,[125] and, according to Cordero-Moss, also acknowledged as a choice of law rule in most legal systems.[126]

For movable, tangible property, authors of Norwegian legal literature assume the solution would also be the *lex situs.*[127] Lundgaard writes that this is the main solution in the Nordic countries.[128] Konow conducted a comparative analysis and found that *lex situs* was widely applied in both civil and common law countries in proprietary disputes. Furthermore, Norwegian law was applied in two court decisions concerning a tangible, movable asset when it had

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[122] BIICL (2011) p. 397.

[123] Nordtveit (2013) p. 76, see also Konow (2006) p. 462.

[124] Cordero-Moss (2018b) p. 277, Lundgaard (2000) p. 283, Cordes, Stenseng and Lenda (2010) p. 348.

[125] Rome I Regulation Article 4(1)(c).

[126] Cordero-Moss (2018b) p. 277.

[127] Cordero-Moss (2018b) p. 278, Konow (2006) p. 306 and 307, Lundgaard (2000) p. 285 and Cordes, Stenseng and Lenda (2010) p. 453.

[128] Lundgaard (2000) p. 285.

arrived in Norway.[129] *Lex situs* remains the general applicable law for disputes concerning property rights, although it may be subject to certain exceptions.[130]

In line with the general choice of law rules for disputes concerning property rights, the *lex situs* could also be applied in cases concerning intangible property rights. However, due to the intangible nature of these assets, their *situs* may be difficult to determine.

Due to the strong influence of the *lex situs* rule in choice of law for property disputes, some lawyers have been driven to attribute an artificial *situs* to the intangible asset.[131] Prior to the Bergen Bunkers decision, Cordero-Moss considered that the *lex situs* should be applied to disputes concerning intangible property rights, in line with its general application to proprietary disputes. She considered it most natural to regard the *situs* of a receivable as the domicile of the assignor, as it constituted a part of the assignor's assets.[132]

However, the *situs* of a receivable is not obvious, and different viewpoints exist. For instance, an English Supreme Court decision held that a receivable is located at the residence of the debtor, as this is the place where it may be enforced.[133] This was also the classical view in Belgium and France, where it was also considered that a fictitious *situs* had to be assigned to the property rights in the receivable, and this was found at the location of the debtor.[134]

In the Bergen Bunkers decision, the Supreme Court rejected *lex situs* as it considered that the security interest lacked a geographical connection.[135] Due to the artificialness of assigning a *situs* to an intangible property right, it considered it better to simply use a different approach to determine the choice of law. The authors of the BIICL study also considered it to be a non-viable option.[136]

4.4 Law of the underlying claim

The law of the underlying claim is the law applicable to the contract between the assignor and the debtor. In Nordtveit's article, she argues that this solution is the most practical to determine the choice of law.

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[129] RG 1958 p. 646, RG 1963 p. 528.

[130] Konow (2006) p. 464 f.

[131] Goode (2014) p. 356.

[132] Cordero-Moss (2018b) p. 281.

[133] Hill and Shúilleanháin (2016) p. 480 with reference to *New York Life Insurance Co v Public Trustee* [1924] (CA) 2 Ch 101 at 119.

[134] BIICL (2011) p. 183.

[135] HR-2017-1297-A para 87.

[136] BIICL (2011) p. 384.

She considers that the law of the underlying claim is a single connecting factor and argues that this will also apply when there is a chain of assignments, and when the assignor has moved between assignments.[137] Therefore, the law of the underlying claim is a stable connecting factor.

Nordtveit and the authors at the BIICL point out that when this solution is applied, there are no problems of classification between contractual and proprietary disputes. The same law would apply to contractual disputes between assignees and debtors, and proprietary disputes between assignees and third parties.[138]

Furthermore, as mentioned above, the assignor's habitual residence solution may not be appropriate for claims to bank accounts and claims arising from financial contracts and instruments. The law of the underlying claim is more suitable, as it is convenient for a bank to review which law applies to all bank accounts held with it rather than the different laws of the account holders' habitual residences.[139] The account holder's habitual residence is also far less stable than the law of the contract between the bank and the customers.

