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ARTICLE

The assignment of future claims in EU private international law

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Abstract

This article analyzes the assignment of future claims in EU private international law. The effectiveness of such an assignment depends on several conflict rules: those governing the existence of the claims, those governing the transfer of future claims and, in case the assignor becomes bankrupt, those governing the insolvency proceedings. In national situations, these laws operate in harmony, but in international situations, this is not always the case. Since multiple conflict rules govern the assignment of future claims and the effectiveness of their assignment against the insolvent estate, multiple substantive laws can apply at the same time. Differences in these laws may cause incongruencies, leading to unintended outcomes: an assignment that would not be effective against the insolvent estate in a domestic situation, may nevertheless be effective in an international one.

This article analyses how and when these unintended outcomes of the assignment of future claims should be prevented. To that end, it reviews the substantive laws of a number of Member States and discusses three examples of unintended outcomes. Each of these unintended outcomes can be prevented trough adaptation, which may be used to render the assignment ineffective against the insolvent estate of the bankrupt assignor. However, this might have a significant effect on the position and legal certainty of the assignee. Hence, the mechanism of adaptation should not be used lightly. As a main rule, an assignment should only be rendered ineffective against the insolvent estate if all the involved jurisdictions intend it to be ineffective.

1. Introduction

1. The assignment of future claims is a complex and multilayered issue. The effectiveness of an assignment of a future claim is particularly relevant during the

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assignor's bankruptcy. Is the (future) claim successfully transferred to the assignee or will it become part of the insolvent estate upon coming into existence? The answer to this question depends on the interplay between general private law, which regulates the assignment of future claims, and insolvency law, which deals with the treatment of such assignments during the assignor's insolvency.

2. However, this interplay may cause difficulties in international situations. Each legal system deals with the assignment of future claims in a different manner. These differences do not matter in domestic situations, where general private law and insolvency law align and are congruent. However, this is not always the case in international situations. This can be illustrated by taking a closer look at Dutch law. In Dutch private law, assigned future claims are only transferred after coming into existence. Furthermore, when these claims come into existence, they always do so in the patrimony of the assignor, before automatically passing to that of the assignee.[2] Dutch insolvency law is tailored to this: pursuant to Article 35(2) of the Dutch Bankruptcy Act (DBA), the assignment of a future claim is effective against the insolvent estate if the assignor acquires it before being declared bankrupt, but it is ineffective if the assignor acquires the claim afterwards.[3] As a result of this interplay between general private law and insolvency law, the assignment of future claims can only be invoked against the insolvent estate if the claims exist before the assignor is declared bankrupt.

3. Although many other jurisdictions also tie the effectiveness of an assignment against the insolvent estate to the existence of the claim,[4] the assignment of

2 Art. 3:84(1) & 3:97(1) Dutch Burgerlijk Wetboek (DBW), https://wetten.overheid.nl/BWBR0005291.

3 DBA: https://wetten.overheid.nl/BWBR0001860/. Pursuant to Art. 23 DBA, assignor loses the power to dispose over their assets on the day they are declared bankrupt. Art. 35(2) DBA is specifically directed at future property and, insofar as relevant, reads: 'If the [insolvent] debtor has delivered property in advance before the day of the declaration of bankruptcy, this property falls, if it was acquired first after that day [when the debtor's bankruptcy was declared], in the insolvent estate'.

4 Belgian law: Art. XX.110, Wetboek van economisch recht (WER), ejustice.just.fgov.be/eli/wet/2013/02/28/2013A11134/justel; Art. 3.14(§2)(4) Belgian Burgerlijk Wetboek (BBW), https://www.ejustice.just.fgov.be/eli/wet/2020/02/04/2020A20347/justel; J. Del Corral, *De leveringsplicht bij de overdracht van roerende lichamelijke goederen* (Antwerpen: Intersentia 2013), para 296; J. Del Corral, 'Zekerheidsrechten. Stand van zaken', *Nieuw juridisch Weekblad (NJW)* 306. 2024, p (578), at 580; C. Lebon, *Het goederenrechtelijk statuut van schuldvorderingen*, (Antwerpen: Intersentia 2010), para 207. Although there is some debate on how strict this principle should be interpretated, it continues to reflect current Belgian law, see also: D. van Gerven, 'Overdracht en inpandgeving van bestaande en toekomstige schuldvorderingen', *Rechtskundig Weekblad (RW)* 2004 14-4, p (521), at 529-530; E. Dirix, 'Verpanding van schuldvorderingen', in P. Francois (ed.), *Voorrechten en hypotheken. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Mechelen: Wolters Kluwer Belgium 2008), para. 32; S. Baeyens, *Vermogensrechten en faillissement. Een rechtsvergelijkend onderzoek naar de tegenwerpelijkheid en afdwingbaarheid van verwervingsrechten, gebruikersrechten en verbods-*

future claims is sometimes dealt with differently in the private law of these jurisdictions. For example, under German law, future claims arising from a legal relationship that already exists at the time of the assignment directly emerge in the patrimony of the assignee.[5] Consequently, the claim is never acquired by the assignor. This is problematic in insolvency proceedings governed by Dutch law because the assignment of a claim directly acquired by the assignee cannot be affected by Article 35(2) DBA, even if the claim only comes into existence after the assignor's bankruptcy. As I will further explain in section 2, this outcome is unintended by both jurisdictions: both in Dutch and German law the claim would normally become part of the insolvent estate. This begs the question whether and how the unintended outcome should be prevented.

4. The mechanism of adaptation (*Anpassung/Angleichung*) offers a solution to this problem. What adaptation entails will be further discussed in section 3, but, in short, adaptation allows courts to amend the applicable rules in a conflict-of-laws case in order to restore incongruencies between them.[6] For instance, Article 35(2) DBA may be adapted to ensure that claims which are directly acquired by the assignee nevertheless become part of the insolvent estate. However, such an adaptation would come to the detriment of the assignee, who no longer becomes the 'owner' of the claim.[7] Consequently, the adaptation may have significant consequences for the legal certainty of the assignee, as well as others, such as subsequent assignees. Hence, the decision to make an adaptation should not be taken lightly. When it comes to the assignment of future claims, I think

rechten in faillissement (Antwerpen: Intersentia 2023), para 193; Dutch law: See S. 2.3, infra.; English law: S. 306(1 & 2), 283(1), 307(1) Insolvency act 1986, legislation.gov.uk/ukpga/1986/45/contents; Court of Appeal 1 February 1883, (1883) 22 Ch. D. 782 (CA) (); House of Lords 30 July 1888, (1888) 13 App. Cas. 523 (*Tailby v Official* Receiver); R.M. Goode/K. van Zwieten, *Goode on principles of corporate insolvency law* (London: Sweet & Maxwell 2018, 5th edn), para 3.04; M. Smith & N. Leslie, *The law of assignment* (Oxford: Oxford Univeristy Press 3rd edn 2018), paras 30.27-30.38; German law: See S. 2.3., infra; French law: Art. L622-21(IV)(2) Code de commerce, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379.

5 BeckOGK/Lieder BGB § 398, para 168; H. Beale & W-G Ringe, 'Transfer of Rights and Obligations under DCFR and CESL. Interactions with German and English Law', Legal Research paper Series No 17/2013, p 13; MüKoBGB/Kieninger BGB § 398, paras 78, 82-84; MüKoBGB/Busche, § 398, paras 64 & 71-75; Bundesgerichtshof 7 July 2003, *WM* 2003, 171-1718, *NJW* 2003, 1690-1691.

6 Specifically tailored at EU PIL: H. Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht (Peter Lang 2019)*; Gössl, 'Anpassung im EU-Kollisionsrecht', *RabelsZ* 82 (2018) 618; G. Dannemann, 'Adaptation', in S. Leible (ed.), General principles of European private international law (Alphen a/d Rijn: Kluwer Law International 2016

7 Some legal systems do not speak of ownership of claims, but rather of entitlement. The apostrophes indicate that the term should not be taken literal, but be understood to include both modes of thinking.

adaptations are best reserved for outcomes are not intended by each of the involved jurisdictions.[8]

5. In this paper, I will further set out how and when adaptations may be used to resolve incongruencies between the laws governing an assignment of future claims and insolvency law. In particular, I will address the impact of such adaptations on the legal certainty of assignee. To some degree, assignees may be protected against adaptations by Article 8 of the (recast) European Insolvency Regulation (EIR).[9] Hence, I will also discuss the role and interpretation of this provision. In order to illustrate the incongruencies that may occur when the assignor of a future claim becomes bankrupt, this paper draws on a study of Belgian, Dutch, German, and, to a lesser degree, English and French law.[10] For reasons of brevity, I will mainly refer to examples of Dutch law. Nevertheless, my analysis concerns EU private international law as a whole and other jurisdictions than Dutch law will be addressed as well. Consequently, the conclusions of this article can be applied to conflict-of-law cases involving other legal systems too.

2. Three unintended outcomes

6. As explained in the introduction, the jurisdictions reviewed all treat the effectiveness of an assignment against the insolvent estate in a similar manner. As a main rule, the assignment of claims existing before the assignor's bankruptcy is effective against the insolvent estate, whereas that of claims coming into existence afterwards is not.[11] However, each legal system applies this main rule differently:

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8 More extensively: section 4.

9 EU Regulation 2015/848, data.europa.eu/eli/reg/2015/848/2022-01-09.

10 This choice was based on the volume of the factoring and securitization markets of the respective countries. Belgium, The Netherlands, France, Germany, The United Kingdom, Italy and Spain are the European countries with the biggest markets for securitisation and factoring (not in that order), see: *FCI Annual Review 2025*, pp 31-34, fci.nl/en/annual-review?language_content_entity=en; AFME, *Securitisation data report Q4 2024 & 2024 full year, 6 March 2025*, p 31, https://www.afme.eu/media/mdtlnysh/securitisationdatareportq42024and2024fy002.pdf. For practical reasons I only included the first five countries, of which English and French law only to a, somewhat, lesser degree. Together, these five legal systems represent different relevant legal traditions. The first four are member states of the EU and thus directly relevant when it comes to the interpretation of EU law. The United Kingdom is not a member state anymore but, in particular, English law is still relevant when it comes to interpreting the EU-conflict rules on assignment. English lawyers had significant influence on Article 14 Rome I and, English law might still – and probably will often - be applicable under Rome I. Furthermore, its inclusion serves to represent other common-law systems. For the recast insolvency regulation, English law is less relevant because most of the regulation exclusively applies to member states.

11 Belgian law: Art. XX.110, Wetboek van economisch recht (WER), ejustice.just.fgov.be/eli/wet/2013/02/28/2013A11134/justel; Art. 3.14(§2)(4) Belgian Burgerlijk Wetboek (BBW), https://www.ejustice.just.fgov.be/eli/wet/2020/02/04/2020A20347/justel; J. Del Corral, *De*

there are several exceptions to it and the wording of the relevant provisions varies. In this section, I will give three examples of these differences and show how they may cause unintended outcomes. Each of these examples is based on the following, fictional, case: a lessor with its registered office in the Netherlands assigns all its existing and future claims to a bank. Later, the lessor decides to lease out one of its properties located in the Netherlands to a Belgian lessee under a lease governed by Belgian law.[12] The lease is to be paid monthly, and the lease claims fall due at the beginning of each month. Shortly afterwards, the lessor is declared bankrupt, and a dispute arises between the insolvency practitioner and the bank: which lease claims belong to the insolvent estate and which to the bank? The answer to this question depends on several factors. The first of these is whether the assigned claims exist.

