

UNIVERSITÉ CATHOLIQUE DE LOUVAIN

FACULTÉ DE DROIT

C E N T R E D E D R O I T D E S O B L I G A T I O N S

Unidroit Principles of International Contracts
2nd edition

Draft on
Assignment of Rights, Transfer of Duties
and Assignment of Contracts

par
Marcel FONTAINE

Doc. 99/29

Projet préparé pour la réunion du Caire (24-28 janvier 2000)
du groupe de travail chargé de préparer la 2^{ème} édition des
Principes d'Unidroit relatifs aux contrats internationaux.

UNIDROIT PRINCIPLES OF INTERNATIONAL CONTRACTS**2nd edition****DRAFT CHAPTER****ON****ASSIGNMENT OF RIGHTS, TRANSFER OF DUTIES****AND ASSIGNMENT OF CONTRACTS****INTRODUCTION TO THE DRAFT**

This draft covers the first section of the future chapter of the Unidroit Principles. It deals only with assignment of rights, leaving transfer of duties and assignment of contracts for a later stage, since those two aspects still have to be the subject of a preliminary discussion in the group, on the basis of pp. 11-17 of our Position Paper (UNIDROIT 1999 Study L – Doc. 61).

The proposals attempt to take into account the first discussions at the Rome meeting in 1998 and the more precise directives given at Bozen in 1999. They have considered the solutions given by some significant earlier codifications, giving special attention to international drafts or achievements such as the Benelux and Uncitral drafts and the Unidroit factoring convention.

Earlier discussions are briefly summarized, with references to the records of the Rome and Bozen meetings.

Commentaries on the proposals are not meant to be the future comments to be included in the final version of the Principles. Their mere purpose is to introduce discussions within the group.

This is obviously a first draft. Some basic difficulties have appeared in our earlier discussions related to the relationship between the contractual and property aspects, or to different approaches between common and civil law on certain matters. The Reporter is aware that this first draft may not adequately meet all such difficulties.

M. Fontaine
November 1999

Abbreviations :

BENELUX	Benelux draft Convention on assignment of rights (1975)
BGB	German Civil Code
CC b.	Belgian Civil Code
CC f.	French Civil Code
CC it.	Italian Civil Code
CC R	Civil Code of Russia
CC Q	Civil Code of Quebec
CO	Swiss Code of Obligations
Kötz, IECL	KÖTZ, Transfer of Rights by Assignments, in <i>Intern. Encycl. of Comp. Law</i> (1990)
NBW	Dutch Civil Code
PECL	Principles of European Contract Law (draft Chapter 12 as of January 1999)
R2C	Restatement Second on Contracts
UCC	Uniform Commercial Code
UNCITRAL	UNCITRAL draft convention on assignment in receivable financing (October 1999 version)
UNIDR. FACT.	Unidroit Factoring Convention (1988)

Section 1 : Assignment of rights

Article 1.1 (*Definition*)

« Assignment of a right » means the transfer by agreement from one person ("assignor") to another person ("assignee") of the assignor's right to payment of a monetary sum from a third person ("the debtor").

Earlier discussions :

The preliminary debates on the chapter on assignment of rights and transfer or duties revealed great differences of approach and terminology (Rome, n° 165-167, 176-178, 180-181, 183-189, 191-193, 195-196, 206, 216-217 ; Bozen, n° 382-390). The expression « assignment of rights » was finally retained by the group (Bozen, n° 388).

It was agreed that the Principles should not interfere with the specific rules that exist in many systems concerning the legal transfer of some rights under certain circumstances (Bozen, n° 392).

There was a discussion on the question whether a right could be assigned without participation of the assignee (Rome, n° 170-172, 174, 177, 179-181, 185-188, 191, 207 ; Bozen, n° 411).

Commentary on the proposal :

Due to the difficulties of approach and terminology, it is felt useful to start each section of the chapter with a definition.

Art. 1.1. submits a definition of « *assignment of a right* » which is inspired from the corresponding provision in UNCITRAL art. 2 (a).

