

UNIDROIT 2003
Study L – Doc. 81
(English only)

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International Institute for the Unification of Private Law

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WORKING GROUP FOR THE PREPARATION OF
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 5th session held in Rome, 3-7 June 2002)

Rome, April 2003

SECTION 1 : ASSIGNMENT OF RIGHTS

Article 1:1 (Definitions)

“Assignment of a right” means the transfer by agreement from one person (the “assignor”) to another person (the “assignee”), including transfer by way of security, 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 section cover assignments of rights as defined in Article 1:1.

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 of a seller's rights against an insurer to the purchaser of an insured building, or the *ipso iure* transfer of rights in merger of companies transactions – see article 1:2 (b) 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 [*tort or non-contractual claims*] [*delictual claims*] or based on a judgment, for instance, can be governed by the present Chapter, subject to art. 1.4 of the Principles. Future rights may also be transferred under the conditions of article 1:5 of this Chapter.

3. Notion of “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. 1:9 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

Provision adopted in Rome 2002, subject to a possible adaptation of terminology in Comment 2 (Summary Records, n° 145-146).

An allusion to the transfer of future rights has been added to Comment 2, following a suggestion made in Rome 2002 (SR, n° 161).

The opening words of the earlier text ("In the Principles ...") have been deleted.

Article 1:2
(Exclusions)

This Section does not apply to transfers made under the special rules governing the transfers :

- (a) of instruments, or**
- (b) of rights in the course of transferring a business.**

COMMENT

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

1. Transfer of instruments

This applies in the first place to assignments made by transfer of an 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 rights made in the course of transferring a business, under special rules governing such

transfers, as may happen in the case of mergers of companies. The applicable law often provides for mechanisms that cause all rights and obligations, under certain conditions, to be transferred *ipso iure* and globally.

Article 1:2 (b) does not prevent the Principles from applying 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 1:2 (a).

Illustrations

1. The shares in Company A are transferred to Company B. If the otherwise applicable law provides that all rights pertaining to the former company are automatically transferred to the latter, the Principles do not apply.
2. The initial facts are the same as in Illustration 1, but 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

Provision adopted in Rome 2002 (SR, n° 150).

Article 1:3

(Assignability of non-monetary rights)

A right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome.

COMMENT

Assignment of a right does not in principle affect the obligor's rights and obligations. However, to a certain extent, the fact that performance is now due to another obligee can modify the conditions under which the obligation is to be performed. The place of performance can be different. The change of obligee in itself may render the obligation more burdensome.

Article 1:8 below entitles the obligor to be compensated by the assignor or the assignee for any additional costs caused by the assignment. This provision should be adequate to take care of the problem in the case of assignment of monetary obligations. However, when the assigned right concerns a non-monetary performance, the remedy may not always be sufficient. Article 1:3 excludes the possibility of assigning such rights when the transfer would render the obligation significantly more burdensome for the obligor.

Illustrations

1. Company X has undertaken to ensure the security against theft of warehouses used by Company A for the storage of wood. The premises are sold to Company B, which intends to apply them to the same use. Nothing in this provision prevents Company A from assigning to Company B its right to the security services provided by Company X.
2. The initial facts are the same as in Illustration 1, but Company B intends to use the warehouses for the storage of electronic equipment. Company A's right to the security services provided by Company X may not be assigned to Company B : such services would become significantly more burdensome since the security risks are obviously much higher with electronic equipment than with wood storage.

Note by the Rapporteur :

No modification in Rome 2002 (SR, n° 153-155).

Article 1:4 (*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, and the assignment does not render the obligation significantly more burdensome.

COMMENT

1. Economic interest

The partial assignment of a right may serve 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 materials.

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.

Another rule prevails for assignments of non-monetary rights, where the validity of partial assignment is made dependent on two cumulative conditions : the divisibility of the performance due and the degree of additional burden partial assignment may put on the obligor. Under article 1:3 above, non-monetary rights are already unassignable as a whole if the assignment would render the obligation significantly more burdensome. The same principle applies here to partial assignments of such rights.

In any case, additional costs borne by the obligor as a result of having to perform in several parts must be compensated for under article 1:8 below.

Illustrations

1. Buyer X is due to pay a price of USD 1,000,000 to Seller A next October 31. Seller A urgently needs USD 600,000 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 400,000 to Seller A and USD 600,000 to Bank B.

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.

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 the light of new tax regulations. Company A then regrets this arrangement, considering the level of the fees to be paid. It proposes to assign 15 of the days to Company B. Tax Consultant X can argue against such partial assignment on the ground that that performance of tasks of such nature are not divisible ; it can also argue that the accounts of Company B are of a significantly more complex nature than those of Company A.

Note by the Rapporteur

Provision adopted in Rome 2002, subject to replacing “it” by “the assignment” in para (2) (SR, n° 157). We have merged the two subdivisions of that paragraph into a continuous sentence.

Article 1:5 (Future rights)

A future right is deemed to be transferred [between parties] 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. Determinability

This provision introduces a requirement of determinability, 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.

3. Retroactive effect

This article also provides that between assignor and assignee, assignment of future rights is 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 1:10 and 1:11 below.

Illustration

In order to finance new investments, Company A assigns to lending institution B the royalties to be earned from future licences of a certain technology. Six months later, Company A licenses 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.

Note by the Rapporteur

As suggested in Rome 2002 (SR, n° 160-161), Comments 2 and 3 make it more explicit that this provision contains two different rules. As also suggested in Rome 2002, Comments 2 and 3 have been inverted.

Following another suggestion made in Rome 2002 (SR, n° 158-158), the words “between parties” have been added between brackets in the black letters. The

Rapporteur feels they are not necessary in the light of what is explained in Comment 3, but the Group may be of a different opinion.

Article 1:6
(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 in bulk. A firm may 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 1:5 above.

