UNIDROIT 2000
Study L – WP.3
(English only)

UNIDROIT

International Institute for the Unification of Private Law

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Meeting of the Drafting Group in Freiburg, 17-20 January 2001

Chapter […]

ASSIGNMENT OF RIGHTS, TRANSFER OF DUTIES, 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)

Rome, December 2000

INTRODUCTORY REMARKS

Section 1 : Assignment of rights

It appeared in Cairo that for clarity's sake, it was advisable to split former article 3 into different provisions, as it covered too many different matters. This has been done in the revised draft, bringing along a global reorganization of the articles.

Matters formerly governed by art. 3 have been redistributed as follows :

- Former art. 3 (1) :

    - Partial assignment : art. 3
    - Rights of a personal character : art. 6 (2)

- Former art. 3 (2) - non-assignment clauses : art. 7.

- Former art. 3 (3) - future rights : art. 4.

- Former art. 3 (4) - bundle assignments : art. 5.

- Former art. 3 (5) - assignment as security : Comments to art. 1.

The new sequence is based on the following structure :

- Definition, scope of application, special types of assignments : art. 1-5
- Basic relationships between assignor, assignee and obligor : art. 6-9
- Defenses and accessory rights : art. 10-11
- Undertakings of the assignor towards the assignee : art. 12.

The former draft provided for the possibility of having a provision on the effect of assignment towards third parties other that the obligor (former art. 10). There was a discussion in Cairo where several options were considered, and article 12.401 (3) of the Goode draft was examined. It was finally suggested not to have a black letter rule on such a complicated and sensitive issue, but to say something in the Comments of what was then art. 4 (now art. 6). It has been done - very briefly - in the Comments of both article 1 and article 6.

Section 2 : Transfer of duties
Section 3 : Assignment of contracts

These two subjects are covered by pp. 11-17 of our initial Position Paper (UNIDROIT 1999 Study L-Doc.61), which have not yet been the subject of a preliminary discussion in the group.

Section 1 : Assignment of rights

Article 1 *(Definition)*

For the purposes of this Chapter, " Assignment of a right " means the transfer 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.

Only transfers by agreement are concerned, as opposed to various situations where the applicable law may provide for legal transfers (e.g., under certain jurisdictions, the transfer to the purchaser of an insured building of the seller's rights against the insurer).

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

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.

" Transfer " of the right means that it leaves the assignor's assets to enter the assignee's. This solution remains subject to third party rights, which are partly covered by this Chapter (cf. art. 9 concerning the obligee and subsequent assignees), and may in some instances be governed by mandatory rules of the applicable law (e.g. the law of bankruptcy). The definition also applies to transfers for security purposes.

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 a sentence at the end of the Comments of this article 1, stating that the definition also covers assignment as security. This follows one

of the options given in Cairo (n° 599-600) ; the other one was to include a statement about assignment as security in the black letters of the same article 1).

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 seems that it was finally decided they were not covered by the Principles, which dealt only with assignment of rights by agreement. Therefore it was decided to begin the definition by the phrase "For the purposes of this Chapter...", *thus leaving aside the question nof 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).

Article 2 *(Scope of application)*

This Section does not apply to assignments :
(a) made by means of a negotiable instrument ;
(b) made as part of the transfer of a business as a whole.

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.

This applies in the first place to assignments made by means of a negotiable instrument, such as a bill of exchange or a bill of lading. The rights embodied in such an instrument can be transfered 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.

The exclusion also applies to assignments made as part of the transfer of a business as a whole, such as in the case of a merger of companies. The applicable law often provides for mechanisms that cause all rights and duties, under certain conditions, to be transferred globally. Article 2 (b) does not prevent the Principles to apply when certain rights pertaining to the transferred business are assigned individually.

Illustration

Company A is absorbed by Company B. The applicable law will often provide that all rights pertaining to the former company are automatically transfered to the latter, and the Principles do not apply. 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 means of a negotiable instrument"). 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 a business as a whole"*).*

Article 3 *(Partial assignment)*

• ***Variant 1***

(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 is divisible.
(3) The assignor must indemnify the obligor for any increase in the expenses incidental to performing in several parts.

COMMENT

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.

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.

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 indemnify Buyer X.

2. Metal Company X is to deliver 10 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 to. 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.

• ***Variant 2***

A right may not be assigned partially if such partial assignment renders the obligation more burdensome.

• ***Variant 3***

A right may not be assigned partially without the obligor's consent.

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 and we submit three.

Variant 1 takes some inspiration from the Goode draft, art. 12.103, quoted at Cairo, n° 447. A different criterium is however submitted for the admission of partial assignment of non-monetary rights (the concept of divisibility already appears in article 7.3.6 (1) of the Principles, admittedly in a different context). The language of (3) is inspired by article 6.1.6 (2).

