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WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

ASSIGNMENT OF CONTRACTUAL RIGHTS AND DUTIES

(Position paper prepared by Professor M. Fontaine)

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ASSIGNMENT OF CONTRACTUAL RIGHTS

AND DUTIES

POSITION PAPER[1]

Introduction. Terminology

The subject of *"assignment of contractual rights and duties"* was one of the topics proposed for an additional chapter in the enlarged 2nd edition of the Unidroit Principles of International Contracts (Unidroit 1998. Study L - Doc. 55, pp. 9-11). After a substantial discussion at the Rome meeting of March 16-19, 1998, it was decided to include this topic among the issues to be dealt with in priority (Unidroit 1998. Study L - Misc. 20, pp. 26-40, hereafter "SR", for "Summary Records").

Terminology is always a problem in comparative law discussions. The debates that took place in Rome made it clear that it is especially the case concerning *"assignment of contractual rights and duties"*.

From the start, there was an explicit discussion concerning the relative meanings of *"assignment"* and *"transfer"* (SR n° 163-168, 172). There are also divergences about the use of the expression *"assignment of contractual duties"* in common law systems (SR n° 224, 237). Some references made to the concepts of *"delegation"* (SR n° 164, 224, 225) and *"novation"* (SR n° 224, 233, 234, 235) showed that such concepts, originated from Roman law, do not necessarily have the same meanings in the different contemporary legal systems (SR n° 225, 236).

In order to avoid confusion and misunderstandings, we suggest to use the expressions *"assignment of rights", "assignment of duties"* and *"assignment of contracts"* to designate the mechanisms that the proposed new chapter in the Unidroit Principles will attempt to organise. Whenever a comparison is made with similar mechanisms belonging to one existing legal system or another, it is advisable to give it the corresponding label (e.g., not to speak of *"delegation" as* if it were a universally uniform notion, but to refer to *"delegation under American law", or "delegation under French law", etc*...). The expressions *"transfer of rights", "transfer of duties"* and *"transfer of contracts"* could be used to designate the respective operations in general, each of which could possibly be achieved by several mechanisms in the different legal systems (e.g. transfer of rights, under Belgian law, can be achieved by *novation par changement de créancier, cession de créance, subrogation,* negotiable instruments, etc ...).

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[1] *Due to unexpected events (fire at the Centre de droit des obligations of the University of Louvain), this paper had to be completed without the support of much of the documentation that had been gathered and under conditions of temporary disorganisation. We apologise for likely shortcomings.*

One has to keep in mind that special care will have to be taken when translating the English version of this chapter of the Principles into other languages.

Civil and common law approaches

The discussions held in Rome showed from the start that the subject of assignment of rights and duties is a very difficult one (SR, pp. 26-40). Much preliminary work must be done to overcome the different perceptions of the problems involved. Some civil lawyers were extremely surprised to hear that at common law, assignment was essentially a property notion (SR n° 166), there was "sharp distinction" between present assignments and promises to assign (SR n° 176, 178), the effectiveness of the transaction was dependent on whether the rules on gifts had been complied with (SR n° 185). Common lawyers were undoubtedly just as surprised at the reactions such statements produced from the other side. Within the civil law systems, perceptions are not uniform either : German law is probably more aware of the interaction between property and contractual aspects of transfer of rights than some other systems.

An important factor which, to our mind, explains some of the difficulties to find common ground is that mechanisms for transfer of rights and duties operate under different environments in the civil law and in the common law. In the former, *"rights" (créances, Forderungen)* and *"duties" (dettes, Schulden) are* the very basic tools of the general theory of obligations; the organization of different means to transfer such rights and duties is a logical development of the elaboration of this general theory (though it took some historical evolution to take the necessary distance from the personal character of the link between *"creditor"* and *"debtor").* On the other hand, the common law has not developed such general concepts (the terms *"obligor"* and *"obligee",* often used in the Unidroit Principles, are not basic everyday notions under English or American law, contrary to their translations in the French, German, Italian or Spanish versions), which makes it more difficult to develop a general theory of transfer of rights and duties. It is interesting to note the common law use of the special concept of *"chose in action"* in the domain of assignment of rights, where civil law systems simply refer to their general concept of *"créance"* or *"Forderung".* The U. N. Draft Convention, which deals with assignment of *"créances"* in French, uses the word *"receivables"* in English, following the example of the 1988 Unidroit Convention on International Factoring.