Illustration

Retailer A assigns all its receivables to Factor B. There are thousands of existing and/or future rights. The assignment does not require the specification of each single claim. Later, Factor B gives notice of the assignment to the obligor 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

No modification in Rome 2002, apart from replacing “obligee” by “obligor” in the Illustration (SR, n° 162). The second sentence of that Illustration has been reformulated.

Article 1:7
(Agreement between assignor and assignee sufficient)

(1) A 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 obligation, in the circumstances, 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 1:1 above. Articles 1:7 to 1:15 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. 1:10 and 1:11 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 1:10 below) is not a 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).

3. Exception : obligation of an essentially personal character

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

Illustrations

1. Company X promises to sponsor activities organised by Organization A, engaged in the defence 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.

2. A famous soprano has made a contract with agent A to sing in concerts organised by this agent. Agent A sells its claims against the soprano to Agent B. This transfer may require the soprano's consent, if the circumstances reveal that she was willing to sing only for Agent A.

4. Effect of other provisions

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. 1:9), though such clause, by itself, does not necessarily imply the essentially personal character of the obligation.

Article 1:7 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 still makes to the assignor (see below, art. 1:10 and 1:11).

Note by the Rapporteur

In view of the discussions in Rome 2002 concerning the meaning of an obligation "of an essentially personal character" (SR, n° 163-169), the black letters have been adapted in the line of a suggestion that was made (SR, n° 168), and the Comments have been amplified with a new illustration (comp. SR, n° 165).

For the sake of clarity, two more subdivisions have been introduced in the Comments.

As decided in Rome 2002 (SR, n° 170), "right" has been replaced by "obligation" in the black letters. The language of Comment 3 has been revised accordingly.

Article 1:8

(Obligor's additional costs)

The obligor has a right to be compensated by the assignor or the assignee for any additional costs caused by the assignment.

COMMENT

1. Compensation for additional costs

Assignment of a right may not affect the obligor's rights and obligations. Should the obligor bear additional costs due to the fact that performance has to be rendered to the assignee, this provision entitles the obligor to receive due compensation.

Illustration

1. Company X is obliged to reimburse a loan of EUR 1,000,000 to Company A. Both companies are located in Switzerland. Company A assigns its right to

Company B, located in Mexico. Company X has a right to be compensated for the additional costs involved in what has now become an international transfer.

The rule of article 1:8 is in harmony with article 6.1.6 of the Principles, which provides a similar solution in case a party changes its place of business subsequent to the conclusion of the contract.

2. Compensation by the assignor or the assignee

Compensation for additional costs may be claimed from the assignor or from the assignee. In the case of a monetary obligation, the obligor will often be in a position to set-off its right to compensation with the performance due to the assignee.

3. Partial assignment

Additional costs can especially occur in the case of partial assignment. Article 1:8 applies accordingly.

Illustration

2. In Illustration 2 under article 1:4 above, Carmaker A had assigned to Carmaker B part of its right to receive a delivery of steel from Metal Company X. Instead of having to deliver 1000 tons to Company A, Metal Company X became obliged to deliver 700 tons to Carmaker A and 300 tons to Carmaker B. Metal Company X is entitled to be compensated for the additional costs deriving from having to deliver in two parts.

4. Obligation becoming significantly more burdensome

In two cases, compensation for additional costs is not considered as a sufficient remedy. Under article 1:3 above, assignment of a right to non-monetary performance is not allowed when it would render the obligation significantly more burdensome. Under article 1:4 above, partial assignment of a right to non-monetary performance is also prevented in similar circumstances.

Note by the Rapporteur

No modification in Rome 2002 (SR, n° 171-172).

Article 1:9
(*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 1:7 (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 corresponding to obligations of an essentially 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 favouring assignment of rights as an efficient means of financing.

Article 1:9 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, if the assignor acted in contradiction to its contractual duties, it is liable to the obligor for breach of contract, under Chapter 7 of the Principles.

Illustrations

1. Contractor A is entitled to payment of USD 100,000 from its client X after a certain stage of 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.

2. Company X was to reimburse EUR 500,000 to Company A at a date when it could have partially set-off this obligation with a claim of EUR 200,000 it had against Company A. The contract between Companies X and A contained a non-assignment clause. In disregard of that clause, Company A assigns its right

to reimbursement to Company B. Company X may claim damages against Company A for the costs involved in having to engage in a separate procedure to recover the sum of EUR 200,000.

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), which leads to a fair balance between the conflicting interests of the three parties concerned. 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

3. Company X has agreed to communicate to Company A all improvements it will develop to a technical process during a period of time. Their contract stipulates that Company A's rights towards Company X are non-assignable. Company A does not need that technology for itself any more and attempts to assign its rights to Company B. Such assignment is ineffective. Company X does not become Company B's obligor. In such a case, Company B has a claim against Company A under article 1:15 (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 Company X would have a claim against Company A for breach of contract.

Note by the Rapporteur

Provision adopted in Rome 2002 (SR, n° 181).

Article 1:10

(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. 1:7 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 1:15 (f) 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 X is discharged. It will be up to Bank B to recover it from Seller A, under article 1:15 (f).

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.

Before receiving notice, the obligor is thus discharged when paying the assignor. The rule makes it irrelevant whether the obligor knew, or should have known of the assignment. The purpose is to put on the parties to the assignment, assignor and assignee, the burden of informing the obligee. This solution is considered to be justified in the context of international commercial contracts. It does not necessarily exclude, in certain circumstances, liability in damages of an obligor having acted in bad faith when paying the assignor.

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 receives no notice, it will be discharged by paying the assignor, as provided in article 1:10 (1).

2. Meaning of “ notice ”

“ *Notice* ” is to be understood in the broad sense of article 1.9 of the Principles. 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 1:6 above) and, in the case of partial assignment, the extent of the transfer.

3. Who should give notice

Article 1:10 (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 still performs in favour of the assignor. But notice given by the assignor has the same effect.

