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PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Chapter [...]

ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS,
ASSIGNMENT OF CONTRACTS

(Revised draft prepared by Professor M.Fontaine in the light of the discussions of the
Working Group at its 3rd session held in Cairo, 24-27 January 2000)

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CHAPTER [...]

ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS

SECTION 1 : ASSIGNMENT OF RIGHTS

Article 1 (Definitions)

In these Principles, « assignment » of a right means the transfer [, including one as security,] by agreement from one person (the "assignor") to another person (the "assignee") of the assignor's right to payment of a monetary sum or other performance from a third person ("the obligor").

COMMENT

In many circumstances, an obligee entitled to payment of a monetary sum or other performance from an obligor may find it useful to assign its right to another person. For instance, such an assignment to a bank is a common way to finance terms of credit granted to a client. The rules of the present chapter cover assignments of rights as defined in Article 1.

1. Transfer by agreement

Only transfers by agreement are concerned, as opposed to various situations where the applicable law may provide for legal transfers (such as, under certain jurisdictions, the transfer to the purchaser of an insured building of the seller's rights against the insurer, or the *ipso iure* transfer of rights in merger of companies operations – see article 2b below).

The definition also does not apply to unilateral transfers, which may intervene, under certain jurisdictions, without the assignee's participation.

2. Right to payment of a monetary sum or other performance

On the other hand, the definition is not restricted to assignment of rights to payment of a monetary sum ; it also covers rights to other kinds of performance, such as the rendering of a service. Nor are assignable rights limited to rights of a

contractual nature. Claims deriving from tort law or based on a judgment, for instance, can be ruled by the present Chapter, subject to art. 1.4 of the Principles.

3. What is meant by « transfer »

« Transfer » of the right means that it leaves the assignor's assets to enter the assignee's. The definition also applies to transfers for security purposes.

4. Third party rights

Such transfer from the assignor's to the assignee's assets remains subject to third party rights. Different third parties can be affected by the assignment of a right between assignor and assignee, such as, in the first place, the obligor, but also attaching creditors and successive assignees. Third party rights are partly covered by further provisions of this Chapter (cf. art. 9 concerning the obligee and successive assignees); they may in some instances be governed by mandatory rules of the applicable law (e.g. the law of bankruptcy).

Note by the Rapporteur

The definition initially submitted has been widened in scope in order to cover also assignments of non-monetary rights, as decided in Cairo (n° 374).

The former article 3 (5), which simply provided that a right could be assigned as security, has been deleted and replaced by an explicit reference in the black letters of article 1. This follows one of the options given in Cairo (n° 599-600); the other one was to include a statement about assignment as security only in the Comments of the same article 1. Pending a final decision of the Group, the black letter reference has been put between brackets.

The Comments point out that the definition is not limited to rights of a contractual nature; this was the wish expressed in Cairo, subject of course to the mandatory prohibitions which may exist in certain legal systems (n° 355-359).

"Unilateral assignments" were the subject of extensive discussions in Rome (n° 170-172, 174, 177, 179-181, 185-188, 191 and 207), much less in Bozen (n° 411), and then again in Cairo (n° 646-650, 658-659). It was finally decided that they were not covered by the Principles, which dealt only with assignment of rights by agreement. Therefore it was agreed to begin the definition by the phrase "In these Principles...", thus leaving aside the question of the validity and regime of unilateral assignments.

The last paragraph of the Comments expresses what main effect assignment of a right has; this tries to meet what was suggested in Cairo (n° 534, 566-569). The essential problem of third party rights is already mentioned in the Comments of this first article.

Article 2
(Exclusions)

This Section does not apply to assignments :
(a) made by transfer of a negotiable instrument governed by special rules ;
(b) made as a part of the transfer of the assets or of a substantial part of the assets of a business.

COMMENT

Some types of assignments of rights are generally subject to very specific rules under the applicable law, which justifies that they are not governed by the Principles.

1. Negotiable instruments

This applies in the first place to assignments made by transfer of a negotiable instrument governed by special rules, such as a bill of exchange or a bill of lading. The rights embodied in such an instrument can be transferred by way of endorsement or mere transfer of the document itself. This does not exclude the possibility that such rights, under certain jurisdictions, could also be transferred by a normal assignment, which would then be subject to this Chapter.

2. Transfer of a business

Another exclusion applies to assignments made as part of the transfer of the assets or of a substantial part of the assets of a business, as in the case of mergers of companies. The applicable law often provides for mechanisms that cause all rights and duties, under certain conditions, to be transferred *ipso iure* and globally.

Article 2 (b) does not prevent the Principles to apply when certain rights pertaining to the transferred business are assigned individually. On the other hand, the mere transfer of shares in a company may fall under article 2 a.

Illustration 1

Company A is absorbed by Company B. The applicable law will often provide that all rights pertaining to the former company are automatically transferred to the latter, and the Principles do not apply.

Illustration 2

In the above operation, however, Company B is not interested in taking over a specific claim against Customer X, and prefers that right to be assigned to Company C. This particular transfer is subject to the Principles.

Note by the Rapporteur

Littera (a) has been phrased differently, in consideration of the observations made in Cairo (n° 390-393) We did not refer to the "negotiation" of the instrument, as in the Goode draft, since the word "negotiation" has a completely different meaning elsewhere in the Principles (see art. 2.15), and we submit another formula (" assignments made by transfer of a negotiable instrument governed by special rules "). The last sentence of the second paragraph of the Comments is to be related to Cairo, n° 381-382.

Due to the problems of interpretation which seemed to arise from the former language of littera (b) (which had been taken over from UNCITRAL, art. 4 c), we also submit another formula (" assignments made as part of the transfer of the assets or of a substantial part of the assets of a business "), with some explanations in the Comments.

