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Assignment of rights, transfer of obligations, assignment of contracts

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Chapter [...]

ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS

(Revised draft prepared for the Bristol meeting)

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Section 1 : Assignment of rights

Article 1 *(Definitions)*
In these Principles, « assignment of a right » means the transfer by agreement from one person (the "assignor") to another person (the "assignee"), including assignment by way of security, of the assignor's right to payment of a monetary sum or other performance from a third person ("the obligor").

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

1. Transfer by agreement
Only transfers by agreement are concerned, as opposed to various situations where the applicable law may provide for legal transfers (such as, under certain jurisdictions, the transfer to the purchaser of an insured building of the seller's rights against the insurer, or the *ipso iure* transfer of rights in merger of companies operations – see article 2b below).
The definition also does not apply to unilateral transfers, which may intervene, under certain jurisdictions, without the assignee's participation.

2. Right to payment of a monetary sum or other performance
On the other hand, the definition is not restricted to assignment of rights to payment of a monetary sum ; it also covers rights to other kinds of performance, such as the rendering of a service. Nor are assignable rights limited to rights of a contractual nature. Claims deriving from tort law or based on a judgment, for instance, can be ruled by the present Chapter, subject to art. 1.4 of the Principles.

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

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

Note by the Rapporteur
We have taken into consideration the two modifications agreed upon in Rome (Summary Records, n° 200 and 202).

Article 2 *(Exclusions)*
This Section does not apply to transfers :
(a) of instruments, or
(b) of rights in the course of transferring a business,
made under the special rules governing such transfers.

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

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

2. Transfer of a business
Another exclusion applies to assignments made as part of the transfer of rights made in the course of transferring a business, under special rules governing such transfers, as it may happen in the case of mergers of companies. The applicable law often provides for mechanisms that cause all rights and obligations, under certain conditions, to be transferred *ipso iure* and globally.

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

Illustration 1
Company A is absorbed by Company B. The applicable law will often provide that all rights pertaining to the former company are automatically transferred to the latter, and the Principles do not apply.

Illustration 2
In the above operation, however, Company B is not interested in taking over a specific claim against Customer X, and prefers that right to be assigned to Company C. This particular transfer is subject to the Principles.

Note by the Rapporteur
The new drafting of article 2 was agreed upon in Rome (SR, n° 218-219).

Article 3 *(Partial assignment)*

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

COMMENT

1. Economic interest
The partial assignment of a right can correspond to justified economic purposes. A Contractor may for instance want to assign part of its right to payment from the Client to a financing institution, and keep the rest for itself. Or it may want to assign the other part to a supplier of raw material.
Admitting partial assignment may however affect the principle that the assignment should not worsen the obligor's situation. If the right is split, the obligor will have to perform in several parts, which could entail extra costs.

2. Monetary and non-monetary rights
The burden of having to make two or several monetary payments instead of one is not in itself deemed to be excessive, and such partial assignments are permitted in principle. But another rule prevails for assignments of non-monetary rights, where the validity of partial assignment is made dependent two cumulative conditions : the divisibility of the performance due and the degree of additional burden partial assignment may put on the obligor.
In both cases, any increase in the expenses borne by the obligor as a result of having to perform in several parts must be reimbursed by the assignor (comp. art. 6.1.3 for a symmetrical solution).

Illustrations
1. Buyer X is due to pay a price of USD 1.000 to Seller A next October 31. Seller A urgently needs USD 600 and assigns a corresponding part of its right to Bank B. Notice of the partial assignment is given to Buyer X. On October 31, both Seller A and Bank B claim payment of their respective parts. Buyer X must pay USD 400 to Seller A and USD 600 to Bank B. However, if there are additional costs involved in making those two payments instead of only one to Seller A, the latter has to compensate Buyer X.
2. Metal Company X is to deliver 1000 tons of steel to Carmaker A next October 31. Due to a decrease in sales, Carmaker A estimates that it will not need so much steel at that time, and assigns the right to delivery, up to 300 tons, to Carmaker B. Notice of the partial assignment is given to Metal Company X. On October 31, both Carmakers A and B claim delivery of their respective quantities. Metal Company X must deliver 700 tons to Carmaker A and 300 tons to Carmaker B. Additional costs involved in making two deliveries instead of only one are to be reimbursed by Carmaker A.

3. Tax Consultant X has promised to spend 30 days to examine the accounts of Company A in order to determine the proper policy to be followed in consideration of new tax regulations. Company A then regrets this arrangement, considering the level of the fees to be paid. It

envisages to assign 15 of the days to Company B. Tax Consultant X can argue against such partial assignment that performance of tasks of such nature are not divisible ; it can also argue that the accounts of Company B are of a significantly more complex nature than those of Company A.

Note by the Rapporteur

This is the text adopted in Rome, with the agreed cumulative solution in paragraph (2) (SR, n° 233).

The Rapporteur was asked to consider the fact that the issue of additional expenses was not specific to partial assignment, but present in assignment of rights in general, since the obligor has to perform in the hands of another obligee (SR, n° 223-227). We feel this is closely connected to the rule on place of performance already stated in article 6.1.6 (2) of the Principles. A solution could be to include a new article in this Section 1, stating that article 6.1.6 (2) applies accordingly if the assignment of a right causes the obligor to bear additional expenses. The provision of article 3 (2) could then be deleted.