The proposed text, however, does not restrict the definition to assignment of *contractual* rights. The broader approach was agreed upon at Bozen (n° 391). But the definition only concerns transfers *by agreement*, thus leaving aside legal transfers, as well as assignments without participation of the assignee. It is also limited to transfers of *rights to payment of monetary sums*.

This definition can also apply to sub-assignments, to which the draft does not otherwise refer.

Article 1.2 (*Scope of application*)

This Section does not apply to assignments :

(a) made by the delivery of a negotiable instrument, with any necessary endorsement ;

(b) made as part of the change in the ownership or the legal status of a business.

Earlier discussions :

It was agreed that the chapter would not apply to negotiable instruments, nor to the assignments of rights deriving from business transfers (Bozen, n° 392.

Commentary on the proposal :

This draft provision is inspired by UNCITRAL 4. Comp. PECL 12.101 (2).

Article 1.3. (*Assignable rights*)

(1) Any right to payment of a monetary sum from a debtor may be fully or partially assigned, unless the right has a personal character or the assignment is prohibited by the applicable law.

(2) Assignment of a right is effective notwithstanding any agreement between the assignor and the debtor limiting or prohibiting such assignment, without prejudice to the assignor's liability towards the debtor for breach of contract.

(3) Assignment of a future or conditional right operates the transfer when the right comes into existence or the condition is fulfilled.

(4) A bulk of rights may be assigned without individual specification provided such rights can be identified at the time of the assignment or when they come into existence.

(5) A right may be assigned as security [for indebtedness or other obligation].

Earlier discussions :

(1) Several members of the group were of the opinion that legal restrictions to assignment of rights should be referred to in the chapter (Bozen n° 402-403).

(2) The Reporter's recollection is that contractual restrictions to assignments were briefly discussed in Rome and/or Bozen, though the records apparently fail to cover the subject.

(3) Several opinions were expressed in favor of including future and conditional rights in the draft, at least as a basis for discussion (Rome, n° 176, 178, 180-182 ; Bozen, n° 399).

(4) It was agreed to include a special provision on bulk assignments (Bozen, n° 401 and 405).

(5) Inclusion of assignment as security was briefly discussed (Bozen, n° 385 ; cf. also n° 405 in connection with bulk assignments).

The draft does not include any provision on so-called « *disputed rights* », as agreed in Bozen (n° 400)

Commentary on the proposal :

This provision establishes rules on various problems of assignability of certain kinds of rights.

(1) The draft takes inspiration from CC It. 1260, CO 164, BENELUX 1, CC R 383 and 388, R2C 317 (2) and PECL 12.602. Rights of a personal character are those where the person of the creditor is particularly significant for the debtor. Legal prohibitions naturally prevail over the Principles (cf. art. 1.4) but several members were of the opinion the restriction should be explicitly stated in the draft.

The draft explicitly permits partial assignments (comp. R2S 326, PECL 12.202).

(2) The draft takes inspiration from UNCITRAL 10 and UNIDR. FACT. 6. Other possibilities would be to make the agreement between assignor and debtor effective towards an assignee who would be aware of it or would have consented to it (comp. CO 164, CC It. 1260 and PECL 12.601 ; also see R2C 317 (2) and 322). The BENELUX draft (art. 1) made such agreement effective without any further condition.

(3) The discussions concerning the assignability of future rights are well known. Due to the needs of the business community to have a workable system of receivable financing, the general tendency is more and more to allow such assignments (Kötz, IECL n° 82). See UNIDR. FACT. 5, UNCITRAL 9, R2C 321 and PECL 12.201 (2); comp. CC Q 1642. The proposed rule is inspired by UNIDR. FACT 5 b ; also see PECL 12.402. Conditional rights are also included according to the wish expressed within the working group (see R2C 320).

(4) The question of bulk assignments also corresponds to the needs of the business community. The draft takes inspiration from UNIDR. FACT. 5 a and UNCITRAL 9.

(5) This draft provision is inspired by UNCITRAL 2 a. If the inclusion of assignment as security is confirmed, the subject may need further developments (Bozen, n° 385).

Article 1.4 (*Agreement between assignor and assignee*)

The right is assigned by mere agreement between assignor and assignee.