Article 3
(*Partial assignment*)

- (1) A right to payment of a monetary sum may be assigned partially.**
- (2) A right to other performance may be assigned partially only [if it is divisible]/[if it does not render the obligation significantly more burdensome].**
- (3) The assignor must compensate the obligor for any increase in the expenses incidental to performing in several parts.**

COMMENT

1. Economic interest

The partial assignment of a right can correspond to justified economic purposes. A Contractor may for instance want to assign part of its right to payment from the Client to a financing institution, and keep the rest for itself. Or it may want to assign the other part to a supplier of raw material.

Admitting partial assignment may however affect the principle that the assignment should not worsen the obligor's situation. If the right is split, the obligor will have to perform in several parts, which could entail extra costs.

2. Monetary and non-monetary rights

The burden of having to make two or several monetary payments instead of one is not in itself deemed to be excessive, and such partial assignments are

permitted in principle. But another rule prevails for assignments of non-monetary rights, where the validity of partial assignment is made dependent [on the divisibility of the performance due]/[on the degree of additional burden it may put on the obligor].

In both cases, any increase in the expenses borne by the obligor as a result of having to perform in several parts must be reimbursed by the assignor (comp. art. 6.1.3 for a symmetrical solution).

Illustrations

1. Buyer X is due to pay a price of USD 1.000 to Seller A next October 31. Seller A urgently needs USD 600 and assigns a corresponding part of its right to Bank B. Notice of the partial assignment is given to Buyer X. On October 31, both Seller A and Bank B claim payment of their respective parts. Buyer X must pay USD 400 to Seller A and USD 600 to Bank B. However, if there are additional costs involved in making those two payments instead of only one to Seller A, the latter has to compensate Buyer X.

2. Metal Company X is to deliver 1000 tons of steel to Carmaker A next October 31. Due to a decrease in sales, Carmaker A estimates that it will not need so much steel at that time, and assigns the right to delivery, up to 300 tons, to Carmaker B. Notice of the partial assignment is given to Metal Company X. On October 31, both Carmakers A and B claim delivery of their respective quantities. Metal Company X must deliver 700 tons to Carmaker A and 300 tons to Carmaker B. Additional costs involved in making two deliveries instead of only one are to be reimbursed by Carmaker A.

[3. Tax Consultant X has promised to spend 30 days to examine the accounts of Company A in order to determine the proper policy to be followed in consideration of new tax regulations. Company A then regrets this arrangement, considering the level of the fees to be paid. It envisages to assign 15 of the days to Company B. Tax Consultant X can argue against such partial assignment that performance of tasks of such nature are not divisible.]

[4. Tax Consultant X has promised to spend 30 days to examine the accounts of Company A in order to determine the proper policy to be followed in consideration of new tax regulations. Company A then regrets this arrangement, considering the level of the fees to be paid. It envisages to assign 15 of the days to Company B. Tax Consultant X can argue against such partial assignment if it occurs that the accounts of Company B are of a significantly more complex nature than those of Company A.]

Note by the Rapporteur

There was an exceptionally lengthy discussion in Cairo concerning the possibility of partial assignment (n° 394-490), originally covered by former art. 3 (1). We were asked (n° 490) to prepare two alternative draft provisions concerning non-monetary rights. We submit one article with two variants in para (2).

Reference was made in Cairo (n° 447) to art. 12.103 of the Goode draft, but this provision has since been replaced by a much shorter one (« Claims which are divisible may be assigned in part, but the assignor is liable to the debtor for any increased costs which the debtor thereby incurs »). Our first variant in para (2) also refers to the concept of divisibility, which already appears in article 7.3.6 (1) of our Principles, admittedly in a different context. As an alternative, the criterium could be that of significant additional burden.

A third possibility would be to retain both variants cumulatively :

(2) A right to other performance may be assigned partially only

- if it is divisible, and

- if it does not render the obligation significantly more burdensome.

The language of (3) is inspired by article 6.1.6 (2). Such a rule was discussed in Cairo (n° 490 ; also see e.a. n° 470, 471, 484-489) ; it appears in the latest Goode draft.

Article 4 (Future rights)

• Variant 1

A future right is deemed to be transferred at the time of the agreement, provided the right, when it comes into existence, can be identified as the right to which the assignment relates.

COMMENT

1. Economic interest

For the purposes of this Chapter, a future right is a right that will or might come into existence in the future (as opposed to a present right for performance due in the future). Examples of future rights are rights a bank may have against a client who could be granted a credit line in the future, or a firm against another firm on the basis of a contract which might be concluded in the future. Assignment of such future rights can be of much economic significance.

2. Retroactive effect

Between assignor and assignee, assignment of future rights are effective with retroactivity. When the right comes into existence, the transfer is considered to have taken place at the time of the assignment agreement.

Concerning third parties, it will be remembered that their rights may in some instances be governed by mandatory rules of the applicable law (e.g. the law of bankruptcy). However, third party rights are partly covered by further provisions of this Chapter, including the consequences of notice given under articles 8 and 9 below.

3. Determinability

A requirement of determinability is necessary, in order to avoid the difficulties which could be caused by a transfer of future rights described in vague and too broad general terms. Assignment of a future right becomes effective at the time of the assignment, only provided that the right, when the right comes into existence, can then be identified as covered by the assignment.

Illustration

In order to finance new investments, Company A assigns to lending institution B the royalties to be earned from future licenses of a certain technology. Six months later, Company A licences that technology to Company X. Royalties due are considered to have been assigned to assignee B from the date of the assignment agreement, provided such royalties can be related to this agreement.

[• Variant 2

A future right is deemed to be transferred when the right comes into existence, provided it can then be identified as the right to which the assignment relates.]

COMMENT

1. Economic interest

For the purposes of this Chapter, a future right is a right that will or might come into existence in the future (as opposed to a present right for performance due in the future). Examples of future rights are rights a bank may have against a client who could be granted a credit line in the future, or a firm against another firm on the basis of a contract which might be concluded in the future. Assignment of such future rights can be of much economic significance.