2.1 Existence of claims

7. The moment a claim comes into existence is established differently in all jurisdictions that were reviewed for the purpose of this article. Moreover, in many jurisdictions there is no general, hard and fast rule to determine the moment at which claims come into existence.[13] Claims arise out of a relationship between

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leveringsplicht bij de overdracht van roerende lichamelijke goederen (Antwerpen: Intersentia 2013), para 296; J. Del Corral, 'Zekerheidsrechten. Stand van zaken', *Nieuw juridisch Weekblad (NJW)* 306. 2024, p (578), at 580; Lebon, *Het goederenrechtelijk statuut van schuldvorderingen*, para 207. Although there is some debate on how strict this principle should be interpretated, it continues to reflect current Belgian law, see also: D. van Gerven, 'Overdracht en inpandgeving van bestaande en toekomstige schuldvorderingen', *Rechtskundig Weekblad (RW)* 2004 14-4, p (521), at 529-530; E. Dirix, 'Verpanding van schuldvorderingen', in P. Francois (ed.), *Voorrechten en hypotheken. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Mechelen: Wolters Kluwer Belgium 2008), para. 32; S. Baeyens, *Vermogensrechten en faillissement. Een rechtsvergelijkend onderzoek naar de tegenwerpelijkheid en afdwingbaarheid van verwervingsrechten, gebruikersrechten en verbodsrechten in faillissement* (Antwerpen: Intersentia 2023), para 193; Dutch law: See S. 2.3, infra.; English law: S. 306(1 & 2), 283(1), 307(1) Insolvency act 1986, legislation.gov.uk/ukpga/1986/45/contents; Court of Appeal 1 February 1883, (1883) 22 Ch. D. 782 (CA) (*Jones Ex p. Nicholls, re*); House of Lords 30 July 1888, (1888) 13 App. Cas. 523 (*Tailby v Official* Receiver); R.M. Goode/K. van Zwieten, *Goode on principles of corporate insolvency law* (London: Sweet & Maxwell 2018, 5th edn), para 3.04; Smith & Leslie, *The law of assignment*, paras 30.27-30.38; German law: See S. 2.3., infra; French law: Art. L622-21(IV)(2) Code de commerce, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379.

12 Art. 4(1)(c) of the Rome I regulation (Reg. EC 593/2008 on the law applicable to contractual obligations, hereafter: Rome I) points to the law of the state where property is located as the law applicable to contracts regarding immovable property, but only in the absence of a choice-of-law. Hence, parties are free to choose Belgian law as the law applicable for their lease agreement, for instance because the lessee is a Belgian entity, see: Art. 3 Rome I.

13 Belgian law: Del Corral, *De leveringsplicht bij de overdracht van roerende lichamelijke goederen*, para 290; Lebon, *Het goederenrechtelijk statuut van schuldvorderingen*, para 116; M.E. Storme, 'Derden in het nieuwe verbintenisenrecht. Derde-medeplichtigheid, vertegenwoordiging, derdenbeding, cessie, subrogatie, rechtstreekse vordering en delegatie', *TPR* 2024(3-4), p (1661) at 1804-1813/para 190 ff;

the debtor and creditor. Whether, when, and how a claim comes into existence depends on that relationship.[14] This makes it difficult to compare legal systems with each other. Nonetheless, scholarly debate and case-law have led to clear rules for certain types of claims, such as lease claims. Therefore, I will use lease claims to compare the moment claims come into existence.

8. Under Dutch law, lease claims come into existence when the lease period that corresponds with them has ended.[15] German law follows a similar approach and considers lease claims to come into existence only once the lease period for which they are due has started.[16] In Belgian and French law, claims come into existence at an earlier moment. In these jurisdictions, lease claims exist from the point in time when the legal relationship from which they will arise comes into existence, such as when the lease agreement is concluded.[17] From that moment on, lease claims are existing claims which periodically become due and payable.

9. Why does it matter whether and when a claim exists? The existence of a claim is crucial for the effectiveness of its assignment against the insolvent estate. All jurisdictions reviewed share the principle that only the assignment of claims

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Dutch law: B.A. Schuijling, *Levering en verpanding van toekomstige goederen*, (Deventer: Wolters Kluwer 2016), S 3.4.3.5/paras 94-97/p 124-130; Smith & Leslie, *The law of assignment*, para 2.109 ff; Y.K. Liew, *Guest & Liew on the Law of Assignment* (London: Sweet & Maxwell 5th edn 2024), para 1-13; German law: F. Eichel, *Künftige Forderungen* (Mohr Siebeck: Tübingen 2014), pp 43-44.

14 For instance, Dutch law sometimes allows parties to influence the moment claims come into existence. However, the extent of their autonomy in this respect is uncertain; it is not possible for all types of claims, see fn. 15, infra & Schuijling, *Levering en verpanding van toekomstige goederen*, S. 3.4.3.9/ para 124/p 161-164, with further references. See also: Hoge Raad (Dutch Supreme Court) 6 April 2012, ECLI:NL:HR:2012:BU3784 (*ASR/Achmea*), deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2012:BU3784; Hoge Raad 16 October 2015, ECLI:NL:HR:2015:3023, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:3023 (*DLL/Van Logtestijn q.q.*); Dutch Hoge Raad 16 October 2015, ECLI:NL:HR:2015:3094, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:3094, (*Ingwersen q.q./ING*); Hoge Raad 26 March 1982, ECLI:NL:HR:1982:AG4349, *NJ* 1982, 615; Hoge Raad 30 January 1987, NJ 1987, 530 (*WUH/Emmerig*).

15 Hoge Raad 30 January 1987, ECLI:NL:HR:1987:AG5528, *NJ* 1987/530. There is discussion whether parties can deviate from this rule, see: M.H.E. Rongen, *Cessie. Beschouwingen over kernthema□s van de overdracht van vorderingen op naam tegen de achtergrond van de hedendaagse (internationale) financiële praktijk en securitisation in het bijzonder* (Deventer: Wolters Kluwer 2012), S. 869; B.A. Schuijling, *Levering en verpanding van toekomstige goederen*, (Deventer: Wolters Kluwer 2016), S. 3.4.3.9/ para 124; G.C. Berkhout, 'Faillissementsbestendige verpanding van huurvoderingen', WPNR 2018/7210 and the reaction on it: W. Loof, *WPNR* 2019/7236.

16 Bundesgerichtshof 25 April 2013, NZI 2013, 586; MüKoInsO/Breuer/Flöther, 4th edn. 2019, InsO § 91, para 47. See also: § 110(1) InsO.

17 V. Sagaert, *Goederenrecht* (Mechelen: Wolters Kluwer Belgium 2021), para 1321; Van Gerven, *RW* 2004, pp 524-525; Lebon, *Het goederenrechtelijk statuut van schuldvorderingen*, para 119; E. Dirix, 'Art. 5.174-5.176 BW', in M. Dambre, E. Dirix & B. Tilleman (eds), *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, (Mechelen: Wolters Kluwer Belgium 2022), para.18; J. Del Corral, *De leveringsplicht bij de overdracht van roerende lichamelijke goederen*, para 295.

which exist at the moment of the lessor/assignor's bankruptcy is effective against the insolvent estate.[18] Consequently, in situations entirely governed by Dutch law, only the assignment of lease claims that relate to terms ending before the assignor's bankruptcy can be invoked against the insolvent estate. However, under Belgian (or French) law, all lease claims exist once the lease agreement is concluded, even those relating to terms after the assignor's bankruptcy. This difference can cause unintended outcomes in cross-border situations, where the insolvency of the assignor may be governed by a different law than the existence of the claim.

2.1.1 Applicable laws

10. The law applicable to the assignor's bankruptcy is determined by the EIR. Pursuant to Article 7(2)(b) EIR, the law of the member state where the insolvency proceedings are opened determines 'the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings'. In main insolvency proceedings, this so-called *lex concursus* is the law of the state where the insolvent assignor has its centre of main interests (COMI). Thus, if the lessor/assignor has its COMI in the Netherlands and is declared bankrupt there, Dutch law is the lex concursus. However, Article 7(2)(b) EIR only applies to assets belonging to or acquired by the insolvent assignor after the insolvency proceedings have been opened. In order to determine whether a claim exists, at which moment and whether it belongs to the assignor or whether it was validly transferred to the assignee, general private international law must be consulted.[19]

18 See S. 2.2.2.

19 X.E. Kramer & H.L.E. Verhagen (with cooperation of S. van Dongen), *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 10. Internationaal privaatrecht. Deel III. Internationaal vermogensrecht* (Deventer: Wolters Kluwer 2022), para 325; P.M. Veder, *Cross-border insolvency procedures and security rights* (Deventer: Kluwer 2004), p 306; M.H.E. Rongen, *Cessie. Beschouwingen over kernthema's van de overdracht van vorderingen op naam tegen de achtergrond van de hedendaagse (internationale) financiële praktijk en securitisation in het bijzonder*, (Deventer: Wolters Kluwer 2012)., para 1153; L.F.A. Welling-Steffens, 'Transfer of Claims. Harmonized EU rules on the law applicable to the assignment of claims and the quest for legal certainty', 2020, p 17, online via papers.ssrn.com/sol3/papers.cfm?abstract_id=3549492; P. Wautelet, 'Article 7. Applicable law', in G. Cuniberti & A. Leandro (eds), *The European insolvency regulation and implementing legislations* (Cheltenham: Edward Elgar 2024), para, 7.034; See also: COM(2018)96 final, Proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, p 10; T.C. Hartley, 'Choice of law regarding the voluntary assignment of contractual obligations under the Rome I regulation', 60. *ICLQ* 2011, p (29), at 48; H. Labonté, *Forderungsabtretung international* (Tübingen: Mohr Siebeck 2016), pp 196; C.A. de Visser, The European community conflict of laws rules on voluntary assignments (Groningen: Hephaestus Publishers 2007), pp 122-123; C.A. de Visser, 'The law governing the voluntary assignment of claims under the Rome I Regulation, *NIPR* 3. 2011, (p 461)

11. The existence of a claim is determined by the law governing it. In our example, the lease claims are governed by Belgian law as this is the law applicable to the lease agreement. Pursuant to Article 14(2) Rome I, this law governs the characteristics of a claim, such as its assignability and the conditions of payment. Since these characteristics depend on the relationship between the lessor and the lessee, they are governed by the law applicable to that relationship. The existence of a claim is another one of those characteristics. Whether, when, and how a claim comes into existence is determined by the relationship between the lessor and lessee, and, consequently, is also governed by Article 14(2) Rome I.[20]

2.1.2 Incongruencies

12. Thus, in our example, Belgian law determines the existence of the claims, and Dutch law determines whether the assignment of these claims is effective against the insolvent estate. What does this mean for the outcome in this example? Previously, we saw that because claims come into existence at an earlier moment in Belgian law[21] than under Dutch law.[22] More specifically, the difference between both laws concerns the claims regarding lease terms after the lessor/assignor's bankruptcy. Since these claims exist under the law governing them: Belgian law, their assignment is effective against the insolvent estate. However, under Dutch law, the lease claims for terms which are not yet finished at the moment the lessor/assignor is declared bankrupt do not exist. As we already saw, this means that their assignment is not effective against the insolvent estate in a domestic Dutch situation. However, in our example, the insolvency proceedings are governed by Dutch law, but the existence of the claims is governed by Belgian law. As a result, the assignment of the lease claims regarding terms not yet finished at the moment the lessor/assignor is declared bankrupt, is nevertheless effective against the insolvent estate. These claims exist under the applicable law and, pursuant to Dutch insolvency law, the assignment of existing claims is effective against the insolvent estate.
13. This outcome is not intended by Dutch law. Moreover, for lease claims, it is not intended by Belgian law either. In Belgian law, lease claims that fall due and are only paid after the lessor/assignor is declared bankrupt do not flow to the

at 464-465. Somewhat different: T. Frech, *Die Drittwirkungen der Forderungsabretung im internationalen Privatrecht* (Tübingen: Mohr Siebeck 2023), p 164, who makes a distinction between third-party effect in- and outside of insolvency.