Earlier discussions :

After preliminary discussions in Rome (n° 197, 216, 218), the suggestion was made at Bozen that there should be no formal requirements between assignor and assignee (n° 404). However, a member pointed out that in the common law an important distinction was made between a commitment to assign in the future and a present assignment ; the exemption from any formal requirements should not blur that distinction (Bozen, n° 407).

Another issue was raised concerning the possibility of an assignment by unilateral act of the assignor, without the assignee's acceptance. It was suggested to resume that discussion once a first draft is prepared (Bozen, n° 415).

The group agreed that assignment did not need the debtor's agreement to be valid between assignor and assignee (Rome, n° 181, 191 ; Bozen, n° 412-413).

Commentary on the proposal :

This draft provision follows the suggestion made at Bozen (n° 404) and reflected in many legal systems according to which assignment of a right occurs by mere agreement between assignor and assignee (see e.g. BGB § 398). This seems to be in line with the « no form required » rule in art. 1.2 of the Principles. The same solution appears in PECL 12.301.

Other legal systems require the assignment to be made in writing (cf. CO 165 ; BENELUX 2).

Several systems distinguish between the assignment agreement itself and the « underlying agreement », which reflects the economic operation that has led the parties to assign the right (such as the sales contract under which the parties have agreed that the buyer will assign a right in lieu of paying the price). German law accentuates that distinction with the principle of « abstraction » which makes the assignment contract legally independent from the underlying agreement (Kötz, IECL n° 65-66). Art. 1.4 of the draft concerns the assignment agreement itself. The problem of the underlying agreement will be met again below, at art. 1.5.

The group will have to consider whether the proposed provision would create problems with the common law distinction mentioned above between a

commitment to assign in the future and a present assignment (Bozen, n° 407).

The possibility of an assignment by unilateral act of the assignor, without the assignee's acceptance, will also have to be examined by the group.

The draft provision implies that assignment if a right takes place without the debtor's agreement, subject to the notice requirements provided below at art. 1.6.

Article 1.5 (*Warranties*)

(1) Unless otherwise agreed, the assignor warrants to the assignee that at the time of the conclusion of their agreement :

- (a) the assignor is entitled to assign the right;
- (b) the assignor has not previously assigned the right to another assignee; and
- (c) the debtor does not and will not have any defences or rights of set-off.

(2) Unless otherwise agreed between the assignor and the assignee, the assignor does not warrant that the debtor has, or will have, the financial ability to pay.

Earlier discussions :

A member of the group referred to the distinction mentioned above, under art. 1.4, between the assignment agreement itself and the underlying contract. Warranties relate to the latter and should not be dealt with in the chapter on assignment. Another member pointed out that the European Principles include a rule on warranties related to the assignment itself (Bozen, n° 409-410).

Commentary on the proposal :

While accepting, at least out a civil law perception, the distinction between the assignment agreement itself and the underlying contract, the rapporteur felt the chapter on assignment of rights in the UNIDROIT Principle would serve a useful purpose by regulating the matter of warranties. Such matter is of great practical importance in the relationship between assignor and assignee. Practitioners referring to our Principles would be surprised not to find any rules on the subject (about the Swiss inclusion of warranty rules in the provisions on assignment, a German author [Kötz, IECL n° 91] admits that « *While this arrangement appears not to be quite logical, it does have the advantage of solving a problem where a reasonable man expects it to be dealt with, i.e. in the context of assignment law in general* »).

Examples of such rules are to be found in CC fr. et b. 1693-1697, CO 171-174, CC it. 1266-1267, CC Q 1639-1640, CC R 390 and R2C 333 (in the BGB,

corresponding rules are to be found in the chapters dealing with underlying agreements : cf. §§ 365, 437-438).

As a basis for discussion, this draft provision chose to find its main inspiration in UNCITRAL 14 and PECL 12.501 (the term « warranties » has been substituted to the UNCITRAL use of the word « representations » ; in PECL, « warranties » is at this stage used within brackets ; obviously terminology will have to be discussed).