Article 4 *(Future rights)*

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

COMMENT

1. Economic interest

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

2. Retroactive effect

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

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

3. Determinability

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

Illustration

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

Note by the Rapporteur

As agreed in Rome (SR, n° 238), former Variant 1 has been retained.

Article 5 *(Rights assigned without individual specification)*

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

COMMENT

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

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

Illustration

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

Note by the Rapporteur
This text was adopted in Rome (SR, n° 240).

Article 6 *(Agreement between assignor and assignee sufficient)*
(1) The right is assigned by mere agreement between assignor and assignee, without notice to the obligor.
(2) The consent of the obligor is not required, unless the right is of an essentially personal character.

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

1. Mere agreement between assignor and assignee
According to (1), assignment of a right is effective, i.e. the right is transferred from the assignor's assets to the assignee's, as the result of the agreement between these two parties.
The reference to a *« mere »* agreement applies to the assignment the rule stated in article 1.2 of the Principles according to which nothing requires a contract to be concluded in writing. This does not affect the possible application of mandatory rules of the applicable law which could for instance submit assignment for security purposes to some formal requirements.
As already stated in the Comments under article 1, this solution remains subject to third party rights, which are partly covered by other provisions of this Chapter (cf. art. 8 and 9 concerning the obligee and successive assignees), and may be in some instances governed by mandatory rules of the applicable law (e.g. the law of bankruptcy). However, it should be stressed that notice to the obligor (see article 8 below) is no condition to the effectiveness of the transfer between assignor and assignee.

2. Consent of the obligor in principle not required
The rule in paragraph (1) already implies that the obligor is not a party to the assignment agreement, i.e. its consent is not required for the 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 essentially personal character, that is a right which has been granted by the obligor in favor of a very specific person. Such characteristic makes the right unassignable without the consent of the obligor.

Illustration
Company X promises to make a donation to non-profit Organization A, engaged in the defense of human rights. Organization A wishes to assign that right to Organization B, active in the protection of the environment. The assignment can only take place with Company X's agreement.
The possibility to assign a right without the obligor's consent may be affected by the presence of a non-assignment clause in the contract between assignor and obligor (see below, art. 7). It leaves open the whole matter of having to give notice of the assignment to the obligor, in order to avoid the consequences of a payment the obligor would still make to the assignor (see below, art. 8 and 9).

Note by the Rapporteur
This text was adopted in Rome (SR, n° 245).

Article 7 *(Non-assignment clauses)*
(1) Assignment of a right to payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such assignment. However, the assignor may be liable to the obligor for breach of contract.
(2) Assignment of a right to other performance is ineffective, if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. Nevertheless, the assignment is effective if the assignee, at the time of assignment, neither knew nor ought to have known of the agreement ; the assignor may then be liable to the obligor for breach of contract.

COMMENT

1. Balance of interests
Article 6 (2) above states that the consent of the obligor is not required for the assignment to be effective between assignor and assignee (with the exception of assignment of rights of an exclusively personal character). However, it is frequent in practice that an agreement between an obligee and an obligor contains a clause limiting or prohibiting assignment of the obligee's rights. The obligor may not wish to have its obligee changed. Should the obligee assign such rights in spite of the clause, respective interests must be weighed. The obligor suffers a violation of its contractual rights, but the assignee must also be protected. On a more general level, consideration must be given to favoring assignment of rights as an efficient means of financing. Article 7 makes a distinction between assignment of monetary rights and assignments of rights to other performance.

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

Illustration
Contractor A is entitled to payment of USD 100,000 from its client X after a certain stage of a construction work is completed. The contract contains a clause prohibiting A from assigning the right. 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.

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

Illustration

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

Note by the Rapporteur

This text was adopted in Rome (SR, n° 254 and 261). Square brackets have been removed in paragraph (2). The illustration under Comment 3 has been modified (cf. SR, n° 260).

Article 8 *(Notice to the obligor)*
(1) Until receiving a notice of the assignment, from either the assignor or the assignee, the obligor is discharged by paying the assignor.
(2) After receiving such a notice, the obligor is discharged only by paying the assignee.

COMMENT

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

Illustrations
1. Seller A assigns to Bank B its right to payment from Buyer X. Neither A nor B gives notice to Buyer X. When payment is due, X pays Seller A. This payment is fully valid and X is discharged. It will be up to Bank B to recover it from Seller A, under article 13(e).
2. Seller A assigns to Bank B its right to payment from Buyer X. Bank B immediately gives notice of the assignment to Buyer X. When payment is due, X still pays Seller A. X is not discharged and Bank B is entitled to oblige Buyer X to pay a second time.
Sometimes parties resort to so-called « silent assignments », where assignor and assignee agree not to inform the obligor. This arrangement is valid between parties, but since the obligor will receive no notice, it will be discharged by paying the assignor, as provided in article 8 (1).

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

3. Who should give notice
Article 8 (1) leaves the question open as to who should give such notice, the assignor or the assignee. In practice, the assignee will probably most of the time take the initiative, as it has a major interest in avoiding the situation where the obligor would still perform in the assignor's hands. But notice given by the assignor has the same effects. When notice is given by the assignee, the obligor may request adequate proof of assignment (see article 10 below).