20 See also: Art. 10(1) Rome I; Veder, *Cross-border insolvency procedures and security rights*, p 287.

21 French law is similar in this respect, see S. 2.

22 German law is similar in this respect, see S. 2 & 2 4.2.1.

assignee.[23] By analogy with the law on attachment, they shall belong to the mortgagee of the leased property or, in the absence of a mortgage, to the insolvent estate.[24] Furthermore, the insolvency practitioner has the power to terminate agreements if the administration of the insolvent estate necessarily requires it. This is an exception to the principle that contracts remain valid during insolvency proceedings. Applied to lease claims, this means that the lessor's insolvency practitioner can generally terminate a lease if all lease claims have been assigned and the leased property is not encumbered with a mortgage.[25] Although this termination may leave the estate liable for damages suffered by the lessee, it stops the lease claims from flowing to the assignee and allows the insolvency practitioner to use the (formerly leased) property for the benefit of the insolvent estate.[26] By contrast, the insolvency practitioner of the lessor lacks a specific power to terminate lease agreements under Dutch law; the lease agreement is left intact in order to protect the lessee against the consequences of the insolvency of the lessor.[27] As a result, the insolvent estate may become trapped in a lease of which the benefits have been assigned.

23 In addition to fn. 24, infra, see: van Gerven, *RW* 2004, p 525; M.E. Storme, 'Derden in het nieuwe verbintenissenrecht. Derde-medeplichtigheid, vertegenwoordiging, derdenbeding, cessie, subrogatie, rechtstreekse vordering en delegatie', pp 681-682/para 194, in V. Sagaert & M.E. Storme (eds), *het vernieuwde verbintenissenrecht* doorgelicht (Mechelen; Wolters Kluwer Belgium 2025); C. Haspeslagh, 'Commentaar bij artikel 1576 Ger.W.', para 4, in W. Vandenbussche (ed.), *X., Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Mechelen: Wolters Kluwer Belgium: 2021); E. Van Heddeghem, 'Beslag op onroerend goed', pp 614-615/para 985, in T. Sorgeloos (ed.), *Beslagzakboekje* (Mechelen: Wolters Kluwer Belgium 2025).

24 Art. 1576 Judicial Code (Gerechtelijk wetboek; GerW), https://www.ejustice.just.fgov.be/eli/wet/1967/10/10/1967101056/justel; Hof van Cassatie (Supreme Court), 9 December 2021, ECLI:BE:CASS:2021:ARR.20211209.1N.5, (*BNP Paribas Fortis/E*), juportal.be/content/ECLI:BE:CASS:2021:ARR.20211209.1N.5. German law is similar in this respect, see: § 1123(1) & 1124 BGB, https://www.gesetze-im-internet.de/bgb/.

25 Art. XX.139(§1)(1) WER. The same power exists under French law, see: L641-11-1(IV) Code de commerce, which adds that the termination may not excessively harm the interests of the other party (lessee). For more information on both provisions, see the Belgian Dissertation by Baeyens, *Vermogensrechten en faillissement*, paras 138, 140, 144. 195, 277, 289 & 292, which extensively discusses French law as well.

26 Art. XX.139(§1)(1) WER. The lessee's damages are partially an unsecured and non-preferential insolvency claim and partially an administrative claim on the insolvent estate, see: Belgian Court of Cassation, 16 January 2009, ECLI:BE:CASS:2009:ARR.20090116.5, juportal.be/content/ECLI:BE:CASS:2009:ARR.20090116.5, para 3; Baeyens, *Vermogensrechten en faillissement*, paras 137 & 141.

27 German law is similar in this respect (see end of this fn.). Dutch law: Art. 37(1) DBA; Hoge Raad 11 July 2014, ECLI:NL:HR:2014:1681, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2014:1681, (*Berzona*); More extensively, see: Polak/Pannevis, N.B. Pannevis, *Insolventierecht* (Deventer: Wolters Kluwer 2022), para 6.2.2. Nevertheless, the insolvency practitioner may terminate the agreement in accordance with the terms provided for in the agreement, if any. Furthermore, the insolvency practitioner can breach the agreement by terminating it unlawfully. However, the damages of the

14. Thus, despite several differences, Belgian and Dutch law intend similar results when it comes to the assignment of lease claims: after the assignor is declared bankrupt, the lease claims no longer flow to the assignee.[28] Nevertheless, in international situations, the applicable conflict rules may result in an opposite outcome, unintended by either jurisdiction. This raises several questions. However, before addressing how and whether this unintended outcome may be prevented, I will first discuss two other examples of unintended outcomes caused by incongruencies between the laws governing an assignment and the lex concursus.

2.2 The moment a claim is transferred

15. The second unintended outcome is the result of differences in the moment a future claim transfers from the assignor to the assignee. Under French law, the assignment of a future claim immediately results in its transfer.[29] Pursuant to Article 1322 of the French Code Civil FCC), claims are assigned by a written instrument ('*acte*'). From the date of this instrument, the claim transfers between the parties and this transfer becomes opposable against third parties, irrespective of whether the assigned claims are present or future.[30] As a result of this immediate transfer of future claims, an assignment governed by French law may pose problems for bankruptcies governed by other laws.

2.2.1 Applicable laws

16. The conditions for an assignment may be governed by a different law than the lex concursus. As set out above, Article 7(2)(b) EIR provides that the lex concursus determines 'the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings'. However, the lex concursus does not determine how future claims are transferred. Instead, the conditions for this transfer are

counterparty become administrative debts of the estate and, under circumstances, the insolvency practitioner may be personally liable for them as well, see: Hoge Raad 9 November 2018, ECLI:NL:HR:2018:2067 (*De Klerk/Hautvast*), deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2018:2067; German law: § 103 & 108(1) InsO; More extensively, see: MüKoInsO/J. F. Hoffmann, 4. Aufl. 2019, InsO § 108 S 1-7 & 32 ff.

28 If, for Dutch law, they concern lease periods ending after the assignor is declared bankrupt, or, for Belgian law, if they fall due and are only paid after the assignor is declared bankrupt, see fn. 23 & 24.

29 See also: Art. L313-27 code monétaire et financier, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072026 and the Cour de Cassation's (Court of Cassation) rulings: 7 December 2004, 02-20.732, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007050427; 22 November 2005, 03-15.669, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007050889/.

30 Art. 1323 FCC. Excluding the debtor, who must be notified of the assignment, see Art. 1324 FCC.

determined by the law governing the transfer of claims and the effectiveness of that transfer against third parties.[31]

17. In EU private international law, it is unclear which law governs the transfer of claims and the third-party effects thereof. It could be argued that Article 14(1) Rome I designates this law.[32] According to this provision, the law applicable to the contract to assign shall govern the 'relationship between the assignor and assignee'. From the wording of this provision, it appears as if its scope is restricted to the *obligatory* (relative, contractual) aspects of the transfer between the parties to the assignment. Nevertheless, recital 38 of Rome I strongly suggests otherwise. According to this recital, Article 14(1) Rome I also governs "the property aspects of an assignment".[33] However, recital 38 is vague and the applicability of several other conflict rules has been proposed as well.[34] Furthermore, the CJEU has ruled that the Rome I regulation does not govern conflicts between competing subsequent assignments of the same claim.[35] Thus, Article 14(1) Rome I does not govern all third-party effects of an assignment. To further add to this unclarity, the European Commission recently withdrew a proposal for a conflict rule on the third-party effects of the assignment of claims.[36] Ultimately, the outcome of this debate is not relevant for this article. Its aim is to analyze the challenges raised by the assignment of future claims for EU insolvency law and the conflict rules on assignment. In the absence of EU conflict rules, the matter is left to national law. Pursuant to these national conflict rules, the transfer of a claim and third-party effects thereof may very well be governed by a law different from the lex concursus. Thus, for the sake of simplicity, in the rest of this paper I will simply refer to the law governing the transfer.
18. Finally, the law governing the transfer should be distinguished from the law governing the existence of a claim.[37] Claims must exist before they transfer from

31 See S.2.1.1, and, in particular, fn. 19, supra.

32 For instance, see: A. Flessner, 'Die internationale Forderungsabtretung nach der Rom I-Verordnung', *IPRax* 2009, (p 35), at 38; H.L.E. Verhagen & S. van Dongen, 'Cross-Border Assignments under Rome I', 6. *JPIL* 2010, p (1).

33 More extensively: E.W. Schipper, 'Third-party and proprietary effects of assignment in EU private international law. A comparative analysis of the scope of Commission's proposal', 32. *ERPL* 2024(6), (p 1037) at 1052.

34 See for example: H.L.E. Verhagen & S. van Dongen, 'Cross-border assignments under Rome I', 6. *JPIL* 2010.

35 CJEU 9 October 2019, ECLI:EU:C:2019:848, BNP Paribas/TeamBank.

36 European Commission 6-10-2025, C/2025/5423; PUB/2025/833, http://data.europa.eu/eli/C/2025/5423/oj.

37 Also: F. Bauer, 'Article 14', in P-G. Callies, Rome regulations: commentary (Alphen a/d Rijn: Wolters Kluwer 2nd edn 2015), para 28-32. It should not be confused with the assignability of (future) claims

the assignor to the assignee under Belgian, Dutch, English and German law,[38] but the law governing the transfer does not determine whether these claims exist. It only determines the requirements for their transfer. Other examples may help further illustrate this difference. For instance, in other jurisdictions, it may be that additional formalities are required for the assignment of future claims. Take (former) Dutch law. In the 1930's, Dutch law only allowed for the assignment of existing claims. However, the Dutch Supreme Court (Hoge Raad) mitigated the consequences of this strict requirement. In its case-law, it ruled that claims which did not yet exist at the time of the assignment, were presumed to exist for the purposes of their assignment.[39] In my view, both the rule that future claims could not be assigned, as well as the Supreme Court's presumption that some claims did exist, are part of the law governing the transfer. They do not affect existence of claims but only regard the extent to which future claims can be assigned.[40]

either, see: E.W. Schipper, 'Assignability of claims in EU private international law', 37. *ERPL* 2025(5/6), p (1207), at 1212-1214.