Two consequences seem to follow.

First, special effort should be made by all participants in the project to take the necessary distance from their own respective legal backgrounds in order to understand other viewpoints. There is no doubt this will be achieved in the working group, as earlier experience demonstrates. As to the reporter, he will need much assistance and much indulgence.

Second, under such conditions, it is already certain that the chapter on assignment of rights and duties, whatever the orientation it will take, will not look equally familiar to all legal systems. The initial differences are simply too fundamental to find compromise solutions

where everyone would recognize part of its legacy. But this is not the main concern of the Unidroit Principles, the purpose of which is to determine the rules best adapted to international commercial contracts. Earlier achievements tend to demonstrate acceptable results can be achieved : see the 1988 Unidroit Convention on International Factoring and the UNCITRAL Draft Convention of Assignment of Receivable Financing.

I. Assignment of rights

- Brief comparative overview

This preliminary position paper is not the place to present a thorough comparative analysis of the respective attitudes of the different legal systems concerning assignment of rights. The necessary careful comparisons will be made in due time when the draft chapter will be prepared. The following paragraphs are only an attempt to sketch the main features of selected legal systems, in order to facilitate understanding of each other's background within the working group[2].

• From the start, in Roman law as well as in the old English common law, rights to claim something from another person seemed to have such a personal character that their transfer could not be imagined. However, it soon became obvious that such transfers could be extremely useful economic operations (the right to claim is an item of wealth) and attempts were made to make them possible, without the cooperation of the debtor. A technique which was often used was for the creditor to give the "assignee" authority to collect the claim in the name of the former, and to retain the proceeds. The main problem that the creditor could withdraw that authority.

• In the early 17th century, the equity courts of England started to allow the assignee to require the assignor to lend his name for the action at law against the debtor. This double procedure was necessary when the assigned right was a "legal chose in action" i.e., a claim that had to be sued for "at law". If the claim was pursued in equity (e.g. the claim of a beneficiary under a trust), it was an "equitable chose in action" and equity judges allowed the assignee to bring the claim directly in his own name. The merging of common law and equity jurisdictions by the Judicature Act of 1873 brought simplification : the assignor still had to be involved in the suit against the debtor of a legal chose in action, but the assignee could be bring him into the action before the same court that was now competent to apply both legal (suit against the debtor) and equitable (suit against the assignor) rules.

The Judicature Act went further. It allowed the owner of a legal chose in action to transfer his rights in such a way that the assignee could himself claim against the debtor, without any

[2] Apart from direct sources in several national legal systems, we have mainly consulted three general comparative surveys:
- K. ZWEIGERT and H. KÖTZ, *An Introduction to Comparative Law,* Amsterdam, New York, Oxford, 1977, II, pp. 108-124.
- K.H. NEUMAYER, La transmission des obligations en droit comparé, in Centre de droit des obligations, *La transmission des obligations,* Brussels and Paris, 1980, pp. 193-225.
- H. KÖTZ, The Transfer of Rights by Assignment, in *International Encyclopedia of Comparative Law*, (reference to be specified), 1990.

further intervention of the assignor. This was achieved by a "statutory assignment", made in writing and notified in writing to the debtor. It was effective provided it was unconditional and covered the whole claim. If those conditions were not satisfied, the assignment could still be valid in certain circumstances as an "equitable assignment".

In the United States, the rules are more flexible. An assignment of rights is valid even though it was not made in writing or was not notified to the debtor. The assignee is entitled to bring suit against the debtor in his own name, without any intervention of the assignor.

Both English and American law allow the debtor to set up against the assignee all defenses he had against the assignor and hold that the assignor's creditors may not attach the debt any more once it has been assigned. However the problem of successive assignments has different solutions : English law gives precedence to the assignee who first gave notice to the debtor, while most American states determine priorities by the order of the assignments themselves[3].

• The French Civil code deals with assignment of claims *(cession de créance)* under the provisions concerning the sales contract (art. 1689-1701). The initial view is that the operation consists in the sale of a claim. It is now generally considered that the assignment can also result from another contract such as a gift or an exchange; the Civil code itself has a provision on assignment for security purposes (art. 2075).