4. When must notice be given
Article 8 does not explicitly require that notice can be given only after the assignment agreement. Sometimes, the contract between the future assignor and the obligor already provides that the rights arising from it will be assigned to a financial company. Whether this can be considered as adequate notice with the consequences provided in this article is a matter of interpretation, possibly depending on the definiteness of the clause regarding the identity of the future assignee.

5. Revocation of notice

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

Note by the Rapporteur

This text was not modified in Rome. The Comments include two additions (SR, n° 266 and 269) and one correction (SR, n° 263).

Article 9 *(Successive assignments)*
If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.

COMMENT

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

Illustration
Seller A assigns its right to payment from Buyer X on February 5 to Bank B, and then again on February 20 to Bank Y. Bank Y notifies the assignment on February 21, and Bank B does so only on February 25. Buyer X is discharged by paying Bank Y, even though the right was assigned later to Bank C than to Bank B.
Unlike the solution prevailing under certain jurisdictions, article 9 does not take into consideration the actual or constructive knowledge the obligor may have of the assignment(s) in the absence of notice. The choice made in the Principles is motivated by the wish to encourage giving notice, thus ensuring the degree of certainty especially advisable in international contracts.

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

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

Note by the Rapporteur
This text was adopted in Rome (SR, n° 267).

Article 10 *(Adequate proof of assignment)*

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

(2) In the meantime, the obligor may withhold payment.

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

(4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

COMMENT

Since receiving such notice has the important effects provided in articles 8 and 9 above, article 10 protects the obligor against the risk of getting fraudulent notice from a fake « assignee » by organising the provision of adequate proof that the assignement has actually been made. In the meantime, the obligor may withhold payment to the alleged assignee. If adequate proof is given, notice is effective from the date it was delivered.

Illustration

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

Note by the Rapporteur

As decided in Rome (SR, n° 284), a provision was added, inspired by article 12:303 of PECL, to the effect that until adequate proof is given, the obligor may withhold payment. The Comments have made it clear that if adequate proof is given, notice is effective from the date it was delivered, which appeared to be the dominant view in Rome (SR, n° 268, 274, 275).

For clarity's sake, we have divided the provision in four paragraphs.

Article 11 *(Defences)*
(1) The obligor may assert against the assignee all defences which the obligor could assert if the claim was made by the assignor.
(2) The obligor may assert against the assignee any right of set-off already exercised by notice between assignor and obligor at the time notice of assignment was received.

COMMENT

1. Assertion of defences
A right can in principle be assigned without the obligor's consent (art. 6 (2) above). This solution rests on the assumption that the assignment will not impair the obligor's legal situation. It can happen that the obligor would have been able to withhold or refuse payment to the original obligee on the basis of a defence, such as defective performance of the obligee's own obligations. Can such defences be asserted against the assignee ? Respective interests have to be balanced. The obligor's situation should not deteriorate as a result of the assignment, but the assignee is also concerned with the integrity of the right it has acquired.
The system adopted by the Principles is to allow the obligor to assert all defences against the assignee which it could assert if the claim was made by the assignor (this article 10 (1)), but to give the assignee, in such a case, a claim against the assignor (article 13 d below).

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

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

2. Set-off
The reduction or extinction by set-off of the assigned right is a defence which the obligor may assert against the assignee, provided the right of set-off has been exercised by notice in accordance with article … of these Principles, before notice of the assignment was given. If the assignment is notified first, the assigned right cannot be set-off any more between assignor and obligor.

Illustration
Company A assigns to company B the right to payment of EUR 100.000 it has against Company X. However, Company X has a claim of EUR 60.000 against Company A. The two claims can be set-off, leaving Company A with a claim of the difference of EUR 40.000 against Company X. In accordance with article …, the right to set-off is exercised by notice, either from

A to X or from X to A. If such notice of set-off is given before Company X receives notice of the assignment, Company B can only claim EUR 40.000 from Company X.

Note by the Rapporteur
Paragraph (1) was adopted as such in Rome, after the deletion of a passage between square brackets (SR, n° 287).
Paragraph (2) is a new proposal, drafted according to a suggestion made during the discussion of set-off that the matter of the set-off defence would be solved on the basis of the order of notices.

Article 12 *(Rights related to the claim assigned)*
An assignment of rights transfers to the assignee :
(a) all the assignor's rights to payment or other performance under the contract in respect of the claims assigned, and
(b) all rights securing such performance.

COMMENT

1. Scope of the assignment
This provision derives from the same principle as article 11. Assignment transfers the assignor's right as it is, not only with the defences the obligor may be able to assert, but also with all rights to payment or other performance under the contract in respect of the claims assigned, and all rights securing such performance.
The following illustrations provide several examples of such rights.

Illustrations
1. Bank A is entitled to receive reimbursement of a loan of one million euros made to Customer X, bringing interest at the rate of 3 %. Bank A assigns its right to reimbursement of the principal to Bank B. The assignment also operates transfer of the right to interest and of the underlying security.
2. In the same example, the loan contract entitles Bank A to claim premature reimbursement in case Customer X fails to pay interest due. This right is also tranferred to Bank B.
3. In the same example, Customer B has deposited some shares as security to the benefit of Bank A. This benefit is transferred to Bank B, subject to the possible application of mandatory requirements of the applicable law under article 1.4 of the Principles.