Variant 2 corresponds to the alternative suggestion made at the end of the discussion in Cairo (n° 490 ; also see e.a. n° 470, 471, 484-489). Variant 3 follows another tendency appeared earlier in the discussions (see e.a. n° 442, 443).

We did not develop Variants 2 and 3 as we have a strong preference for Variant 1. A rule along the line of Variant 2 could be the cause of many difficulties in practice (how does one decide the obligation has become " more burdensome " *? cannot the obligor argue it is always the case with partial assignment ?). On the other hand, submitting all partial assignments to the obligor's consent would seriously impair the possibility of such split transfers, thus having a rule in the Principles that would hinder useful economic operations.*

Variant 1 seems to provide a balanced solution, which allows for partial assignments to take place (more or less liberally according to whether the right is monetary or not), but always gives the obligor the right to be compensated for extra costs.

Article 4 *(Future rights)*

• ***Variant 1***

Assignment of a future right is effective when the right comes into existence, provided it can then be identified as the right to which the assignment relates.

COMMENT

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.

" Effective " relates to the transfer of the right from the assignor's assets to the assignee's. 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.

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.

• ***Variant 2***

Assignment of a future right is effective at the time of the assignment, provided such right, when it comes into existence, can be identified as the right to which the assignment relates.

COMMENT

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.

" Effective " relates to the transfer of the right from the assignor's assets to the assignee's. ***(comp. Le Caire note bas p. 75 !)*** Assignment of such 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. This protects the assignee against the supervening insolvency of the assignor, but without prejudice to the notice requirement provided in article 8.

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.

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.

Both variants attempt to express a determinability requirement as suggested (n° 560-565). Inspiration has been taken from the Goode draft (n° 564).

We have also tried to clarify one point. Instead of writing " assignment of a future right … " operates "… "*, as in the preceding version, we chose the expression* " is effective "*, to align with the language of article 7, and we gave an explanation in the Comments.*

Article 5 *(Bundle assignment)*

A bundle 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. 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 by* " bundle of rights " *as suggested (n° 571).*

" Identification " *has been made more precise* (" as rights to which the assignment relates "*), in accordance with article 4.*

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

Article 6 *(Agreement between assignor and assignee)*

(1) The right is assigned by mere agreement between assignor and assignee.
(2) The consent of the obligor is not required, unless the right has an exclusively 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 9 are operative provisions which govern the respective legal positions of assignor, assignee and obligor.

(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 an agreement between these two parties.

As already stated in the Comments under article 1, this solution remains subject to third party rights, which are partly covered by this Chapter (cf. art. 8 concerning the obligee and subsequent assignees), and may be in some instances governed by mandatory rules of the applicable law (e.g. the law of bankruptcy).

It will also be recalled that this Chapter does not govern so-called " unilateral " transfers, which may intervene, under certain jurisdictions, without the assignee's participation.

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.

(2) 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 assigment to be effective between assignor and assignee. This is explicitly stated is paragraph (2).

An exception is made for the case the right to be assigned is of an exclusively 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

infra, 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 *infra*, 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).

The formula used in the third paragraph of the comments of (1) attempts to avoid entering into the difficulties resulting from the fact that under certain jurisdictions, an assignment is not considered as a contract (comp. e.a. n° 631, 632, 633, 638, 640, 643).

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 exclusively personal character (comp. the former art. 3 (1)) to this new paragraph (2), since such rights can after all be transfered 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.

The preceding considerations govern the sequence in which articles 6 to 9 have been arranged.

Article 7 *(Non-assignment clauses)*

(1) Assignment of a right to payment of a monetary sum is effective notwithstanding any agreement between the assignor and the obligor limiting or prohibiting such assignment, without prejudice to the assignor's liability towards the obligor for breach of contract.
(2) Assignment of a right to other performance is ineffective, when it is contrary to an agreement between the assignor and the obligor limiting or prohibiting such assignment.
[(3) However, in the case of the preceding paragraph (2), assignment is effective if the assignee, at the time of assignment, did not know and ought not to have known of the agreement, without prejudice to the assignor's liability towards the obligor for breach of contract.]

COMMENT

Article 6 (2) 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.

(1) In the former case, preference is given 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. Contactor 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) and (3) Assignment of rights to non-monetary performance do not bear the same relationship to credit, thus justifying another solution. 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, while assignor is 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 lenghty 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). 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 paragraph (3) between brackets.*

Article 8 *(Notice to the debtor)*

(1) The assignor or the assignee or both may give the obligor notice of the assignment.
(2) If notice of the assignment is given by the assignee, the obligor is entitled to 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 obligor is discharged by paying the assignor. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

COMMENT

While between assignor and assignee, the assignment is effective as the result of their agreement (art. 6 above), notice must be given to the obligor to induce the consequences provided in article 8 below.