On the other hand, the law of the underlying claim is inconvenient for bulk assignments, for instance in the factoring sector. The assignee would have to comply with the laws of all of the underlying contractual relationships, which could vary. Also, it is unsuitable when future claims are assigned. An assignor may wish to assign claims that have not yet come into existence.[140] This occurred in the Bergen Bunkers case, where ING Bank was supposed to have security in the claims from future bunker purchases, as well as the existing claims. If the law of the underlying claim is applied, the assignee cannot know which law will apply at the time of the assignment.

Another problem with applying the law of the underlying claim is that the assignor's creditors would have to investigate each underlying claim in order to know which law they need to comply with to ensure priority. Nordtveit acknowledges this, however she argues that the creditors cannot legitimately rely on being able to seize the assignor's assets if they have not ensured additional security in the assets before the event of default, i.e. by creating a security interest.[141]

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[137] Nordtveit (2013) p. 82-83.
[138] Nordtveit (2013) p. 83, BIICL (2011) p. 390.
[139] BIICL (2011) p. 391.
[140] BIICL (2011) p. 392.
[141] Nordtveit (2013) p. 83.

Another issue is that the debtor and the assignor could agree to change the law in order to adversely affect the assignee. The assignee would be subjected to whichever law the assignor and debtor agree upon, and would be unable to exercise any control over the choice of law.[142]

Nordtveit considers that the risk of abuse is low, as in a creditor-debtor relationship there are usually other considerations that are central for the choice of law, such as ability to enforce the claim. However, as a principle, it is unfortunate that the creditor and debtor are able to control which law applies in a dispute which concerns a third party. This was determinative for the Supreme Court's rejection of this solution in the Bergen Bunkers decision.[143] In the wording of Judge Kaasen, it could lead to forum-shopping, especially if the dispute is between a bankruptcy estate and an assignee. He held that: 'This could be in conflict with the central concerns for mandatory rules, verifiability, equality and efficiency during the insolvency proceedings.'[144]

4.5 Law applicable to the contract between the assignor and assignee

By applying the law in the contractual relationship between the assignor and assignee to any third-party effects of the assignment, a coherent choice of law is made. The assignor and assignee can make one choice of law in their contract, and the assignee could rest assured that this choice of law would be applicable for any disputes which may arise following the assignment.

This ensures flexibility for the parties, who may, for instance, make a choice which will ensure priority for the assignee in case of bankruptcy or insolvency for the assignor.[145] As the parties are flexible, they can choose the law best suited for their specific relationship.

However, as mentioned in Section 4.4, there is a problem with party autonomy. The assignor is not a party to a dispute which arises between the assignee and a third party. It is problematic that the assignor and assignee would be able to make a choice of law without regard to one of the parties to the dispute. There is a risk that this party autonomy could be abused as the assignor and assignee may wish to choose a law which provides the third party with little or no security.

[142] BIICL (2011) p. 392.
[143] HR-2017-1297-A para 92.
[144] HR-2017-1297-A para 92.
[145] BIICL (2011) p. 385-386.

In the Netherlands, where this solution is applied in disputes concerning the third-party effects of assignments of claims, abuse does apparently not happen frequently.[146] Also, the risk of abuse may be limited by creating restrictions on how the choice of law can be made by the assignor and assignee.[147] Still, the principle of party autonomy is eroded by this solution.

Another problem is uncertainty, which may arise if the parties make a choice of law that was seemingly only meant to apply to the contractual obligations between the assignor and assignee, and not the effects for third parties. The question of whether this choice of law should be extended to the third-party dispute would then emerge. Furthermore, if no choice of law is made, it is unclear whether the applicable private international law for contracts would also be suitable for the proprietary effects.[148]

If the claim is assigned twice and the choice of law is different in each assignment contract, it is unclear which law should apply to the dispute. Proponents for the solution argue that the property law principle of *prior tempore, potior iure* could be applied. The first assignment would have priority, but may have to yield priority in case the second transaction is a good faith acquisition under its governing law.[149] This could potentially lead to some uncertainty, as unlike national property law, the first assignee would not know how to protect its priority from subsequent good faith acquisitions. Additionally, the issue of eroding the principle of party autonomy remains unresolved.