French law distinguishes conditions of validity of the assignment between parties (assignor and assignee) and "*opposabilité*" towards third parties (the debtor and any other third party concerned). Between parties, assignment is perfected by mere agreement. In order to be effective against third parties, there has to be an official notification *(by "huissier")* to the debtor, or the debtor's "acceptance" (actually acknowledgment) in a judicial or notarial document (art. 1690). Such requirements are cumbersome; they have been regularly criticized, and courts have adopted flexible interpretations and temperaments. In 1994, art. 1690 was modified in Belgium, where the assignment is now made effective towards the debtor by any type of notification, and has become *per se* effective towards other third parties.

The moment assignment becomes effective against third parties governs the answers to the classical questions: to whom must the debtor pay, until when may the assignor's creditors attach the claim, who will be preferred in case of successive assignments.

Cession de créance transfers the claim as such, i.e. with its *"accessories"* (art. 1692) and the debtor's defences (cf. art. 1295 concerning set-off). As it considers the mechanism as a type of sale, the Civil code also organizes certain warranties the assignor may owe under certain conditions as to the existence of the claim and the debtor's solvency (art. 1693-1695). Special provisions concern assignment of inheritance and disputed rights (art. 1696-1701).

Cession de créance is not the only means of transferring a claim under French or Belgian law. Apart from the different types of negotiable instruments organized by commercial law, the Civil code itself still mentions the archaic *novation par changement de créancier* (art. 1271, 3°); it also organizes different types of subrogation, including the *subrogation conventionnelle*

[3] This summary is essentially based on K. ZWEIGERT and H. KÖTZ, *op. cit*., pp. 109-111, 118-122. Comp., for English law, CHESHIRE, FIFOOT and FURMSTON's *Law of Contract,* London, 11th ed., 1986, pp. 492-506 *(ref. to be updated); for* American law, E.A. FARNSWORTH, *Contracts*, 1982, pp. 748-794 *(ref. to be updated);* for Australian law, CHESHIRE and FIFOOT's *Law of Contract*, 7th ed., 1997, pp. 279-312.

consentie par le créancier (art. 1250, 1°), which often appears in practice as a strong competitor of *cession de créance* [4].

• The German Civil code also devotes several provisions to assignment of claims *(Übertragung der Forderung*) (§§ 398-413). The German system is the most simple : the assignee replaces the assignor without any need to inform the debtor (§ 398). The latter is protected by the rule that if unaware of the assignment, he pays the assignor, he is discharged (§ 407). The debtor can continue to set up all defences based on grounds existing when the claim was assigned (§ 404).

German law considers the assignment of a claim as "abstract" from the contractual agreement that caused it (e.g. a sale, a gift). Possible defects of that agreement do not affect the assignment itself. However, German authors point out that the practical importance of the principle of abstraction in the law of assignment is rather limited.

In the case of successive assignments, German law applies the priority rule, since the first assignment has already transferred property of the claim. Nevertheless, the debtor is protected if unaware of a prior assignment, he pays a subsequent assignee (§ 408)[5].

- Discussion in Rome

Apart from the terminological matters already discussed above, the discussions in Rome focused on one hand on some basic features where the different legal systems seem to have very specific approaches, on the other hand on some of the main issues to be met by the future rules on assignment of debts. As one may expect, the two aspects were often intimately linked.

The first group of comments gave the opportunity to common lawyers to describe the status of assignment under their system. It was pointed out that assignment at common law is essentially a property notion, and that it can only concern existing rights; future rights can only be the object of promises to assign, a contract transaction where consideration is required; an assignment could be effective in equity before it is effective at law; present rights can be transferred by gift or by contract, under different formalities (SR n° 166, 176, 178, 183, 185, 186, 187, 188, 192, 195, 216). Civil lawyers expressed their remarks on the common law approach (e.g. SR 177, 180, 181, 184, 189, 191, 193, 217) and on their own conceptions, which are not identical in all civil law countries (e.g. SR n° 165, 167, 191, 196, 206).

The second group of comments (as was said, often mingled with the former) brought up several important points

> what are the requirements between assignor and assignee (SR n° 194, 197, 216, 218) ?