When notice is given by the assignee, the obligor may request adequate proof of assignment (see article 1:12 below).

4. When must notice be given

Article 1:10 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 in certain circumstances, *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 still pays that person afterwards would not be discharged any more.

Note by the Rapporteur

A paragraph has been added in Comment 1 following discussion in Rome 2002 (SR, n° 185).

Article 1:11

(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 1:11 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 1:15 (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 1:11 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 1:10 (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 1:12 below.

Note by the Rapporteur

Provision adopted in Rome 2002 (SR, n° 186).

Article 1:12

(Adequate proof of assignment)

(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.

(3) Unless adequate proof is provided, notice is not effective.

(4) 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 1:10 and 1:11 above, article 1:12 protects the obligor against the risk of getting fraudulent notice from a fake “assignee” by organising the provision of adequate proof that the assignment has actually been made. In the meantime, the obligor may withhold payment to the alleged assignee. If adequate proof is given, notice is effective from the date it was delivered.

Illustration

On December 1, Client X has to pay USD 10,000 to Contractor A as an instalment 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. Until such adequate proof is given, X may withhold payment.

Note by the Rapporteur

Provision adopted in Rome 2002 (SR, n° 188).

Article 1:13
(Defences)

- (1) The obligor may assert against the assignee all defences which the obligor could assert against the assignor.**
- (2) The obligor may assert against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.**

COMMENT

1. Assertion of defences

A right can in principle be assigned without the obligor’s consent (art. 1:7 (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 1:13 (1)), but to give the assignee, in such a case, a claim against the assignor (article 1:15 (d) below).

Illustration

1. 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 receipt. 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 1:15 (d).

The same solution applies to defences of a procedural nature.

Illustration

2. 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.

2. Set-off

The reduction or extinction by set-off of the assigned right may be asserted by the obligor against the assignee, provided the right of set-off was available to the obligor, under article ... (*article 1 of the Chapter on Set-Off*) of these Principles, before notice of the assignment was given.

This solution is in accordance with the principle that the obligor's situation should not deteriorate as a result of the assignment. The assignee's interests are protected by the claim it may then have against the assignor under article 1:15 (e) of this Chapter.

Illustration

3. Company A assigns to company B the right to payment of EUR 100,000 it has against Company X. However, Company X has a claim of EUR 60,000 against Company A. The two claims have not yet been set-off by notice given under article 3 of the Chapter on set-off, but the required conditions for set-off were satisfied before the assignment was notified. Company X may still assert set-off by giving notice to the assignee. Company B can then only claim EUR 40,000 from Company X. Company B can recover the difference from

Company A, which has undertaken that the obligor will not give notice of set-off concerning the assigned right.

Note by the Rapporteur

The language of paragraph (1) has been modified as suggested in Rome 2002 (SR, n° 189), to align it with the language of article 2:8.

Paragraph (2), modified in substance from the previous draft, has been adopted in Rome 2002 (SR, n° 209-210). The Comment and the Illustration have been adapted.

The Rapporteur submits that this modification should lead to a modification of article 1:15 (e) below : the assignor should undertake towards the assignee not only that the obligor has not given notice of set-off concerning the assigned right, but also that the obligor will not give any such notice. Comment n° 2 has been drafted on the assumption that this last solution is accepted.

Article 1:14

(Rights related to the right assigned)

Assignment of a right transfers to the assignee :

- (a) all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and**
- (b) all rights securing performance of the right assigned.**

COMMENT

1. Scope of the assignment

This provision derives from the same principle as article 1:13. Assignment transfers the assignor's right as it is, not only with the defences the obligor may be able to assert, but also with all rights to payment or other performance under the contract in respect of the right assigned, and all rights securing performance of the right assigned.

The following illustrations provide several examples of such rights.

Illustrations

1. Bank A is entitled to receive reimbursement of a loan of one million euros made to Customer X, bearing interest at the rate of 3%. Bank A assigns its right to reimbursement of the principal to Bank B. The assignment also operates as a transfer of the right to interest and of the underlying security.
2. The initial facts are the same as in Illustration 1, but the loan contract entitles Bank A to claim early repayment in case Customer X fails to pay interest due. This right is also transferred to Bank B.

3. The initial facts are again the same as in Illustration 1, but 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.

2. Partial assignment

In case a right is partially assigned, the rights covered by article 1:14 are transferred in 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.

3. Contractual deviations

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

4. 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

Without intending to affect the substance, we have introduced some drafting modifications to the provision approved in Rome (SR, n° 211), mainly by doing away with two references to the “claim assigned” and replacing them by references to the “right assigned”. This seems to be more appropriate in a Section dealing with “assignment of rights”.

Article 1:15

(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 not have any defences ;**
- (e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;**

(f) 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 in relation to a right to a payment already made or of a right previously avoided.

Illustration

1. 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 1:5 above, no such undertaking exists.

Illustration

2. 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 from assigning the right.

Illustration

3. Company X has agreed to communicate to Company A all improvements it will develop to a technical process during a period of time. Their contract stipulates that Company A's rights towards Consultant X are non-assignable. Company A does not need that technology for itself any more and attempts to assign its rights to Company B. This illustration was already given above, under article 1:9, to give an example of an ineffective assignment. In such a case, Company B has a claim against Company A under article 1:15 (b). It will be recalled that the solution would be reversed should Company B demonstrate that it did not know nor ought to have known of the non-assignment clause.

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 1:11, 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 1:13 (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

4. 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 1:13 (1). Bank B can then have a claim against Contractor A.

Set-off is a defence which may be asserted by the obligor if the right of set-off was available to the obligor before notice of assignment was received (see article 1:13 (2) above). The assignor undertakes towards the assignee that neither the assignor nor the obligor has already given notice of set-off affecting the assigned right. The assignor also undertakes that such notice will not be given in the future. If, for instance, the obligor were to give such notice to the assignee after the assignment, as permitted by article 1:13 (2), the assignee would have a claim against the assignor under this article 1:15 (e).