4.6 Law of the debtor's habitual residence

The law of the debtor's habitual residence would involve reviewing the underlying assigned claim, and learning who the debtor is. Then, this debtor's habitual residence would have to be determined, and then the law of this jurisdiction would be applied to the dispute.

As mentioned in the Bergen Bunkers decision, the Supreme Court rejected a statement from the preparatory works to the Security Interest Act, which stipulated the law of the debtor's habitual residence.[150] The Supreme Court held that this statement in the preparatory works appeared 'categorical and unfounded', as well as 'old, in an area marked by judicial development'.[151]

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[146] Ibid.
[147] BIICL (2011) p. 387.
[148] BIICL (2011) p. 388.
[149] BIICL (2011) p. 389.
[150] Ot.prp.nr.39 (1977-1978) p. 75.
[151] HR-2017-1297-A para 78.

There are several disadvantages in applying the law of the debtor's habitual residence to a dispute between the assignee and a third party, and therefore the Supreme Court's rejection of the preparatory works was likely a wise decision. BIICL rejected the solution outright as a 'non-viable option'.[152]

Firstly, applying a choice of law which is based on the debtor means that it is unsuitable for bulk transfers of claims, as discussed previously. In an international industry, this is even more unsuitable than applying the law of the underlying claim. If the law of the underlying claim is applied, there is at least a possibility that the assignor has entered into a standard contract with all of its debtors, which would ensure that the same choice of law applied in all of the underlying claims. On the contrary, if the law of the debtors' habitual residences applied, the choice of law would only be coherent if the assignor operated solely in one country.

In the Bergen Bunkers decision, the debtors were shipowners who were habitually resident all over the world. ING Bank would then have had to comply with priority and perfection rules in all of these jurisdictions.

Secondly, unlike the law of the underlying claim, there is no stability to the debtor's habitual residence. The debtors may move, and if they do, the law in the dispute between the assignee and a third party will change. It is conceivable that a rule designating a point in time at which the choice of law is made could be applied. Nevertheless, the same issue of uncertainty which applies for the law of the assignor's habitual residence applies for the law of the debtor's habitual residence. If the debtor moves between assignments, it would provide little foreseeability for prudent assignees who scrutinise the habitual residences of the debtors at the time of assignment.

Goode previously argued that the place where the claim would have to be enforced would be in the jurisdiction of the debtors. Therefore, the law of their habitual residence should apply to the dispute between the assignee and any third party.[153] However, in addition to the reasons why the debtor's habitual residence is unsuitable as a choice of law for the dispute between an assignee and a third party, this argument been also been criticised on its own merits. Struycken and Stevens argue that jurisdiction may be based on grounds other than residence, and orders of enforcement are often directed towards the assets of the debtor, which can be located

[152] BIICL (2011) p. 384.
[153] Goode (2010) pp. 1241-1242

in different countries, rather than the person of the debtor.[154] Goode later appeared to change his position.[155]

[154] Struycken and Stevens (2002) p. 16.

[155] Goode (2014) 375-377

5 The European Commission's Proposal for a new Regulation

5.1 Introduction

The issue of finding the applicable law to a dispute concerning the third-party effects of an assignment of a claim has also been subject of a long-lasting discussion in other European countries. Different approaches among those discussed in Chapter 4 have been adopted by the Member States, which means there have not been any harmonised understanding of which approach is the most suitable in the EU.

The EU Commission has now put forward a proposal for a new Regulation which would regulate choice of law for the third-party effects of assignments of claims in all EU Member States.

This final chapter of the thesis will compare the solution proposed by the Commission with the approach taken by the Supreme Court in the Bergen Bunkers decision, and discuss whether the EU Regulation could have an impact on Norwegian choice of law rules if it is eventually adopted into EU law.