38 Belgian law: Art. XX.110, Wetboek van economisch recht (WER), ejustice.just.fgov.be/eli/wet/2013/02/28/2013A11134/justel; Art. 3.14(§2)(4) Belgian Burgerlijk Wetboek (BBW), https://www.ejustice.just.fgov.be/eli/wet/2020/02/04/2020A20347/justel; J. Del Corral, *De leveringsplicht bij de overdracht van roerende lichamelijke goederen* (Antwerpen: Intersentia 2013), para 296; J. Del Corral, 'Zekerheidsrechten. Stand van zaken', *Nieuw juridisch Weekblad (NJW)* 306. 2024, p (578), at 580; Lebon, *Het goederenrechtelijk statuut van schuldvorderingen*, para 207. Although there is some debate on how strict this principle should be interpretated, it continues to reflect current Belgian law, see also: D. van Gerven, 'Overdracht en inpandgeving van bestaande en toekomstige schuldvorderingen', *Rechtskundig Weekblad (RW)* 2004 14-4, p (521), at 529-530; E. Dirix, 'Verpanding van schuldvorderingen', in P. Francois (ed.), *Voorrechten en hypotheken. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Mechelen: Wolters Kluwer Belgium 2008), para. 32; S. Baeyens, *Vermogensrechten en faillissement. Een rechtsvergelijkend onderzoek naar de tegenwerpelijkheid en afdwingbaarheid van verwervingsrechten, gebruikersrechten en verbodsrechten in faillissement* (Antwerpen: Intersentia 2023), para 193; Dutch law: See S. 2.3, infra.; English law: S. 306(1 & 2), 283(1), 307(1) Insolvency act 1986, legislation.gov.uk/ukpga/1986/45/contents; Court of Appeal 1 February 1883, (1883) 22 Ch. D. 782 (CA) (*Jones Ex p. Nicholls, re*); House of Lords 30 July 1888, (1888) 13 App. Cas. 523 (*Tailby v Official* Receiver); R.M. Goode/K. van Zwieten, *Goode on principles of corporate insolvency law* (London: Sweet & Maxwell 2018, 5th edn), para 3.04; Smith & Leslie, *The law of assignment*, paras 30.27-30.38; German law: See S. 2.3., infra; French law: Art. L622-21(IV)(2) Code de commerce, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379.

39 Hoge Raad 29 December 1933, *NJ* 1934, p 343 ff (*Fijn van Draat*). The Hoge Raad followed the same approach for the attachment of claims: Hoge Raad 7 June 1929, *NJ* 1929, p 1285 ff (*De Staat/Buitenlandsche Bankvereeniging*); Hoge Raad 25 February 1932, *NJ* 1932, p 301 ff (*Ontvanger/Schermer*).

40 Also: A. Flessner, 'Die internationale Forderungsabtretung nach der Rom I-Verordnung', *IPRax* 2009(35), p 42; Asser/Kramer & Verhagen 10-III 2022/320 & 321; Garcímartin, 'Article 14', para. 34; H. Labonté, *Forderungsabtretung international* (Tübingen: Mohr Siebeck 2016), pp 163-164; V. Sagaert, E-M. Kieninger & H-C. Sigman, 'De cessie van schuldvoreringen in het voorstel van de Rome I-Verordening: een kritische analyse', Financieel forum/Bank- en financieel recht 2006(1), p (336), para 34, p 346. Seemingly different: M. Renner & T. Kindt, 'Rome I Article 14. Voluntary assignment and contractual subrogation', in G-P. Calliess & M. Brenner (eds), *Rome Regulations Commentary*

Even the Supreme Court's presumption that future claims exist, does not concern the actual existence of these claims. It was made in light of the requirements for the transfer of these claims and made solely for the purposes of this transfer. Almost a century later, these requirements have been abolished,[41] but similar obstacles could exist in other jurisdictions. This line of reasoning could, mutatis mutandis, be applied to those requirements for the assignment of claims as well: any additional requirements to the assignment of future claims or assumptions on the existence of these claims made in light of the requirements for its transfer should be characterized as part of those requirements.

2.2.2 Incongruencies

19. Thus, the law governing the transfer of a claim can differ from the lex concursus. As we saw in the beginning of this section, claims directly transfer from the assignor to the assignee upon their assignment under French law, even if the claims are still future. By contrast, under Belgian, Dutch, and German law, the transfer only takes place once the assigned claim comes into existence.[42] Since Dutch insolvency law – as well as Belgian and German insolvency law – is tailored to the fact that claims are only transferred after coming into existence, the immediate transfer of future claims under French law could result in unintended outcomes. Our earlier example may help illustrate this. In the example, a lessor with its COMI in the Netherlands assigns its future lease claims but is declared bankrupt before those claims come into existence. In an entirely Dutch situation, the assignment of lease claims coming into existence after the opening of the insolvency proceedings against the assignor (lessor) is not effective against the insolvent estate. However, if the transfer is governed by French law, the claims are immediately transferred to the assignee. Consequently, their assignment can be invoked against the insolvent estate, even if they only come into existence after the lessor/assignor's bankruptcy.
20. This outcome is not intended by any of the jurisdictions involved. When it comes to the assignment of claims which are still future under the law governing them, most of these assignments are not effective against the insolvent estate of the

(Alphen a/d Rijn: Kluwer Law International 2020), nr 33. The Dutch Supreme Court also seems to follow a different interpretation, at least with respect to Dutch law, see: Hoge Raad 11 June, ECLI:NL:HR:1993:ZC0993, NJ 1993/776 (Caravan Centrum Zundert), and, with criticism and further references, both: Asser/Kramer & Verhagen 10-III 2022/320 & Schipper, *ERPL* 2025(5/6), pp 1212-1214.

41 Currently all future claims can be assigned by notifying the debtor (disclosed). Without notification of the debtor, a with an authentic or privately registered deed are required and only claims that arise from an already existing legal relationship can be assigned, see: Art. 3:94(1 & 3) DBW.

42 The same holds true for English law, see S. 2.2.1.

assignor under French insolvency law either. Article L622-21(IV) of the French *code de commerce* renders any assignment ineffective if the claims did not exist at the opening of the insolvency proceedings, except for one category of assignments. So-called *Loi Dailly* assignments made by way of guarantee within the meaning of Article L313-23 of the *code monétaire et financier* remain valid, regardless of when the claims come into existence.[43] Again, different paths lead to similar destinations in domestic situations: the assignment of claims which are future at the moment the assignor is declared bankrupt is – usually – not effective against the insolvent estate during those proceedings. This raises the question whether the assignment of claims which are still future once the assignor is declared bankrupt should actually be effective against the insolvent estate in insolvency proceedings governed by Dutch law, or Belgian and German law for that matter, or whether this unintended outcome ought to be prevented.

2.3 Direct and indirect acquisition

21. The third and final example of an unintended outcome is the direct acquisition of claims by the assignee. Similar to the conditions for assignment, the acquisition of claims by the assignee is determined by the law governing the transfer. In the introduction we already saw that the assignee always acquires future claims *indirectly* under Dutch law: outside of insolvency, the assignee only becomes entitled after the claims have arisen in the patrimony of the assignor.[44] This is the case under Belgian and English law as well.[45] However, we also saw that future claims may be *directly* acquired by the assignee under German law. To be more precise, an assignee can acquire a claim in two ways under German law, depending on whether the assigned claim stems from an existing relationship or not. Future

43 Art. L622-21 code de commerce: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044052603. In conjunction with Art. L313-23 code monétaire et financier (https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072026), this means that any assignment of claims which are still future once the assignor is declared bankrupt can nevertheless be invoked against the insolvent estate if (I) It is made in relation to credit granted by a credit institution, an alternative investment fund (AIFM), or a non-bank lender (*société de financement*), (II) to a legal entity or natural person acting in the course of their professional activities, (III) provided that the debtor of the claim is also a legal entity or natural person acting in the course of their professional activities.

44 Art. 3:84(1) & 3:97 DBW

45 Belgian law: Art. 3.14(2) BBW; English law: Smith & Leslie, *The law of assignment*, paras 2.108, 15.02 & 15.38-15.46; M.G. Bridge, L. Gullifer, K.F.K. Low & G. McMeel, *The law of personal property* (London: Sweet Maxwell 3th edn 2022), para 24-006 & 24-008; Tolhurst, *The assignment of contractual rights*, paras 4.31 & 7.44; House of Lords 3 August 1861, (1862) 10 H.L. Cas. 191, at 210-211 (*Holroyd v Marshall*); French law: Del Corral, *De leveringsplicht bij de overdracht van roerende lichamelijke goederen,* paras 295 & 296; Dirix, 'Art. 5.174-5.176 BW', para 18.

claims arising from a relationship that does not yet exist first emerge in the patrimony of the assignor. By contrast, future claims arising from a legal relationship that already exists at the time of the assignment directly emerge in the patrimony of the assignee. This is called *Direkterwerb* or direct acquisition.[46] This direct acquisition poses problems for Article 35(2) DBA because the wording of this provision is tailored to the – always - indirect acquisition of claims under Dutch law.[47] As a result, problems occur when Article 35(2) DBA is applied to an assignment of claims directly acquired by the assignee: those claims are never acquired by the assignor. Thus, if Article 35(2) DBA is interpreted strictly, it does not affect the validity of an assignment under German law pursuant to which the assignee directly acquires the assigned claim, even if this claim only comes into existence after the assignor's bankruptcy.

22. This incongruency stands at odds with the rationale of Article 35(2) DBA. Moreover, the aim of German insolvency law is similar to that of Dutch law in this respect.[48] According to § 91(1) InsO, rights in assets of the insolvent estate cannot be acquired after the opening of the insolvency proceedings. As a result, an assignment of future claims is only effective if these claims arise before assignor's insolvency, regardless of the way the assignee would have acquired them.[49] There is only one exception to this rule: if the assignee has a 'secured legal position' (*gesicherte Rechtsposition*), the assignment of a claim that did not exist at the time the assignor is declared bankrupt, will nevertheless be valid.[50] For there to be a secured legal position, the debtor must not be able to do anything without the permission of the assignor that could prevent the claim from coming into existence.[51] This may be the case when a life insurance policy can only be changed after approval of the assignee and even cancellation of the policy by the

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46 BeckOGK/Lieder BGB § 398, para 168; H. Beale & W-G Ringe, 'Transfer of Rights and Obligations under DCFR and CESL. Interactions with German and English Law'. *Legal Research paper Series* 17/2013, p 13; MüKoBGB/Kieninger BGB § 398, paras 78, 82-84; MüKoBGB/Busche, § 398, paras 64 & 71-75; Bundesgerichtshof 7 July 2003, *WM* 2003, 171-1718, *NJW* 2003, 1690-1691.

47 See the introduction, in particular, fn. 3.

48 See on the 'fixation principle' in German law and the similarities with Dutch law: B.F.M. Vulto, 'Das Fixierungsprinzip im niederländischen und deutschen Insolvenzrecht', *KTS - Zeitschrift für Insolvenzrecht*, 1. 2021, p (75).

49 Breuer/Flöther Münchener Kommentar zur Insolvenzordnung, 4th edn. 2019, para 44; MüKoBGB/Kieninger BGB § 398, para 84; Eichel, *Künftige Forderungen*, p 435.

50 Bundesgerichtshof 26 January 2012, *NJW* 2012, 1510, para 29; *NZI* 2013, 641. See also § 110 InsO, which specifically regulates rent and lease claims, which will be discussed later. See also: Eichel, *Künftige Forderungen*, pp 452-457.

51 BeckOGK/Lieder, BGB § 398, paras 176-176.1; MüKoBGB/Kieninger BGB § 398, para 84.

insurer or the insured assignor stopping to pay the insurance fee would not have any effect on of the claims from that policy coming into existence.[52]

3. A remedy: adaptation

23. At the root of these unintended outcomes lies the interconnectedness between general private law and insolvency law. As a result of this interconnectedness, discrepancies between the two can cause problems in international situations: if the lex concursus depends on specific characteristics of substantive law that are not shared by the laws governing the assignment, problems of incongruity occur.[53] These problems may cause unintended outcomes. Neither Rome I nor the EIR offer any explicit solution for this. Nevertheless, those incongruencies may be resolved through *adaptation*. In this section, I will discuss what adaptation is and *how* it may be used to resolve the incongruencies discussed in this paper. *Whether* these incongruencies can and should be resolved is a different, but also relevant, question, which shall be addressed in the next section.
24. Thus, what is adaptation? Adaptation (*Anpassung/Angleichung*) is a correction mechanism of private international law.[54] Although it finds its origins in the national law of several (Member) States,[55] it is a principle of EU private international law as well.[56] This is not surprising since EU conflict rules may be confronted by the same challenges and incompatibilities as national ones, such as the incongruencies discussed in this article. Thus, adaptation may be used both in conflict-of-laws cases governed by national and by EU private international law.