5. Reimbursement of payment by the obligor

Article 1:10 (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 any payment it receives from the obligor before notice of the assignment was given.

Illustration

5. 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 Comment on article 1:10, this payment is fully valid and B is discharged. However, article 1:15 (f) 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

6. 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 makes available the remedies provided for 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 is the text that was agreed upon in Rome 2002 (SR, n° 212), with a suggested modification in paragraph (e) as a consequence of the modification of article 1:13 (see above Rapporteur's note under article 1:13).

SECTION 2 : TRANSFER OF OBLIGATIONS

Article 2:1
(*Modes of transfer*)

An obligation to pay money or render other performance may be transferred from one person (the “original obligor”) to another person (the “new obligor”) either

a) by an agreement between the original obligor and the new obligor, or

b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

COMMENT

As well as the assignment of rights covered by Section 1 above, the transfer of obligations may serve useful economic purposes. For instance, if firm A can claim payment from its client B, but itself owes a similar amount to its supplier X, it may be practical to arrange for the client to become the supplier’s obligor.

Such transfer of an obligation may occur in two different ways.

1. Transfer by agreement between the original obligor and the new obligor

In practice, the more frequent way to transfer an obligation is by agreement between the “original ” and the “new ” obligors, with the obligee’s consent, under article 2:3 below.

Illustration

1. Firm A owes EUR 5,000 to its Supplier X, and Client B owes the same sum to Firm A. Firm A and Client B agree that the latter will take over the former’s obligation towards Supplier X; the obligation is transferred if Supplier X agrees to the transaction.

2. Transfer by agreement between the obligee and the new obligor

Another possibility is an agreement between the obligee and the new obligor, by which the new obligor accepts to take over the obligation.

Illustration

2. The products of Company X are sold by Distributor A on a certain market. The contract between the parties is close to termination. Distributor B enters into negotiations with Company X, proposing to take over the distributorship. In order to gain Company X’s acceptance, Distributor B promises that it will

assume a debt of EUR 5,000 still owed by Distributor A to Company X, and Company X accepts. Distributor B has become Company X's obligor.

3. Obligee's consent necessary

In both cases, the obligee must give its consent to the transfer. This is obvious when the transfer occurs by agreement between the obligee and the new obligor. In the other situation, the requirement is stated in article 2:3 below; consent may be given in advance under article 2:4.

Without the obligee's consent, the obligor may agree with another person that this person will perform the obligation under article 2:6 below.

4. Transfer by agreement only

Only transfers by agreement are governed by this Section, as opposed to situations where the applicable law may provide for legal transfers (such as, under certain jurisdictions, the *ipso iure* transfer of obligations in merger of companies transactions – see article 2:2 below).

5. Obligations in respect of payment of money or other performance

This Section is not restricted to transfer of obligations in respect of payment of money; it also covers transfer of obligations relating to other kinds of performance, such as the rendering of a service. Nor are transferable obligations limited to obligations of a contractual nature. Obligations deriving from tort law or based on a judgment, for instance, can be governed by the present Chapter, subject to art. 1.4 of the Principles.

6. What is meant by “transfer”

“Transfer” of an obligation means that it leaves the original obligor's passive assets to enter the new obligor's.

However, in some cases, the new obligor becomes bound towards the obligee, but the original obligor is not discharged : see article 2:5 below.

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 214). The Comments have been reorganised.

The opening words (“For the purposes of this Section ...”) have been deleted.

Article 2:2
(*Exclusion*)

This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.

COMMENT

The present rules do not apply to transfers of obligations made in the course of transferring a business under special rules governing such transfers, as it may happen in the case of mergers of companies. The applicable law often provides for mechanisms that cause all rights and obligations, under certain conditions, to be transferred *ipso iure* and globally.

Article 2:2 does not prevent the Principles from applying when certain obligations pertaining to the transferred business are transferred individually.

Illustrations

1. Company A is acquired by Company B. If the otherwise applicable law provides that all obligations pertaining to the former company are automatically transferred to the latter, the Principles do not apply.
2. The initial facts are the same as in Illustration 1, but Company B has reasons to prefer not to become the obligor of firm X, one of Company A's suppliers. Company A can transfer the obligations concerned to Company C, with the consent of firm X. This particular transfer is subject to the Principles.

Note by the Rapporteur

This provision was agreed upon in Rome (SR, n° 216).

Article 2:3

(Requirement of obligee's consent to transfer)

Transfer of an obligation by an agreement between the original and the new obligor requires the consent of the obligee.

COMMENT

1. Agreement between original and new obligors

As stated in article 2:1 (a) above, transfer of an obligation may occur by agreement between the original obligor (the "original" obligor) and the person who will become the "new" obligor.

2. Obligee's consent required

This agreement, however, does not suffice to transfer the obligation. It is also necessary that the obligee gives its consent.

This is different from the corresponding rule on assignment of rights, where the operation is in principle effective without the consent of the obligor (article 1:7 above). Assignment of a right does not affect the obligor's situation, except that the obligor will have to deliver performance to another person. On the contrary, a change of obligor may considerably affect the obligee's position, as the new obligor may be less reliable than the original one; the change may not be imposed on the obligee, who must give its consent to it.

Illustration

Company A owes USD 15,000 to Company X, located in Asia, for services rendered. Due to a reorganisation of the group, Company A's activities in Asia are taken over by affiliate Company B. Companies A and B agree that Company B will take over Company A's debt towards Company X; the obligation is transferred only if Company X gives its consent.

3. Original obligor not necessarily discharged

With the obligee's consent, the new obligor becomes bound by the obligation. It does not necessarily follow that the original obligor is discharged : see article 2:5 below.

4. Lack of consent by the obligee

If the obligee refuses to consent to the transfer, or if its consent is not solicited, an arrangement for third party performance is possible under article 2:6 below.