2. No retroactivity

Between assignor and assignee, assignment of such future rights are effective when the right comes into existence, i.e. without retroactivity, and without prejudice to the notice requirement provided in article 8.

Concerning third parties, it will be remembered that their rights may in some instances be governed by mandatory rules of the applicable law (e.g. the law of bankruptcy). However, third party rights are partly covered by further provisions of this Chapter, including the consequences of notice given under articles 8 and 9 below. In any case, no assignment of a future right can be effective towards third parties before the right comes into existence.

3. Determinability

A requirement of determinability is necessary, in order to avoid the difficulties which could be caused by a transfer of future rights described in vague and too broad general terms. Assignment of a future right becomes effective when the right comes into existence only provided the right can then be identified as covered by the assignment.

Illustration

In order to finance new investments, Company A assigns to lending institution B the royalties to be earned from future licenses of a certain technology. Six months later, Company A licences that technology to Company X. Royalties due are assigned to assignee B from the time the licence contract is concluded, provided such royalties can be related to the assignment agreement.

Note by the Rapporteur

Originally part of art. 3 (3).

The draft does not include any more provision concerning assignment of conditional rights as this notion proved to be extremely ambiguous, between civil and common law (n° 553) but even within the common law (n° 550). The invitation to mention such rights in the Comments (n° 554) still has to be implemented (it will be a difficult exercise !).

Concerning future rights, two alternative drafts are submitted, as required after a non-conclusive vote at Cairo (n° 559), with and without retroactivity.

The retroactive solution in Variant 1 can find support in the UNCITRAL draft (art. 10). The Goode draft (art. 12.202 (2) has a similar rule, but explicitly limited to the effects between assignor and assignee.)

Both variants attempt to express a determinability requirement as suggested in Cairo (n° 560-565). Inspiration has been taken from both the UNCITRAL (art. 9, 1° b) and the Goode (art. 12.102) drafts.

Article 5
(Rights assigned without individual specification)

A number of rights may be assigned without individual specification provided such rights can be identified as rights to which the assignment relates at the time of the assignment or when they come into existence.

COMMENT

Rights are often assigned as a bundle or as a bulk. A firm will for instance assign all its receivables to a factoring company. It would be excessively burdensome in practice to require individual specification of each assigned right. But the global identification of the rights assigned as a bundle must be such as to permit recognition of each concerned right as part of the assignment.

In the case of existing rights, such recognition must be possible at the time of the assignment. If future rights are included in the bundle, identification must be possible at the time the rights come into existence, in accordance with article 4.

Illustration

Retailer A assigns all its receivables to Factor B. There are thousands of rights, both existing and future ones. The assignment does not require the specification of each single claim. Later, Factor B gives notice of the assignment to the obligee of a specific receivable. Factor B must be able to demonstrate the inclusion of that receivable in the bundle, either at the time of the assignment, or, in the case of a right which did not exist yet at that time, when the right came into existence.

Note by the Rapporteur

Originally art. 3 (4).

« Bulk of rights » has been replaced another less colloquial expression (« Rights assigned without individual specification »), but the comments will make practitioners feel comfortable with references to the former expression, as well as to the wording « bundle of rights ».

« Identification » has been made more precise (« as rights to which the assignment relates »), in accordance with article 4 of this Chapter and article 9, 1° of the UNCITRAL draft.

We have tried to ensure good coordination with the rules on future rights.

Article 6

(Agreement between assignor and assignee sufficient)

- (1) The right is assigned by mere agreement between assignor and assignee, without notice to the obligor.**
(2) The consent of the obligor is not required, unless the right is of an essentially personal character.

COMMENT

Assignment of a right has already been described as a « *transfer by agreement* » in the definition of article 1 above. Articles 6 to 13 are operative provisions which govern the respective legal positions of assignor, assignee and obligor.

1. Mere agreement between assignor and assignee

According to (1), assignment of a right is effective, i.e. the right is transferred from the assignor's assets to the assignee's, as the result of the agreement between these two parties.

The reference to a « *mere* » agreement applies to the assignment the rule stated in article 1.2 of the Principles according to which nothing requires a contract to be concluded in writing. This does not affect the possible application of mandatory rules of the applicable law which could for instance submit assignment for security purposes to some formal requirements.

As already stated in the Comments under article 1, this solution remains subject to third party rights, which are partly covered by other provisions of this Chapter (cf. art. 8 and 9 concerning the obligee and successive assignees), and may be in some instances governed by mandatory rules of the applicable law (e.g. the law of bankruptcy). However, it should be stressed that notice to the obligor (see article 8 below) is no condition to the effectiveness of the transfer between assignor and assignee.

2. Consent of the obligor in principle not required

The rule in paragraph (1) already implies that the obligor is not a party to the assignment agreement, i.e. its consent is not required for the assignment to be effective between assignor and assignee. This is explicitly stated in paragraph (2).

An exception is made for the case the right to be assigned is of an essentially personal character, that is a right which has been granted by the obligor in favor of a very specific person. Such characteristic makes the right unassignable without the consent of the obligee.

Illustration

Company X promises to make a donation to non-profit Organization A, engaged in the defense of human rights. Organization A wishes to assign that right to Organization B, active in the protection of the environment. The assignment can only take place with Company X's agreement.

The possibility to assign a right without the obligor's consent may be affected by the presence of a non-assignment clause in the contract between assignor and obligor (see below, art. 7). It leaves open the whole matter of having to give notice of the assignment to the obligor, in order to avoid the consequences of a payment the obligor would still make to the assignor (see below, art. 8 and 9).

Note by the Rapporteur

Para (1) was originally art. 4 ; para (2) is an addition, which also includes part of former art. 3 (1).

As discussed in Cairo (n° 661, 665), a second paragraph has been added in the black letters explicitly stating that the consent of the obligor is not required.

It is proposed to link the problem of rights of an essentially personal character (comp. the former art. 3 (1)) to this new paragraph (2), since such rights can after all be transferred if the obligor agrees.