52 Similarly, see: Bundesgerichtshof 26 January 2012, *NJW* 2012, 1510; *NZI* 2013, 641.

53 See also: J. Offerhaus, 'Aanpassing in het internationaal privaatrecht', in Mededelingen der Koninklijke Nederlandse Akademische Wetenschappen, *Nieuwe Reeks, Deel 26. Afdeling letterkunde. Numbers 1-12* (Amsterdam: Noord-Hollandsche uitgeversmaatschappij 1963), p 162-197; Staudinger/Loosschelders, BGB/EGBGB, 'Anpassung', para 1235.

54 Gössl, 'Anpassung im EU-Kollisionsrecht', *RabelsZ* 82 (2018) 618, 621-624

55 See Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht* 34 & 65-85; Staudinger/Loosschelders, BGB/EGBGB, 'Anpassung' para 1233.

56 Some regulations explicitly allow for adaptation, see e.g. Art. 54 Brussels I recast (EU 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), http://data.europa.eu/eli/reg/2012/1215/2015-02-26); Art. 31 Succession regulation (EU 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, https://data.europa.eu/eli/reg/2012/650/2012-07-05); Furthermore, several scholars demonstrate it is a part of the general doctrine of EU private international law, see: Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht*; Gössl, 'Anpassung im EU-Kollisionsrecht', *RabelsZ* 82 (2018) 618, in particular at 634; Dannemann, 'Adaptation'; Staudinger/Loosschelders, BGB/EGBGB, 'Anpassung' para 1233.

25. The goal of adaptation is to ensure fair and consistent outcomes in conflict-of-laws cases, in line with the aims of the laws applicable.[57] As such, it may be used in a wide array of situations and allows courts to correct the outcomes of specific cases.[58] Consequently, courts are granted a large degree of discretion to adapt or (re)interpret the applicable laws in such a way that the incompatibilities are restored. However, this discretion comes with a risk: adaptations threaten the consistency and predictability of outcomes in conflict-of-laws cases.[59] Therefore, the decision to adapt the outcome of a conflict-of-laws case should not be taken lightly.[60] Nonetheless, it is difficult to provide clear-cut rules on when and how courts should use adaptation because of the case-by-case nature and the wide array of situation in which adaptation may be applied. Nevertheless, doctrine does provide some guidelines for the application of adaptation. In the rest of this paper, I will apply these doctrinal insights to the incongruencies discussed here. For instance, there are several ways in which an adaptation can take place: either the conflict rules or the substantive laws can be adapted to each other.[61] The preferred option mainly depends on what is the most marginal one: which adaptation alters the applicable laws the least and decreases legal certainty as the slightest?[62]
26. The unintended outcomes discussed in this paper are the result of substantive differences between the laws applicable to the assignment and the way these assignments are dealt with in insolvency law. Therefore, the starting point of the rest of this paper will be to try and resolve them at the substantive level. At this level, either the private law rules on assignment can be adapted to the applicable insolvency law or vice versa. In essence, these are two sides of the same

57 Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht* 122-125; Gössl, 'Anpassung im EU-Kollisionsrecht', *RabelsZ* (2018) 618; Staudinger/Looschelders, BGB/EGBGB, 'Anpassung' para 1232.

58 Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht* 31.

59 Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht* 136-138; Gössl, 'Anpassung im EU-Kollisionsrecht', *RabelsZ* 82 (2018) 618, 631.

60 Also: Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht* 123; Staudinger/Looschelders, BGB/EGBGB, 'Anpassung' paras 1244-1246.

61 Staudinger/Looschelders, BGB/EGBGB, 'Anpassung', para 1247; G. Kegel & K. Schurig, *Internationales Privaatrecht* (München: Verlag C.H. Beck 9th edn 2004), p 361; A.P.M.J. Vonken, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 10. Internationaal privaatrecht. Deel I. Algemeen deel IPR* (Deventer: Wolters Kluwer 2023), para 420 & 420a; J. Kropholler*, Internationales Privatrecht* (Tübingen: Mohr Siebeck 6th edn 2006), p 237; Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht*, pp 108-109;

62 In general: Kegel & Schurig, *Internationales Privatrecht*, p 361 & 2; Asser/Vonken 10-I, para 420b; Kropholler, *Internationales Privatrecht*, p 238; Staudinger/Looschelders, BGB/EGBGB, 'Anpassung', para 1247. Specifically on EU private international law: Gössl, *RabelsZ* pp 634-645; Dittmers, *Die Anpassung im europäischen Internationalen Privatrecht*, pp 108-112 & 217 ff.

coin. Nevertheless, I think that the three unintended outcomes discussed in this paper are best prevented by adapting insolvency law.

27. Ultimately, the lex concursus determines whether an assignment is effective against the insolvent estate. Consequently, adapting insolvency law is a logical starting point to resolve the differences in how each jurisdiction deals with the assignment of future claims. Moreover, the key differences between the jurisdictions, causing the unintended outcomes, lie in insolvency law. In each of the three examples of unintended outcomes, the insolvency law of all jurisdictions reviewed is aimed at similar outcomes, despite the significant differences in general private law. The reason for this, is that the substantive insolvency law of each jurisdiction is tailored to national private law. For instance, French insolvency law is not directed at the moment claims are transferred, but at the moment they come into existence. As a result, the immediate transfer of future claims is not problematic. Furthermore, Belgian and – to some extent – French insolvency law contain specific provisions dealing with the assignment of lease claims. As a result, the assignment of lease claims concerning lease terms after the lessor/assignor's bankruptcy is still not effective against the insolvent estate, even if the claims immediately exist once the lease agreement is concluded. The same holds true for the direct acquisition of claims under German law. Since German insolvency law is not tailored to the moment claims are acquired by the assignor, the direct acquisition of assigned future claims does not cause any problems either. In private international law, inconsistencies can be resolved in the same way: the lex concursus should be adapted to the applicable rules of private law. Finally, in the following section we will see that German law already addresses some incongruencies in insolvency law, with § 110(1) InsO. Thus, adapting insolvency law is most in line with the way the jurisdictions reviewed deal with the assignment of future claims in substantive law and, by extension, seems most predictable for the parties involved.

28. In the next section, I shall analyze how an adaptation of insolvency law may prevent unintended outcomes. Since each adaptation should marginal, and the remedies ought to respect the applicable laws as much as possible, these adaptations are solely aimed at the effectiveness of a specific assignment against the insolvent estate.

3.1 Existence of claims

29. Only assignments of claims which would exist under Dutch law should be effective against the insolvent estate.[63] In section 2 we saw that lease claims arise later in Dutch law than in Belgian and French law. Adapting Dutch insolvency law in such a way that a claim should exist under Dutch law for its assignment to be effective against the insolvent estate, ensures that an assignment is effective against the insolvent estate only if it would have been in a domestic situation. Consequently, Dutch insolvency law is applied uniformly and any unintended outcomes are prevented.
30. This adaptation is similar to a remedy used in German law. Under German law, the effectiveness of assignments of future claims vis-à-vis the insolvent estate is governed by § 91 *Insolvenzordnung* (Insolvency Act, hereafter: InsO).[64] According to this provision, the assignment of claims that come into existence before the assignor's insolvency is effective against the insolvent estate and that of those coming into existence after is not. As a result, differences in the moment claims come into existence may also cause unintended outcomes in cases governed by German insolvency law. However, the InsO contains a special regime for lease claims.[65] Pursuant to § 110(1) InsO, an assignment of lease claims for immoveable property made by the insolvent debtor prior to their bankruptcy is only valid insofar as it concerns claims for the current calendar month, or, if the insolvency proceedings are opened after the fifteenth day of the month, the following calendar month. Thus, this provision ties the effectiveness of an assignment of lease claims closely to the moment these claims come into existence under German law. Future lease claims do not belong to the assignee (except for those coming into existence the next calendar month if the insolvency proceedings are opened after the fifteenth day of the month). Instead, they belong to the mortagee of the leased property, or, in the absence of a mortgagee, the insolvent estate.[66] Consequently, § 110(1) InsO ensures a uniform application of German insolvency law and prevents any unintended outcomes resulting from inconsistencies in the moment claims come into existence.

3.2 Transfer of claims

31. Only assignments of claims which actually exist should be effective against the insolvent estate. This remedy, which prevents problems caused by the immediate

63 From a Dutch perspective, see: Van Galen, Van Apeldoorn, & Berends, *Grensoverschrijdende insolventieprocedures*, p 104; Struycken, *NTHR* 2013, p 83.
64 MüKoInsO/Breuer/Flöther, 4. Aufl. 2019, InsO § 91, para 44.
65 See also: MüKoInsO/Eckert/J. F. Hoffmann, 4. Aufl. 2019, InsO § 110, para 2.
66 § 1123(1) & 1124 BGB, https://www.gesetze-im-internet.de/bgb/.

transfer of future claims under French law, is similar to the previous remedy we discussed. The unintended outcome can be resolved by adapting Dutch law so that it does not focus on whether the claim has been transferred, but on whether the claim exists at the time the assignor is declared bankrupt. Again, this ensures a uniform application of Dutch insolvency law, regardless of the law(s) governing the assignment, and prevents unintended outcomes. However, this adaptation does raise one question: according to which law should the assigned claims exist, the law governing them or Dutch law? For the purposes of the adaptations, the claim should, in principle, exist under the law governing them. This ensures that the adaptation remains marginal. Nevertheless, if this would lead to another unintended outcome, caused by differences in the moment the assigned claims come into existence, there may be good reasons to directly check if the claim would exist under Dutch law.[67] Otherwise, the outcome may remain unintended, or two adaptations would be needed.

3.3 Direct and indirect acquisition

32. For the third and final remedy, Article 35(2) DBA should be applied to every assignment of claims future at the time the insolvency proceedings are opened, regardless of when and how the assignee acquires them. This solution resolves incongruities arising from the, sometimes, direct acquisition of claims under German law. The problems that these incongruities may cause can be prevented by adapting Dutch insolvency law. Article 35(2) DBA should not focus on when the assignor acquires a claim, but on when it the claim is transferred – or, in light of sections 3.2 and 3.1 respectively, on when the assigned claim comes into existence, either under the law governing the claim or under Dutch law. This solution ensures Dutch insolvency law can be applied uniformly and prevents any unintended outcomes.

3.4 Two exceptions

33. Two exceptions are relevant for these remedies. As we saw in section 2, the assignment of claims which do not yet exist at the time of the opening of the insolvency proceedings is in fact effective against the insolvent estate under French law, if it falls within the meaning of Article L313-23 *code monétaire et financier*. Furthermore, under German law the direct acquisition of a claim by the assignee is effective against the insolvent estate if the assignee has a secured legal position (*gesicherte Rechtsposition)*. If either of these exceptions occur, the outcome is not unintended by both legal systems, but only by the one governing

67 See S. 3.1.

the insolvency proceedings. For instance, take the direct acquisitions of claims under German law. If the assignee has a secured legal position, the assignment is effective against the insolvent estate in an entirely German case, even if the claim comes into existence only after the assignor's bankruptcy. In a domestic Dutch situation, this assignment would not be effective against the insolvent estate. Hence, this outcome is *un*intended by Dutch law and it could be rendered ineffective by adapting Article 35(2) DBA. However, the assignment is *in*tended to be effective against the insolvent estate by German law. Should exception stand in the way of an adaptation of Article 35(2) DBA? If one of these exceptions occurs, courts should take them into account when considering to use adaptation. In the following section, I will further set out what determines whether courts should decide to adapt the applicable laws to prevent any unintended outcomes.