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 222).

Article 2:4

(Advance consent of obligee)

(1) The obligee may give its consent in advance.

(2) [Where paragraph 1 applies,] [t]he transfer of the obligation becomes effective when notice of the transfer is given to the obligee or when the obligee acknowledges it.

COMMENT

1. Advance consent by the obligee

The obligee's consent, required under article 4 above, may be given in advance.

Illustration

1. Licensor X enters into a transfer of technology agreement with Licensee A. For a period of ten years, Licensee A will have to pay royalties to Licensor X. When the contract is concluded, Licensee A envisages that some time in the future, it would prefer the royalties to be paid by its affiliate Company B. Licensor X may agree in advance in the contract that the obligation to pay the royalties will possibly be transferred by Licensee A to Company B.

2. When the transfer is effective as to the obligee

According to paragraph 2, if the obligee has given its consent in advance, the transfer of the obligation becomes effective when it is notified to the obligee or when the obligee acknowledges it. It means that it is sufficient for either the original or the new obligor to notify the transfer when it occurs. Notification is not needed if it appears that the obligee has acknowledged the new transfer, to which it had given its consent in advance. “Acknowledgement” means giving an external sign of having become aware of the transfer.

Illustrations

2. The initial facts are the same as in Illustration 1, but there comes a time when Licensee A actually agrees with Company B that from now on the latter will take over the obligation to pay the royalties. This decision becomes effective when notice is given to Licensor X.

3. No notice is given, but for the first time, Company B pays the yearly royalties. Licensor X writes to Company B to acknowledge receipt of the payment and to confirm that it will from then on expect Company B to pay the royalties. The transfer is effective with this acknowledgement.

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 232). A sentence has been added in Comment 2 concerning the meaning of “acknowledgement” (see SR, n° 230 and 231).

Article 2:5

(Discharge of original obligor)

(1) The obligee may discharge the original obligor.

(2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.

(3) Otherwise the original obligor remains as an obligor, jointly and severally with the new obligor.

COMMENT

1. Extent of original obligor's discharge

The obligee's consent, whether under article 2:1 (b) or under article 2:3, has the effect that the new obligor becomes bound by the obligation. Another issue is to determine whether the original obligor is discharged. In all cases, this will depend on the choices which are available to the obligee. In the case of article 2:1 (b), it also depends on the original obligor.

2. Obligees choice : full discharge

A first possibility open to the obligee is to accept to fully discharge the original obligor.

Illustration

1. Supplier X accepts that its obligor Company A transfers its obligation to pay the price to Client B. Fully confident that the new obligor is solvent and reliable, Supplier X discharges Company A. Should Client B fail to perform, the loss will be on Supplier X, who will have no recourse against Company A.

However, the obligee, who is in any case entitled to refuse its consent, may also accept on the condition that it retains a claim against the original obligor.

This can be done in two different ways.

3. Obligees choice : original obligor retained as a subsidiary obligor

The second possibility is that the original obligor is retained as an obligor in case the new obligor does not perform properly. In this case, the obligee must necessarily claim performance first from the new obligor. The original obligor will be called upon only if the new obligor does not perform properly.

Illustration

2. Supplier X accepts that its obligor Company A transfers its obligation to pay the price to Client B, but this time stipulates that Company A will remain bound in case Client B does not perform properly. Supplier X no more has a direct claim against Company A, and must first require performance from Client B. Should however Client B fail to perform, then Supplier X would have a claim against Company A.

4. Obligees choice : original obligor retained as joint and several obligor – default rule

Another possibility, the more favourable for the obligee, is to retain the original obligor as an obligor jointly and severally bound with the new obligor. This means that

when performance is due, the obligee can exercise its claim against either the original or the new obligors. Should the obligee obtain performance from the original obligor, the latter would then have a claim against the new obligor.

The language of the provision makes this option the default rule. Unless the obligor has agreed to discharge the original obligor, or to keep the original obligor only as a subsidiary obligor, the original obligor remains jointly and severally bound to the obligor.

Illustration

3. Supplier X accepts that its obligor Company A transfers its obligation to pay the price to Client B, but this time stipulates that Company A will remain bound jointly and severally with Client B (or nothing is said on the issue). In such cases, Supplier X may require performance either from Company A or from Client B. Should Client B perform properly, both original and new obligors would be fully discharged. Should Company A have to render performance to Supplier X, it would then have a recourse against Company B.

5. Original obligor refusing to be discharged

When the obligation is assumed by an agreement between the obligee and the new obligor, as provided in article 2:1 (b), this agreement would amount to a contract in favour of a third party if its effect were to discharge the original obligor. Under *article 6 of the Section on Third party rights*, this cannot be imposed on the beneficiary, who may have reasons not to accept such a benefit. The original obligor may thus refuse to be discharged by this agreement between the obligee and the new obligor.

If such refusal occurs, the new obligor is bound to the obligee, but the original obligor remains bound, jointly and severally with the new obligor, in harmony with the default rule of article 2:5 (3).

Illustration

4. In the first three illustrations given under this article 2:5, [??] Company A may be happy to be relieved of its debt of EUR 5,000 at the end of its relationship with Company X, and thus accept to be discharged. However, Company A may also want to keep its chances of benefiting from a renewal of its contract with Company X, and in that context wish to keep the relationship by insisting on remaining bound by its debt towards the obligee. Company A may refuse to be discharged.

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 255).

Article 2:6
(Third party performance)

(1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation, in the circumstances, has an essentially personal character.

(2) The obligee retains its claim against the obligor.

COMMENT

1. Agreement on performance by another party

Obligations can be transferred either by agreement between the original and the new obligors, with the obligee's consent (article 3 above), or by agreement between the new obligor and the obligee (article 6 above).

In another set of situations, the obligee does not give its consent. Either such consent has not been solicited, or it has been refused. It is then possible for the obligor to agree with another person that this person will perform the obligation in place of the former. When performance becomes due, the other person will render it to the obligee.