Article 1.6 (*Notice to the debtor*)

Unless otherwise agreed between them, the assignor or the assignee or both may give the debtor notice of the assignment.

Earlier discussions :

As recalled above under art. 1.4 of the draft, the group agreed that assignment did not need the debtor's agreement to be valid between assignor and assignee (Rome, n° 181, 191 ; Bozen, n° 412-413). Effectiveness of the agreement against the debtor is another matter. It could be made dependent upon serving notice to the debtor, ou upon the debtor's awareness of the assignment (Rome, n° 182, 191, 195, 197 ; Bozen, n° 412, 414).

Some members mentioned situations where the parties to the assignment do not want the debtor to be informed of the operation. Such « silent assignments » could be subject to special rules (Bozen, n° 413-414).

Commentary on the proposal :

This draft provision has to be read together with art. 1.7 below. The two articles organize a system by which assignment of a right is effective vis à vis the debtor only after it receives notice of the assignment.

Notice requirements are present in many legal systems, with several variations. See e.g. CC fr. 1690, CO 167, CC It. 1264, BENELUX 2 and 4, CC Q 1641, CC b. 1690 (different from CC fr. since 1994), CC R 382, R2C 341 (2). Also see UNIDROIT FACT. 1, 4° and 8, as well as PECL 12.604 and 12.607.

Art. 1.6 deals with the practically important question of determining who should serve such notice, assignor or assignee. Inspired by UNCITRAL 15, the proposed provision leaves it open to either party (or to both) to serve the notice, unless otherwise agreed. (The UNCITRAL references to payment instructions have been left out, as this seems to be a different problem).

« Notice » is governed by art. 1.9 of the Principles.

The group will have to decide whether « silent assignments » (kept secret from the debtor) should also be considered.

Article 1.7 (*Discharge of the debtor*)

(1) Until receiving notice of the assignment, the debtor is discharged by paying the assignor, [unless the assignee proves that the debtor was aware of the assignment].

(2) After receiving such notice, the debtor is discharged only by paying the assignee.

(3) However, if notice of the assignment is given by the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made, otherwise the debtor 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.

(4) If the same right has been assigned to two or more successive assignees, the debtor is discharged by paying in accordance to the first notice received [unless a previous assignee proves that the debtor was aware of that previous assignment].

Earlier discussions :

(1)-(3) As to the effectiveness of the assignment agreement against the debtor, it was mentioned that it could be made dependent upon serving notice to the debtor, ou upon the debtor's awareness of the assignment (Rome, n° 192, 195, 197 ; Bozen, n° 412, 414). The problem of so-called « silent assignments » was also raised (Bozen, n° 415).

(4) Doubts were raised as to the feasibility of regulating the so-called « property aspects » of assignment. It was suggested to attempt to deal first with the issue of successive assignments (Rome, n° 182, 194 ; Bozen n° 393)

Commentary on the proposal :

As already said, this provision should be read together with art. 1.6 of the draft.

(1)-(3) Many systems make effectiveness of the assignment towards the debtor dependent upon a notice requirement, or upon the debtor's awareness of the assignment. To the references quoted above under art. 1.6 (CC fr. 1690, CO 167, CC It. 1264, BENELUX 2 and 4, CC Q 1641, CC b. 1690 [différent de CC fr. depuis 1994]), CC R 382 ; R2C 341 (2) ; UNIDROIT FACT. 1, 4° and 8 ; PECL 12.604 and 12.607), add CC fr. 1691, BGB § 407, CC Q 1643.

The draft provisions of art. 1.7 (1) and (2) are inspired by the clear-cut (in principle) provisions of UNCITRAL 19 (1) and (2) : before receiving notice, the debtor is still discharged by paying the assignor ; after receiving such notice, the debtor has to pay the assignee Also see UNCITRAL 16 (1). It is suggested, between brackets, to amend this system by making payment to the assignor before notice is received ineffective if the assignee proves that the debtor was aware of the assignment (cf. CC it. 1264 ; comp. BGB § 407 ; CC b. 1690).

Para (3) of the draft provision is inspired by UNCITRAL 19 (6).