2. Partial assignment
In case a right is partially assigned, the rights covered by article 12 are transferred to the same proportion, if they are divisible. If they are not, parties should decide whether they are transferred to the assignee or remain with the assignor.

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

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

Note by the Rapporteur
After a new lengthy discussion concerning the notion of « accessory rights », it was agreed in Rome to avoid using a concept with which common lawyers are not familiar. It was also decided to follow the model of article 12:201 (1) of PECL, with one amendment (precisely the deletion of the reference made to « accessory rights ») (SR, n° 310-311).
The Comments have been adapted accordingly.

Article 13 *(Assignor's undertakings)*
The assignor undertakes towards the assignee that :
(a) the assigned right exists at the time of the assignment, unless the right is a future right;
(b) the assignor is entitled to assign the right;
(c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party ;
(d) the obligor does have any defences ;
(e) the obligor has not given notice of set-off concerning the assigned right and the assignor will not give any such notice;
(f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

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

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

Illustration
Company A assigns a bundle of rights to Factor B. When required to pay by Factor B, Client X establishes that the due amount has been paid to Company A before the assignment. Factor B has a claim against Company A, since the right did not exist any more at the time of the assignment.
If a future right is assigned, as allowed by article 4 above, no such undertaking exists.

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

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

Illustration
Company X has agreed to communicate to Company A all improvements it will develop to a technical process during a period of time. Their contract stipulates that Company A's rights towards Consultant X are non-assignable. Company A does not need that technology for itself any more and attempts to assign its rights to Company B. This illustration was already given above, under article 7, to give an example of an ineffective assignment. In such a case, Company B has a claim against Company A under article 13 (b). It will be reminded that the solution would be reversed should Company B demonstrate that it did not know nor ought to have known of the non-assignment clause.

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

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

4. No defence from the obligor

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

Illustration

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

Set-off is a defense which may be asserted by the obligor if notice of set-off was given before notice of assignment was received (see article 11 (2) above). The assignee undertakes towards the assignee that no notice of set-off has already been given by the obligor affecting the assigned right. The assignee also undertakes that it will not give in the future any notice of set-off affecting the same right. However, there is no undertaking that the obligor will not give such notice in the future.

5. Reimbursement of payment by the obligor

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

Illustration

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

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

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

Illustration

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

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

Note by the Rapporteur
This text was agreed upon in Rome (SR, n° 313).
However, the decision was postponed concerning set-off. After the discussions which took place later on that subject, and considering the solution we have submitted in article 11 above, we suggest a new separate paragraph (d), further explained in the Comments.

Section 2 : Transfer and assumption of obligations

Note by the Rapporteur
This Section was discussed in Rome (SR, n° 314-368) on the basis of the earlier draft. A small Drafting Group was asked to prepared a new consolidated version of former articles 1, 3, 5 and 6. The Drafting Group also modified the language of former article 4 and rearranged the order of the provisions concerned. The text was then submitted to the whole Working Group, consisting in articles 1, 3, 4, 5 and 6 of the provisions listed in SR, n° 368 (articles 2, 7 and 8 of that list were not part of the Drafting Group's proposals). Due to the inclusion by the Rapporteur of a new article 4 (advance consent of the obligee, as decided in Rome (SR, n° 378-389)), the texts reviewed by the Drafting Group have become articles 1, 3, 5, 6 and 7 below.

Art. 2 (exclusion), 8 (defences) and 9 (obligations transferred to the new obligor) have been adapted by the Rapporteur after the discussions in Rome. Article 10 (securities) is submitted for the first time, following a decision taken in Rome (SR, n° 364-367).

The new title of the Section was also proposed by the Drafting Group, as suggested during the discussion (SR, n° 342, 344). However, though it was not recorded in the SR, at least one member of the Working Group pointed out the anomaly of having only one of the two terms of the title defined (« transfer of an obligation » in article 1), and not the other one (« assumption »)(also see SR, n° 343). Perhaps this title should be discussed again.

Comments and illustrations have been added for the first time.

Article 1 *(Definitions)*
In these Principles, « transfer of an obligation » means the transfer by agreement from one person (the « old obligor ») to another person (the « new obligor ») of an obligation to pay a monetary sum or render other performance.

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

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

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

1. Transfer by agreement

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

Two types of agreements are possible. The more frequent in practice is an agreement between the « old » and the « new » obligors, with the obligee's consent, which is covered by article 3 below. Another possibility is to have an agreement between the obligee and the new obligor as provided in article 6 below.

In both cases, the obligee gives its consent to the transfer. Without such consent, the obligor may agree with another person that this person will perform the obligation under article 7 below.

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

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

3. What is meant by « transfer »

« Transfer » of an obligation means that it leaves the old obligor's passive assets to enter the new obligor's.

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

Note by the Rapporteur

This definition was accepted in Rome, taking a modification of language into consideration (SR, n° 316). It was also suggested to replace « transferor » and « transferee » by « old obligor » and « new obligor » (SR, n° 339).