While an obligee may refuse to accept a new obligor before performance is due, it may not in principle refuse to accept the performance itself when it is offered by another party.

Illustration

1. Companies A and B have entered into a cooperation agreement for their activities on a certain market. At one point they decide to redistribute some tasks. Company B will take over all operations concerning telecommunications, which were previously Company A's responsibility. Company A was bound to pay an amount of USD 100,000 to Company X, a local operator, on the following October 30. The two partners agree that Company B will pay that amount when it is due. On October 30, Company X may not refuse such payment made by Company B.

2. Obligation of an essentially personal character

Third party performance may not be refused by the obligee in all cases where it would be equally satisfactory as a performance were it rendered by the obligor. The situation is different when performance due is of an essentially personal character, linked to the obligor's specific qualifications. The obligee may then insist on receiving such performance by the obligor itself.

Illustration

2. In the above example, Company B also takes over operations concerning maintenance of some sophisticated technological equipment developed by Company A and sold to Company Y. The partners agree that the next yearly

maintenance will be done by Company B. When Company B's technicians arrive at Company Y's premises to do the work, Company Y may refuse their intervention, invoking the fact that due to the highly technical nature of the verifications involved, they are entitled to receive performance from Company A in person.

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 259).

Article 2:7
(Defences)

The new obligor may assert against the obligee all defences which the original obligor could assert against the obligee, except set-off.

COMMENT

1. Assertion of defences

The obligation transferred to the new obligor is the very same obligation that used to bind the original obligor (and, in some cases, still binds it – see article 2:5 above).

Whenever 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, the new obligor may rely on the same defences against the obligee.

Illustration

1. Company A owes Company X an amount of EUR 200,000, due at the end of the year, as the price to be paid for facilities management services. Company A transfers this obligation to Company B, with Company X's consent. It happens that Company X renders extremely defective services to Company A, which would have given Company A a valid defence for refusing payment. When payment is due, Company B may assert the same defence against Company X.

2. Defences of a procedural nature

The same solution applies to defences of a procedural nature.

Illustration

2. The facts are the same as in Illustration 1. Company X sues Company B before its national courts. Company B can successfully invoke the arbitration clause included in the contract between Companies A and X.

3. Set-off

The defence of set-off relating to an obligation owed by the obligee to the original obligor, however, may not be asserted by the new obligor. The reciprocity requirement is no longer fulfilled between the obligee and the new obligor. The original obligor may still assert set-off if it has not been discharged.

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 261).

Article 2:8

(Rights related to the obligation transferred)

(1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred.

(2) If the original obligor is discharged under article 2:6 (1), a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.

(3) Discharge of the original obligor also extends to any security of the original obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the original and the new obligors.

COMMENT

1. Scope of the transfer

This provision derives from the same principle as article 2:7. The obligation is transferred to the new obligor as it is, not only with the defences the original obligor was able to assert, but also with all rights to payment or other performance under the contract in respect of the obligation transferred.

The following illustrations provide examples of such rights.

Illustrations

1. Company A owes Bank X reimbursement of a loan of one million euros, bearing interest at the rate of 3%. Customer A transfers its obligation to reimburse the principal to Company B. The transfer also includes the obligation to pay the 3% interest.
2. The initial facts are the same as in Illustration 1, but the loan contract entitles Bank X to claim premature reimbursement in case Customer X fails to pay interest due. Bank X can also assert this right against Company B.

2. Contractual deviations

Party autonomy permits deviations from the rule in article 2:8, such as a separate transfer of the obligation to pay interest.

3. Securities in assignment of rights and transfer of obligations compared

In the case of an assignment of a claim, all rights securing performance are automatically transferred to the assignee (see article 1:14 (b) above). This solution is justified by the fact that assignment of a claim does not alter the obligor's situation, i.e. securities can continue to serve their purposes in unchanged circumstances.

Transfer of an obligation to a new obligor, on the contrary, modifies the context in which the security has been granted. If the original obligor is discharged, and if the security were to be transferred with the obligation, the risk of breach or insolvency to be covered would be that of another person, thus completely altering the object of the security.

4. Personal securities

If the original obligor's obligation was covered by security granted by a person, this security can survive if the original obligor remains bound. If, on the other hand, the original obligor is discharged, the personal security cannot be transferred to cover the new obligor, unless the person who granted the security agrees that it should continue to be available to the obligee.

Illustration

3. Company A owes one million dollars to Company X. Bank S has agreed to provide its guarantee for the due performance of this obligation. With Company X's agreement, Company A transfers the obligation to Company B, and Company X accepts to discharge Company A. Bank S does not guarantee Company B's obligation, unless it agrees to continue to provide the security.

A special case occurs when the security was granted by the person who was itself to become the new obligor. In such a case, the security necessarily disappears, since a person cannot provide a security for its own obligations.

5. Securities over assets

The original obligor may have given security on one of its assets. In this case, if the obligation is transferred and the original obligor is discharged, the security ceases to cover the obligation now binding the new obligor.

Illustration

4. Bank X has granted a loan of EUR 100,000 to Company A, secured by a deposit of shares by the obligor. With Bank X's agreement, Company A transfers the obligation to pay back the loan to Company B, and Bank X accepts to discharge Company A. The shares cease to serve as security.

The solution is different if the asset which was given as security is transferred as part of a transaction between the original and the new obligors.

Illustration

5. The initial facts are the same as in Illustration 4, but the transfer of the obligation between Companies A and B occurs as part of a broader operation in which ownership of the shares is also transferred to Company B. In such a situation, the shares will continue to serve as security for Company B's obligation to reimburse the loan.

Note by the Rapporteur

This provision was not modified in Rome 2002 (SR, n° 261-262).

SECTION 3 : ASSIGNMENT OF CONTRACTS

Article 3:1
(Definitions)

“ 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 of a contract with another person (the “ other party ”).