[4] Cf. J. GHESTIN, La transmission des obligations en droit positif français, in Centre de droit des obligations, *La transmission des obligations*, Brussels and Paris, 1980, pp. 16-58; P. VAN OMMESLAGHE, La transmission des obligations en droit positif belge, *ibid*., pp. 89-142; K. ZWEIGERT and H. KÖTZ, *op. cit*., pp. 115-118.

[5] This summary is essentially based on K. ZWEIGERT and H. KÖT2, *op. cit*., pp. 111-115. Also see J. ESSER, *Schuldrecht,* I*, Allgemeiner Teil,* Karlsruhe, 4th ed., 1970, pp. 401-415 (*ref. to be updated*).

> can the assignment take place without participation of the assignee (link with the common law distinction between gifts and contracts and the respective formalities involved) (SP n° 170, 171, 172, 174, 177, 179, 180, 181, 185, 186, 187, 188, 191, 207) ?
> can future rights be assigned (SR n° 176, 178, 180, 181, 182) ?
> are underlying securities transferred along with the right they secured (SR n° 175) ?
> can the assignment take place without participation of the debtor (SR n° 181, 191) ?
> how can the assignment be effective vis à vis the debtor (SR n° 182, 191, 195, 197) ?
> how can the assignment be effective vis à vis the assignor's creditors (SR n° 182, 194, 195, 197, 198, 204, 206, 211, 212, 213, 214, 215, 216) ?
> how can the assignment be effective vis à vis subsequent assignees (SR n° 182, 194) ?
> should the proposed rules leave aside property / priority issues (SR n° 198, 199, 200, 203, 204, 205, 206, 207, 208, 209, 210, 211, 214, 217, 219) ?
> comparisons or links with factoring and the Factoring convention : SR n° 189, 190, 192, 200, 201, 219
> comparisons or links with the UNCITRAL draft convention on receivables financing : SR n° 184, 189, 198, 199, 205, 219, 220

- Main issues

The main legal issues arising out of assignment of rights seem to be the following ones:

a) Scope of Unidroit rules

1. Limited to assignment of contractual rights, or not ?
(could the Rules also be applicable for instance to assignment of rights arising out of tort law or out of a judgment ?)

2. Exclusion of transfer of rights through negotiable instruments

3. No interference with the specific rules that exist in many systems concerning the legal transfer of some rights under certain circumstances (e.g. subrogation of first-party insurer).

4. Leave out all property aspects ?
(Which are they precisely ?)

5. Special provisions on sub-assignment ?
Comp. Goode Sect. 8

b) Relationship between assignor and assignee (comp. Goode Sect. 3, 4, 6)

6. Are there limits to the assignability of rights ?

Future rights

Disputed rights
Bulk assignments
Legal restrictions (salaries, rights against the State, etc...)
Contractual restrictions (no assignment clause)

7. Are there any formal requirements between assignor and assignee ?

Distinction between the contractual and property aspects ?

8. Does the assignor owe any warranty to the assignee ?

Existence of the right (present future) ?
Solvency of the debtor ?

9. Can a right be assigned without participation of the assignee ?

b) Position of the debtor (comp. Goode Sect. 5, 7)

10. Should the debtor's agreement be a condition of validity of the assignment ?

(Probably not in principle. Exceptions ?)

11. Should the debtor be given notice of the assignment ?

If so, in which form ?

12. What if the debtor still pays the assignor ?

Before notification
After notification

13. Assignment cannot modify the debtor's legal situation

Defenses prior to notification can be set up against assignee
Special problems
(such as set-off, withholding performance, ...)

Underlying securities are transferred to the assignee

c) Issues concerning other third parties

(Unless excluded from the Principles as being considered "property aspects")

14. Under what conditions must third parties other than the debtor bear, or may invoke, the consequences of the assignment to a new obligor ?

Mere agreement between assignor and assignee ?
Notification to debtor ?
Other forms of publicity ?

15. Should there be any distinction between different types of such third parties?

Assignor's "creditors", assignee's "creditors"
Successive assignments

- Preparation of further work

It would be useful if the working group could decide which items of the preceding list of issues should, at least at a first stage, be considered or excluded when preparing a first draft.

The most important choice is probably whether to consider so-called "property aspects" or not.