4. Legal certainty versus uniformity

4.1 A main rule

34. The previous section explored how adaptation may prevent unintended outcomes. This section analyses whether and when courts may decide to apply those adaptations. As noted before, the case-by-case nature of adaptation makes it difficult to provide clear-cut rules. Nevertheless, scholars stress the importance of legal certainty and that courts should show restraint in applying adaptation: there should be significant incompatibilities and good reasons to adapt the applicable laws.[68] With these insights in mind, this section attempts to develop a main rule for the use of adaptation in order to prevent unintended outcomes caused by incongruencies between the laws governing the assignment of future claims and the laws determining the effectiveness of this assignment against the insolvent estate of the assignor.
35. The decision to adapt the applicable law depends on the weighing of two factors. On the one side stand the aims of the involved jurisdictions, particularly the uniform application of insolvency law. The adaptations discussed above ensure a uniform application of insolvency law, in line with the intention of the jurisdictions involved. On the other side stand the interests of the assignee and other

68 J. Offerhaus, 'Aanpassing in het internationaal privaatrecht', in Mededelingen der Koninklijke Nederlandse Akademische Wetenschappen, *Nieuwe Reeks, Deel 26. Afdeling letterkunde. Numbers 1-12* (Amsterdam: Noord-Hollandsche uitgeversmaatschappij 1963), p 162-197; Staudinger/Loosschelders, BGB/EGBGB, 'Anpassung', para 1235; Gössl, 'Anpassung im EU-Kollisionsrecht', *RabelsZ* 82 (2018) 618; Dannemann, 'Adaptation' 336.

involved parties.[69] The discussed adaptations all render the assignment ineffective against the insolvent estate. Consequently, the assignee, as well as any other third parties whose legal position depends on that of the assignee, such as subsequent assignees, will be left empty handed because of the adaptation. when should a court decide to use adaptation, and how should it balance these conflicting interests?

36. As a main rule, it is my view that there is only room for an adaptation if all of the involved jurisdictions intend a similar result, but this result is not achieved due to incongruities between the applicable (conflict) rules. If all involved jurisdictions intend the same result, but the actual result would be the opposite, there is ample reason to justify an adaptation made to resolve this significant incongruency. For instance, if the assignment of a claim that is still future at the moment the assignor is declared bankrupt is not effective against the insolvent estate in both a domestic French and a domestic Dutch situation, the outcome should be the same in situations governed by a combination of French and Dutch law. Why should the assignee expect this to be different? Consequently, the impact of an adaptation on the legal certainty of the assignee is limited; the adapted situation is in line with the aims of the involved jurisdictions and the outcomes in domestic situations. As a result, this adapted situation will be the outcome that the assignee, as well as all the other parties involved, expect, or, at least, should expect.

37. Nevertheless, the assignee is sometimes further protected by EU law. According to Article 8 EIR, "[t]he opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets […] belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings". In the following paragraphs, I will take a closer look at what Article 8 EIR means for the assignment of future claims and any adaptations of the laws applicable to such assignments.

4.2 Article 8 EIR

38. The scope of Article 8 EIR has been the subject of many debates. Insofar as relevant for this paper, two aspects of that scope are relevant. Article 8 EIR protects (a)

69 The three examples used in this paper concern scenarios in which both jurisdictions do not intend for the assignment to be effective against the insolvent estate, even though this assignment would be effective under a strict application of the applicable laws. Of course, opposite scenarios, where the assignment is intended to be effective, but will not be under a strict application of all involved laws, are imaginable as well. In those scenarios, the question would be whether the insolvent estate should be protected against any adaptations.

rights in rem in respect of assets (b) *situated within the territory of another Member State*.[70] To start with the latter, Article 8 EIR only applies to assets which are situated in another Member State than where the insolvency proceedings have been opened.[71] However, claims are intangible, so where are they situated? According to Article 2(9)(viii) EIR, most claims are situated in the state of the COMI of the debtor of that claim.[72] Consequently, Article 8 EIR only applies if the debtor of a future claim has its COMI in another member state than the insolvent assignor. If the claim is situated elsewhere, the provision does not apply.

39. Secondly, Article 8 EIR only protects rights in rem. However, what is a *right in rem*? As becomes apparent from Article 8(2)(b) EIR, the assignment of existing claims results in a right in rem: the assignee becomes the owner, or title holder, of the claims.[73] Yet, it is disputed whether an assignment of a future claim may result in a right in rem as well: if the claim does not yet exist, can any rights actually vest in it? In Senior Home, the CJEU ruled on the interpretation of the term *right in rem*.[74] It considered that, as a starting point, national law determines what constitutes a right in rem. However, the CJEU also holds that the limits of what constitutes a right in rem are set by the EIR and, because Article 8 EIR is an exception to the main rule of Article 7 EIR, it should be interpreted restrictively. Thus, if any jurisdictions are inclined to give too broad an interpretation of what constitutes a right in rem, these rights may fall outside the scope of Article 8 EIR.

40. It is my view that the assignment of future claims is not protected by Article 8 EIR, because *rights in rem* can only vest in existing claims. However, several scholars have argued differently. According to Virgós and Garcimartín, Article 8 EIR only applies to "present property", but "present property" also includes "potential property". This potential, or nascent, property is: "property not yet in existence but growing out of property which is in existence", such as rights in claims arising out of a contract which is concluded before the insolvency proceedings

70 This paper only focusses on the aspects of Art. 8 EIR directly relevant for it. A general overview of the Article is provided by, e.g.: R. Snowden, 'Article 8. Third parties' rights in rem', in R. Bork & K. van Zwieten (eds), *Commentary on the European insolvency regulation* (Oxford: Oxford University Press 2nd edn, 2022); T.H.D. Struycken, 'Article 8: Third parties' rights in rem', in G. Cuniberti & A. Leandro (eds), *The European insolvency regulation and implementing legislations* (Cheltenham: Edward Elgar 2024).

71 M. Virgós & E. Schmit, *Report on the Convention of Insolvency Proceedings*, Brussel: European Council, 6500/96, para 97.

72 Except for cash held in accounts with a credit institution which are located in the member state indicated in the account's IBAN, pursuant to Article 2(9)(iii) EIR.

73 This includes rights in claims, such as pledges or rights of usufructs, as well as the outright assignment of claims, see: Article 8(2)(a) & (b) EIR. More extensive on this: Struycken, 'Article 8: Third parties' rights in rem', paras 8.041-42.

74 CJEU 26 October 2016, ECLI:EU:C:2016:804 (*Senior Home*). This judgment is on Article 5 Insolvency Regulation, No 1346/2000, which is identical to its successor: Art. 8 EIR.

are opened.[75] Indeed, there are good reasons to assume that rights in nascent property should be considered as a *right in rem*. In Belgian, Dutch, English, and German law, the assignment of a future claim creates a special, proprietary, relationship which immediately results in a fully effective assignment once the claim comes into existence.[76] Moreover, the assignment of future claims is immediately effective against third parties under French law.[77] This suggests that the assignment of a future claim can immediately result in a *right in rem*. Furthermore, Article 8 EIR applies to other assets than claims as well, such as tangible assets. However, the rationale for strictly distinguishing between existing and future tangibles does not apply in full to claims. The existence of claims is by far not as straightforward as that of tangible assets, as is illustrated by the differences in when a claim comes into existence in substantive law of the jurisdictions reviewed and the fact that parties can influence the existence of claims by their sheer will.[78] Thus, the difference between existing and future claims is ambiguous and can be manipulated.[79] Therefore, one can wonder whether such far reaching consequences as the validity of an assignment during insolvency should be attached to this indiscriminate criterion. Moreover, a too strict interpretation of what constitutes a *right in rem* can cause legal diversity. In some jurisdictions claims arising from existing contracts exist while they are future in others. A broader interpretation of the term *right in rem* - which includes assigned future claims stemming from existing contracts, regardless of the law governing

75 M. Virgós & F.J. Garcimartín, *European Insolvency Regulation: law and practice* (Den Haag: Kluwer law international, 2004), p 101. Virgós also wrote the part on the interpretation of what is now Article 8 EIR in the Virgós/Schmit report, although the report only speaks about existing property and remains silent on nascent property (see fn. 81, infra). Furhtermore, Virgós and Garcimartín only mention security rights. However, I do not see any reason why, if Article 8 EIR is interpreted somewhat more extensively, this extension should be restricted to security rights.

76 Belgian law: Lebon, *Het goederenrechtelijk statuut van schuldvorderingen,* paras 95, 115 & 211; van Gerven, *RW* 2004, p 529-530; Del Corral, *De leveringsplicht bij de overdracht van roerende lichamelijke goederen*, para 298; Dirix, 'Verpanding van schuldvorderingen', para. 32; Dutch law: Schuijling, *Levering en verpanding van toekomstige goederen*, para 171; English law: House of Lords 30 July 1888, (1888) 13 App. Cas. 523 (*Tailby v Official* Receiver); Court of Appeal 9 July 1915, [1915] 2 CH. 345, p 537 (*Lind, re*); Smith & Leslie, *The law of assignment*, paras 15.42-15.44; Bridge et al., *The law of personal property,* paras 24.008 & 24.009; German law: BeckOGK/Lieder, BGB § 398, para 170; MüKoBGB/Kieninger BGB § 398, paras 78-79; and, with a different vision: Eichel, *Künftige Forderungen*, pp 53-55, 401-404 & 524-525.

77 Art. 1323 FCC, which is further discussed in S. 2.2. supra.

78 See section 2.1., in particular fn. 14 & 15, supra.

79 This ambiguity does not only exist between different legal systems, but within these systems as well. See, for example: Bridge et al., *The law of personal property,* paras 24-011, 24-085 to 124, and, in particular, para 95.

them – disregards these differences in substantive law and contributes to a more consistent application of Article 8 EIR.[80]

41. In my view, however, the arguments against a wide interpretation of the term *right in rem* are more convincing. Article 8 EIR seems clear, and the wording and history of the provision only point in one direction: Article 8 EIR solely protects rights in rem *existing* at the time of the opening of insolvency proceedings. In their report what would later become the insolvency regulation, Virgós and Schmit write that: [Article 8] 'only applies to the rights in rem created before the opening of proceedings. If they are created after the opening, [Article 7] shall apply without exception'.[81] Furthermore, it is hard to conceive how a right in rem in a claim can exist before the claim itself exists and, in my view, the mere fact that that assignee becomes entitled to a claim once that claim arises during the insolvency proceedings, does not constitute a right in rem already existing at the time of the opening of those proceedings. Finally, the CJEU's ruling in Senior Home seems clear: the term *right in rem* should be interpreted strictly. Therefore, I think that the assignment of future claims does not result in a *right in rem* within the meaning of Article 8 EIR.[82]

4.3 Interim conclusion

42. An adaptation can have a significant effect on the assignee's legal certainty: it renders the assignment ineffective against the insolvent estate. Thus, the assignee's position should be considered when deciding whether any of the applicable laws should be adapted. In this light, I propose a main rule, stating that, in short: an outcome may be adapted if it is contrary to the outcome intended by the involved jurisdictions. However, the assignee may be further protected by Article 8 EIR. This provision precludes any adaptations if (a) the assignment resulted in a *right in rem* and (b) the claim is situated in 'another Member State'. For there to be a *right in rem*, the assigned claim should exist. Only then, the assignee's interests in the claim and legal certainty are deemed worthy of protection. Indeed, if the assignment concerns a right in rem, an adaptation of this assignment has

80 The importance of a uniform interpretation is also stressed by Veder, *Cross-border insolvency proceedings and security rights*, p 335.