As also discussed at length in Cairo (e.g. n° 602, 603, 607-619, 623-625), the Comments attempt to clearly state the relationship between the assignor/assignee agreement and the notice requirement. It has been felt that a link should also be made in the comments to non-assignment agreements and the provision in article 7.

Article 7

(Non-assignment clauses)

(1) Assignment of a right to payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such assignment. However, the assignor may be liable to the obligor for breach of contract.

(2) Assignment of a right to other performance is ineffective, if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. [Nevertheless, the assignment is effective if the assignee, at the time of assignment, neither knew nor ought to have known of the agreement ; the assignor may then be liable to the obligor for breach of contract.]

COMMENT

1. Balance of interests

Article 6 (2) above states that the consent of the obligor is not required for the assignment to be effective between assignor and assignee (with the exception of assignment of rights of an exclusively personal character). However, it is frequent in practice that an agreement between an obligee and an obligor contains a clause limiting or prohibiting assignment of the obligee's rights. The obligor may not wish to have its obligee changed. Should the obligee assign such rights in spite of the clause, respective interests must be weighed. The obligor suffers a violation of its contractual rights, but the assignee must also be protected. On a more general level, consideration must be given to favoring assignment of rights as an efficient means of financing.

Article 7 makes a distinction between assignment of monetary rights and assignments of rights to other performance.

2. Monetary rights

In the former case, para (1) gives preference to the needs of credit. The assignee of a monetary right is protected against non-assignment clauses and assignment is fully effective. However, since the assignor acted in contradiction to its contractual duties, it is liable towards the obligor for breach of contract, under Chapter 7 of the Principles.

Illustration

Contractor A is entitled to payment of USD 100,000 from its client X after a certain stage of a construction work is completed. The contract contains a clause prohibiting A from assigning the right. Contractor A, nevertheless, assigns the right to Bank B. Bank B can rely on the assignment in spite of the clause, and claim payment when it is due. However, Client X is entitled to sue Contractor A for acting in breach of the clause ; damages could for instance be claimed should Client X demonstrate it has suffered some prejudice.

3. Non-monetary rights

Assignment of rights to non-monetary performance do not bear the same relationship to credit, thus justifying another solution in para (2). In this case, non-assignment clauses are given effect towards the assignee and the assignment is considered ineffective. [However, the solution is reversed if it can be established that at the time of assignment, the assignee did not know and ought not to have known of the non-assignment clause. In such a case, assignment is effective, but the assignor may be liable towards the obligor for breach of contract].

Illustration

Consultant X has agreed to give some legal advice to Company A during a certain period of time. Their contract stipulates that Company A's rights towards Consultant X are non-assignable. Company A feels it does not need that advice for itself any more and attempts to assign its rights to Company B. Such assignment is ineffective. Consultant X does not become Company B's obligee. In such a case, Company B has a claim against Company A under article 12 (1) (b) below.

[However, should Company B demonstrate that it did not know nor ought to have known of the non-assignment clause, the solution would be reversed : assignment to Company B would be effective, but Consultant X would have a claim against Company A for breach of contract].

Note by the Rapporteur

The earlier version of this provision was the former art. 3 (2). It was phrased along the line of the new art. 7 (1), but it did not distinguish between monetary and non-monetary rights.

A lengthy discussion took place in Cairo, where the respective interests involved were weighed. The decision was made to keep the former rule, favorable to the needs of financing, for assignments of monetary rights (n° 526). This is in line with the UNCITRAL draft, art. 11 (comp. the more restrictive approach of the Goode draft, art. 12.301, 2 b). The opposite solution, to have the non-assignment clause prevail, seemed to have the preference for non-monetary rights, but the provision of an "escape clause" in favor of a bona fide assignee was left open (n° 526-530). This explains the different solutions of paragraphs (1) and (2) and the presentation of the second part of (2) between brackets.

Article 8
(Notice to the obligor)

- (1) Until receiving a notice of the assignment, from either the assignor or the assignee, the obligor is discharged by paying the assignor.**
- (2) After receiving such a notice, the obligor is discharged only by paying the assignee.**

COMMENT

1. Effect of notice on the obligor

While between assignor and assignee, the assignment is effective as the result of their agreement (art. 6 above), the obligor is still discharged by paying the assignor until it receives notice (the assignee can then recover that payment from the assignor, as provided in article 13 (e) below). The assignment becomes effective towards the obligor only after such notice is given to it ; the obligor can then be discharged only by paying the assignee.

Illustrations

1. Seller A assigns to Bank B its right to payment from Buyer X. Neither A nor B gives notice to Buyer X. When payment is due, X pays Seller A. This payment is fully valid and B is discharged. It will be up to Bank B to recover it from Seller A, under article 13(e).

2. Seller A assigns to Bank B its right to payment from Buyer X. Bank B immediately gives notice of the assignment to Buyer X. When payment is due, X still pays Seller A. X is not discharged and Bank B is entitled to oblige Buyer X to pay a second time.

Sometimes parties resort to so-called « silent assignments », where assignor and assignee agree not to inform the obligor. This arrangement is valid between parties, but since the obligor will receive no notice, it will be discharged by paying the assignor, as provided in article 8 (1).

2. Meaning of « notice »

« *Notice* » is to be understood in the broad sense of article 1.9 above. Though the contents of the notice are not specified in the black letters, such notice should indicate not only the fact of the assignment, but also the identity of the assignee, the specifications of the transferred right (subject to article 5 above) and, in the case of partial assignment, the extent of the transfer.

3. Who should give notice

Article 8 (1) leaves the question open as to who should give such notice, the assignor or the assignee. In practice, the assignee will probably most of the time take the initiative, as it has a major interest in avoiding the situation where the obligor would still perform in the assignor's hands. But notice given by the assignor has the same effects.