At the Rome meeting of March 1998, it was pointed out, on the one hand, that the UNCITRAL draft has been unable to reach uniform substantive rules on property issues (SR 198). Some members believe that once third parties are considered, it is not possible to derogate from local law; for instance, a reference to the Principles in the contract could hardly bind creditors world-wide (SR 204, 205, 211, 214, 217).

On the other hand, some other members thought UNIDROIT could do better than UNCITRAL, as it had already done on the also delicate issue of specific performance (SR 199, 200). The Group should not be concerned with whether the assignment was a contract or whether it concerned property and, instead, focus on the results that it wanted to achieve, leaving aside notions of domestic law (SR 193). Such "property" rules in the Principles could still serve some useful purpose (e.g. serve as models for legislators) even if a choice of the Principles as the governing law would not be considered to affect creditors (SR 210).

II. **Assignment of duties**

- Brief comparative overview

Here again, we do not intend to present a thorough comparative analysis of the respective attitudes of the different legal systems concerning assignment of duties. The necessary careful comparisons will be made in due time when the draft chapter will be prepared. The following paragraphs are only an attempt to sketch the main features of selected legal systems, in order to facilitate understanding of each other's background within the working group[6].

• Under the common law, the duties arising out of a contract cannot be shifted off the shoulders of the obligor without the consent of the obligee. *"Novation" is* the only method to replace the original obligor by a new one, and it is a contract which involves the obligee, who must agree to release the original debtor and to accept the assignee as its new obligee.

This is to be distinguished from *"vicarious performance",* where the original obligee has arranged that performance will be rendered by another person, which the obligor must accept in principle. Such *"delegated performance"* does not discharge the original obligee. It is not permissible in all cases [7].

• The French / Belgian Civil Code does not organise assignment of debts as such. It provides for *"novation par changement de débiteur"* (art. 1271, 2°) and *"délégation" (art. 1275), which is "parfaite"* or *"imparfaite"* depending on whether the creditor accepts or not to discharge the original debtor. Such mechanisms do not really assign the debt as the relationship they create between the new debtor and the creditor is not the original debt, but a new one : the creditor loses all securities and the new debtor may not set up the initial debtor's defences against the creditor. It is also possible to bind a new debtor towards the creditor through a somewhat unexpected use *of "stipulation pour autrui*" (stipulation to the benefit of a third party), but the original debtor is not discharged.

Such rules are clearly inadequate. However, contrary to what is often said, *"cession de dette"* is not prohibited at all; only its legal regime is not organised. Nothing prevents the three concerned parties (creditor, initial debtor, new debtor) to agree on a contractual assignment of the debt, with all securities and defences. Provided the creditor agrees, the initial debtor can be fully discharged.

French law distinguishes the above mechanisms from the promise made by someone to the debtor to perform the latter's obligation, which can in principle be imposed to the creditor (art. 1236 C. civ.); as in German law, this operation does not discharge the debtor, and it does not transfer any right to the creditor [8].

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[6] Cf. K.H. NEUMAYER's comparative survey, La transmission des obligations en droit comparé, in Centre de droit des obligations, *La transmission des obligations,* Brussels and Paris, 1980, pp. 226-253.

[7] Cf. CHESHIRE, FIFOOT and FURMSTON's *Law of Contract, op. cit.,* pp. 509-511 (English law) *(ref. to be updated)*. Comp., for American law, E.A. FARNSWORTH, *op. cit*, pp. 794-807 *(ref. to be updated);* for Australian law, CHESHIRE and FIFOOT's *Law of Contract, op. cit*, pp. 312-317.

[8] Cf. J. GHESTIN. *op. cit*., pp. 59-65; P. VAN OMMESLAGHE, *op. cit*., pp. 143-152.

• The German Civil code organises assignment of duties under the name *"Schuldübernahme"* (BGB §§ 414-419). It derives either out of a contract between the new debtor and the creditor (§ 414), or out of an agreement between the original and the new debtors, approved by the creditor (§ 415). The original debtor is normally discharged, but the creditor may also accept the new debtor without discharging the original one *("kumulative Schuldübernahme" or "Schuldbeitritt").* The obligation is transferred as such, i.e. the new debtor can set up against the creditor all defences resulting from the original relationship between the original debtor and the creditor (but not the defences arising out of its relationship with the original debtor) (§ 417). However all securities connected to the original debt are discharged, unless those who provided such securities approve of the transfer (§ 418).