(4) The problem of successive assignments is sometimes met by reference to the chronological order of the notices given, sometimes by taking the debtor's awareness (or acceptance) of the different assignments into consideration (see e.g. BGB § 408 ; CO 167 ; CC it. 1265 ; CC b. 1690 ; comp. CC Q 1646).

The draft provision is inspired by UNCITRAL 19 (3) and PECL 12.701 ; also see UNCITRAL 16 (2). It gives a chronological solution to the problem of successive assignments, based on the priority of notice. However, it is suggested, between brackets, to amend this system by making payment to an assignor who has given earlier notice ineffective if a previous assignee proves that the debtor was aware of that previous assignment.

The provision is connected with the problem of the effect of assignment towards third parties other than the debtor, debated at art. 10.1 *infra*.

As already said, the group will have to decide whether « silent assignments » should also be considered.

Article 1.8 (*Defences*)

(1) The debtor may set up against the assignee all defences from its contract with the assignor of which the debtor could avail itself against the assignor at the time notice of assignment was received.

(2) The debtor 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.

Earlier discussions :

(1) A member pointed out that assignment should not modify the debtor's legal situation. The debtor should retain its defences against the assignee (Bozen, n° 416).

(2) The set-off defence is a special problem, which could not be covered before the rules on set-off in general had been drafted (Bozen, n° 416).

Other defences may need special treatment, such as withholding performance, claims and counterclaims arising from the same contract. They could be examined once a draft had been prepared (Bozen, n° 416).

Commentary on the proposal :

(1) The principle that the debtor retains its defences against the assignee seems to be generally accepted (CO 169 ; BGB § 404 ; BENELUX 5 ; NBW 6.145 ; UNIDROIT FACT. 9, 1° ; CC Q 1637, 1643 ; CC R 386 ; UNCITRAL 20 ; R2C 336 ; PECL 12.605 (1)). « Retain » usually means that the defences that the debtor can raise against the assignee are those that were available at the time the assignment became effective towards the debtor, i.e. when notice was received (comp. art. 1.7 of the draft). This solution is proposed, though UNCITRAL 20 (1) and UNIDROIT FACT. 9, 1° seem to be wider (« all defences ... arising from the contract of which the debtor could avail itself if such claim was made by the assignor »).

(2) This rule on set-off is already submitted, though the matter should be reexamined in the light of the future chapter on set-off. The proposed provision seems to be in the line of the generally accepted solution, though several variations appear (comp. CC fr. 1295 ; BGB § 406 ; CO 169, 2° ; BENELUX 6 ; CC b. 1295 [different from CC fr.] ; UNIDROIT FACT. 9, 2° ; UNCITRAL 20 ; PECL 12.605 (2)).

The group should consider the possibility of including a provision on the debtor's agreement not to raise defences against assignees : comp. UNCITRAL 21.

Article 1.9 (*Accessory rights and securities*)

- (1) Accessory rights, including interests due, are transferred to the assignee.**
- (2) Underlying securities are transferred to the assignee without a separate act of transfer, unless the law governing the security provides otherwise.**
- (3) The assignor is obliged to take all necessary steps to allow the assignee to enjoy the benefit of accessory rights and securities.**

Earlier discussions :

The idea was supported that underlying securities should be transferred to the assignee. However the means of doing so (automatic transfer or not) might differ according to the types of security and the jurisdiction (Rome, n° 175 ; Bozen, n° 417).

Commentary on the proposal :

The principle that assignment of a right does not change the debtor's legal situation also implies that the assignor, as a rule, receives the benefit of all accessory rights, including securities. Cf. CC fr. and b. 1692 ; BGB § 401 ; CO 170 ; CC it. 1263 ; BENELUX 7-9 ; UNIDROIT FACT. 7 ; NBW 6.142 ; CC Q 1638 ; CC R 384 ; R2C 340 ; UNCITRAL 11 ; PECL 12.401. Accessory rights include interests due (CO 170, 2° ; CC it. 1263 ; BENELUX 9 ; NBW 6.142, 2° ; CC R 384).