4. When must notice be given

Article 8 does not explicitly require that notice can be given only after the assignment agreement. Sometimes, the contract between the future assignor and the

obligor already provides that the rights arising from it will be assigned to a financial company. Whether this can be considered as adequate notice with the consequences provided in this article is a matter of interpretation, possibly depending on the definiteness of the clause regarding the identity of the future assignee.

5. Revocation of notice

Notice given to the obligor can be revoked, *e.g.* if the assignment agreement itself becomes invalid, or if an assignment made for security purposes is no longer necessary. This will not affect payment made before the revocation to the person who was then the assignee, but the obligor who would still pay that person afterwards would not be discharged any more.

Note by the Rapporteur

The contents of the former articles 6 and 7 have been rearranged. The new article 8 combines the former article 6 and paras (1) and (2) of the former article 7 ; the new article 9 corresponds to para (4) of the former article 7 ; the new article 10 corresponds to para (3) of the former article 7.

In this article 8, when incorporating the former article 6 in para (1), we have deleted « unless otherwise agreed ... » as the possibility of different contractual arrangements is always present under art. 1.5 of the Principles.

As agreed in Cairo (see inter alia n° 724, 727, 730, 742), the debtor's knowledge of the assignment is no longer assimilated to receiving notice.

*Some explanations have been given in the Comments as to the meaning and form of « notice » (with a reference to article 1.9, its contents, which must contain minimum information, *e.g.* in the cases of partial assignment (Cairo, n° 769-773), « silent assignments » (Bozen, n° 413-414 and Cairo, n° 843-844), anticipatory notice (Cairo, n° 720) and revocation of notice (Cairo, n° 775-783).*

We have temporarily kept referring to « paying » in articles 8 and 9, though assignments can concern non-monetary rights. This may be a terminological problem under certain jurisdictions (cf. Cairo, n° 711-716).

Article 9 (Successive assignments)

If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.

COMMENT

1. Priority of first notice

Article 9 covers the case of successive assignments of the same right to different assignees by the same assignor. This should normally not happen, but it sometimes occurs in practice, whether the assignor does so consciously or inadvertently. Preference is then given to the assignee who was the first one to give notice. Other assignees can then claim against the assignor under article 13 c below.

Illustration

Seller A assigns its right to payment from Buyer X on February 5 to Bank B, and then again on February 20 to Bank Y. Bank Y notifies the assignment on February 21, and Bank B does so only on February 25. Buyer X is discharged by paying Bank Y, even though the right was assigned later to Bank C than to Bank B.

Unlike the solution prevailing under certain jurisdictions, article 9 does not take into consideration the actual or constructive knowledge the obligor may have of the assignment(s) in the absence of notice. The choice made in the Principles is motivated by the wish to encourage giving notice, thus ensuring the degree of certainty especially advisable in international contracts.

2. No notice given

If no notice is given by any of the successive assignees, the obligor will be discharged, under article 8 (1), by paying the assignor.

3. Notice without adequate proof

Notice by an assignee without adequate proof that the assignment has been made, if such proof was requested by the obligor, is ineffective under article 10 below.

Note by the Rapporteur

This article 9 originates from para (4) of the former article 7.

The meaning of « successive assignments » has been clarified by the inclusion of « by the same assignor » in the black letters (cf. Cairo, n° 767, 768 and 774).

As decided in Cairo (n° 761), this provision does not take the obligor's actual or constructive knowledge into consideration any more.

Article 10
(Adequate proof of assignment)

If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made, and, unless the assignee does so, the notice is not effective. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

COMMENT

Since receiving such notice has the important effects provided in articles 8 and 9 above, article 10 protects the obligor against the risk of getting fraudulent notice from a fake « assignee » by organizing the provision of adequate proof that the assignment has actually been made.

Illustration

On December 1, Client X has to pay USD 10,000 to Contractor A as an installment on the cost of construction of a plant. In October, Contractor A assigns the right to Bank B. Either A or B may give notice of the assignment to Client X. If Bank B takes the initiative and writes to X that it has become the assignee of the sum, X may require B to provide adequate proof. Without prejudice to other types of evidence, B will probably produce the assignment agreement or any other writing from A confirming the right has been assigned.

Note by the Rapporteur

This article 9 originates from para (4) of the former article 7.

If no adequate proof is provided, a broader formula (« the notice is not effective ») has been substituted to the former one (« the debtor is discharged by paying the assignor »), in order to cover the case of successive assignments (see above, article 9).

Article 11
(Defences)

(1) The obligor may assert against the assignee all [substantive and procedural] defences of which the obligor could assert if the claim was made by the assignor.

[(2) The obligor may assert against the assignee any right of set-off in respect of claims existing against the assignor available at the time notice of assignment was received.]

COMMENT

A right can in principle be assigned without the obligor's consent (art. 6 (2) above). This solution rests on the assumption that the assignment will not impair the obligor's legal situation.

It can happen that the obligor would have been able to withhold or refuse payment to the original obligee on the basis of a defence, such as defective performance of the obligee's own obligations. Can such defences be asserted against the assignee? Respective interests have to be balanced. The obligor's situation should not deteriorate as a result of the assignment, but the assignee is also concerned with the integrity of the right it has acquired.

The system adopted by the Principles is to allow the obligor to assert all defences against the assignee which it could assert if the claim was made by the assignor (this article 10 (1)), but to give the assignee, in such a case, a claim against the assignor (article 13 d below).

Illustration

Software Company A promises to Client X to install a new accounting application before the end of the year. The main payment is to take place one month after reception. Company A has immediately assigned that right to Bank B. When the payment is due, Bank B wants to claim it from Client X, but the latter explains that the new software is not working properly and that the accounting department is in a chaotic situation. Client X refuses to pay until this catastrophic situation is remedied. Client X is justified in asserting that defence against Bank B, which can then claim against Software Company A under article 12 (1) d.

The same solution applies to defences of a procedural nature.