Article 2 *(Exclusion)*
This Section does not apply to transfers of obligations in the course of transferring a business, made under the special rules governing such transfers.

COMMENT
The present rules do not apply to transfers of obligations made in the course of transferring a business under special rules governing such transfers, as it may happen in the case of mergers of companies. The applicable law often provides for mechanisms that cause all rights and obligations, under certain conditions, to be transferred *ipso iure* and globally.
Article 2 does not prevent the Principles to apply when certain obligations pertaining to the transferred business are transferred individually.

Illustration 1
Company A is absorbed by Company B. The applicable law will often provide that all obligations pertaining to the former company are automatically transferred to the latter, and the Principles do not apply.

Illustration 2
In the above operation, however, Company B has reasons to prefer not to become the obligor of firm X, one of Company A's suppliers. Company A can transfer the obligations concerned to Company C, with the consent of firm X. This particular transfer is subject to the Principles.

Note by the Rapporteur
This provision was agreed upon in Rome (SR, n° 317, where the words « in the course of transferring a business » are inadvertently omitted), after adapting it to the new language of Article 2 (b) of Section 1.

Article 3 *(Agreement between old and new obligors, with obligee's consent)*
An obligation can be transferred by an agreement between an old and a new obligors, with the consent of the obligee.

COMMENT
1. Agreement between old and new obligors
The first – and more frequent – way to transfer an obligation is by agreement between the original obligor (the « old » obligor) and the person who will become the « new » obligor.

2. Obligee's consent required
This agreement, however, does not suffice to transfer the obligation. It is also necessary that the obligee gives its consent.
This is different from the corresponding rule on assignment of rights, where the operation is in principle effective without the consent of the obligor (article 6 (2) of Section 1 above). Assignment of a right does not affect the obligor's situation, except that the obligor will have to deliver performance to another person. On the contrary, a change of obligor may considerably affect the obligee's position, as the new obligor may be less reliable that the original one ; the change may not be imposed on the obligee, who must give its consent to it.

Illustration
Firm A owes EUR 5.000 to its Supplier X, and Client B owes the same sum to Firm A. Firm A and Client B agree that the latter will take over the former's obligation towards Supplier X ; the obligation is transferred only if Supplier X agrees to the operation.

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

4. Lack of consent by the obligee
If the obligee refuses to consent to the transfer, or if this consent is not solicited, an arrangement for third party performance is possible under article 7 below.

Note by the Rapporteur
This is the text of the Drafting Group, after the discussions in Rome (SR, n° 368).

Article 4 *(Advance consent of the obligee)*
(1) The obligee may give its consent in advance.
(2) In such a case, the transfer of the obligation becomes effective when it is notified to the obligee or when the obligee accepts it.

COMMENT
1. Advance consent by the obligee
The obligee's consent, required under article 4 above, may be given in advance.

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

2. When is the transfer effective
According to paragraph 2, if the obligee has given its consent in advance, the transfer of the obligation becomes effective when it is notified to the obligee or when the obligee accepts it. It means that it is sufficient for either the old or the new obligor to notify the transfer when it occurs. No notification is even needed if it appears that the obligor has accepted the new transfer.

Illustration 2
In the above example, there comes a time when Licensee A actually agrees with Company B that from now on the latter will take over the obligation to pay the royalties. This decision becomes effective when notice is given to Licensor X.

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

Note by the Rapporteur
A similar provision, inspired by the Italian and Portuguese codes, was first accepted in Rome for the Section on assignment of contracts below (Variant 1, article 4). It was however pointed out that the Dutch civil code dealt with advance consent already in connection with transfer of obligations, then extending the solution to assignment of contracts. This system was accepted (SR, n° 375-380).

Article 5 *(Discharge of the old obligor)*
(1) When giving its consent, the obligee may discharge the old obligor.
(2) The obligee may also retain the old obligor as an obligor in case the new obligor does not perform properly.
(3) Otherwise the old obligor remains as an obligor, jointly and severally with the new obligor.

COMMENT

1. Obligee's discretion concerning discharge of the old obligor

The obligee's consent has the effect that the new obligor becomes bound by the obligation. The obligee may also accept to fully discharge the old obligor.

Illustration 1

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

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

This can be done in two different ways.

2. The old obligor as a subsidiary obligor

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

Illustration 2

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

3. Joint and several obligations – default rule

Another possibility, the more favorable for the obligee, is to retain the old obligor as an obligor jointly and severally bound with the new obligor. This means that when performance is due, the obligor can exercice its claim indifferently against either the old or the new obligors. Should the obligee obtain performance from the old obligor, the latter would then have a claim against the new obligor.

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

Illustration 3

Supplier X accepts that its obligor Company A transfers the obligation to pay the price to Client B, but this time stipulates that Company A will remain bound jointly and severally with Client B (or nothing is said on the issue). In such cases, Supplier X may require performance either from

Company A or from Client B. Should Client B perform properly, both old and new obligors would be fully discharged. Should Company A have to render performance to Supplier X, it would then have a recourse against Company B.

Note by the Rapporteur
This is the text of the Drafting Group, after the discussions in Rome (SR, n° 368).