5.2 The background for the proposal

The discussion of the choice of law for third-party effects of assignment of claims has been ongoing for a long time. Some Member States and scholars assumed that Article 14 of the Rome I Regulation also applied to the proprietary effects against third parties of the assignment.[156] However, other Member States argued that 14(1) applied only to the proprietary effects *inter partes* in the specific agreements, and that 14(2) applied only between the assignee and the debtor.[157] They argued that the proprietary effects in Article 14(1) concern e.g. the moment when the risk passes between the contractual parties.

There was a fierce debate among Member States as to whether this issue is already regulated by the Rome I Regulation, or whether this issue was unregulated at the EU level.

The Member States that held the view that the issue was unregulated also pointed to Article 27, which stipulated 17 June 2010 as the deadline for a report concerning third party effects of assignments. The report was to be accompanied by a proposal to amend the Rome I Regulation, if appropriate. As Article 27 includes a duty to consider an amendment of the Rome I Regulation to regulate this issue, this suggested that the current Article 14 is not applicable to third-party effects of an assignment.

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[156] BIICL (2011) p. 31.

[157] BIICL (2011) p. 30.

This debate between the Member States may now be considered finally settled. In 2018, the Commission presented a proposal for a new Regulation of the EU Parliament and of the Council on the Law Applicable to the Third-Party Effects of Assignment of Claims.[158] This entails that the Commission did not regard the matter as settled by an interpretation of Article 14.

Furthermore, in 2018 the European Court of Justice held that Article 14 of the Rome I Regulation does not refer to the third-party effects of an assignment of a claim.[159] It acknowledged that a Commission proposal was underway, however at the present time, it considered the absence of rules a conscious choice by the EU legislators.

Therefore, a new legal instrument is necessary in order to create a harmonised rule for the choice of law for third-party effects of an assignment of a claim. The proposal was put forward by the EU Commission 12 March 2018, and the EU Parliament published its position after the first reading 13 February 2019. The proposal is currently being reviewed by the Council of the EU and has not yet been adopted into EU law.

5.3 The proposed rules for determining the applicable law

5.3.1 Article 4(1) – Assignor's habitual residence

The main rule is set out in Article 4 (1) of the Commission's Proposal. The main rule is:

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

Therefore, the main rule of the proposal aligns with the position under Norwegian law following the Bergen Bunkers decision. The applicable law is determined by finding the habitual residence of the assignor.

In the second subparagraph of Article 4(1), there is a rule on *conflit mobile*. A criticism voiced by Skoghøy, among others, is that when applying the law of the assignor's habitual residence, the assignor might move between countries in between two assignments.[160] This is resolved by the second subparagraph which stipulates a point in time at which the habitual residence of the assignor is fixed. This point in time is: '[…] the time of the assignment which

[158] COM (2018) 96.

[159] Case C-548/18 BNP Paribas v. TeamBank paras 31, 37 and 38.

[160] Skoghøy (1990) pp. 506-507.

first became effective against third parties under the law designated as applicable pursuant to the first subparagraph.'[161]

If a dispute arises, the laws of the assignor's first and second habitual residence would have to be examined. The first assignee would have to comply with whichever rules on perfection that exist in the assignor's first country of habitual residence to protect herself from the second assignee. The first assignee will lose the priority dispute if the second assignee has complied with the rules of perfection in the assignor's second habitual residence before she perfected the claim in the first country. As the assignor would have to physically move, the first assignee would probably be secured if she perfects the claim in the country of the assignor's first habitual residence without undue delay.

Another criticism voiced by Kronke, Hartley and Goode relates to the issue of chain assignments as described in Section 4.2 above.[162] This issue was raised by Nordtveit in Norway.[163] The problem arises when a claim is assigned to more than one assignee, who then re-assigns the claim. The problem is which assignor's habitual residence should be applied, and also that the final assignees will be unaware of the other 'branch' of assignments. Goode was critical that this problem was not addressed in the BIICL report, and Kronke is similarly critical that this is not addressed in the Proposal.[164] A resolution may be possible by applying a rule based on the property law maxim *nemo dat quod non habet,* described as the 'last event' solution by Goode.[165] It could be characterised as a flaw in the proposal that this remains unaddressed.