" 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 and, in the case of partial assignment, the extent of the transfer.

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 article 9 (2) is a matter of interpretation, depending e.a. on the definiteness of the clause regarding the identity of the future assignee.

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.

Since receiving such notice has such important effects, paragraph (2) protects the obligor against the risk of getting fraudulent notice from a fake " assignee " by organizing the provision of adequate proof that the assignement 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

Paragraph (1) corresponds to the former art. 6. We have deleted " unless otherwise agreed … " *as the possibility of different contractual arrangements is always present under art. 1.5 of the Principles.*

Some explanations have been given in the Comments as to the meaning of " notice ", its form (with a reference to article 1.9) and its contents, which must contain minimuim information, e. a. in the cases of partial assignment (Cairo, n° 769-773) and anticipatory notice (Cairo, n° 720).

Paragraph (2) originally stood (in a partly different wording) as art. 7 (3). It was decided in Cairo (though not reported in the minutes) *to move the provision as the continuation of the former art. 6.*

Article 9 *(Discharge of the obligor)*

(1) Until receiving notice of the assignment, the obligor is discharged by paying the assignor.
(2) After receiving such notice, the obligor is discharged only by paying the assignee.
(3) If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying in accordance to the first notice received.

COMMENT

Paragraphs (1) and (2) determine the obligor's position in respect to payment to be made, before and after receiving notice. In the former case, the debtor is discharged if it still pays the assignor (the assignee can then recover that payment from the assignor, as provided in article 12 (1)(e) below). After notice is received, the obligor is only discharged 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 12 (1)(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 9 (1).

Paragraph (3) covers the case of subsequent assignments of the same right to different assignees by the same assignor. Preference is given to the assignee who was the first one to give notice.

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.

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

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).

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.

The cas of " silent assignments ", discussed in Bozen (n° 413-414) and in Cairo (n° 843-844), is mentioned in the Comments.

The last paragraph of the Comments results from another discussion in Cairo (n° 775-783).

Article 10 *(Defences)*

(1) The obligor may set up against the assignee all substantial and procedural defences of which the obligor could avail itself if the claim was made by the assignor.
[(2) The obligor may set up 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 raised againt 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 raise all defences against the assignee of which it could avail itself 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 12 (1) 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 X 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 setting up 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 in accordance with n° 818 (see discussion n° 801-817).

Paragraph (2) was 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 11 *(Accessory rights, interest and securities)*

(1) Accessory rights and interest are transferred to the assignee.
(2) Underlying securities are transferred to the assignee without a separate act of transfer.

COMMENT

This provision derives from the same principle as article 10. Assignment transfers the assignor's right as it is, with the defences the obligor may be able to set up as well as with all the accessory rights, interests and securities.

Illustration

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 %, and guaranteed by a deposit of shares. 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.

In case a right is partially assigned, accessory rights and securities are transfered 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.

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

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 language of paragraph (1) has been modified in order not to "include" interest in accessory rights any more (Cairo, n° 829). On the other hand, the group could perhaps have a dicsussion on what accessory rights are meant, other that interest and securities.

In (2), the reference to contrary rules of the applicable law has been deleted since it was already covered by article 1.4 (n° 822).

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 12 *(Undertakings)*

(1) The assignor undertakes towards the assignee that :

(a) the assigned right exists at the time of the assignment, or, if it is a future right, that it will come into existence;

(b) the assignor is entitled to assign the right;

(c) the assignor has not previously assigned the right to another assignee;

(d) the obligor does not and will not set up any defences [or rights of set-off];

(e) the assignor will reimburse the assignee of any payment the assignor would receive from the obligor before notice of the assignment was given.

(2) The assignor does not undertake that the obligor has, or will have, the financial ability to pay.

COMMENT

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

(1)(a). 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, the undertaking is that the future right will come into existence.

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 a claim against Company A.

(1)(b) 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 art. 7 (3) between brackets is adopted].**

(1)(c). 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.

(1)(d) According to article 10 (1), the obligor may set up against the assignee all defences of which the obligor could avail itself 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.

(1)(e) Article 9 (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.

(2) Parties to the assignment may certainly provide for an undertaking by the assignor concerning the obligor's present or future solvency, but 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).

In paragraph (1)(d), the reference to set-off has been put between brackets as the matter still has to be discussed.

Paragraph (1)(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).

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

Section 2 : Transfer of duties

(to be drafted at a later stage)

Section 3 : Assignment of contracts

(to be drafted at a later stage)