Illustration

Company X sells a gas turbine to Contractor A, to be incorporated in a plant built for Client B. When the work is completed, Contractor A assigns the warranty of satisfactory performance to Client B. When the turbine does not work properly, Client B sues Company X before its national courts. Company X will successfully invoke the arbitration clause included in its contract with Contractor A.

[Paragraph (2) kept subject to further discussions].

Note by the Rapporteur

This was formerly article 8.

The scope of the defences available to the obligor has been widened after the discussions in Cairo (n° 784-800), from all defences available « at the time notice of assignment was received » to all defences « of which the obligor could avail itself if the claim was made by the assignor » ; inspiration is taken from the Unidroit draft on factoring, art. 9, 1°. The Group may have to give further thought to the harmony between this solution, very favorable to the obligor, and the solution in article 7 (1), where preference is given to the assignee's interests and the needs of credit.

Procedural defences have been explicitly included in the black letters, as decided in Cairo (n° 818 ; see discussion n° 801-817). However we have used brackets to invite further discussion, since the respective meanings of « substantive » and « procedural » defences could give rise to uncertainties.

Paragraph (2) was also put in brackets, subject to further discussions (n° 820).

Waiver of defences clauses still have to be considered, but probably as part of a more general provision our colleague Finn was asked to prepare (n° 819-820).

Article 12
(Accessory rights)

Accessory rights, including securities and the right to interest, are transferred to the assignee.

COMMENT

1. Transfer of accessory rights

This provision derives from the same principle as article 11. Assignment transfers the assignor's right as it is, with the defences the obligor may be able to assert as well as with all accessory rights.

2. Accessory rights : notion

The notion of « accessory rights » may have various meanings in different contexts or under different jurisdictions. In this Chapter, a broad meaning has been retained, to include securities and the right to interest. Another example is given in the second illustration below.

Illustrations

1. Bank A is entitled to receive reimbursement of a loan of one million euros made to Customer X, bringing interest at the rate of 6 %. Bank A assigns its

right to reimbursement of the principal to Bank B. The assignment also operates transfer of the right to interest and of the underlying security.

2. In the same example, the loan contract entitles Bank A to claim premature reimbursement in case Customer X fails to pay interest due. This accessory right is also transferred to Bank B.

3. In the same example, Customer B has deposited some shares as security to the benefit of Bank A. This benefit is transferred to Bank B, subject to the possible application of mandatory requirements of the applicable law under article 1.4 of the Principles.

3. Partial assignment

In case a right is partially assigned, accessory rights and securities are transferred to the same proportion, if they are divisible. If they are not, parties should decide whether they are transferred to the assignee or remain with the assignor.

4. Contractual deviations

On the other hand, party autonomy permits deviations from the rule in paragraph (1), such as a separate assignment of interest.

5. Assignor's cooperation

It follows from the general duty to cooperate stated in article 5.3 of the Principles that the assignor is obliged to take all necessary steps to allow the assignee to enjoy the benefit of accessory rights and securities.

Note by the Rapporteur

The discussion in Cairo has shown the difficulty of defining « accessory rights », e.g. in relation to interest and securities (n° 823, n° 829). We suggest this comprehensive formula, which gives « accessory rights » a broad meaning, sufficient to include interest and securities. The former paras (1) and (2) have thus been merged, and an explanation is given in the Comments. However, there is a coordination problem with article 8 of Section 2 and article 6 of Section 3 below (see the notes under these two provisions). It will have to be solved after further discussion.

Also concerning securities, the reference to contrary rules of the applicable law has been deleted since it was already covered by article 1.4 (n° 822). A reference to this article 1.4 appears in one of the illustrations.

A brief discussion of the effects of partial assignment on accessory rights and securities has been included in the Comments (n° 823, 829-830).

Since it was rightly pointed out that the former paragraph (3), taken from the Uncitral draft, art. 11, was already implied by the general duty to cooperate

expressed in article 5.3 of the Principles, it has been removed from the black letters and converted into a statement in the Comments.

Article 13
(Assignor's undertakings)

The assignor undertakes towards the assignee that :

- (a) the assigned right exists at the time of the assignment, unless the right is a future right;**
- (b) the assignor is entitled to assign the right;**
- (c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party ;**
- (d) the obligor does have any defences [or rights of set-off];**
- (e) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.**

COMMENT

By assigning a right by agreement to the assignee, the assignor assumes several undertakings.

1. Existence of the right

The assigned right should exist at the time of the assignment. This would, for instance, not be the case of a right to a payment already made or of a right previously avoided.

Illustration

Company A assigns a bundle of rights to Factor B. When required to pay by Factor B, Client X establishes that the due amount has been paid to Company A before the assignment. Factor B has a claim against Company A, since the right did not exist any more at the time of the assignment.

If a future right is assigned, as allowed by article 4 above, no such undertaking exists.

Illustration

Company A assigns to Bank B the royalties from a licence of technology to be granted in the near future to Company X. That licence never materializes. Bank B has no claim against Company A.

2. Assignor entitled to assign the right

The assignor should be entitled to assign the right. This would, for instance, not be the case if there was a legal or contractual prohibition to assign the right.

Illustration

Consultant X has agreed to give some legal advice to Company A during a certain period of time. Their contract stipulates that Company A's rights towards Consultant X are non-assignable. Company A feels it does not need that advice for itself any more and attempts to assign its rights to Company B. This illustration was already given above, under article 7 above, to give an example of an ineffective assignment. In such a case, Company B has a claim against Company A under article 12 (1) (b). *[to be complemented in case the passage between brackets in art. 7 (2) is adopted].*

3. No previous assignment, no third party rights or claims

If the assignor has already assigned the right to another assignee, it is not entitled to make this second assignment, and this could be considered as already covered by the preceding undertaking under (b). The practical importance of this hypothesis justifies a separate and explicit provision. It will however be remembered that under article 9 (3), the second assignee may prevail over the first one if it gives earlier notice to the obligee.