5.3.2 Article 4(2) – Law of the underlying claim

Article 4(2) is the first exception, which will be applied to cash credited to an account in a credit institution, and claims arising from a financial instrument such as derivatives contracts. As mentioned in Sections 3.3.3 and 4.4 above, the assignor's habitual residence is not an ideal connecting factor when the assignment concerns cash credited to an account in a credit institution, or financial instruments. Therefore, Article 4(2) provides that the connecting factor should be 'the law applicable to the assigned claim'.

Although some have argued that having one applicable solution for all assignments would increase legal certainty,[166] it is probably accurate to be critical of this insistence, as Goode has

[161] COM (2018) 96 Article 4(1) on p. 31

[162] Kronke (2019) p. 17-18, Hartley (2011) p. 55 and Goode (2014) pp. 376-377.

[163] Nordtveit (2014) p. 82

[164] Goode (2014) p. 377 and Kronke (2019) p. 17-18.

[165] Goode (2014) p. 377

[166] Labonté (2018) p. 333.

been.[167] One rule does not fit all regarding choice of law for the assignment of claims, as discussed above in Chapter 4. Therefore, a mixed solution like the Commission proposes is probably necessary.

5.3.3 Article 4(3) – Law of the underlying claim by choice

Article 4(3) is the second exception. It applies to assignments in view of a securitisation. It allows the parties to choose the law applicable to the assigned claim, if they wish to. If they do not make a choice, the law of the assignor's habitual residence will apply, in accordance with the main rule in Article 4(1). According to Article 4(3) second paragraph, the choice must be made in contract, the formal validity of which should be determined by the applicable law.

This limited party-autonomy approach entails that the assignor and assignee may bind third parties to a choice of law they were unaware of. Bazinas expressed criticism concerning this part of the proposal, as it in his view is against the legal traditions of Europe for two parties to be able to contractually bind a third party. Further, he is critical that 'securitisation' is not defined in the proposal.[168] The problem of applying the assignor's habitual residence only arises in large securitisations, where there are several assignors in different countries. As Article 4(3) encompasses all securitisations, its scope becomes broader than necessary.[169] The Commission stated that this was the reason for giving the parties to the securitisation a choice, so that the parties may apply the rule which is most suitable to their situation, depending on the size of the securitisation.[170] This could create some uncertainty. However, it would also be difficult to create a more certain division between small and large securitisations, and the rule could become too inflexible and rigid.

The EU Parliament was sceptical of the party autonomy provided by the second exception in Article 4(3), which would enable the assignor and assignee to bind third parties to their choice of law. In its amendment of Article 4, Article 4(3) was deleted.[171]

5.3.4 Article 4(4) – Priority conflicts between the two rules

An issue which may arise as a result of the freedom of choice, is that the same claim is assigned twice with the applicable law determined by the assignor's habitual residence in the first assignment, and the law of the assigned claim in the second assignment.

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[167] Goode (2014) p. 372

[168] Bazinas (2019) p. 627.

[169] Ibid.

[170] COM (2018) 96 p. 20.

[171] P8_TA-0086/2019 amendment 22.

Article 4(4) attempts to resolve this conflict of priority. According to this provision, the applicable law should be the law under which the third-party effects first became effective.

The EU Parliament retains Article 4(4); however, it amends it by adding that in case both assignments become effective against third parties under their respective laws simultaneously, the law of the assignor's habitual residence should apply.[172]

It is unclear why the EU Parliament retains Article 4(4) when it deleted Article 4(3). Article 4(4) relates to the situation where the assignor assigns a claim in view of securitisation twice, and different applicable laws are applied in the respective assignments. When Article 4(3) is removed, this is no longer possible. The law of the assignor's habitual residence would apply, unless the claim falls under the exceptions in Article 4(2). Therefore, the purpose of retaining Article 4(4) is unclear.