81 M. Virgós & E. Schmit, *Report on the Convention of Insolvency Proceedings*, Brussel: European Council, 6500/96, paras 96 & 100-105, in particular 103. The term 'created' in para 96 refers to the moment the *right in rem* comes into existence, not the moment the parties (attempt to) establish the right in advance by meeting al conditions for its establishment while the claim is still future. This becomes clear from the context in which the term 'created' is used throughout the report, para 103, and the French version, which uses the term 'nés'.

82 Also: Veder, *Cross-border insolvency proceedings and security rights*, paras 306 & 332 ff. Different: Asser/Kramer & Verhagen 10-III 2022/326.

a bigger impact than when the assignee only has an (expected) right in a future claim. In the rest of this section, I shall apply the main rule and the exception of Article 8 EIR to the remedies discussed in section 3.

4.4 Existence of claims

43. If a claim exists under the law governing it, its assignment should not be adapted. In section 3, we saw that incongruencies between the existence of a claim and the effectiveness of its assignment can be resolved by adapting the lex concursus in such a way that assignments are only effective against the insolvent estate if the assigned claim also exists under the general private law of the state of the lex concursus. However, this remedy stands at odds with the legal certainty of the assignee, and Article 8 EIR in particular, because the assigned claim exists under the law governing it. As we have already seen, if a claim exists under the law governing it, its assignment will generally be effective against the insolvent estate. For instance, take a claim which exists under Belgian law, but does not exist under Dutch law. If the claim is governed by Belgian law, its assignment will be effective against the insolvent estate in insolvency proceedings governed by Dutch law. Furthermore, the assignment of the claim is – normally – effective against the insolvent estate in a domestic Belgian situation as well.[83] Consequently, I see no room for an adaptation of Dutch insolvency law which would render this assignment ineffective against the insolvent estate. Instead, the assignee's legal certainty should be protected against such an adaptation. In addition, the assignment results in a right in rem within the meaning of Article 8 EIR; thus, if the claim is situated in 'another Member State', the assignment is protected by Article 8 EIR as well.[84]

4.4.1 Lease claims

44. For lease claims, however, an exception might be made to this principle. Lease claims stem from a contract requiring continuous and repetitive performance: the lessor must continuously provide the lessee with the leased property, and the lessee must pay each lease term. As a result, it is not surprising that jurisdictions may have special rules concerning the lease contracts and/or the assignment of lease claims after the lessor is declared bankrupt. For instance, in section 2.1.2., we saw that Belgian law allows for the termination of leases by the insolvency

83 See section 2.1.

84 Seemingly different: T.H.D. Struycken, 'Zekerheidsrechten in het internationale handelsverkeer', 2. *NTHR* 2013, p (75), at 83, who follows the view of van Galen, van Apeldoorn & Berends, *Grensoverschrijdende insolventieprocedures*, p 104.

practitioner of the lessor while Dutch law does not. Moreover, we also saw that under Belgian law, lease claims falling due and only paid after the lessor/assignor is declared bankrupt do not flow to the assignee but belong to the mortgagee of the leased property or, in the absence of a mortgage, to the insolvent estate. Article 8 EIR does not take these rules into account, nor the normative considerations of the national legislators behind them. As a result, a strict application of Article 8 EIR to the assignment of lease claims may lead to outcomes unintended by the involved jurisdictions, as well as the EIR itself.

45. Let us revert to the fictional example used in section 2. A lessor with its registered office in the Netherlands has assigned all its existing and future claims to a bank. Later, the lessor decides to lease out one of its properties located in the Netherlands to a Belgian lessee, under a lease governed by Belgian law.[85] As we saw in section 2.1, under Dutch law, the lease claims concerning lease terms which are not yet finished at the moment the lessor/assignor is declared bankrupt, are future claims and, thus, part of the insolvent estate. Furthermore, we also saw that, under Belgian law, the assignment of lease claims falling due and only paid after the lessor/assignor is declared bankrupt is not effective against the insolvent estate either. In short, both jurisdictions intend the same outcome. However, without any adaptations, the actual outcome is opposite to the intended one. Since lease claims exist under Belgian law as soon as the lease agreement is concluded, their assignment is effective against the insolvent estate in a bankruptcy governed by Dutch law. This outcome is unintended by either jurisdiction. Therefore, I think it may – and should – be resolved by adapting Dutch insolvency law.

46. However, one thing stands in the way of this adaptation. In our example, the lessee/debtor is a Belgian entity. Consequently, the lease claims will probably be situated in Belgium. This means that their assignment falls under the scope of Article 8 EIR. Since the claims exist under the law governing them, Belgian law, their assignment results in a *right in rem*. As a result, any adaptations rendering the assignment ineffective against the insolvent estate are precluded by Article 8 EIR, at least, if the provision is interpreted strictly. German law is confronted with the same problem. In section 3.1, we discussed §110(1) InsO. This provision may also render the assignment of claims existing under the law governing them

85 Art. 4(1)(c) of the Rome I regulation (Reg. EC 593/2008 on the law applicable to contractual obligations, hereafter: Rome I) points to the law of the state where property is located as the law applicable to contracts regarding immovable property, but only in the absence of a choice-of-law. Hence, parties are free to choose Belgian law as the law applicable for their lease agreement, for instance because the lessee is a Belgian entity, see: Art. 3 Rome I.

ineffective against the insolvent estate.[86] However, it is my view that Article 8 EIR should not be applied so rigidly to the assignment of lease claims. In the rest of this section, I will set out why there may be good reasons to nevertheless render the assignment of certain lease claims ineffective against the insolvent estate, even if this means disregarding Article 8 EIR.

4.4.2 Article 8 & 11 EIR

47. An exception to Article 8 EIR for lease claims might be considered for the following reasons. All assignments create a three-party relationship between the assignor (lessor), debtor (lessee), and assignee. However, if the assigned claims stem from a contract requiring continuous or repetitive performance, such as lease agreements, this relationship is put under strain after the assignor's insolvency: the assignor must continue to perform the obligations under the contract while all claims stemming from that contract now continue to be assigned to the assignee. Unsurprisingly, this problem does not occur in domestic situations. As we saw in section 2.1.2, the assignment of lease claims is or can be rendered ineffective against the insolvent estate in all jurisdictions reviewed. Nevertheless, unintended outcomes occur in international situations. In our example, the lease claims are governed by Belgian law, while the leased property is located in the Netherlands. Under Belgian (or French) law, the insolvency practitioner has the power to terminate the lease. With this power, the lessor/assignor's insolvency practitioner can prevent the insolvent estate from becoming trapped in a lease. However, Article 11 EIR states that "[t]he effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated". Thus, Dutch law determines whether the insolvency practitioner of the lessor/assignor may terminate the lease and, under Dutch law, such a special power does not exist. Consequently, the insolvent estate could remain bound to a lease while the lease claims continue to flow to the assignee. This outcome is unintended by all involved jurisdictions. Hence, I think it should be resolved.
48. This problem can be resolved by adapting, or rather, ignoring Article 8 EIR. Although one might argue that adapting Article 11 EIR could also solve this problem, this solution stands at odds with the aim and intention of both Article 11 EIR and substantive national law. Adapting Article 11 EIR may grant the lessor/

86 Or, for that matter, even a uniform application of the Belgian insolvency law, pursuant to which assigned lease claims not yet due flow to the mortgagee of the leased property, or, in absence of one, the insolvent estate, instead of the assignee, see S. 2.1.2, and, in particular, fn. 24, supra.

assignor's insolvency practitioner the power to terminate leases. In that case, the insolvency practitioner could terminate the lease. As a result, the insolvent estate will no longer be trapped in a lease, and the lease claims do not flow to the assignee anymore. However, this remedy should not be welcomed. With Article 11 EIR, the EU legislator recognizes the connectedness of insolvency law and the validity of contracts relating to immoveable property, such as lease contracts.[87] Consequently, Article 11 EIR aims to ensure a consistent application of the rules on the validity of lease contracts and to respect any normative choices by the member states on this matter. With respect to leased immovable property situated in the Netherlands, this means that Article 11 guarantees that Dutch law is applicable to validity of the lease after the lessor's bankruptcy, and, thus, that the lessee is protected against the lessor's bankruptcy by leaving the lease intact. Making Article 11 EIR give way and granting the lessor/assignor's insolvency practitioner the power to terminate the lease would result in the opposite outcome. The lessee would not be protected against the consequences of the lessor's bankruptcy, but the lessee may become the victim of it, if the lease is terminated. Moreover, the unintended outcome we are trying to resolve, the fact that the insolvent estate may become trapped in a lease while the lease claims continue to flow to the assignee, is caused by the assignment of lease claims. The lessee is not involved in this assignment. Therefore, it would be particularly problematic if the prevention of this outcome comes at the cost of the uninvolved and otherwise protected lessee. Thus, ignoring Article 11 is not an adequate solution.

49. By contrast, ignoring Article 8 EIR is an adequate solution. Firstly, this remedy is in line with Article 11 EIR. The lessor/assignor's bankruptcy may have consequences for the lessor/assignor's insolvent estate, the lessee, or the assignee. At least one of these three actors involved must bear the consequences of the lessor's bankruptcy. The insolvent estate may remain bound to a lease while the lease claims continue to be assigned to the assignee, the lessee might lose the lease, and the assignee might see the assignment rendered ineffective against the insolvent estate. Thus, who should pay the prince of the lessor's bankruptcy? The answer to this question is a normative one. As we have seen in section 2, it is answered differently in several jurisdictions. In my view, EU private international law should respect the normative considerations of Member States made in this regard. Article 11 ensures that this happens with respect to the validity of the lease. As we saw above, this means that the lessee does not have

87 Z. Crespi Reghizzi, 'Article 11: contracts relating to immoveable property', in G. Cuniberti & A. Leandro (eds), *The European insolvency regulation and implementing legislations* (Cheltenham: Edward Elgar 2024), nr 11.003.

to pay the price of the lessor's insolvency because the lease is protected under Dutch law. However, this leaves us with a follow-up question: who should carry the costs instead: the insolvent estate or the assignee? Article 11 EIR does not directly address this matter, because is only directed at the lessor and the lessee. However, this only paints only partial picture of the third-party relationship created by the assignment of the lease claims. In my view, it is in line with Article 11 EIR to, again, protect the normative considerations of the Member State where the leased immovable property is situated. Regarding Dutch law, this means that the assignee should bear the burden of the lessor/assignor's bankruptcy, rather than the insolvent estate. Consequently, the assignment should be rendered ineffective against the insolvent estate – at least, insofar as it concerns claims which would not have been assigned with effect against the insolvent estate in domestic situations either.