COMMENT

Rights and obligations can be transferred separately, under the respective rules of Sections 1 and 2 above. In some cases, however, a contract is assigned as a whole. More precisely, a person transfers to another person all the rights and obligations deriving from its being a party to a contract. A contractor, for instance, may wish to let another contractor replace it as one of the parties in a construction contract with a client. The rules of the present Section cover assignments of contracts as defined in Article 3:1.

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 *ipso iure* transfer of contract in merger of companies operations – see article 3:2 below).

Note by the Rapporteur

This text was adopted in Rome 2002 (SR, n° 263).

The opening words of the earlier text (“In the Principles ...”) have been deleted.

Article 3:2
(Exclusion)

This Section does not apply to assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.

COMMENT

Assignments of contracts may be subject to special rules of the applicable law when they are made in the course of transferring a business. Such special rules often

provide for mechanisms that cause all contracts, under certain conditions, to be transferred *ipso iure*.

Article 3:2 does not prevent the Principles from applying when certain contracts pertaining to the transferred business are assigned individually.

Illustrations

1. Company A is taken over by Company B. If the otherwise applicable law provides that all contracts to which the former company was a party are automatically transferred to the latter, the Principles do not apply.
2. The initial facts are the same as in Illustration 1, but Company B is not interested in taking over a contract with Company X, and prefers that contract to be assigned to Company C. This particular transfer is subject to the Principles.

Note by the Rapporteur

This text was adopted in Rome 2002 (SR, n° 265).

Article 3:3

(Requirement of consent of the other party)

Assignment of a contract requires the consent of the other party.

COMMENT

1. Agreement between assignor and assignee

The first requirement to assign a contract is that assignor and assignee agree on the operation.

2. Other party's consent required

This agreement, however, does not suffice to transfer the contract. It is also necessary that the other party gives its consent.

If it were only for the assignment of the rights involved, such consent would in principle not be needed (see article 1:7 above). However, assignment of a contract also involves a transfer of obligations, which cannot be effective without the obligee's consent (see article 2:3 above). Thus assignment of a contract can only occur with the other party's consent.

Illustration

Office space is rented by Owner X to Company A. The contract expires only six years from now. Due to the development of its business, Company A wants to move to larger premises. Company B would be interested to take over the lease. The contract can be assigned by agreement between companies A and B, but the operation also requires Owner X's consent.

3. Assignor not necessarily discharged of its obligations

With the other party's consent, the assignee becomes bound by the assignor's obligations under the assigned contract. It does not necessarily follow that the assignor is discharged : see article 3:5 below.

Note by the Rapporteur

This text was adopted in Rome 2002 (SR, n° 267).

Article 3:4

(Advance consent of the other party)

(1) The other party may give its consent in advance.

(2) [Where paragraph 1 applies,] [t]he assignment of the contract [then] becomes effective when notice of the assignment is given to the other party or when the other party acknowledges it.

COMMENT

1. Advance consent by the other party

The other party's consent, required under article 3:3 above, may be given in advance.

This rule, concerning assignment of contracts, corresponds to the rule in article 2:4 above in the Section dealing with transfer of obligations. The obligee, who must consent to the transfer of the obligation, may express this consent in advance. Similarly, the other party, who must consent to the assignment of the contract, may also give its consent in advance.

Illustration

1. Company X enters into an agreement with Agency A, providing that the latter will be responsible for advertising Company X's products in Spain for the next five years. Agency A, however, is already considering ceasing its activities in Spain in the not too distant future, and obtains Company X's advance consent

that the contract may be assigned later to Agency B, located in Madrid. This advance consent is effective under Article 3:4.

2. When the assignment of the contract is effective as to the other party

According to paragraph 2, if the other party has given its consent in advance, the assignment of the contract becomes effective when it is notified to the other party or when the other party acknowledges it. This means that it is sufficient for either the assignor or the assignee to notify the assignment when it occurs. Notification is not needed if it appears that the other party has acknowledged the assignment of the contract, to which it had given its consent in advance. “Acknowledgement” means giving an external sign of having become aware of the transfer.

Illustrations

2. The initial facts are the same as in Illustration 1. When Agency A actually assigns its contract to Agency B, the assignment becomes effective as to the other party when either Agency A or Agency B notifies it to Company X.
3. No notice is given, but Agency B sends Company X a proposal for a new advertising campaign. Company X understands the assignment has taken place and sends its comments on the proposal to Agency B. The assignment of the contract is effective with this acknowledgement.

Note by the Rapporteur

This text was adopted in Rome 2002 (SR, n° 268).

Article 3:5

(Discharge of the assignor)

- (1) 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.**

COMMENT

1. Extent of assignor’s discharge

This rule, concerning assignment of contracts, corresponds to the rule in article 2:6 above in the Section dealing with transfer of obligations. Inasmuch as assignment of a contract causes obligations to be transferred from the assignor to the assignee, the other party, as an obligee, may decide which effect acceptance of the assignee as a new

obligor has on the assignor's obligations. Article 3:5 gives the other party several choices and provides for a default rule.

2. Other party's choice : full discharge

A first possibility open to the other party is to accept to discharge the assignor fully.

Illustration

1. By contract with Company X, Company A has undertaken to dispose of the waste produced by an industrial process. At one point, Company X accepts that the contract is assigned by Company A to Company B. Fully confident that the Company B is solvent and reliable, Company X discharges Company A. Should Company B fail to perform properly, Company X will have no recourse against Company A.

However, the other party, who is in any case entitled to refuse its consent, may also accept on the condition that it retains a claim against the assignor.

This can be done in two different ways.

3. Other party's choice : assignor retained as a subsidiary obligor

The first possibility is that the assignor is retained as an obligor in case the assignee does not perform properly. In this case, the other party must necessarily claim performance first from the assignee. The assignor will be called upon only if the assignee does not perform properly.