Bazinas argues that Article 4(4) should have been removed alongside Article 4(3). According to him, both Article 4(3) and 4(4) create uncertainty, and:

> '[…] potential assignees would have no objective and reliable way of finding out that there have been other assignments and ascertaining the time when those assignments became effective against third parties.'[173]

5.4 The relationship between the proposal and Norwegian law

5.4.1 The similarities

As explained, the main rule of the EU Commission's Proposal is based on the assignor's habitual residence. The EU proposal's main rule and the approach chosen in the Bergen Bunkers decision align.

It appears that similar reasoning lies behind the options chosen by the Norwegian Supreme Court and the EU Commission, respectively. For instance, in the Recitals to the proposed Regulation, the Commission accentuates the benefit of foreseeability.[174] As discussed previously in Section 4.2, the assignor's habitual residence is a single connecting factor which is objectively ascertainable. The Supreme Court also emphasised this in its decision, as well as pointing out that the dispute has a close connection with the assignor's habitual residence.[175]

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[172] Ibid.

[173] Bazinas (2019) p. 629.

[174] COM (2018) 96 Recital 20 on p. 26

[175] HR-2017-1297-A paras 85 and 88-90.

'Habitual residence' is defined in Article 2 of the proposal, and will generally coincide with the centre of main interest (COMI) used in the Insolvency Regulation.[176] This is beneficial as disputes concerning third-party effects of an assignment will often arise in relation with insolvency proceedings.[177] This was also pointed out by the Supreme Court in the Bergen Bunkers decision.[178] The suitability for bulk assignments is highlighted by both the Supreme Court[179] and the EU Commission.[180]

The Commission and the Norwegian Supreme Court therefore formulated the same solution for choice of law and appears to have similar reasoning behind arriving at this approach. If the Commission's Proposal is adopted in its current form, the legal position under Norwegian law and the main rule in the proposal will be in alignment. The reasoning and the considerations which were emphasised also appears to be corresponding.

5.4.2 The differences

As shown, the Commission's Proposal have diverging exceptional rules. Although the main rule of the assignor's habitual residence is in alignment, the Commission's Proposal also elaborates on the issue of *conflit mobile.* This issue, as well as the issue with chain assignments as described previously, remains unresolved in Norwegian law following the Bergen Bunkers decision.

The first exception in the Commission's Proposal concerns claims relating to cash credited to credit institutions and claims arising from derivative contracts.[181] The facts of the Bergen Bunkers decision did not involve cash credited to credit institutions and claims arising from derivative contracts. However, Eriksrud Bergan has argued that the rule in the Bergen Bunkers decision is the only applicable rule for choice of law for third-party effects of assignment of any claim in Norwegian law, and therefore it is most likely that the law of the habitual residence of the assignor would be applied to all cases involving assignments of claims.[182]

In his view, the current Norwegian position is therefore divergent from the potentially future position under EU law. As discussed above in Chapter 4, there are several reasons why the

[176] Insolvency Regulation.
[177] COM (2018) 96 Recital 22 on p. 26.
[178] HR-2017-1297-A paras 85 and 90.
[179] HR-2017-1297-A para 91.
[180] COM (2018) 96 Recital 21 on p. 26.
[181] COM (2018) 96 Article 4(2) on p. 31.
[182] Eriksrud Bergan (2019) pp. 275-276.

assignor's habitual residence is an unsuitable rule for assigning security interests in bank accounts, and the like. Whether the Supreme Court would apply the law of the assignor's habitual residence to a case which concerns cash credited to a credit institution, or arising from derivative contracts, is arguably not quite clear. This thesis has argued that there is no evidence that the Supreme Court would consider itself obligated to apply the law of the assignor's habitual residence to a case concerning e.g. the assignment of a security interest in a bank account.