4. No defence from the obligor

According to article 11 (1), the obligor may assert against the assignee all defences which the obligor could assert if the claim was made by the assignor. In such a case, the assignee has a claim against the assignor on the basis of this undertaking.

Illustration

Bank B is the assignee of Contractor A's right to payment of a certain sum from Client X. When payment is due, Client X refuses to pay arguing that Contractor A did not perform its obligations properly. Such defence can be successfully set up against Bank B under article 10 (1). Bank B can then have a claim against Contractor A.

5. Reimbursement of payment by the obligor

Article 8 (1) above provides that until receiving notice of the assignment, the obligor is discharged by paying the assignor. This is the right solution to protect the obligor, but the assignor and the assignee have agreed between themselves on the transfer the right. Therefore, the assignor undertakes that it will reimburse the assignee of any payment it would receive from the obligor before notice of the assignment was given.

Illustration

Seller A assigns to Bank B its right to payment from Buyer X. Neither A nor B gives notice to Buyer X. When payment is due, X pays Seller A. As already explained in the Comments below article 9, this payment is fully valid and B is discharged. However, article 12 (1)(e) enables Bank B to recover it from Seller A.

6. No undertaking concerning the obligor's performance or solvency

Parties to the assignment may certainly provide for an undertaking by the assignor concerning the obligor's present or future solvency, or, more generally, the obligor's performance of its obligations. However, without such an agreement, there is no such undertaking under the Principles.

Illustration

Company B is the assignee of Company A's right to payment of a certain sum from Client X. When payment is due, Company B finds out Client X has become insolvent. Company B has to bear the consequences. The solution would be the same if Company B discovered that Client X was already insolvent at the time of the assignment.

Breach of one of the assignor's undertakings opens the remedies provided in Chapter 7 of the Principles. The assignee may for instance claim damages from the assignor, or terminate the agreement under the conditions of art. 7.3.1 *et seq.*

Note by the Rapporteur

This was formerly article 5. The new location of the provision is a consequence of the global restructuring of the section explained above.

As suggested in Cairo (n° 666, 702), we have replaced "warranties" by "undertakings".

References to the possibility of agreements to the contrary were deleted as this possibility always derives from art. 1.5 the Principles (n° 672-674).

A new undertaking has been added in paragraph (1)(a) concerning the existence of the right, in accordance to a decision taken in Cairo (n° 667-669). The special case of future rights has been covered in the black letters (n° 668-669, 682-685).

Littera (c) has been widened to include an undertaking that the right is « free from any right or claim from a third party », a formula coming from CISG, art. 41.

In (d), the undertaking is now that the obligor does not « have » any defence, instead of « does not and will not set up » any defence. The reference to set-off has been put between brackets as the matter still has to be discussed.

Littera (e) is also new. Its inclusion in this article was suggested in Cairo (n° 743-756). Though the language is different, the model was the Uncitral draft, art. 16 (1)(b).

On the other hand, the former para (2), stating that « The assignor does not undertake that the obligor has, or will have, the financial ability to pay », has been deleted and replaced by a passage in the Comments, with a wider content.

A short paragraph has been included in the Comments concerning the consequences of breach of undertaking, referring to damages and termination (Cairo, n° 696, 703-707). This matter could be the subject of further discussions.

SECTION 2 : TRANSFER OF OBLIGATIONS

Article 1
(Definitions)

In these Principles, « transfer of an obligation » means the transfer by agreement from one person (the « transferor ») to another person (the « transferee ») of the transferor's obligation to payment of a monetary sum or other performance to its obligee.

Article 2
(Exclusion)

This Section does not apply to transfers of obligations made as part of the transfer of the assets or of a substantial part of a business.

Note by the Rapporteur

As this will be the first examination of this draft section by the Working group, no comments or illustrations have been yet prepared.

We suggest the use of the expression « transfer of obligations » instead of « transfer of duties », as previously envisaged, since the word « obligation » is used in the preceding chapters of the Principles.

The definition covers both obligations to payments of monetary sums and obligations to other performance, in harmony with the definition of assignments of rights.

Article 2 corresponds to para (2) of article 2 of the section on assignments or rights.

Article 3
(Agreement between transferor and transferee, with obligee's consent)

An obligation can be transferred by an agreement between a transferor and a transferee, with the consent of the obligee.

Article 4
(Third party performance)

- (1) Without the obligee's consent, a person may undertake to the obligor that it will perform the obligation in place of the latter, unless the obligation has an essentially personal character.**
- (2) In such a case, the obligee retains its claim against the obligor.**

Article 5
(Agreement between obligee and new obligor)

An obligation can also be transferred by an agreement between the obligee and a new obligor.

Article 6
(Discharge of the transferor)

- (1) When giving its consent, the obligee may discharge the transferor.**
- (2) The obligee may also retain the transferor as an obligor in case the transferee does not perform properly.**
- (3) Otherwise the transferor remains as an obligor, jointly and severally with the transferee.**

Note by the Rapporteur

This set of provisions is a first attempt to cover the different situations resulting from

- 1° the obligee's attitude with respect to the transfer itself;*
- 2° the obligee's attitude with respect to discharging the transferor in case of transfer.*

The task is made more complicated by the fact that the different legal systems envisage these multiple situations with different degrees of elaboration, different types of classification and different terminologies. In this respect, extreme care

should be taken not to use terms that can have very different meanings in the respective domestic systems, such as « delegation » or « novation ».

The attached chart (« Scheme of Articles 3-6 ») attempts to give a comprehensive view of the proposed system.

The PECL draft is much less elaborate in its version of January 2001. Article 13:101 only provides that :

« A third person may undertake with the agreement of the debtor and the creditor to be substituted as debtor, with the effect that the original debtor is discharged as a result of the creditor's assent ».