Article 6 *(Agreement between obligee and new obligor)*
An obligation may be assumed by an agreement between the obligee and a new obligor. [The old obligor may refuse to be discharged by this agreement].

COMMENT
1. Agreement between obligee and new obligor
Transfer of an obligation usually occurs after an agreement between the old and the new obligors, to which the obligee has to give its consent (see above, article 3). It is also possible that it is initiated by an agreemeent between the obligee and the new obligor.

Illustration 1
The products of Company X are sold by Distributor A on a certain market. The contract between the parties is close to termination. Distributor B enters into negotiations with Company X, proposing to take over the distributorship. In order to gain Company X's acceptance, Distributor B promises that it will assume an debt of EUR 5.000 still owed by Distributor A to Company X, and Company X accepts. Distributor B has become Company X's obligor.

[2. Old obligor may refuse to be discharged
This agreement between the obligee and the new obligor would be a stipulation in favour of a third party if its effect were to discharge the old obligor. This cannot be imposed on the beneficiary, who may have reasons not to accept such a benefit. The old obligor may thus refuse to be discharged by this agreement between the obligee and the new obligor.
If such refusal occurs, the new obligor is bound towards the obligee, but the old obligor remains bound, jointly and severally with the new obligor (in harmony with the default rule of article 5 (3)).

Illustration 2
In the above example, Distributor A may be happy to be relieved of its debt of EUR 5.000 at the end of its relationship with Company X, and thus accept to be discharged. However, Distributor A may also want to keep its chances to benefit from a renewal of its contract with Company X, and in that context wish to keep the relationship by insisting to remain bound by its debt towards the obligee. Distributor A may refuse to be discharged.]

Note by the Rapporteur
This is the text of the Drafting Group, after the discussions in Rome (SR, n° 368). The second sentence was put between square brackets because the solution is related to the rules on third party beneficiaries (see SR, n° 337, 338, 346). This will have to be discussed further.

Article 7 *(Third party performance)*

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

(2) In such a case, the obligee retains its claim against the obligor.

COMMENT

1. Agreement on performance by another party

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

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

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

Illustration 1

Companies A and B have entered into a cooperation agreement for their activities on a certain market. At one point they decide to redistribute some tasks. Company B will take over all operations concerning telecommunications, previously Company A's responsibility. Company A was bound to pay an amount of USD 100.000 to Company X, a local operator, on the following October 30. The two partners agree that Company B will pay that amount when it is due. On October 30, Company X may not refuse such payment made by Company B.

2. Obligation of an essentially personal character

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

Illustration 1

In the above example, Company B also takes over operations concerning maintenance of some sophisticated technological equipment developed by Company A and sold to Company Y. The partners agree that the next yearly maintenance will be done by Company B. When Company B's technicians arrive at Company Y's premises to do the work, Company Y may refuse their intervention, invoking the fact that due to the high technicity of the verifications involved, they are entitled to receive performance from Company A in person.

Note by the Rapporteur

This is the text of the Drafting Group, after the discussions in Rome (SR, n° 368).

Article 8 *(Defences)*

(1) The new obligor may assert against the obligee all defences which the old obligor could assert against the obligee.

(2) However, the new obligor may not assert any right of set-off based on a claim which the old obligor could exercise against the obligee after the transfer of the obligation.

COMMENT

1. Assertion of defences

The obligation transferred to the new obligor is the very same obligation that used to bind the old obligor (and, in some cases, still binds it – see article 5 and 6 above).

Whenever the obligor would have been able to withhold or refuse payment to the original obligee on the basis of a defence, such as defective performance of the obligee's own obligations, the new obligor may rely on the same defences against the obligee.

Illustration 1

Company A owes Company X an amount of EUR 200.000, due at the end of the year, as the price to be paid for facilities management services. Company A transfers this obligation to Company B, with Company X's consent. It happens that Company X renders extremely defective services to Company A, which would have given Company A a valid defence for refusing payment. When payment is due, Company B may assert the same defence against Company X.

The same solution applies to defences of a procedural nature.

Illustration 2

In the same case, Company X sues Company B before its national courts. Company B will successfully invoke the arbitration clause included in the contract between Companies A and X.

2. Set-off

Set-off is a special case. If the old obligor becomes entitled to a claim against the obligee after the obligation has been transferred, the new obligor may not invoke that claim to assert a set-off defence against the obligee, which would amount to disposing of the old obligor's claim. No set-off for the benefit of the new obligor can take place under such circumstances. The old obligor will exercise its claim independently (or possibly, if it has not been discharged, give notice of set-off to the obligee), but the new obligor remains bound for the full amount of the obligation transferred.

Note by the Rapporteur

This provision has taken into consideration the decisions taken in Rome (deletion of two sets of words) (SR, n° 357-359). It is in line with article 11 of Section 1.

Paragraph (2) is a new proposal, subject to discussion. The same view seems to have prevailed in the PECL group (see January 2001 version of Chapter 13, p. 4).

Article 9 *(Rights related to the obligation transferred)*
The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred,

COMMENT
1. Scope of the transfer
This provision derives from the same principle as article 8. The obligation is transferred to the new obligor as it is, not only with the defences the old obligor was able to assert, but also with all rights to payment or other performance under the contract in respect of the obligation transferred.
The following illustrations provide examples of such rights.