However, is clear that as of now, Norwegian law could not be described as certainly being in complete alignment with the Commission's Proposal. The question of which rule will be applicable to the assignment of a claim to funds in an account is resolved in the European Commission's Proposal, but potentially unresolved in Norwegian law.

Another approach could be to apply the law of the debtor's habitual residence. When the debtor is a credit institution, this approach could be more suitable. The main problems with applying the debtor's habitual residence is discussed in Section 4.6 above. It includes unsuitability for bulk assignments, and that the debtor might change its residence and therefore create uncertainty for the assignees.

However, when the claim which will be assigned concerns cash credited to a credit institution, it is less likely that there will be problems with bulk assignments. Also, the credit institution will likely have a more permanent residence than other types of debtors. The issues of applying the debtor's habitual residence might therefore not manifest themselves when the assigned claim is a claim to cash credited to an account.

However, the Supreme Court could also find the law of the underlying claim the most suitable approach, and thus place Norwegian law in alignment with EU law. Or, it could apply the law of the habitual residence of the assignor, in line with the Bergen Bunkers decision.

The Commission's Proposal included another exception in Article 4(3), which concerned assignments in view of securitisations. However, the EU Parliament deleted this rule in their review of the proposal, and therefore it might not be included in the final adopted regulation.

The Supreme Court rejected party autonomy for choice of law for third-party effects of assignments in the Bergen Bunkers decision. Judge Kaasen held that: 'The autonomy of the parties should not affect the validity and perfection of the security interest in the form of a binding choice of law. I find that this must be decisive.'

The rule in Article 4(3) involves the parties making a choice of law which will be binding on third parties. The statement of Judge Kaasen suggests that Norwegian law would be hesitant to follow the EU if this rule is included in an adopted Regulation.

5.4.3 Will the final Regulation serve as legal source in Norway?

If, for instance, a case which concerns choice of law for a dispute arising after an assignment of a security interest in a bank account will be heard by Norwegian Supreme Court in the future, a question which could arise is which weight will be placed on the new Regulation. This discussion assumes that the preparatory work currently undertaken in the EU will result in a final Regulation which will eventually become adopted into EU law.

As the proposal is based on TFEU Article 81(c), it appears that the final Regulation will probably not be binding upon Norway through the EEA agreement.[183] As discussed in Chapter 1.3.2, EU law concerning private international law has been considered by the Norwegian Supreme Court when deciding cases concerning choice of law in Norway, even if it is not formally binding. The final Regulation could therefore become influential.

This is supported by the statement of Judge Kaasen in the Bergen Bunkers decision, where he stated that: 'Until this work gives results, the above-mentioned concern for uniform rules has no relevance to the decision of these choice of law issues.'[184] This suggests that when a final Regulation exists, concern for uniformity may entail that Norwegian law is influenced by it.

In the report Cordero-Moss wrote for the Ministry of Justice and Public Security, she mentions the Bergen Bunkers decision and the development in the EU. She writes that the rule formulated by the Supreme Court has less detail than the Proposal, and therefore the Proposal could be influential in the future. She writes that in case of divergence between the EU Regulation, if it is adopted, and the Norwegian choice of law rules, considerations of harmonisation and uniformity may imply that the Norwegian course must be modified.[185] Lilleholt makes the same remarks in a comment on the Bergen Bunkers decision.[186]

When faced with the question of how to determine the choice of law for a dispute concerning an assignment of a security interest in a bank account, the future Supreme Court could have the Bergen Bunkers decision pointing to the assignor's habitual residence, and the EU Regulation pointing to the law of the underlying claim. In light with what this thesis has argued, it

[183] Cordero-Moss (2018a) p. 162.
[184] HR-2017-1297-A para 80.
[185] Cordero-Moss (2018a) p. 162.
[186] Lilleholt (2018) p. 541

is most likely that the Supreme Court will follow the EU Regulation. This is due to several reasons.