However, third party performance is already dealt with by article 7.106 of the published part of PECL :

« (1) Except where the contract requires personal performance the obligee cannot refuse performance by a third person if :

(a) the third person acts with the assent of the obligor, or

(b) the third person has a legitimate interest in performance and the obligor has failed to perform or it is clear that he will not perform at the time performance is due.

« (2) Performance by the third person in accordance with paragraph (1) discharges the obligor. »

On the other hand, the same article 13:101 of the PECL draft also contains two provisions which could be examined by the Working Group :

« (2) When such assent is given in advance, the substitution will take effect only on notice by the original debtor or the substituted debtor.

« (3) Where the conditions set out in the preceding paragraphs have been satisfied the creditor is not affected by any defect in the agreement for substitution between the original and the substituted debtor of which he neither knew or ought to have known. »

Article 7 (Defences)

The transferee may assert against the obligee all [substantive and procedural defences] of which the transferor could assert against the obligee if the claim was made against it.

Article 8 (Accessory rights)

The obligee may avail itself against the transferee of all accessory rights, including the right to interest, it could avail itself against the transferor.

Note by the Rapporteur

These two articles correspond to articles 11 and 12 of the section on assignment of rights.

Article 7 is very similar, mutatis mutandis, to article 11 (1). It is in harmony with art. 13:101 (6) of the PECL draft. The case of set-off will have to be examined when the respective chapter is available.

Article 8 corresponds to article 12, but securities are no longer said to be included in the transfer. Personal securities are dependent on the confidence given to the original obligor's solvency ; they cannot be automatically transferred to cover the transferee.

It will have to be decided to leave it to the Comments to give some explanations about securities, or to take some inspiration from the provisions of art. 13:101 (4) and (5) of the PECL draft :

« (4) The discharge of the debtor also takes effect with regard to any security for the performance of the obligation, which he has granted to the creditor, unless the security is over an asset which is transferred as part of a transaction between the debtor and the third person.

« (5) Any security granted by any other person for the performance of the obligation is also released, unless that other person agrees that it should continue to be available to the creditor. »

Obviously, the respective texts of article 12 of Section 1 and this article 8 of Section 2 will have to be coordinated after further discussion. Securities cannot be included in accessory rights in the former text and not in the second. Also see article 6 of Section 3 below.

SECTION 3 : ASSIGNMENT OF CONTRACTS

Article 1
(Definitions)

In these Principles, « assignment » of a contract means the transfer by agreement from one person (the « assignor ») to another person (the « assignee ») of the assignor's rights and obligations arising out a contract with another person (the « other party »).

Article 2
(Exclusion)

This Section does not apply to assignment of contracts made as part of the transfer of the assets or of a substantial part of a business.

Note by the Rapporteur

As this will be the first examination of this draft section by the Working group, no comments or illustrations have been yet prepared.

It will be remembered that very few examples exist of codifications of assignment of contracts. Remarkable examples are the Civil codes of Italy (art. 1406-1410), Portugal (art. 424-427) and the Netherlands (art. 6:159). One should also refer to Sect. 2-503 (c) of the UCC and § 328 of the R2C, as well as to the very brief PECL draft (art. 13:102).

It should be stressed again that extreme care should be taken not to use terms such as « delegation » or « novation », which do not have the same meanings under different jurisdictions.

Articles 1 and 2 have been adapted from corresponding articles in the two preceding sections of this Chapter.

The Comments will make it clear that assignment of a contract, as provided in article 1, means the assignment to the assignee of a party's rights and obligations, and not only the assignment of the rights deriving from that contract, which would fall under Section 1 of the present Chapter. This should meet the interpretation problem covered by the UCC and R2C provisions cited above.

Article 3

(Agreement between assignor, assignee and other party)

A contract can be assigned by an agreement between an assignor and an assignee, with the consent of the other party.

Article 4

(Advance consent of the other party)

- (1) The other party can give its consent in advance.**
- (2) In such a case, the assignment of the contract becomes effective when it is notified to the other party or when the other party accepts it.**

Article 5

(Discharge of the assignor)

- (1) When giving its consent, the other party may discharge the assignor ;**
- (2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly ;**
- (3) Otherwise the assignor remains as the other party's obligor, jointly and severally with the assignee.**

Note by the Rapporteur.

Articles 3 and 5 correspond, mutatis mutandis, to articles 3 and 6 of the section on transfer of obligations. The « obligation side » of the transfer of contractual rights and obligations justifies this similar approach.

Article 4 is inspired by article 1407 (1) of the Italian Civil code and article 424 of the Portuguese Civil code.

Article 6

(Defences)

(1) The assignee may assert against the other party all [substantive and procedural] defences arising out of the assigned contract which the assignor could assert against the same party.

(2) The other party may assert against the assignee all [substantive and procedural] defences arising out of the assigned contract which it could assert against the assignor.

Article 7

*(Accessory rights, interest and securities)****(to be drafted)****Note by the Rapporteur.*

Article 6 corresponds, mutatis mutandis, to articles 11 of Section 1 and 7 of Section 2. Its scope is limited to defences arising of the assigned contract, and it protects the other party as well as the assignee, since they become each other's obligors.

Corresponding provisions : CC. It., art. 1409, CC Port. 427 ; PECL draft, art. 13:102 (2) cbn. art. 13.101 (6).

No draft provision has been drafted on accessory rights yet, as securities cause some difficulties. Corresponding provisions on assignment of rights (art. 12) and transfer of obligations (art. 8) should first be agreed upon and coordinated. Comp. the PECL draft ; art. 13:202 (2) : «To the extent that the substitution of the contracting party involves a transfer of rights, the rules on accessory rights as provided by chapter 12 apply ; insofar as debts are transferred, article 13:101 applies ». No provision on the subject seems to exist in the Italian, Portuguese and Dutch codifications already referred to.

Another possible provision could impose on the assignor an undertaking that the assigned rights and obligations exist (comp. CC It., art. 1410 ; CC Port., art. 426).

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