German law distinguishes the situation where a person promises the debtor to perform the latter's obligation *("Erfüllungsübernahme");* this operation does not discharge the debtor, and it does not transfer any right to the creditor [9].

- Discussion in Rome

At the Rome meeting of March 1998, the discussion on assignment of duties was not very thorough (SR n° 221-253).

A first subject was the distinction between assignment of debt and third-party performance. While being familiar to several participants, this distinction was questioned by a prominent member of the group (SR n° 221-238). Third-party performance is covered by Article 7:206 of the Principles of European Contract Law. If it were to be included in the Unidroit Principles, it should probably be in the performance chapter (SR n° 223).

The discussion then shifted to another subject (assignability of rights deriving out a judgment) which, however interesting it may be, does not concern assignability of duties. The discussion then went on to other aspects of assignment of rights (SR n° 239-253).

Finally the subject of assignment of duties itself was not really discussed at Rome.

- Main issues

The main legal issues arising out of assignment of duties seem to be the following ones

a) Scope of Unidroit rules

1. Limited to assignment of contractual duties, or not ?
(could the Rules also be applicable for instance to assignment of duties arising out of tort law or out of a judgment ?)

[9] Cf. J. ESSER, *op. cit*., pp. 415-420 (*ref. to be updated*); K.H. NEUMAYER, *op. cit*., pp. 228-230.

2. No interference with the specific rules that may exist concerning the legal transfer of some duties under certain circumstances
(e.g. some obligations connected to sold property)

3. Leave out all property aspects ?

b) Relationship between assignor, assignee and creditor (comp. Goode Art. 3.6 and 3.7)

4. In principle, an assignment of duties needs the creditor's acceptance is necessarily a three-party agreement.

Exceptions ?

5. Depending on the creditor, the original debtor (assignor) can

be fully discharged of the assigned duties
remain liable only if the assignee fails to perform
remain liable (jointly and severally ?) together with the assignee

(in the last two cases,
would the assignor be obliged to perform
have a subsequent claim against the assignee ?)

6. The assigned debt is the original debt,
i.e. the assignee can invoke all defenses prior to the agreement

7. Should the creditor refuse any type of assignment of duties,
an agreement is possible between the debtor and the would-be assignee providing for third-party performance at the date of maturity,
under the conditions provided
by the corresponding provision of the Principles

b) Issues concerning other third parties

(Unless excluded from the Principles as being considered "property aspects")

8. Must third parties bear,
or may they invoke,
the consequences of the assignment to a new obligee ?

9. Should there be any formal (publicity ?) requirement as regards third parties ?

- Preparation of further work

It would be useful if the working group could decide which items of the preceding list of issues should, at least at a first stage, be considered when preparing a first draft.

III. Assignment of contracts

- Brief comparative overview

• Subject to the observations of common law members of the Working Group, no special rules seem to apply to assignment of contracts as such under the common law. The problems involved appear to be solved by combining the respective rules on assignment of rights and duties[10].

• Under French and Belgian law, assignment of contracts is not organised as such (apart from special cases regulated by law). The main approach is to consider that assignment by a party of its position in a bilateral contract amounts the addition of assignment of its rights and duties, i.e. the cumulative application of the respective rules. For instance, the active part of the transfer can be fulfilled through *"cession de créance"* and the passive part through *"dé1égation"* or conventional *"cession de dettes"*. This is not very practical as it amounts to adding the difficulties of both mechanisms. The main point is that the agreement of the other party is always necessary because of the passive side.

Some authors suggest that this approach is inadequate as such splitting is contrary to the global economy of a contract. They point out a contractual position should be transferred as a whole, with the other party's approval (without such approval, an agreement between assignor and assignee would suffice to transfer the rights, with due notification to the other party, while the "assignee" could promise the "assignor" to perform the obligations at maturity)[11].

• German law also does not recognise assignment of contracts as an independent mechanism in general (there are special cases where it is regulated by law). The operation implies the cumulative application of rules governing assignment of rights and duties. It is made easier than under French law as assignment of debts is better organised under German law, but it still implies agreement of the other party[12].