Firstly, as discussed in Chapter 2, there is no evidence to suggest that a single application of the Irma-Mignon formula results in an inflexible 'firmer rule' which cannot be departed from. Secondly, the full scope of the Bergen Bunkers decision was not clarified by the Supreme Court, and it may not be a strong precedent if a case arises with a different set of facts. Thirdly, as discussed in Chapter 4, the application of the assignor's habitual residence is not an ideal rule for assignments relating to security interests over bank accounts. The concern for reasonableness therefore suggests that the assignor's habitual residence is not applied. Fourthly, the Supreme Court has in several decisions appeared to be heavily influenced by the concern for uniformity with the EU, and the statement by Judge Kaasen in the Bergen Bunkers decision is in line with this tendency.

Both the concern for reasonableness and the concern for uniformity with EU law suggests that the Supreme Court should ignore its approach in the Bergen Bunkers decision and apply the law of the underlying claim in future cases concerning choice of law for the assignment of a security interest in a bank account.

If a case arises where the facts do not involve either cash credited to an account, claims arising from derivative contracts or securitisations, it is likely that the decision in the Bergen Bunkers decision will be followed. Both the Supreme Court precedent from the Bergen Bunkers decision and the main rule of the EU Regulation point to this approach. This thesis has also argued that, in many situations, it is the most suitable rule.

However, as the Proposal is considered by the EU legislative bodies, modifications may be made. In a progress report from the Council, it becomes evident that the Working Party for Civil Law Matters have heard new proposals from delegations concerning several additional exceptions to the main rule.[187]

Moreover, a number of delegations also proposed reversing the rules in Articles 4(1) and 4(2), resulting in the law of the underlying claim being the main rule, and the law of the assignor's habitual residence the exception.[188] If these delegations' proposals become incorporated in the final Regulation, the main rule under EU law would be in contradiction with the solution in the Bergen Bunkers decision.

[187] ST-9562/2019 page 7
[188] Ibid.

The law of the underlying claim rule involves an erosion of party autonomy, as it would be agreed between the debtor and the assignor. This approach was firmly rejected in the Bergen Bunkers decision.[189] If the final EU Regulation includes this approach as a main rule, its weight as a legal source for the Norwegian Supreme Court could be diminished. Although the law of the underlying claim might be applied in some situations, it has been rejected as the 'main rule' in the Bergen Bunkers decision.

Therefore, it will be interesting to see which solution the EU will finally adopt, and whether it will make the law of the underlying claim the main rule. If that happens, the Norwegian Supreme Court might have to set its own course, independently of the approach taken in the EU.

[189] HR-2017-1297-A para 92

6 Conclusion

Following the Bergen Bunkers decision, some clarity on the choice of law for third-party effects from assignment of claims was achieved. The Supreme Court chose the law of the assignor's habitual residence as the solution to the question of which law applies to the third-party effects of an assignment of a claim.

However, some important questions remain. The scope of the decision, i.e. in which cases the assignor's habitual residence rule will be applicable, remains unclear. This is due to an issue of interpretation. The Supreme Court stated that it applied the Irma-Mignon formula, yet its reasoning appears to have been principled, as it emphasised the importance of foreseeability and coherence. This suggests that the reasoning was intended to be suitable for cases beyond the Bergen Bunkers case. If that holds true, one question remains: how far beyond?

The consequence of this is that it is unknown whether the Bergen Bunkers decision will be applicable to e.g. a case which concerns a security interest over an account in a financial institution. The European Commission has proposed a dual solution, in which the law of the assignor's habitual residence is the main rule, and the law of the underlying claim may be applied as an exception. Due to considerations of uniformity, the Supreme Court might have to consider this nuance in the future if a new regulation is adopted in the EU.

Going forward, it would be useful to have some clarification on the relationship between the firmer rules, or presumptions, and, the Irma-Mignon formula in Norwegian law. Private international law, with particular emphasis on choice of law, remains an area of law where there are methodical and material uncertainties. This invites the Supreme Court to pay particular attention to its reasoning in decisions concerning choice of law, as until a statutory law is possibly adopted, this is the best way to achieve some more predictability.

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