Illustration 1
Company A owes Bank X reimbursement of a loan of one million euros, bringing interest at the rate of 3 %. Customer A transfers its obligation to reimburse the principal to Company B. The transfer also includes the obligation to pay the 3 % interest.

Illustration 2
In the same example, the loan contract entitles Bank X to claim premature reimbursement in case Customer X fails to pay interest due. Bank X can also assert this right against Company B.

2. Contractual deviations
Party autonomy permits deviations from the rule in article 9, such as a separate transfer of the obligation to pay interest.

Note by the Rapporteur
This provision has been reformulated to align its language to that of article 12 (a) of Section I and to take one drafting suggestion into consideration (SR, n° 360-363).
The observation made at SR, n° 361-362 has not been met in the above Comments, pending further discussion. It seems that the rule in article 9 is also suitable when the old and the new obligors are joint debtors.

Article 10 *(Securities)*
(1) If the old obligor is discharged, a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.
(2) Discharge of the old obligor also extends to any security of the old obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the old and the new obligors.

COMMENT
1. Securities in assignment of rights and transfer of obligations compared
In the case of an assignment of a claim, all rights securing performance are automatically transferred to the assignee (see Section 1, article 12 b above). This solution is justified by the fact that assignment of a claim does not alter the obligor's situation, i.e. securities can continue to serve their purposes in unchanged circumstances.
Transfer of an obligation to a new obligor, on the contrary, modifies the context in which the security has been granted. If the old obligor is discharged, and if the security were to be transferred with the obligation, the risk of breach or insolvency to be covered would be that of another person, thus completely altering the object of the security.

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

Illustration 1
Company A owes one million dollars to Company X. Bank S has agreed to provide its guarantee for the due performance of this obligation. With Company X's agreement, Company A transfers the obligation to Company B, and Company X accepts to discharge Company A. Bank S does not guarantee Company B's obligation, unless it agrees to continue to provide the security.
A special case occurs when the security was granted by the person itself who was to become the new obligor. In such a case, the security necessarily disappears, since a person cannot serve as a security for its own obligations.

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

Illustration 2
Bank X has granted a loan of EUR 100.000 to Company A, secured by a deposit of shares by the obligor. With Bank X's agreement, Company A transfers the obligation to reimburse the loan to Company B, and Bank X accepts to discharge Company A. The shares cease to serve as security.
The solution is different if the asset which was given as security is transferred as part of a transaction between the old and the new obligors.

Illustration 3
In the same case as illustration 2, the transfer of the obligation between Companies A and B occurs as part of a broader oparation in which ownership of the shares is also transferred to

Company B. In such a situation, the shares will continue to secre as security for Company B's obligation to reimburse the loan.

Note by the Rapporteur
This is a new provision, inspired by PECL, art. 13:101 (4) and (5), as suggested in Rome (SR, n° 364-367).

Section 3 : Assignment of contracts

Note by the Rapporteur :

This section was discussed in Rome (SR, n° 369-386) on the basis of an earlier draft. Articles 1, 3 and 5 were accepted as proposed (SR, n° 370, 372 and 381), as well as a redrafted article 2 (SR, n° 374 and 386). The Rapporteur promised to prepare provisions on « accessory rights » and securities (SR, n° 385 – also see the draft proposed at SR, n° 386) ; such provisions are submitted below under articles 7 and 8.

When discussing the proposed article 4 (advance consent of the other party), the Rapporteur pointed out that the matter should already be addressed in the section on transfer of obligations, and there was support for this proposal (SR, n° 375-380) ; this has now been done with article 4 of Section 2 above.

In the discussion of the proposed article 6 (defences), it was pointed out that the rules where already covered by the corresponding provisions in Section 1 (assignment of rights) and 2 (transfer of obligations). The SR, n° 384, states that the Group decided to delete the article, but we had taken other notes : we were to follow the example of PECL, art. 13:102 – which has been done in article 6 below.

In these two instances of articles 4 and 6, it appeared that some rules on assignment of contracts were simply the applications of rules already stated concerning assignment of rights or transfer of obligations. When preparing this latest draft, the Rapporteur felt the same could be said about discharge of the assignor (article 5), rights transferred with the contract (article 7) and securities (article 8).

This leads us to wonder whether we could not avoid unnecessary repetitions by using the model of PECL 13:102 not only for defences, but also for the other matters where the same drafting technique could apply.

This explains why we submit two variants for the rules following article 3 below : either the detailed articles 4 to 8 (where article 6 already refers to the preceding sections), or a single article 4 (for which we submit two sub-variants).

Comments and illustrations have been added for the first time under articles 1 to 3. We have suspended their further preparation until a decision is made on the matter just discussed.

Article 1 *(Definitions)*
In these Principles, « assignment » of a contract means the transfer by agreement from one person (the « assignor ») to another person (the « assignee ») of the assignor's rights and obligations arising out a contract with another person (the « other party »).