• A comparative approach to assignment of contracts can only stress in at least three countries, Civil codes have attempted to regulate the mechanism as such : Italy (C. civ., art. 1406-1410), Portugal (C. civ., art. 424-427) and the Netherlands (N.B.W., book 6, art. 159)[13]. Those provisions will provide extremely useful models if it is decided to devote specific provisions to assignments of contracts.

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[10] Cf. K.H. NEUMAYER, *op. cit.,* pp. 260-261; E.A. FARNSWORTH, *op, cit*, p. 748 (example given concerning "sale of business" *(ref. to be updated)*.

[11] Cf. J. GHESTIN, *op. cit.,* pp. 65-72*;* P. VAN OMMESLAGHE, *op. cit*., pp. 153-177.

[12] Cf. J. ESSER, *op. cit*., pp. 423-426 (*ref. to be updated*); K.H. NEUMAYER, *op. cit.,* pp. 259-260.

[13] Cf. K.H. NEUMAYER, op. *cit.,* pp. 254-256; for Italy *(ref. to include) ; for* Portugal *(ref. to include*) ; for the Netherlands, cf. ASSER-HARTKAMP, *Verbintenissenrecht,* I, Zwolle, 9th ed., 1992, pp. 562-565 *(ref. to be updated)*.

- Discussion in Rome

The discussions in Rome were also very brief concerning assignment of contracts (SP n° 254-267). It was rightly pointed out that as this operation can be considered as a cumulative transfer of rights and obligations, its legal regulation can only be considered after the rules on assignment of rights and obligations have been established. This does not exclude organizing assignment of contract as a whole as a distinct operation, following some rare but interesting models (Italy, Portugal, the Netherlands).

The special case of transfer of contracts connected to mergers and other transfers of business was considered. There are developments in European law, and consequently in the laws of Union members. The concept of "universal succession" plays an important part in some countries.

Other particular situations were mentioned, where the law organizes an automatic transfer of some contracts (e.g. sale of real estate).

- Main issues

N.B. For clarity's sake, we will call "the other party" the party who was contractually bound with the assignor.

1. Should there be a special provision on assignment of contacts, following some remarkable models (Italy, Portugal, the Netherlands), or should the problems involved be solved through the combination of the respective rules on assignment of rights and obligations ?

A special provision would in any case have to face the same problems as above on assignment of rights and obligations, but taking the operation as a whole could permit some simplification (e.g. if the consent of the other party is required for the assignment of the duties, it is no longer necessary to organize some sort of notification to that party as regards the assignment of the corresponding rights). The following issues should be met with that in mind.

a) Scope of Unidroit rules

1. No interference with the specific rules that may exist concerning the legal transfer of some contracts under certain circumstances
(e.g. insurance contracts concerning sold property, mergers, etc ...) ?

2. Leave out all property aspects ?

b) Relationship between assignor, assignee and other party

3. A global assignment of contract should probably require the consent of the three parties concerned, the assignor, the assignee and the other party.

Exceptions ?

4. As regards the assigned duties, depending on the other party, the assignor can

be fully discharged of the assigned duties
remain liable only if the assignee fails to perform
remain liable (jointly and severally ?) together with the assignee

(in the last two cases,
would the assignor be obliged to perform
have a subsequent claim against the assignee ?)

5. The assigned contract is the original contract,

i.e. the assignee can set up all defenses prior to the agreement against the other party
the other party can set up all defenses prior to the agreement against the assignee

6. Should the other party refuse assignment of the contract,

- the would-be assignor can still assign its rights to the assignee, subject to the relevant rules

- an agreement is possible between the would-be assignor and the would-be assignee providing for third-party performance of the obligations at the date of maturity, under the conditions provided by the corresponding provision of the Principles

b) Issues concerning other third parties
(Unless excluded from the Principles as being considered "property aspects")

7. Must third parties bear,
or may they invoke,
the consequences of the assignment to a new obligor/ obligee ?

8. Should there be any formal (publicity ?) requirement as regards third parties ?

- Preparation of further work

We are inclined to prepare a special provision on assignment of contracts. The absence of such a provision is often pointed out as a regrettable gap in many Civil codes, especially in the light of the solutions available in Italy, Portugal and the Netherlands.

However we believe a final decision on this can only be taken after the rules on assignment of rights and duties have been drafted.

Marcel FONTAINE
February 1999

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