The proposed art. 1.9 (1) and (2) express that principle ; the provision concerning securities, inspired by UNCITRAL 11 (1), reserves the inevitable application of mandatory rules of the applicable law.

The assignor should be obliged to take the necessary steps to allow the assignee to enjoy the benefit of accessory rights and securities, such as delivering evidential documents or abiding by any requirement upon which such transfers may be conditional (cf. CO 170, 2° ; NBW 6.143). The proposed draft art. 1.9 (2) is phrased in very general language ; a more elaborate model can be found in NBW 6.143. For special ways of dealing with certain securities, see CC it. 1263 par. 2 ; BENELUX 8.

It could be envisaged to oblige the assignor to warrant performance by the assignee of the obligations linked to transferred accessory rights or securities (see BENELUX 7 par. 2 ; NBW 6.144).

Article 1.10 (*Effect of assignment towards third parties other than the debtor*)

Subject to further debate

Earlier discussions :

Third party issues have been described as a delicate task for the Principles to deal with. In the context of assignments, they would widen the scope of the Principles considerably because the number of parties involved is potentially important. Also the requirements for an assignment to be effective vis-à-vis third parties could fall under an applicable law different from the Principles, where there was little chance the Principles would prevail. Doubts were also expressed about applying the Principles to third parties who had not chosen to be governed by them (Bozen, n° 395, 420).

However the view was also expressed that the draft could still cover some third-party issues, such as successive assignments, only leaving aside the application of insolvency law. Another participant favored dealing with affects of assignments against third parties, another one suggested drafting alternative texts (Bozen, n° 394, 396-397, 406).

Besides successive assignments, third-party issues also include the situation of the assignor's and the assignee's respective creditors, as well as the transfer of certain kinds of securities linked to the assigned right (Bozen, n° 418-419).

On third party issues, also see Rome, n° 182, 194-195, 197-200, 203-216, 219.

Commentary on the (lack of) proposal :

Third-party issues certainly raise difficult questions concerning their possible submission to the Principles. The chapter on agency has already given the occasion to consider such problems.

Assignment of rights raises similar and additional difficulties. A third-party is necessarily involved in the person of the debtor. The assignor and the assignee may certainly choose to apply the Principles to the assignment agreement to which they are parties, but their choice is not the debtor's choice. Provisions of this draft which confer rights or obligations to the debtor thus cannot apply under para 2 of the Preamble to the Principles. However, they could apply under other paragraphs of the said Preamble, e.g. by arbitrators referring to the *lex mercatoria* or confronted with a gap in the applicable law. They could also serve as models for national or

international legislators. In spite of the difficulties, our provisions could still serve several useful purposes.

Third parties other than the debtor elicit the same question of applying the Principles to parties who have not chosen their application - with the same answers -, plus questions related to priorities among creditors and insolvency law. The Principles could still provide rules that would serve some purposes (such as offering models for legislators) but even arbitrators could not apply such rules under the *lex mercatoria* irrespective of public policy provisions of the applicable law. Also see IECL 12-608.

National legislation, which controls its own rules on priorities among creditors and insolvency, can provide general solutions to the effectiveness of assignments towards third parties other than the debtor, and sometimes does (cf. CC fr. 1690 ; CC it. 1265 ; CC Q 1641 ; CC b. 1690 [different from CC fr.] ; R2C 341). An international convention, due to be inserted in the domestic legislation of the ratifying states, could attempt to do the same (cf. BENELUX 2), but the difficulties are well perceived : when it comes to third parties other than the debtor, the UNCITRAL draft convention opts for conflicts of law rather than material law provisions (art. 24 and 25).

All of this explains why at this stage, the draft does not contain any general provision on the effect of assignment towards third parties other than the debtor.

It must be pointed out, however, that two aspects of the problem have been met before :

- the case of successive assignments is regulated by art. 1.7 (4) of the draft, from the debtor's viewpoint ;
- the transfer of securities is covered by art. 1.9 (2), which - significantly - reserves the application of the law governing the security.

Section 2 : Transfer of duties

(to be drafted at a later stage)

Section 3 : Assignment of contracts

(to be drafted at a later stage)