50. Secondly, ignoring Article 8 EIR is in line with Article 8 EIR itself as well. Article 8 EIR intends to "protect the trade in the State where the assets are situated and legal certainty of the rights over them" and these rights should not be "more affected by the opening of insolvency proceedings in other [Member] States than they would be by the opening of national insolvency proceedings."[88] However, in our example, the opposite is true: Article 8 EIR does not protect an existing position, but, rather, it seems to create one. In our example, the lease claims are situated in Belgium. As we saw in section two, the assignment of lease claims falling due and only paid after the lessor/assignor's bankruptcy is not effective against the insolvent estate under Belgian law.[89] Thus, with regard to those claims, the assignee has no position that should be protected by Article 8 EIR: the assignment is ineffective in domestic situations. Yet, in an international situation, Article 8 EIR creates such a position, because it stands in the way of any adaptations which would render the assignment of those claims ineffective against the insolvent estate. In doing so, Article 8 EIR strives past its own goals, with unintended outcomes as the result.

51. Thirdly, normally, rights in rem protected by Article 8 EIR can be dealt with in secondary proceedings, opened in the Member State where the assets are situated.[90] However, in our example, opening secondary proceedings may not help to prevent the unintended outcome. For instance, I doubt whether secondary proceedings in Belgium may render the assignment ineffective against the

88 Virgós & Schmit, *Report on the Convention of Insolvency Proceedings*, Brussel: European Council, 6500/96, para 97.

89 See fn. 23 & 24, supra.

90 Art. 34 EIR & Virgós & Schmit, *Report on the Convention of Insolvency Proceedings*, Brussel: European Council, 6500/96, para 98.

insolvent estate, at least, without the Belgian courts making use of adaptation themselves. As we saw in section 2.1, the assignment of lease claims is ineffective against the insolvent estate under Belgian law because of an analogous application of the law on attachment, which determines that the claims become part of a mortgage on the leased property, if there is a mortgage.[91] Nonetheless, the assignment itself is not directly affected by this rule. Hence, I am unsure whether a Belgian court would rule that the assignment itself is ineffective against the insolvent estate. Furthermore, the leased property is situated in the Netherlands and, thus, Dutch law governs the mortgage on it. Under Dutch law, lease claims do not become part of the mortgage. As a result, I am also not sure whether a Belgian court would rule that the claims have become part of the mortgage on the leased property or, in the absence of one, belong to the insolvent estate instead. In resume, Article 8 EIR should not protect the assignment of lease claims which would not be effective against the insolvent estate in domestic situations. This protection stands at odds with the aim of Article 8 EIR, because it does not protect any existing domestic positions. Furthermore, it may not always be able to deal with the issues that this protection by opening secondary proceedings.

4.4.3 Further details of the adaptation

52. Thus, there are ample reasons to ignore Article 8 EIR. Nevertheless, this still leaves us with two questions. Under Belgian law, lease claims not yet due and only paid after the lessor/assignor's bankruptcy belong to the mortgagee of the leased property and only in absence of one, to the insolvent estate, while under Dutch law, claims concerning lease periods ending after the bankruptcy always flow to the insolvent estate. Thus: the assignment of which claims exactly should be rendered ineffective against the insolvent estate? And, which entity should become entitled to the lease claims if their assignment is rendered ineffective against the insolvent estate: the mortgagee or the insolvent estate?

53. To start with the second question, I think the claims should belong to the insolvent estate. Ultimately, the decision should be made on a case-by-case basis, but the lex concursus is leading. Pursuant to Article 7(2)(b) EIR, the lex concursus determines 'the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings'. Since Dutch law is the lex concursus and, under Dutch law, the claims belong to the insolvent estate, this should be the outcome. Moreover, this outcome is in line with the remedies discussed in section 3, as well as with Article 11 EIR. Furthermore, the leased property is located in the Netherlands. As

91 See S. 2.1.2.

a result, the mortgage is governed by Dutch law as well and, under Dutch law, the mortgagee is not entitled to the lease claims. Finally, this solution is in line with the one chosen in German law as well. In section 3.1, we saw that German law already prevents unintended outcomes caused by differences in the moment lease claims come into existence because §110(1) InsO closely ties the effectiveness of an assignment of lease claims to the moment these claims come into existence under German law.

54. With regard to the first question, the difference in which claims can be assigned with effect against the insolvent estate between Belgian and Dutch law is only subtle. The exact difference depends on many factors, such as when the claims are due, paid and whether any contractual stipulations may affect the moment they come into existence.[92] This will only be clear in a concrete situation. Therefore, the answer depends on each individual case. Nevertheless, I think the lex concursus should be leading as well. Usually, it will be in the interest of the assignee if the solution which renders the assignment of the least amount of lease claims ineffective. However, for the courts it may be far easier and far more efficient to simply apply the lex concursus. Moreover, the application of the lex concursus ensures the most uniform application of the applicable insolvency law. Hence, I think that the lex concursus should also be leading when determining exactly which assignments of which claims should be rendered ineffective against the insolvent estate. In our example, that means which claims which belong to the insolvent estate is determined on the basis of Dutch law.

4.4.4 Interim conclusion

55. To conclude this subsection, Article 8 EIR stands in the way of adaptations to the assignment of claims which exist under the laws governing them and are situated in 'another Member State'. Nevertheless, when it comes to the assignment of lease claims existing under the law governing them, there may be reasons to make an exception to this protection. Under a strict interpretation, Article 8 EIR is ill-equipped to deal with the three-party relationship created by the assignment of lease claims. In fact, its application may result in outcomes contrary to those intended by national legislators on the validity of lease agreements and the effectiveness of the assignment of lease claims as well as those intended by the EIR itself. In the coming two subsections, I will analyze the two other unintended outcomes discussed in this paper: those relating to (I) the conditions under which a future claim is assigned and (II) the direct and indirect acquisition of future claims by the assignee.

92 For this latter part, see fn. 14 & 15, supra.

4.5 Conditions for the assignment of future claims

56. The second incongruity is caused by the conditions for the assignment of future claims. Under French law, the assignment of future claims immediately results in their transfer. This may cause problems for the insolvency law of the other jurisdictions reviewed, such as Dutch law. However, these problems can be resolved by rendering an assignment ineffective if the claims do not exist when the insolvency proceedings against the assignor are opened. If the claims are still future at that moment, the assignee's legal certainty and Article 8 EIR do not stand in the way of any adaptations to their assignment. This assignment does not result in a *right in rem*. Furthermore, as we saw earlier, most assignments of claims which are still future once the insolvency proceedings against the assignor have been opened, are not effective against the insolvent estate in entirely French situations either. As a result, rendering the assignment ineffective hardly affects the legal certainty of the assignee. The fact that some specific assignments are exempt from this main rule, does not change this. Any other interpretation would open the door for the abuse of the assignment of future claims under French law in order to evade provisions protecting the insolvent estate and the general body of creditors in other jurisdictions. Instead, as stated in section 3, courts can take this exception into account when deciding to make an adaptation or not. Otherwise, courts are free to render the assignment ineffective against the insolvent estate by an adaptation of the lex concursus.

4.6 Direct and indirect acquisition

57. The third and final incongruity concerns the direct acquisition of claims. Sometimes, future claims are directly acquired by the assignee under German law. This causes problems for Dutch law. However, these problems can be resolved by adapting Article 35(2) DBA, so that it treats the assignment of claims directly acquired by the assignee similar to those indirectly acquired by the assignee.[93] This adaptation hardly hampers the legal certainty of the assignee, and is in line with the guideline set out at the beginning of this section. Article 35(2) DBA only affects assignments of claims which are still future at the time the insolvency proceedings are opened and, thus, it does not affect any *rights in rem*. Furthermore, the outcome in situations governed by German law is similar: if the claims are still future, their assignment is not effective against the insolvent estate either. Moreover, the rationale of Article 35(2) DBA is clear and reflected and by

93 Similar: Van Galen, van Apeldoorn & Berends, *Grensoverschrijdende insolventieprocedures*, pp 103-104; Rongen, *Cessie*, para 1153.

its legislative history, case-law, and several similar provisions.[94] Since Dutch law only allows for the indirect acquisition of claims, Article 35(2) DBA always leads to the same result in an entirely Dutch situation: the assignment of claims arising before opening of the insolvency proceedings is effective against the insolvent estate, while the assignment of claims arising after the opening of the proceedings is not. Finally, if the exception of a secured legal position (*gesicherte Rechtsposition*) occurs, the courts can take this exception into account when determining whether an adaptation should be made.

5. Conclusions

58. The assignment of future claims brings general private law and insolvency law together. In domestic situations, both fields are coordinated and operate coherently. However, this coherence may be disrupted in international situations. Each jurisdiction deals differently with the assignment of future claims. These differences can cause incongruencies between general private law and insolvency law, which may result in outcomes unintended by either legal jurisdiction. Conflict rules should try to prevent these unintended and unintended outcomes.
59. In the EU, several different conflict rules govern the assignment of future claims. According to Article 7(2)(b) EIR, the lex concursus determines which claims are part of the insolvent estate and how claims acquired after the opening of insolvency proceedings are treated. However, whether a claim exists and whether, how, and when it is assigned is not determined by Article 7(2)(b) EIR. The existence of claims is governed by Article 14(2) Rome I. The manner in and conditions under which claims are assigned is determined by the law governing the transfer, but it is uncertain which law this exactly is.
60. Incongruencies occur when these conflict rules point to different laws. This article discussed three examples of such incongruencies and set out how they may be resolved. Adapting the applicable insolvency law to the laws governing

94 S.C.J.J. Kortmann, N.E.D. Faber, B.A. Schuijling, *Geschiedenis van de Faillissementswet 2-III*; *wetswijzigingen* (Deventer; Wolters Kluwer 2nd edn 2018) Art. 35 Fw, para 13; For example: Art. 23, 24, 35(1) 53 & 54 DBA; N.B. Pannevis, *Insolventierecht* (Deventer: Wolters Kluwer 2022) par. 1.5; M.J.M. Franken, *Het Insolventiepassief* (Deventer: Wolters Kluwer 2019) par. 3.2; B. Wessels, *Insolventierecht: Gevolgen van faillietverklaring (1)* (Deventer: Wolters Kluwer 2019) para 2003; Hoge Raad 26 March 1982, ECLI:NL:HR:1982:AG4349, *NJ* 1982, 615; Hoge Raad 30 January 1987, NJ 1987, 530 (*WUH/Emmerig*). On the other hand, Article 3:110 DBW does allow for a direct acquisition by an intermediary. This is not interrupted by insolvency law. Thus, one might argue that a similar exception should be permitted for the direct acquisition of future claims under German law. However, the legal system, legal history and case-law on the matter are clear: claims that come into existence after insolvency become part of the insolvent estate.

the assignment restores the harmony between the applicable laws and ensures they operate ‘in sync’. However, these adaptations come at a cost: an otherwise effective assignment becomes ineffective against the insolvent estate, which reduces legal certainty and may harm the interests of the assignee and other third parties, such as consecutive assignees.

61. Whether an adaptation should be made depends on the severity of the unintended outcome on the one hand and the protection of the position and legal certainty of the assignee on the other. Ultimately, this decision should be made on a case-by-case basis. Nevertheless, in this paper I have attempted to set out a guideline which may help to make this decision. If an outcome is unintended by all jurisdictions, the impact of an adaptation on the legal certainty of the assignee is limited and the importance of a uniform application of insolvency law generally outweighs the assignee’s protection. However, if a claim already exists under the law governing it, the assignee may be further protected by Article 8 EIR. Nevertheless, in some situations an unintended outcome may be so severe that there may be reasons to make an exception to this protection and Article 8 EIR, such as in the case of lease claims.