Illustration

2. The initial facts are the same as in Illustration 1, but this time, Company X, when consenting to the assignment, has stipulated that Company A will remain bound in case Company B does not perform properly. Company X no more has a direct claim against Company A, and must first require performance from Company B. Should Company B however fail to perform, then Company X would have a claim against Company A.

4. Other party's choice : assignor retained as joint and several obligor – default rule

Another possibility, the more favourable for the other party, is to retain the assignor as an obligor jointly and severally bound with the assignee. This means that when performance is due, the other party can exercise its claim against either the assignor or the assignee. Should the other party obtain performance from the assignor, the latter would then have a claim against the assignee.

The language of the provision makes this option the default rule. Unless the other party has agreed to discharge the assignor, or to keep the assignor only as a subsidiary obligor, the assignor remains jointly and severally bound towards the other party.

Illustration

3. Company X accepts that Company A assigns the contract to Company B, but this time stipulates that Company A will remain bound jointly and severally with Company B (or nothing is said on the issue). In such cases, Company X may require performance either from Company A or from Company B. Should Company B perform properly, both assignor and assignee would be fully discharged. Should Company A have to render performance to Company X, it would then have a recourse against Company B.

5. Differentiated options possible

A party to a contract is often subject to a whole set of obligations. When the contract is assigned, the other party may choose to exercise different options with regard to the different obligations. The other party may for instance accept to discharge the assignor for a certain obligation, but to retain it either as a subsidiary obligor or as a joint and several obligor for other obligations.

Illustration

4. Company A has entered into a know how licence contract with Company X. In return for the transferred technology, Company A has undertaken to pay royalties and to cooperate with Company X in the development of a new product. When later Company X accepts that Company A assigns the contract to Company B, Company X discharges Company A from the obligation to participate in the joint research, for which it will be satisfied to deal with the assignee only, but retains Company A as a subsidiary (or joint and several) obligor concerning payment of the royalties.

Note by the Rapporteur

This text was adopted in Rome 2002 (SR, n° 369).

Article 3:6 (Defences)

(1) To the extent that assignment of a contract involves an assignment of rights, article 1:13 applies accordingly.

(2) To the extent that assignment of a contract involves a transfer of obligations, article 2:7 applies accordingly.

COMMENT

Assignment of a contract entails both an assignment of the original rights and a transfer of the original obligations from the assignor to the assignee. The transaction

should not impair the other party's situation as an obligor and it should put the assignee in the same situation as the assignor in its capacity as an obligor.

As a consequence, the above provisions concerning defences in Sections 1 and 2 above should apply accordingly. When the assignee exercises its rights, the other party may assert all defences it could have asserted as an obligor if the claim had been made by the assignor (in conformity with article 1:13 above). When the other party exercises its rights, the assignee may assert all defences which the assignor could have asserted as an obligor if the claim had been made against it (in conformity with article 2:7 above)

Illustrations

1. Company X has outsourced its risk management department to Consultant A. With Company X's consent, the contract is assigned to Consultant B. Company X then suffers a considerable loss for which it was not properly insured, due to Consultant A's incompetence. Pending indemnification, Company X may suspend paying the agreed fees to Consultant B.
2. Airline Company A has a contract with Catering Company X. Company A transfers the operation of its flights to certain destinations to Airline Company B. With Company X's consent, the catering contract is assigned by Company A to Company B. Litigation later arises, and Catering Company X sues Airline Company B before its national courts. Airline Company B may successfully invoke as a procedural defence that the assigned contract includes an arbitration clause.

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 272).

Article 3:7

(Rights transferred with the contract)

(1) To the extent that assignment of a contract involves an assignment of rights, article 1:14 applies accordingly.

(2) To the extent that assignment of a contract involves a transfer of obligations, article 2:8 applies accordingly.

COMMENT

Assignment of a contract entails both an assignment of the original rights and a transfer of the original obligations from the assignor to the assignee. In parallel to what has been said about defences under article 3:6, the operation should not impair the other party's situation as an obligee and it should put the assignee in the same situation as the assignor as an obligee.

As a consequence, the above provisions of Sections 1 and 2 concerning rights related to the claim assigned and to the obligation transferred should apply accordingly.

When the assignee acts against the other party, it may assert all rights to payment or other performance under the contract assigned in respect to the rights assigned, as well as all rights securing such performance (in conformity with article 1:14 above). When the other party exercises its rights, it may assert against the assignee all its rights to payment or other performance under the contract in respect of the obligation transferred (in conformity with article 2:8 (1) above); securities granted for the performance of the assignor's obligations are maintained or discharged according to the rules in article 2:8 (2) and (3) above.

Illustrations

1. A service contract provides that late payment of the yearly fees due by Client X to Supplier A will bear interest at the rate of 10%. With Client X's consent, Supplier A assigns the contract to Supplier B. When Client X fails to pay the yearly fees in time, Supplier B is entitled to claim such interest (see article 1:14 (a)).
2. The facts are the same as in Illustration 1, but Client X has also provided Supplier A with a bank guarantee covering payment of the fees. Supplier B may call upon that guarantee should Client X fail to pay the fees (see article 1:14 (b)).
3. Company X has ordered the construction and the installation of industrial equipment from Company A. Performance levels have been agreed, and the contract provides for liquidated damages should actual performance be insufficient. With Company X's consent, Company A assigns the contract to Company B. The assignee delivers equipment that does not meet the required performance levels. Company X may avail itself of the liquidated damages against Company B (see article 2:8 (1)).
4. The facts are the same as in Illustration 3, but Company A has provided Company X with a bank guarantee covering satisfactory performance. The bank guarantee will not apply to Company B's obligations resulting from the assignment, unless the bank accepts to continue to offer its guarantee in respect of the assignee's obligations (see article 2:8 (2)).

Note by the Rapporteur

This provision was adopted in Rome 2002 (SR, n° 273).