COMMENT
Rights and obligations can be transferred separately, under the respective rules of Sections 1 and 2 above. In some cases, however, a contract is assigned as a whole. More precisely, a person transfers to another person all the rights and obligations deriving from its being a party to a contract. A contractor, for instance, may wish to let another contractor replace it as one of the parties in a construction contract with a client. The rules of the present Section cover assignments of contracts as defined in Article 1.
Only transfers by agreement are concerned, as opposed to various situations where the applicable law may provide for legal transfers (such as, under certain jurisdictions, the *ipso iure* transfer of contract in merger of companies operations – see article 2 below).

Note by the Rapporteur
This text was adopted in Rome (SR, n° 369).

Article 2 *(Exclusion)*

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

COMMENT

Assignments of contracts may be subject to special rules of the applicable law when they are made in the course of transferring a business. Such special rules often provide for mechanisms that cause all contracts, under certain conditions, to be transferred *ipso iure*.

Article 2 does not prevent the Principles to apply when certain contracts pertaining to the transferred business are assigned individually.

Illustration 1

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

Illustration 2

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

Note by the Rapporteur

This text was adopted in Rome, after the earlier version was modified by a Drafting group, to align it to the corresponding provisions of the preceding two sections of this Chapter (SR, n° 372 and 386).

Article 3 *(Agreement between assignor, assignee and other party)*
A contract can be assigned by an agreement between an assignor and an assignee, with the consent of the other party.

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

2. Other party's consent required
This agreement, however, does not suffice to transfer the contract. It is also necessary that the other party gives its consent.
If it were only for the assignment of the rights involved, such consent would in principle not be needed (see Section 1, article 6, 2° above). However, assignment of a contract also involves a transfer of obligations, which cannot be effective without the obligee's consent (see Section 2, art. 3 above). Thus assignment of a contract can only occur with the other party's consent.

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

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

Note by the Rapporteur
This text was adopted in Rome (SR, n° 374).

• VARIANT 1 : articles 4 to 8 (see note by the Rapporteur opening this Section)

Article 4 *(Advance consent of the other party)*
(1) The other party can give its consent in advance.
(2) In such a case, the assignment of the contract becomes effective when it is notified to the other party or when the other party accepts it.

Note by the Rapporteur
This text was adopted in Rome, with the proposal to express the rule already under Section 2 (see article 4 of Section 2 above) (SR, n° 378-380).

Article 5 *(Discharge of the assignor)*
(1) When giving its consent, the other party may discharge the assignor ;
(2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly ;
(3) Otherwise the assignor remains as the other party's obligor, jointly and severally with the assignee.

Note by the Rapporteur
This text was adopted in Rome (SR, n° 381).

Article 6 *(Defences)*
(1) To the extent that assignment of a contract involves an assignment of rights, articles 11 and 12 of Section 1 apply accordingly.
(2) To the extent that assignment of a contract involves a transfer of obligations, articles 8, 9 and 10 of Section 2 apply accordingly.

Note by the Rapporteur
The Rome Report states that the Group had decided to delete the provision on defences, since the provisions already existing on assignment of rights and transfer of obligations could suffice (SR, n° 383-384). However we had taken other notes, according to which inspiration would be taken from article 13:102 of PECL. This is done in the new drafting of article 6 submitted above. See the note by the Rapporteur opening this Section and Variant 2 below.

Article 7 *(Rights transferred with the contract)*
(1) The assignee may assert against the other party all rights to payment or other performance under the contract assigned in respect to the rights transferred.
(2) The other party may assert against the assignee all rights to payment or other performance under the contract assigned in respect to the rights transferred.

Note by the Rapporteur
This provision is based on a text prepared in Rome by a Drafting Group (SR n° 386). However, we have modified the title, in order to avoid the controversial expression « accessory

rights », we have replaced « avail … of » by « assert » and we have deleted the references to securities, more specifically covered by article 8 below.

Article 8 *(Securities)*
(1) If the assignor is discharged, a security granted by any person other than the assignee for the performance of an obligation is discharged, unless that other person agrees that it should continue to be available to the other party.
(2) Discharge of the assignor also extends to any security of the assignor given to the other party for the performance of an obligation, unless the security is over an asset which is transferred as part of a transaction between the assignor and the assignee.

Note by the Rapporteur
This text is an adaptation of article 10 of Section 2 above.

• VARIANT 2 : article 4 (see note by the Rapporteur opening this Section)

> Variant 2 A :

Article 4 *(Rules applicable to the rights assigned and the obligations transferred)*
(1) To the extent that assignment of a contract involves an assignment of rights, articles 3, 4, 5, 7, 11, 12 and 13 (a) through (d) of Section 1 apply accordingly.
(2) To the extent that assignment of a contract involves a transfer of obligations, articles 4, 5, 8, 9 and 10 of Section 2 apply accordingly.

Note by the Rapporteur
This is an attempt to list the respective relevant provisions. The adequacy of these lists should be discussed. Variant 2 B may be a better solution.

> Variant 2 B :

Article 4 *(Rules applicable to the rights assigned and the obligations transferred)*
(1) To the extent that assignment of a contract involves an assignment of rights, the relevant provisions of Section 1 apply accordingly.
(2) To the extent that assignment of a contract involves a transfer of obligations, the relevant provisions of Section 2 apply accordingly.

Marcel Fontaine
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